# OFFICIAL RECORD OF PROCEEDINGS

## Saturday, 5 August 2006

## The Council continued to meet at Nine o'clock

## MEMBERS PRESENT:

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

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

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

THE HONOURABLE LEE CHEUK-YAN

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

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

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

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

THE HONOURABLE MARGARET NG

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

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE CHAN YUEN-HAN, J.P.

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

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

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

THE HONOURABLE LEUNG YIU-CHUNG

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

THE HONOURABLE WONG YUNG-KAN, J.P.

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

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

THE HONOURABLE LAU KONG-WAH, J.P.

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

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

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

THE HONOURABLE CHOY SO-YUK, J.P.

THE HONOURABLE ANDREW CHENG KAR-FOO

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

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

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

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

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

THE HONOURABLE ALBERT CHAN WAI-YIP

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

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

THE HONOURABLE VINCENT FANG KANG, J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

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

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

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

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

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

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

THE HONOURABLE LEUNG KWOK-HUNG

DR THE HONOURABLE KWOK KA-KI

DR THE HONOURABLE FERNANDO CHEUNG CHIU-HUNG

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

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

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

THE HONOURABLE CHIM PUI-CHUNG

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

THE HONOURABLE KWONG CHI-KIN

THE HONOURABLE TAM HEUNG-MAN

## MEMBERS ABSENT:

THE HONOURABLE ALBERT HO CHUN-YAN

THE HONOURABLE SIN CHUNG-KAI, J.P.

DR THE HONOURABLE YEUNG SUM

THE HONOURABLE LAU CHIN-SHEK, J.P.

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

THE HONOURABLE ALBERT JINGHAN CHENG

## PUBLIC OFFICERS ATTENDING:

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

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

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

## CLERKS IN ATTENDANCE:

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

MS PAULINE NG MAN-WAH, ASSISTANT SECRETARY GENERAL

MRS JUSTINA LAM CHENG BO-LING, ASSISTANT SECRETARY GENERAL

**BILLS**

**Committee Stage**

**CHAIRMAN** (in Cantonese): The Secretary for Security has given notice to move an amendment to clause 39 in relation to specific functions of the Commissioner.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, in the debate on the amendment of clause 39 held earlier, I have already explained that a notice may be given to the subject by the Commissioner. Therefore, we propose to amend clause 39 to illustrate that this is a function of the Commissioner.

*Proposed amendment*

**Clause 39 (see Annex)**

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

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

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 39 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 39 as amended stand part of the Bill.

**CHAIRMAN** (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 44.

**CHAIRMAN** (in Cantonese): Ms Margaret NG has given notice to amend clause 44. Mr James TO has also given notice to amend clause 44 and to add the definition of "subject of interception or covert surveillance" to subclause (1) of clause 2. The Secretary for Security has also given notice to amend clause 44.

Committee now proceeds to a joint debate. I will first call upon Ms Margaret NG to move her amendment.

**MS MARGARET NG** (in Cantonese): Chairman, I move the amendment to clause 44.

Chairman, clause 44 sets out the grounds for not carrying out an examination when the Commissioner receives an application for examination on a case of interception or covert surveillance targeted at the applicant. According to the Blue Bill, which is also the Bill tabled before us, the Commissioner may not carry out an examination if the application for the examination is received by the Commissioner more than one year after the day on which the interception have taken place.

Chairman, the amendment I move makes it five year instead of one year. This is because within the period of one year, the person who has been subject to interception may remain unaware of the incident. When he is finally aware of this, normally it will have exceeded the period of one year, therefore making the already restricted means of lodging a complaint even more restricted. As such, I suggested changing it to five years, which is more reasonable.

With regard to subclause (2), both subclause (2) and subclause (3) provide that if any criminal proceedings relevant to the complaint lodged are pending or are likely to be instituted, the Commissioner shall not carry out the examination. Chairman, actually the Commissioner has enough discretionary power to determine when to and when not to carry out an examination. Particularly when it comes to criminal proceedings that are likely to be instituted, it could drag on for a long and indefinite time. As compared to the period of one year, it is all the more disproportionate.

Therefore, Chairman, we propose to delete subclause (2) and subclause (3) to give sufficient discretionary power to the Commissioner so that he can carry out examinations as long as the incident has taken place within five years. I implore Members to support my amendment. Thank you, Chairman.

*Proposed amendment*

**Clause 44 (see Annex)**

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

**MR JAMES TO** (in Cantonese): Chairman, why is it necessary to amend this time limit? The reason is very simple. I can understand the argument of the Government for a time limit. In fact, there are a great number of matters for which the principle of a termination period apply. In this regard, if a complaint can be lodged against an incident without any time limit whatsoever, then all the articles and records will have to be kept indefinitely; this may even call into question the impartiality and fairness of the relevant procedures, because different persons remember things and handle things differently.

Nevertheless, one year is hardly a right balance. It is interesting if we judge it from the wording. One year refers to the period after which the matter is alleged to have taken place. Of course, if you mean it is about the allegation made by the person concerned, if this is what it means, then it is equivalent to not having any time limit at all. When a person has suspicion and makes the move of lodging a complaint, which means he is having a suspicion and is making an allegation. If the time limit is one year, this will never work out to this person at all, because he has the suspicion the day he lodges the complaint. Of course, unless he says he suspects he has been subject to interception for two years, in which case you can tell him he can at most complain about an incident that happened only within the past one year, because he only alleges that is one year.

But if this should be the case, I would find it very strange indeed. Since the interception takes place in secret, the subject is certainly not aware of it. If he is not aware of it, and his suspicion is caused by bits and pieces of traces and clues, then if the so-called one year refers to the day he starts having suspicion, it would mean that one can always lodge a complaint. This being the case, what is the Government trying to say? The question we have in our minds is that if the authorities have in fact conducted an act of interception or covert surveillance for five years, then even in the most extreme case, the evidence or information will only be kept for five years. Of course, whether it should be five years, three years or two years is a matter of degree, for which it is hard to have a decision in the absolute sense. But apparently, if it is just one year, I would feel that it is too short a period.

After all, when bits and pieces of traces and clues should appear and result in certain appearance that arouse the suspicion of the subject, it would be at a later stage, and it is not all that easy. When a person learns from court proceedings that an wiretapping was conducted against a certain accused on a

specific address, and it turns out that he lived just next door, the person may then associate the case to a hole he has discovered earlier at his home. But when he is aware of the case, the wiretapping may have happened a very long time ago, and he may not be able to lodge a complaint for the suspicion he is now having.

If the law only provides a specific period of one year, I believe a fairly high percentage of similar cases would have been expired. These are actions that would not be discovered right away, otherwise the law-enforcement agencies are substandard, that they have not done their job right, and they are not veterans. I certain hope that our law-enforcement agencies are veterans. As such, providing a period of one year for lodging complaints does not seem to me to be a right balance.

Moreover, I will also move a motion to delete subclause (2) and subclause (3). It has often occurred to me that, take the Complaints Against Police Office (CAPO) as an example, the most handy reason they will use for not accepting a complaint is that a trial is not currently underway, or criminal proceedings are imminent. However, they are not going to tell you they do not receive your complaint. Instead, they will give you some guidance: that if you lodge a complaint now, you may need to give a statement, and the statement will then be passed down to the prosecution. Since it will be the police who are investigating the police themselves, this will be inevitable, and it may be disadvantageous to you. As such, the person concerned will normally drop the complaint.

Yet, please do remember this: it may be disadvantageous to him legally or affecting him personally simply because it is the police who are investigating the police themselves. But under the current circumstances, the Commissioner is independent, or at least he is independent from the police, and the matter that is subject to the examination of the Commissioner is about another department. Of course, since his final decision will be given covertly, it will not in any way affect any criminal proceedings, because no result will be published or reported.

Second, after having conducted an examination, if the Commissioner believes that any report of any action in relation to the incidents, or the mere mentioning of such incidents in the annual report would cause any effects to the legal proceedings, the Commissioner, being a former senior Judge himself, will certainly understand the situation. Besides, the amendment from Ms Margaret NG which provides for a general discretionary power for the Commissioner has

been voted down too, so he could only look at the files and fix the matter as soon as possible.

Why would I say this is very important? This is because otherwise, when subclause (2) and subclause (1) are taken together, it will result in a situation where, simply put, if anything happens, a charge will be pressed to unfold a criminal proceeding, in which case even before the Commissioner can open a file to freeze or to retrieve the materials concerned, those materials will be disposed of by someone according to standing instructions. As such, the materials will vanish, and when the Commissioner wants to work on it, he will find out that the original information is no longer available. Taken together, it will result in greater difficulties for the Commissioner to carry out his work, or even going so far as making it altogether impossible.

Since everything he does is done in secret, the possibility of his obstructing the course of justice is extremely remote. Because the Commissioner is the gate-keeper, he certainly knows what the consequences are. Therefore, if subclause (1) provides that the examination must not be carried out, in other words, a lot of information with respect to covert surveillance may be admissible to the Court. Comparatively, interception of communications is even more "over the top". This provision is there because interception of communications is not admissible to the Court. They can only be used as intelligence. Since they will only be used as intelligence, that they are not admissible to the Court, whereas the examination of the Commissioner is done in secret, how will the course of justice even be obstructed?

Therefore, I hope the Government will explain in detail how the course of justice might be obstructed by the very special conditions as specified in subclause (2) with a Commissioner who is a senior Judge acts as the gate-keeper. This is all what the Government has in mind, right? I hope the Government can explain this in detail.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, the authorities moved the amendment to clause 44 in response to the suggestions made by the Bills Committee. The amendment provides that if the applicant cannot be identified or traced after the use of reasonable efforts, the Commissioner may refuse to carry out or to proceed with the carrying out of the examination.

The Government opposes the amendments proposed respectively by Ms Margaret NG and Mr James TO to clause 44. With regard to clause 44(1), the amendments proposed respectively by Ms Margaret NG and Mr James TO will have an effect that cases for which examinations can be carried out by the Commissioner will include interceptions or covert surveillance that are alleged to have taken place five years ago instead of one year ago. This will mean that the number of cases for which application for examination can be made will increase substantially. The time limit provided for by the Bill is similar to other relevant provisions in other pieces of legislation as far as lodging a complaint is concerned. If the period is set too long, the duration for which relevant information is kept by the department concerned will have to be adjusted accordingly. With respect to the information obtained from interception and covert surveillance, much of it is related to personal privacy. We must not make it mandatory to retain such information for an excessively long period of time.

Furthermore, clause 44(1)(a) provides that even if an application for examination is received by the Commissioner more than one year after the day on which the operation is alleged to have taken place, the Commissioner can still carry out an examination if he believes that it is unfair for him not to carry out the examination. As such, the Bill has provided enormous flexibility to the Commissioner to ensure that all complaints will be handled fairly.

Ms Margaret NG and Mr James TO also proposed the deletion of clause 44(2) and (3). This will have the effect that prior to an examination, or in the course of an examination carried out by the Commissioner, if any relevant criminal proceedings are pending or are likely to be instituted, the examination will have to continue. However, the purpose of clause 44(2) and (3) aims to prevent the accused in a criminal case from making a request for examination to the Commissioner and therefore attempt to delay the trial on the grounds that the case is being examined by the Commissioner. Allowing this will not only subject our judicial resources to abuses, it will also undermine the resources made available to the Commissioner for monitoring the law-enforcement agencies. We believe that the channel for lodging complaints to the Commissioner should not be subject to abuses, and so we oppose these amendments.

Madam Chairman, I call upon Members to support the Bill introduced by the Government. Thank you, Madam Chairman.

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

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

**MR JAMES TO** (in Cantonese): Chairman, this is really an eye-opener. I cannot believe what I have just heard.

Chairman, according to the first point of the Government, it is afraid that this will increase the workload substantially. I hope the Secretary will understand that, all these matters are done in secret. It would be very hard for the public to find any traces and clues that will arouse their suspicion. Of course, if the complaints are lodged by people who are paranoid, people who have hallucination and anxiety or mental problems, that is, people who are paranoid about everything, then whether it is one year or five years will not make any difference. But if we assume there will be many complainants, and the complaints lodged by these people are based on legitimate reasons and suspicion, we must not use a time limit of one year or five years with the aim of reducing our workload.

Please keep in mind that these operations constitute serious intrusion of personal privacy. Even the Government itself says that when applications are made for these warrants, they will specify whether or not the same could be done by other less intrusive means. In other words, the Government is aware of the fact that this is a serious matter resulting in intrusion of privacy and infringement upon the freedom of communications. These are no ordinary complaints. For example, when damage is caused to postal articles, the Post Office may think that it is because it has mishandled the articles or if that is due to some other reasons. Those are trivial complaints.

The Government has put it in a funny way. It says the same applies to other complaint cases too. But keep in mind that this particular kind of complaints differs from other complaints in that the subject matter of other complaints are done in broad daylight, such as the issue of penalty tickets, or the service attitude of staff at the Transport Department or the Inland Revenue Department, and so on. Those are overt acts and both parties involved are aware of each other's acts and conditions. Yet, what is the subject under

discussion now? It is about covert operations. Of course, we have to assume that the enforcing agencies are veterans. It would be another matter if their jobs will let people find out easily. But I cannot assume as such. This is because the whole idea, right from the beginning, is about confidentiality and covertness. The subject is completely unaware of the operation. Even questions are not allowed in the examination. It is due to these unique conditions that a longer period of time must be given, so that if the subject should find it out in future, he will be able to lodge a complaint. This is unlike a search warrant, whether you are searching a newspaper office or a residential dwelling — even if the person concerned is abroad, it would not be possible that he would be away for one to five years, right?

Now the problem is, if that is done overtly, the person concerned can apply for judicial review anytime. He can challenge what has been done to him, or he can lodge a complaint. This is because he is aware of the fact that his home has been searched by the authorities. But if that is about his e-mails or his mobile phone, then even if he has been under the surveillance of the authorities for a long period of time, the person concerned may not be aware of the matter until, say, when his computer starts having problems during a certain period of time, or when he starts noticing something unusual. The subject would not normally open up his phone to check, nor would he probe into his system frequently. In some cases it is not until when the system breaks down at a certain period of time, or when renovation is carried out in a residential dwelling, when a hole is found, when the subject will become aware of the fact that he has been under surveillance. Therefore, as far as the time limit is concerned, certainly we cannot compare this to other complaint cases.

The third point is even more bizarre. The Government is saying that if the examination continues to proceed once criminal proceedings have begun, the complainant may make use of this procedure to delay the trial. I read out these few sentences which may be unfair to others. Although the Secretary is not a lawyer himself, he used to work at the ICAC, he was once the Director of Immigration, and he has experience working with the disciplined services. The police press charges against the suspects every day, and many suspects would lodge a complaint with the CAPO no matter if they have any justification. We have been discussing this issue for a very long time. But is there any case where the investigation conducted by the CAPO would cause the Judge to tell the prosecutor, "sorry, but because a complaint has been lodged against you for beating up people, that the case is being investigated by the CAPO"; or "because

the investigation committee of the ICAC is conducting an investigation, or L Group is making an investigation, so I am sorry, I cannot try your case, it has to be postponed. Let us postpone it for two weeks until the investigation is over." This has never happened before. The most that the Judge will do is to record that a complaint has been lodged. Or maybe there is no complaint lodged at all. It is out of the question that the Judge will postpone the trial simply because of this. The Director of Public Prosecutions can confirm on this. Therefore, the argument that the trial will be delayed is absolutely ridiculous.

Furthermore, there is another weird phenomenon. Although the Government is saying that the period of one year should be used, as specified in clause 44 (1)(a), there is a tail nevertheless, that if the Commissioner believes it is not unfair not to carry out an examination and set a time limit, he can still carry out an examination. But please keep in mind that if this sentence is added to the Bill, then I cannot help but ask: how will the filing system of the administrative authorities cope with this accordingly? If the authorities say, since the period provided for in the legislation is one year, so in general, the materials will be kept for one year and be destroyed after one year. Now, for cases which have exceeded the period of one year, but the Commissioner believes it would be unfair not to carry out an examination, then what should be done? Can you tell the Commissioner that the files have been destroyed, because the files are to be kept for just one year, as stated in the legislation? The authorities do not accord special status to each and every case. Now all of a sudden an examination is to be carried out after three years have lapsed, but the files have been destroyed already.

Therefore, even if the Commissioner believes that the period is unfair, what can he do actually? Can he tell the applicant by saying that he is sorry, but the relevant files have been destroyed? If the authorities agree there will be cases which may be unfair, and that the files will actually be kept for five years, then the actual practice of the authorities may be closer to the amendments Ms Margaret NG and I have proposed. But if the authorities say the files will be kept for just one year, because this is what is provided for in the legislation, then the files will be destroyed after one year. Furthermore, the files will be converted to intelligence, just like flour, water and sugar are used in making bread. Once the information is put into the intelligence system, it can no longer be distinguished, nor will it be recoverable. Nobody will be able to tell which comes from wiretapping, and which is provided by informants. There will be no way to distinguish them through examinations. As such, the objective of

clause 44 is to do away with complaints all together. Even if that is unfair, there will be no way to address the matter.

The provision before hinders the Commissioner from carrying out his duties in accordance with the law, whereas the provision here hinders the Commissioner from initiating an examination of his own accord, or requesting an examination on the part of the law-enforcement agencies. There are other provisions that state that once a certain period of time has lapsed, no complaints will be accepted. The Commissioner is pictured as having formidable powers, whereas in fact he is far less powerful than he appears to be, and there is actually not much he can do to help. As regards the provisions, not only are restriction set up everywhere, they are very restrictive too. So what is in the mind of the authorities? They are actually deceiving and misleading the public. They are saying that a Commissioner will be there to help, and there will be Judges for giving approval to applications, but it turns out that it is not a Court. They are saying that there will be a Commissioner who is himself a Judge, and a senior Judge as well, but it turns out that the Commissioner is not given any power at all.

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

**MR LAU KONG-WAH** (in Cantonese): Chairman, with regard to this provision, the Secretary for Security has, in the course of deliberations, actually adopted a suggestion, that for applications that cannot be identified or traced, he has to use reasonable effort, and he cannot do nothing simply by saying he does not know.

I agree with Mr James TO as to what he has said just now, that it is difficult to draw the line. You can say one year, two years, but why must it be five years? It is hard to explain this clearly. Just now Mr James TO has given an example by saying that some people may not open up his phone until five years later or more than five years later, when he will find something inside it. But nobody can be sure that he may not open up his phone only until six or seven years later, when he will realize he has been put under surveillance, in which case he will not be given protection either. This being the case, we may as well do away with any time limit all together, so that complaints can be lodged

anytime. This will make it easy, and everybody will be given protection. Otherwise, the suggestion by Mr James TO cannot offer protection to people who are not aware that they have been put under surveillance until more than five years later. This is my first point.

Second, citing the example given by Mr LEUNG Kwok-hung yesterday, he said he always discovered small holes in his home, so he suspected he had been wiretapped. Even a tiny hole may make him worry that he is being intercepted. I believe as he always says, there are all those buzzing sounds on his phone, and he is worried that he is being wiretapped. This is really very bad, because he lives in terror every day. If somebody encounters a situation like this, I believe he will lodge a complaint right away or go to see the Commissioner. If he really has this suspicion. He would not say he hears buzzing sounds or finds out a tiny hole today, but wait until five years later to lodge a complaint. Therefore, this does not make sense.

Therefore, I believe the period of 1 year is an adequate balance, that it will give a certain period of time to the person concerned. Of course, administratively you may say it is possible to allow for five years, 10 years or even 20 years, this will certainly give ample time administratively; of course, there are administrative remedies, but the remedies cannot extend to over five years, like the kind of protection suggested by this amendment for a period after five years.

**MS MARGARET NG** (in Cantonese): Chairman, I would like to respond to the points the Secretary made earlier.

Chairman, what we are discussing right now is how to perfect the system so that it will gain public confidence, and one very important area in this is the protection of the right of the public to make complaints. With regard to these covert operations, if there is no way to make a complaint, the public would have no confidence in it at all. Therefore, when a suggestion on a channel for complaints is made, we have to look at it to see if this is really a practical channel for complaints, or if this is just a small window for complaints with lots of hurdles set along the way, making complaints difficult so that the channel for complaints will not work? Therefore, Chairman, our suggestion today is to extend the period of one year to five years.

But what grounds have the Secretary come up with to oppose this suggestion? We all know that making time limit for complaints longer so that the applicant can lodge a complaint within five years is certainly a greater right as compared to having a period of just one year, and this will certainly offer greater protection to the rights of the public. But what proper grounds has the Secretary got to reject this reasonable period? First, he said a period of five years would greatly increase the number of complaint cases. If the ICAC would tell the public today that they will no longer entertain complaints for incidents that have happened more than one year ago, it will greatly undermine public confidence on the ICAC. If you tell the people of Hong Kong that complaints from the public for crimes that have happened more than one year ago will not be entertained, then how much confidence do you think the public will have towards the police and the law-enforcement officers? It will certainly be reduced, because for no reason, you hinder them from making complaints.

This is particularly so when it comes to covert surveillance. Chairman, if it is an arson case or if it is a robbery case, these are matters will be known at once. However, for matters that are done in secret, such as corruption, bribery or conspiracy to commit crime, it is generally hard to discover, not to mention conduct any covert surveillance. I have come across some cases that some people have finally become aware that they may have been subjects of these operations only because the officers responsible for conducting interceptions recount their operations on the radio or the television after they have retired. In these cases, the more covert the operation is, the later will the case be discovered. As such, one year is very unreasonable, whereas five years is the minimum period.

Chairman, the Secretary said earlier that it was going to be fine, because if the Commissioner believed it was unfair or unreasonable, he could accept a period of more than one year. But then why do you have to turn the right of the public to lodge a complaint into a discretionary power of the Commissioner? This is absolutely unreasonable.

Then the Secretary said that another reason he opposed the period of five years was that this would cause the law-enforcement departments to keep the files for a fairly long period of time, which would add to their burden. Chairman, this is a case of the tail wagging the dog. You have to define the

rights of the public before you talk about how the administrative departments can work in unison. Strong governance is for the people, but if by virtue of your strong governance, the public is unable to lodge their complaints, or if they are deprived of the channels to seek redress, how can your strong governance gain the support of the public? Therefore, this is the tail wagging the dog.

Furthermore, Chairman, is it necessary that the Commissioner must not carry out examinations during criminal proceedings? Since there will be a Commissioner, who is a person that you will find trustworthy, and since the Commissioner will have discretionary power, why should his discretionary power be limited? Mr James TO said it very well earlier. Any complaint lodged with the CAPO will not cause the trial to be stopped or delayed. As a matter of fact, during any criminal proceedings or civil litigation, nobody can cause the trial to be stopped, suspended or delayed unless there are proper reasons. All along, in handling cases like this, the Court will not approve casually an application for a case to be delayed. How can you say that criminal proceedings will be delayed because of the complaints from the public? On the other hand, criminal prosecution can be delayed indefinitely according to your logic. I went over the provision again. Since I did not understand why the Secretary would have said criminal proceedings would be delayed, I went over the provision again for fear of overlooking anything. It turns out that this is not what it is all about. As a matter of fact, it is about the Commissioner is not allowed to conduct the examinations.

Yet, there is no provision whatsoever which stipulates that criminal proceedings will have to come to a halt whenever an examination is carried out by the Commissioner. On the contrary, the Commissioner is definitely not allowed to carry out any examination until the criminal proceedings have been finally determined or until they are no longer likely to be instituted. With regard to a final determination, we may still say that it is about five years to seven years. But if it is about criminal proceedings that are no longer likely to be instituted, anybody who knows how the ICAC works will know that some investigation cases have been kept in the file for many years, and even if they have been kept for seven years, it cannot be said that proceedings are no longer likely to be instituted. In other words, the examination will be dragging on and on to an unspecified date. In the meantime, the citizens who suspect that they are the victims may have to wait for three years, five years, seven years or 10

years. However, during this time, will the authorities continue to keep those files? Or will the authorities tell you, sorry, but the files have been destroyed after the prescribed period for keeping the files. Therefore, the time has reached when criminal proceedings are no longer likely to be instituted, there is nothing much to be done.

Chairman, I am responding to the reasons given by the Secretary just to make the public see the attitude the authorities adopt when Members of the Council are trying to protect the public's right to complaints. Chairman, the reasoning is very straightforward. If any action carried out by the administrative departments may affect the rights of the public, then the public must have a channel or a mechanism for complaints; in this case, the channel or the mechanism is to lodge a complaint with the Commissioner. If the authorities impose many restrictions on the Commissioner in order to stop him from carrying out the examination and an one-year period is added for complaints by the public, and these are done just in order to make its staff do less work and do not keep files for a long period of time, is this reasonable?

Furthermore, subclause (3) of the provision specifies the types of criminal proceedings that will be regarded as relevant in relation to which examination must not be carried out by the Commissioner. In fact, this part should be given detailed consideration. For an ordinary citizen, he will not be able to tell when the Commissioner can carry out an examination with regard to his complaint and when he cannot. This will undermine the confidence of the public.

Chairman, the amendments we proposed can strengthen public confidence, and it will not cause any inconvenience to the criminal prosecutors or law-enforcement officers when conducting covert surveillance and interception of communications. Chairman, why is it that the Secretary does not speak up for the public and stand up for the rights of the public? Why should he be biased in favour of the Commissioner so that he would not have to do so much work? In fact, for the Commissioner to do less work, the best way is to ensure impartiality in the authorities, so that the public will be free from having suspicion. In fact, if there is a good authorizing mechanism which the public has confidence in, there will not be so much suspicion. If the authorities are confident of the authorizing mechanism, and if they are confident of how the

law-enforcement officers carry out their job, why should they be afraid of changing the period from one year to five years after all?

Thank you, Chairman.

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

**MS AUDREY EU** (in Cantonese): Chairman, I would like to respond to the remark made by Mr LAU Kong-wah.

Mr LAU Kong-wah said in the speech he made that he agreed very much with Mr James TO on the need for drawing up a time limit for lodging complaints, unless complaints could be made without any time limit. But then he also said that if the period was set at five years or six years, then no protection would be given. I am surprised that remarks like this can be taken as a response. He said there would be no protection after six years, yet that is better than having no protection at all for matters that have happened in one year to five years ago. He cannot argue that the time limit for lodging complaints should be as short as possible simply because the suggestions made by Mr James TO or Ms Margaret NG will not be able to offer protection to events that happened six years ago or longer. As such, the remark made by Mr LAU Kong-wah can hardly be taken as a response.

Just now Ms Margaret NG has made it very clearly in the speech she made. If the ICAC or the police should decide that crimes or corruption cases that happened more than one year ago will not be investigated, what will the public think? That was very well said. I would like to make some additions and cite some examples of similar time limits. According to the common law, for example, the time limit for civil litigations is six years in general, which means civil actions taken by a citizen against another citizen generally have a time limit of six years. If the case is about land encroachment, the time limit is 20 years. For cases involving personal injuries or fatalities, the time limit is three years. I must further point out that with regard to this three-year period for cases involving personal injuries or fatalities, if the person concerned can prove that he is not aware that the injuries sustained at that time were serious, or that he is not

aware of some hidden illnesses, he can apply to the Court for extension of the time limit starting from the day he first became aware of that.

The Bill has set the time limit for lodging complaints to one year, and that is not calculated from the day the subject is first aware that he has been put under covert surveillance, but one year from the day when the covert surveillance has taken place for the last time. That is to say, if the subject finds out he has been put under covert surveillance for more than one year, even if he will find that out on the first day after one year, he will have no right to complain. Given the nature of covert surveillance, instead of calculating the time limit from the day the subject first finds out he has been a subject of covert surveillance, it is calculated on the day the covert surveillance has taken place, this is in itself very unfair.

Chairman, this provision is very unfair indeed. Clause 44(1) provides that the complainant or the applicant must specify when the surveillance took place, starting from the day the covert surveillance last took place. The Commissioner will ask the applicant the last day on which the covert surveillance took place, and if the day on which he was under covert surveillance for the last time was more than one year ago, then the Commissioner will refuse to entertain this complaint case. In other words, the applicant must specify the day on which he was last subject to covert surveillance. Chairman, this is related to an issue we raised in the debate held yesterday. Chairman, you may remember that when this Council debated on clause 45 yesterday, we deliberated on the amendment moved by Ms Margaret NG, during which Mr Ronny TONG, Ms Margaret NG, Mr Alan LEONG and I all pointed out that the way clause 45(1) was drafted was quite problematic. It was very hard to understand, even for lawyers. Although it is the Blue Bill that I have with me right now, I know that the Secretary has moved an amendment, and I have read the amendment as well. If the Commissioner receives a complaint case, and in making a determination, the Commissioner applies "the principles applicable by a court on an application for judicial review", even people from the legal profession will not understand what it means. What does "the principles applicable on an application for judicial review" refer to? If the Secretary will explain that this is the ground for an application for judicial review, then we will know what it means. It means the three reasons for making an application for judicial review, namely, illegality, irregularity and unreasonableness. These are what people can understand. However, when it says "principles", then nobody will know what they are.

One of the important principles of applying for judicial review is that the burden of proof rests with the applicant. This is the general understanding in the legal profession.

According to clause 44, if an applicant lodges a complaint with the Commissioner for suspecting that he has been put under covert surveillance, the burden of proof will rest with him because he is the one making the application. He has to point out the last occasion on which the covert surveillance took place, and he will have the right to complaint within one year starting from that day. If the period has exceeded one year, then the Commissioner will not be able to handle the application. But how can the complainant point out the relevant day? Therefore, the time limit of one year is too short, and it should be changed to five years to make it more reasonable. Mr LAU Kong-wah asked earlier if a person noticed a hole on the wall of his home, or if his phone had those "buzzing" sounds, why did he not go to lodge a complaint? Why should he wait for five years? Normally when a person finds a hole on the wall of his home or hears those "buzzing" sounds on the phone, he will not instantly associate this to covert surveillance. No, this is not going to be the case. From the perspective of a citizen, he will not care too much because he would regard himself as "upright" and that he will not be made the subject of covert surveillance. Generally, a normal person may not instantly associate frequent hackings in the computer or strange things sent to him with covert surveillance and to complain accordingly. Instead, as Ms Margaret has described, many people will only suspect that they have been put under covert surveillance and complain accordingly when they recall similar experiences after they have learned from books or radio programmes that expose a particular covert surveillance operation. However, given the time limit of one year, the Commissioner will require the applicant to point out the day when the operation last took place, and so the burden of proof will rest with the applicant. But how is he supposed to prove that? Therefore, this is the reason why we are asking to change the time limit to five years.

I hope Mr LAU Kong-wah and the DAB will reconsider this. Being elected Members ourselves, we should always see things from the perspective of the public. For the period to be changed from one year to five years, what is the reason for opposition as a matter of principle? What is the problem? What harm will it do to the public to extend the time limit to a more reasonable duration, so that those who have been under covert surveillance, wiretapping and interception of communications can lodge a complaint? I hope the elected

Members in this Chamber will judge this matter from the perspective of the public.

Thank you, Chairman.

**MR RONNY TONG** (in Cantonese): Chairman, I would not repeat what Ms Audrey EU has already said. I just want to add that for the sake of comparison, there is no time limit for criminal cases.

The time limit of six years in civil litigation that Ms Audrey EU said is principally about torts, which is the protection given under the common law against torts, including copyright piracy or injuries resulting from traffic accidents. I have to ask, when even common cases of tort covered are given a time limit of six years, then what about our Basic Law? If we weigh up the rights protected by the constitution to other general legal rights, is it really on a ratio of 1:6? This I would like to ask the Government. Every time I rise to speak I always demand the Government to respect the Basic Law. When even ordinary acts of tort are given a time limit of six years, how can the Government fix a time limit of one year in this piece of law? What were the criteria used for fixing it at one year? Was it by flipping a coin? Or if they just woke up to realize that the period of one year is a good number?

We must not forget that even in ordinary tort cases, if the victim has been deceived, the time limit may be further extended, so that the period is calculated starting from the day he learns about the tort. What we are discussing now is covert surveillance. Just as the way it sounds, if your surveillance is not covert enough, you have not done a good job. If you do a good job in surveillance, the citizens will be kept in the dark, so how can you fix the period to just 1 year?

Chairman, basically I would like to speak on Ms Margaret NG's suggestion for deleting subclauses (2) and (3). Subclause (3) provides that if any proceedings are underway, then the Commissioner must not carry out any examination. Since my Honourable colleagues have given some accounts on how this provision would be disadvantageous to the public, I do not intend to repeat their arguments. But I must point out one thing, that the examination carried out by the Commissioner is not a judicial procedure; in fact, it is quite far away from being a judicial procedure. Generally speaking, as far as judicial

procedures are concerned, if two cases are being dealt with at the same time, then one of the cases will have to be suspended. This is understandable to me. However, since this is not a judicial procedure, what is the rationale for stopping the examination? I have reminded Members on several occasions in this Chamber that, when we examine a provision, we must put it in the context of the overall legislation. We must not study the provision independently and scrutinize it with a magnifier, as this will result in over-generalization and prevent us from understanding how the overall legislation works.

We must not forget that regardless of whether findings are obtained in an examination, such findings will have no effect on the judicial procedure in progress. Why do I say this? This is because clause 58 states this very clearly (I hope we will get to clause 58 in the discussion today). However, this is yet another perplexing provision, because although the title of the clause is "Non-admissibility of telecommunications interception product", it is not restricted to telecommunications interception alone. It is stated clearly in the provision that any information obtained through telecommunications interception must not be disclosed. Subclauses (3) and (4) specify that in any proceedings before any Court, any questions with regard to information obtained with authorization or pursuant to an authorization must not be asked.

With regard to subclauses (4) and (5), and considering the amendments the authorities will be moving — now if no such questions can be asked, it is surely out of line, and the authorities are aware of this. We spent a long period of time in the Bills Committee on this issue, and finally they had come to understand this. But according to them, if any disclosure was to be allowed, the primary reason was not because the act to obtain the information was illegal, but because the information could be used to prove that the defendant was innocent. I do not question this principle, because this is precisely what we are after. Naturally, regardless how information is obtained, if you know that it can be used to prove that the defendant is innocent, it should certainly be disclosed, and this should be done without having Members of this Council begging for it. However, this is not where the problem lies. The focal point of this question is, even if the information obtained by means of an examination, covert surveillance or interception of telecommunications is disclosed during a trial, the trial procedures will have nothing to do with whether or not the information has been obtained by illegal means, or if it is obtained pursuant to the conditions as set out in this legislation. In other words, under the current circumstances, I absolutely

do not envisage any situation in any judicial procedure where the Judges or the lawyers will be discussing whether or not the product of any covert surveillance has been obtained by illegal means or pursuant to the conditions as set out in this legislation. Cases like this will not happen in any legal proceedings. Since this will not happen at all, why should we have these provisions in this piece of law? Why must the Commissioner stop carrying out the examination simply because something happens somewhere that is totally unrelated to what we are discussing right now? When we have examined the provisions from the overall point of view, including all the inadequacies, mistakes and omissions that we have been discussing, and we come back to look again at the period of one year given to the applicants by the authorities, the provisions that require an examination to stop whenever legal proceedings are underway, and the restriction that relevant information must not be mentioned during the legal proceedings, we cannot help but ask, what sort of protection is this?

**MS MARGARTE NG** (in Cantonese): Chairman, I would like to point out two more points. First, in dealing with subclauses (4) and (5), I moved an amendment in which I suggested act of covert surveillance without lawful authorization should be made a criminal liability. The motion has been voted down. But what is the significance of that? If that was made a criminal liability, the public could press a criminal charge against persons who conduct unauthorized covert surveillance. However, since now this act does not carry any criminal liability, the public can only lodge a complaint within a period of one year. Chairman, is this being unfair to the public? This practice is extremely unfair. This is the only means available to the public, yet so much restriction is imposed.

Chairman, in these marathon-like deliberations, everybody has been working very hard. However, the media have found it hard to cover the progress. For example, we have discussed many details in legal procedures, which people in this Chamber may understand, but the media may find it difficult to cover. However, on this score, the media should not find it difficult. This issue is actually pretty straightforward. If a person has been subject to covert surveillance or interception of communications when he should not have been subject to such treatment, to what extent is he entitled to complain? The media should certainly cover this. Why should the Government restrict the time limit for lodging complaints to one year? Is the period of one year fair? Why

should other Members oppose our proposal of lifting the right of the public to a more reasonable level, which is five years? I hope the media can relate these details to the public.

Chairman, we are moving so many amendments today, not because we are optimistic that these amendments will get passed, but because we feel we should take the opportunity to record the problems of this Bill in the records of proceedings of this Council. It is not our wish that the problems we raise today will be known to history alone. Instead, we wish the public would be aware of the extent of the rights given to them, and we hope they can stand up for their rights and persuade the Government to change its mind.

Therefore, Chairman, I once again implore Members to support the amendment I moved.

**MR MARTIN LEE** (in Cantonese): Madam Chairman, actually, we should talk about principles, that is to say, why should there be a time limit? That is a way of saying that they are too late in lodging their complaints. If you have a reason to complain, but you do not take any action and simply let the thing drag on, nobody will have pity on you. However, the matters under discussion are done covertly, so how will the public know about that? Actually these are matters that are difficult even to imagine, so how can the public know? Since these are actions taken by unlawful means, and they are not done pursuant to the law, the public stand a remote chance of knowing about them in the first place. They may not be aware of the matter until a lot of twists and turns and until somebody leaks out the information. But when they finally know about that, the time limit has expired, so what can they do?

You may argue that it is not true that they can do nothing. If the Commissioner believes it is unfair not to carry out an examination, he will initiate an examination. However, this is not how the provision is written. It does not say that the Commissioner should carry out an examination if the time limit has expired when you first learn about the matter. Will the Commissioner say, "This gentleman has come to me to lodge a complaint; according to him, he first learned that he was subject to unlawful covert surveillance yesterday, so he has come to lodge his complaint today as quickly as he could. Since he did not learn about the matter until last night, and he has lodged his complaint at 9 am

this morning, if I do not follow up his case, would that be unfair? As a matter of fact, the Commissioner will refute this point because this is not how the law is written. Since the time limit of one year has expired, or it may already be five days since the expiry date, he will question how this is unfair? Since the Commissioner has not carried out any examination, how can it be unfair? I hope Members will judge it from this perspective. If only the provision is written conversely, that if a citizen knows or have reasons to know — or he will know if he simply asks a person, but he has not done so, then he will be deemed to have knowledge of the matter. When a person is deemed to have known about the matter but he does not take any action, therefore, his complaint will be subject to limitation. To me, I would find this reasonable. But this is not how the provision is written. All and all, once the time limit is expired, it will be up to the Commissioner to decide if he will carry out an examination. But the Commissioner does not have much discretionary power. He will consider if it is unfair for him not to carry out the examination. But when the time limit of one year has expired, if he carries out an examination, it will be unfair to the Government, so what should he do? This is the problem.

Therefore, Madam Chairman, it would be unreasonable if the time limit could not be extended. After all, five years is not an excessively long period of time. Of course, Mr LAU Kong-wah always has a view of his own. He always finds the suggestions of the Government reasonable. Yet, we should bear in mind that it is the human rights of a citizen that are infringed upon, and under such circumstances, the person may even be told that the time limit has expired. Maybe he first came to know about that just last night, but he did not want to call and disturb the Commissioner at night. The Commissioner may even tell him, "I am very sorry, but even if you had called me last night, the time limit would still have been expired." So what are the remedies available to the public? Therefore, from the fact that the Government is unwilling to make any concession even on this tiny small area, we should understand that this is a piece of draconian legislation, is it not?

Hence, Madam Chairman, to me the Government has got to a state where it is not to be reasoned with. You may argue that these are trivial details, but what is trivial to the Government may be important to the public. A good government will have arrangements like this: with regard to the time limit, a shorter period should apply when the Government is pressing a charge against a citizen; and a longer period should apply when a citizen is filing a lawsuit against

the Government. This is what we call a good government, a government for the people, and a government of the people. But right now the contrary is true.

Therefore, Madam Chairman, if Members do not support this provision, I will be totally speechless.

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

**MR JAMES TO** (in Cantonese): Chairman, I would like to raise two points. I have found the last sentence in the speech of Mr Martin LEE very impressive. This is because the Government commands lots of resources and manpower, whereas the general public is totally unarmed; therefore, the two are certainly not on an equal footing. The Government always talks about resources, and it says it is worried about having an enormous amount of cases, but to me these arguments are totally unacceptable.

I was thinking about the purpose of having clause 44(2), and now I can see it more and more clearly. What the Government is most fearful of? It is not about affecting the course of criminal proceedings, but about things that will be disclosed in relation to these interceptions and trackings in the course of the criminal prosecution. The disclosure of those matters may reveal the details of a case to the public, or something may be discovered in the course of the questioning. As such, the Government has to "contain" it with the time limit of one year. Why? The Government may say, the time limit has expired, and you have discovered this too late. I have ruled out things that happened many years ago. In fact, Chairman, you should have a profound feeling on this, because in an inquiry session held in this Council, it was mentioned that you had once been wiretapped. This is a painful experience indeed.

However, the point is, when you really found out some problems in the criminal proceedings, you would certainly want to lodge a complaint at once, but at that time you were unable to lodge a complaint. It would be easy for the law-enforcement agencies to handle the matter though. They would say the matter is being processed. When the proceedings are concluded, the law-enforcement agencies will say, "According to clause 44(2)(b), it is stated that 'until they are no longer likely to be instituted'. Since other investigations in relation to this one are still underway, and because this is a syndicate, and the case is still under investigation, we are unable to handle it." Now many years

later, when finally the matter can be handled, the files are already destroyed. What are the criteria the Commissioner adopts? That is "without authority of the prescribed authorization". This is serious to the disciplined forces. It constitutes a case of dereliction of duty, but it falls short of being a criminal offence, because the amendments we moved have been voted down. Let us see if the amendments we will move in a short while in relation to civil liabilities will get passed. In a criminal prosecution, if the Commissioner has got the authority to carry out an examination, and the result of the examination shows that it was done without having authorization. It will truly be very bad. Why? Because if the Commissioner is given the authority to carry out an examination, the Commissioner will ask, "Shall I talk?" If he does talk, it will be crucial with regard to the guilt or innocence of the person, the reason being that some of the evidences may have been obtained by unlawful means.

The Government is scared right now. It knows that in the CAPO it is a case of the police investigating the police themselves, so they will come up with nothing for sure. But if the examination is carried out by the Commissioner, it would be disastrous if the Commissioner comes up with something. If the examination comes up with something, the officers will be affected, so they must not let the examination to be carried out, and so it is necessary to have clause 44(2) to put a stop to the examination. After a long period of time, the information will no longer be available. Because they have to entertain the law-enforcement officers of the prosecuting authority, the scenario would be like this: the prosecutor will demand to have access to all information, whether or not they will be useful. All unused materials and articles have to be obtained; otherwise it would be difficult to gain an upper hand in the lawsuit. Furthermore, failing to do so will mean that he has not fulfilled his duty as a prosecutor, as well as the legal responsibility and his professional conduct in his capacity as a lawyer to the Court. As such, the prosecutor is obliged to demand the front-line law-enforcement officers to supply all the information. The information must not be destroyed, but once the lawsuit is finished, the information can be disposed of. By then, if one demands to carry out an examination, all the information will no longer be available.

Therefore, this is really a wicked provision. It is meant to put out any matters that stand a chance of being exposed or investigated. Bear in mind that if the result of the examination indicates no sign of violation of the terms of the authorization, at least an examination has been conducted and a verdict has been reached. What is most pathetic is that due to reasons such as procedural matters,

disposal of information, and expiry of the time limit of one year, and so on, the examination and the complaints have to be suspended, or worse yet, the examination would have not permitted to begin in the first place. Bear in mind that the examination must not be carried out in the first place, including the fact that the Commissioner cannot demand the files must not be destroyed, because the Commissioner himself has not yet opened a file for the examination. He does not even possess this initial first power; that is to say, he does not even have the power to demand the authorities not to destroy the information subsequent to the conclusion of the legal proceedings. Why? Because this is how the provision is written. The situation is this bad, so bad that it covers up any matters that stand a chance of being unveiled as in breach of the terms of the authorization or without any authorization at all.

Frankly, even if the phone sounds strange, we have to check if the phone is in order; if there is a hole in your home, and it is suspected that there is water seepage, you have to go through inspections by the Food and Environmental Hygiene Department and the Water Supplies Department. The thought of your having been made a subject of interception may not cross your mind until those specialists tell you the hole does not appear be naturally worn out, instead it looks like an artificial opening. The situation over these past few months may have been better, because we have kept talking about interceptions, and it may keep the Commissioner busy because many people may go and lodge a complaint with him. However, honestly speaking, under normal circumstances, it will not occur to a normal person that he should lodge a complaint with the Commissioner whenever he hears some weird sounds in his phone. Otherwise people will think you are nuts. When you have a tiny thread of blood running from your nose, you would not think it is cancer, you would normally think it is some kind of inflammation in the lungs instead. This is a normal reaction.

Therefore, after I have read the whole provision carefully, I have a feeling that the purpose of the provision is to prevent all examinations from being carried out in the first place. In this way, the authorities will have peace of mind, and the disciplinary officers will be given a free hand. This is the message that has got across to us.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, the Government cares much about the mechanism of complaints for the public. In formulating the complaint mechanism and the law in general, the officers of the Security Bureau and the Department of Justice have conducted a massive amount of researches, with a view to drawing reference from the practices of other common law jurisdictions.

According to our studies, with the exception of the United Kingdom, other jurisdictions do not have any complaint mechanism in this regard. As of the United Kingdom, the current time limit is one year. In my opinion, one of the reasons is that a longer time limit for the complaint mechanism makes it necessary to maintain information with respect to personal privacy for a longer period of time. Therefore, there is a question of striking a balance between the protection of personal privacy of the public and the formulation of the complaint mechanism. In the United Kingdom, a period of one year is considered to be the balance. Since we have to draw reference from the practices of other areas, we have fixed the period to one year accordingly.

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

**MS MARGARET NG** (in Cantonese): Chairman, I must respond to this point.

First of all, the Secretary is asking us to draw reference from the practices of other countries. Does it mean that we should copy whatever is in place in other countries? Are the practices in other countries necessarily superior? We must consider the rights given to the public as provided by the system under this law. We have already pointed out that in our deliberations of the Bill, generally speaking, there are many areas which show that our system is much less open compared to that of other countries. The degree of transparency of our system is pretty low too. When the degree of transparency is so low, the government is not held accountable to the parliament, whereas the reverse is true in overseas countries. The governments there do not report to the Legislative Council, nor

is there any mechanism that will hold the governments accountable to the Legislative Council. This being the case, should our Government not provide more opportunities to the public in a direct way? When the Secretary refers to the conditions of the overseas countries, should he inform the public the entire system that is available in the overseas countries as well? If the public tell them today that they are not confident with the one year restriction, the Secretary will reply, "The same applies in other overseas countries as well." Will the people of Hong Kong tell him this is fine? Their rights have been undermined as well. The Secretary is not telling the public the mechanisms that are in place in other overseas countries; instead, when he says other overseas countries do not have any complaint mechanism, or the time limit in the United Kingdom is also one year, he expects the public to find that acceptable.

Chairman, I believe a response like this is absolutely unacceptable. He is not looking at the issue from the perspective of the public, or from the perspective of the rights of the public, or whether it is fair or not, all he is doing is just trying to get away with it. Chairman, I really think that the public will find this very disappointing.

Thank you, Chairman.

**MR MARTIN LEE** (in Cantonese): Madam Chairman, if we were to collect all the laws or all the related legislation of the world and formulate a piece of legislation with bits and pieces from here and there, what will it end up? Even if they are the top 10 most famous dishes, if you simply pick some ingredients here and there from each dish and mix them together and come up with a dish — I know nothing about cooking, but Ms Margaret NG is quite good at that — since the ingredients do not match with each other, a dish made with the ingredients of the top 10 most famous dishes is not going to be delicious. After all, what the Government has come up with is not a renowned dish to begin with. It is just bits and pieces of some unpalatable ingredients put together from here and there, so how can this be taken as a valid response?

In the meantime, Madam Chairman, as I said earlier, a shorter time limit should apply when the Government is pressing a charge against a citizen; and a longer period should apply when a citizen is filing a lawsuit against the Government. What is the response of the Government in this respect?

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): I am not in a position to respond to the Government's legal policy that Mr LEE has mentioned just now, and I have nothing to add with respect to other areas.

**CHAIRMAN** (in Cantonese): Before I put the question with regard to the amendment moved by Ms Margaret NG, I would like to remind Members that if the amendment is passed, Mr James TO and the Secretary for Security may not move their amendments.

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

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

**CHAIRMAN** (in Cantonese): Will Members please check their votes. If there are no queries ……

(Ms Audrey EU hurried into the Chamber)

**CHAIRMAN** (in Cantonese): We will wait for Ms Audrey EU to cast her vote.

(Ms Audrey EU cast her vote by pressing the button)

**CHAIRMAN** (in Cantonese): Voting shall now stop and the result will be displayed. Among the Members returned by functional constituencies, 23 were present, four were in favour of the motion and 19 against it; the question is not agreed by Members of this group. Among the Members returned by geographical constituencies, 20 were present, 10 were in favour of the motion and nine against it, the question is not agreed by Members of this group either. Since the question was not……

**MR LEE CHEUK-YAN** (in Cantonese): A point of order. Is the result shown on the screen incorrect?

**CHAIRMAN** (in Cantonese): The result shown on the screen is not incorrect, because the Chairman does not cast a vote.

**MR LEE CHEUK-YAN** (in Cantonese): No, but the geographical constituencies ……

(Mr LEE Cheuk-yan indicated that he had understood the voting result)

**CHAIRMAN** (in Cantonese): Mr LEE Cheuk-yan, you are not the only Member who has had this question. This is not the first time, and I believe this is not going to be the last time either. *(Laughter)*

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE and Dr Fernando CHEUNG voted for the amendment.

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

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 23 were present, four were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to clause 44 and to add the definition of "subject of interception or covert surveillance" to subclause (1) of clause 2.

*Proposed amendments*

**Clause 44 (see Annex)**

**Clause 2 (see Annex)**

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

(Members raised their hands)

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

(Members raised their hands)

**CHAIRMAN** (in Cantonese): I think the question is not agreed by a majority respectively of each of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendments negatived.

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move the amendment to clause 44.

*Proposed amendment*

**Clause 44 (see Annex)**

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 44 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 44 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

**CHAIRMAN** (in Cantonese): I think the question is agreed by……

**MR JAMES TO** (in Cantonese): Sorry, I want to claim a division.

**CHAIRMAN** (in Cantonese): You may claim a division because I have not yet declared whether the question is passed or negatived.

Mr James TO rose to claim a division.

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

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

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

Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted for the motion.

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the motion.

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

THE CHAIRMAN announced that there were 44 Members present, 28 were in favour of the motion and 15 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

**CLERK** (in Cantonese): Clause 47.

**CHAIRMAN** (in Cantonese): The Secretary for Security and Mr James TO have separately given notice to move the amendments to subclause (2) of clause 47.

Committee now proceeds to a joint debate. I will first call upon the Secretary for Security to move his amendment.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendment to clause 47 of the Bill as set out in the paper circularized to Members.

The authorities have proposed the amendments to clause 47 after taking into consideration the views of the Bills Committee to include more details in the annual reports submitted by the Commissioner, including breakdowns on different types of authorization and renewal, the number of cases of authorization for which renewals have been sought more than five times, the number of applications that have been rejected, the number of notices that have been issued, and the number of disciplinary actions taken by the departments, and so on. Coupled with the original stipulations of the Bill, including the major categories of offences involved in the authorizations, a summary of reviews conducted by the Commissioner, a report of any cases of irregularities identified and an assessment on the overall compliance with the relevant requirements, and so on. The annual report of the Commissioner will be fairly comprehensive and certainly comparable to the requirements of other common law jurisdictions.

We oppose the Committee stage amendments proposed by Mr James TO to clause 47(2). The proposals of Mr James TO will require very detailed breakdowns and details to be provided by the Commissioner. As I pointed out earlier, the contents of the annual reports of the Commissioner will be fairly comprehensive with the inclusion of the amendments proposed by the authorities to the Bill. However, we must acknowledge the fact that due to the nature of the operations, the information that can be disclosed will inevitably be restricted. Therefore, we must strike a balance between confidentiality and transparency. We are of the opinion that the original stipulations of the Bill coupled with the amendments the authorities have proposed have reached an adequate balance.

Madam Chairman, I call upon Members to oppose the amendments Mr James TO proposed to clause 47 and pass the amendments proposed by the authorities. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 47 (see Annex)**

**CHAIRMAN** (in Cantonese): I now call upon Mr James TO to speak on the amendment moved by the Secretary for Security as well as his own amendment.

**MR JAMES TO** (in Cantonese): Chairman, my amendment is mainly about what should be covered in the annual reports and what should not. I believe the principle to be considered is how the public can, to a certain extent, monitor and understand how this piece of legislation is implemented. A major reason given by the Secretary for raising his opposition is confidentiality and the need to strike a balance between confidentiality and transparency. Maybe I can state my request for Members to judge, to discuss and to think it over, particularly for those Members who have not joined the Bills Committee, as to whether or not the request will affect the government operations and confidentiality. I also welcome the Secretary to explain in greater details to us how this will affect confidentiality.

First, I have not asked for specific details of any operations in the amendment. I have not asked for details of any individual cases, this is the first point that I want Members to know. Second, what I have asked for are statistics, in other words, they are in terms of hundreds, thousands or tens of thousands, this is the concept to begin with. For example, my proposal to add subparagraph (xi) asks for a total number, which is the total number of two major categories of applications in relation to prevention and detection of crimes as well as protection of public security.

Why are these figures so important? As far as crimes are concerned, we all know that from the number of serious crimes happening in Hong Kong each year, that is, from the approximate number of such cases, we will be able to estimate the overall number of crimes and their rate of increase. Moreover, once these total numbers are published, basically the ratio is traceable, with

which it is possible to determine if the rate of increase or rate of decrease is reasonable. Yet, public security is totally non-restrictive. I do not wish to repeat the arguments I made previously. To sum up, the answer is that there is no definition, or say this is how it is defined — this is what is called the pubic security of Hong Kong.

With regard to the public security of Hong Kong, there were cases which indicated that the public security of Hong Kong could have a bearing on that of other regions, which could in turn affect the public security of Hong Kong. The example of Falun Gong may fall into this category. It means that even though there is no law in Hong Kong to deal with this situation, it will nevertheless affect other regions and *vice versa*. Moreover, there is no specific provision that pubic security cannot be listed as an item under Article 23. As far as the so-called economic security is concerned, it is possible to conduct interception for this purpose, so the scope is very extensive. Interceptions can be carried out for tapping commercial secrets or even placing a transaction instruction in the stock market.

If the definition is that extensive, then there is a possibility that it may be subject to abuse. If there are abuses and the general number is not published, we may not know that the majority of the resources may have been allocated to applications related to the protection of public security. As such, Hong Kong may become a society of political surveillance. I am not saying that this will be the case right away, but the point is, if the general figures will be released, the public will have peace of mind.

The Government has provided some simple statistics and made an estimated projection with data from the past three to six months. We certainly hope that pubic order will be getting better and better while the number of such cases will decrease. However, as far as these estimated figures are concerned, say there are approximately 1 600 to 1 700 cases of application within four months, which means the general figure is a few hundred cases per month. Yet, there are people who say that if the general figure is released, law enforcement will be affected. I hope the Secretary will stop telling stories and stop saying things that are absurd and ridiculous. Please explain specifically how the disclosure of figures in terms of hundreds and thousands will affect public order and how these will affect public security?

The second major category of items that I have proposed is the addition of the six items from subparagraph (xii) to subparagraph (xvii). As I have said,

according to the projection, the number of such applications should be a thousand something. But we have already scrutinized the relevant topic, and we pointed out in the deliberations on clauses 29 and 30, that a single application could be used to cover more than one target, and a single application could be used to cover more than one premises and more than one telephone line. Furthermore, if it is target-oriented, which is not the same as what it means by target-oriented in the field of education, theoretically a target can be using many telephone lines, or there may be a number of telephone lines on his premises, when coupled with the telephone lines that he may use — I do not know how many telephone lines he uses. If we only talk about the general figure, how many telephone lines in Hong Kong have been wiretapped each year? Is it 5 000, 10 000, or 500 000 telephone lines? This general figure will allow the citizens to make a broad judgement as to whether or not Hong Kong has been made a society of political surveillance?

The same is true in other similar things too, such as fax lines, e-mail addresses, Internet protocol, which is a specific address for each specific computer — this may be easier to understand — and the total number of the people and the premises involved. These are some general figures. For example, if 2 000 people have been made subjects of surveillance this year, can a person tell whether or not he is one of these targets? This is out of the question.

Furthermore, the Government has come up with an even more weird argument, which I hope the Secretary will explain in greater details. The Government says that if somebody analyses these figures systematically, such as 5 000 for the current year, 4 700 for the next year and 5 200 for the year after next, and so on, the capacity of the Government will be exposed. This is totally absurd. This is because the number of interception operations are to be conducted depends on the need in the prevention of crimes and protection of public security. It does not mean that we have to wiretap all 20 000 telephone lines simply because we have the equipment to wiretap 20 000 telephone lines. Nobody will be able to tell your capacity. Even if you have the capacity for 20 000 telephone lines, if all you need is to wiretap 4 700 lines today, so be it. It is this simple. Nobody can tell.

In addition, with regard to this issue, I have been moving amendments during the deliberations of the government budget held in March every year. I have moved amendments to the budgets delivered by different Financial Secretaries — not that I have any grudges against them, but just because I have

been following up the same topic, which incidentally also has something to do with this provision. Some people have oversimplified these items and categorized it as informant fees. The police alone account for $70 million to $80 million of the appropriation. Actually, every year I would ask the Government for the amount of money spent in relation to crimes and the amount of money spent elsewhere, the manpower deployed, the equipment used, and the amount of wiretapping devices. Why is this so important that I have been following it up for more than a decade? That is purely because this particular item of expenditure, first of all, this item, known as Reward and Special Services, which I call a bottomless abyss, is a black hole, because nobody knows how the monies are spent. The newspapers or the media call it informant fees, whereas in fact informant fees only take up a very small proportion of the appropriation. Rewards and under-the-counter payments are not that much either. So how much do these take up? Historically, these were expenditures for the Special Branch and that means the money is spent on those clandestine matters.

Now there is this sum of $70 million to $80 million, of which any large items of expenditures will never be disclosed; coupled with the progress of technology and fall in prices — the flash RAM that everybody uses have a capacity ranging from a couple hundred MB to 1 GB. We can see that every time Mr Howard YOUNG gets back to his company, he would always plug it on. Our fellow party member Mr SIN Chung-kai does that occasionally too. A couple of years ago, a flash RAM with 1 GB of memory was selling for more than $2,000 and it was very bulky, but nowadays a flash RAM with 1 GB of memory is very compact, with non-brand name products selling for just some $200, and even brand name products are selling for just some $300. In fact, over the past few years, irrespective of whether it is about the prices of memory or the progress of technology, with the same amount of $70 million to $80 million, the Government is able to have an increased capacity in matters that require memory storages and search function such as surveillance and interception.

Of course, I also hope that the Government can spend less money while getting an increased capacity for catching the criminals. This is a hope we share. But the point is, given this amount of money, if a concept is not available with which the public may rule out a possibility, that is, a possibility of our society being put under political surveillance, this I think would be unfair to the citizens. You have got tens of million dollars, in addition to the appropriation for police expenditures. Nobody can ever tell your capacity judging from this figure. Why? Because in the past you might have been

subject to certain limitations given the same amount of money, in the sense that you could only purchase a certain amount of services, or be equipped with a certain amount of capabilities in conducting surveillance activities. But today you can have more given the same amount of money. Nobody can tell from the figures, because the fact of the matter is that prices have dropped a lot.

Therefore, I can only say that without making these relevant general figures available, to me, it will be very unfair to the citizens. It will also result in a scenario in which, since it is not really an independent Court in the first place, plus the fact that the Commissioner is appointed by the Chief Executive — even if complaints are lodged, the information will be destroyed fairly quickly; in addition, a time limit applies. What is more, even the annual reports, which will contain the general figures, will just report very limited information, whereas the general figures which are most essential, most crucial and most sensitive may be entirely unavailable. If this is the case, I think this would be very unfair to the public. I may even go so far as to say that I do not rule out the possibility that the implementation of this legislation will place the public in white terror and trap them in a society of political surveillance in which everyone is overwhelmed by fear.

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

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

**MR MARTIN LEE** (in Cantonese): Madam Chairman, I would just like to add one more point. Mr James TO has said it very well. Even if people are aware of your capacity — this is strange to me though, because this may be what the Government will do, if it is capable of doing so, it is possible that the Government will fully utilize its capability for conducting interception activities, so Mr James TO may not be right on this account — but even if the criminals are aware of the capability of the police, and if I were the ringleader of a group of crooks, even if I know that the funding from the Government this year has been reduced as a result of some little things done by Mr James TO, will it reduce of odds of my crimes being busted by the police? This is not going to be the case. Does it mean that the police will not target me for investigation or interception?

This is not going to be the case either. Apparently, these arguments are not acceptable.

**MS MARGARET NG** (in Cantonese): Chairman, we can say that the report by the Commissioner is the only place where there is any transparency, since the authorization and surveillance are all conducted in secret, whereas complaints from the public are subject to huge restrictions. The Secretary said earlier that the part on the stipulations with regard to complaints is comparable or even superior to that of other countries, but in fact the level of transparency as well as accountability is lagging far behind than that of other countries. Even the time limit of one year in the United Kingdom that he mentioned is due to the fact that the Commissioner there has great powers, say, to revoke a warrant, instead of simply having the power to examine if anybody has done anything wrong after all is said and done, or whether or not any compensation is warranted in case that the interception has been carried out without authorization. No, it is not that simple. Therefore, we cannot compare an apple to an orange, so to speak.

The Commissioner's report is the key to letting the public know about and allowing the legislature to monitor how this system works. However, Chairman, the report is not submitted to you, nor is it submitted to the Legislative Council; it is submitted to the Chief Executive. The report will only be submitted to the Legislative Council when the Chief Executive thinks it fit to do so. Furthermore, the Chief Executive may even exclude information which he believes to be inappropriate. Now what kind of sensitive information that the Chief Executive may find inappropriate? Please take a look at the checklist under clause 47. What can we tell from those figures? Chairman, during the initial stage of the deliberations held in the past two days, we were very concerned about the actual, concrete contents of the independent authorization mechanism, which is to say, the actual number of authorizations issued by the panel Judges, the number of cases handled internally, the number of emergency applications, and the number of such cases which are subsequently ruled by the panel Judges as unacceptable, or whether or not confirmation is given to all these cases? Or are there any abuses? These are all very important figures. They are figures that are shown in the form of a breakdown, and how these figures are broken down is very important for the Legislative Council and society as a whole in monitoring this system. However, as we can see, the figures provided by the authorities and the way these figures are broken down do not enable us to conduct any analysis or to come up with any conclusion based on these figures.

Chairman, the Bill before us is a revised version from the authorities, meaning that their amendments have already been incorporated. First of all, the numbers of different types of authorizations are grouped together, with just an average duration of surveillance for all types of authorizations. In reality, the actual duration of different surveillance actions may vary, so exactly how long have the surveillance actions lasted? However, the report only gives an average figure, without listing the longest and the shortest duration of the surveillance actions respectively. Likewise, the same is true to renewals. The report only gives an average duration of renewal without listing the longest duration given for a renewal. As such, there is no way we can tell for how long the subject has been placed under surveillance. From this information, there is no way we can tell the number of cases which are found to be problematic by the panel Judges subsequent to their examination, so it is very hard for us to come up with any conclusion from this report.

Mr James TO's amendments aim at making the classification clearer, and Mr James TO is particularly concerned about the number of cases where the investigations have been conducted for the purpose of combating crimes and the number of cases where the investigations have been conducted for the purpose of protecting public security. These are the crux of the issue. However, Chairman, these are all unknown to us, because in the end only a number of major categories of offences are listed in paragraph (b). Chairman, those are very useful information, particularly in paragraph (b) which lists out the number of persons arrested and prosecuted as a result of the covert surveillance. I hope Members will take a look at these figures in future, because it can show that covert interceptions are totally unrelated to the persons arrested. But what worries us most is the actual number of cases conducted for the purpose of protecting "public security" which has not been defined, and of which how many cases have been conducted through making an application to the panel Judges, and how many through making an internal application? As a matter of fact, this is the only way with which we may monitor the entire system directly, but there is nothing we can tell from these figures.

Chairman, I drew reference to the practices of other countries during my research, so I hope the Secretary would stop telling us that because there is no such a report in other countries, so we will be doing the same. Please do not just give us those general figures. Do allow us to judge it from that perspective to see if we can tell from these figures how well the law-enforcement agencies

have complied with the law. How exactly will this affect our public security at all? Do not hide matters behind the figures, but do provide us with figures that will allow us to make analyses and judgements.

Thank you, Chairman.

**MR LEE WING-TAT** (in Cantonese): Chairman, having listened to the debate for these few days, I have the growing feeling that the Bill is seriously flawed. However, it is simply impossible to persuade the Secretary to introduce amendments or accept the amendments proposed by the pan-democratic camp through today's debate.

The reason why we still want to express our opinions is to let the public know that our discontent is based on facts. Actually, all governments have a deep-rooted habit of disliking the disclosure of information. Democratic governments are no exception, for they will then be put on an equal footing with the public in discussions as a result of the disclosure of information. This applies to all countries, from totalitarian states to democratic ones. Only that it is far more serious in totalitarian countries. Democratic countries pretend to be open, and so every elected president or prime minister will declare his support for openness, fairness and justice. But actually, he will hide everything he can possibly can. Only that there is little he can hide owing to the institution.

Here are some reports and figures. As I pointed out during yesterday's debate on the power and appointment of the Commissioner, the more I look at the legislation, the more I feel that the framework is quite comprehensive and all-embracing. Even a foreigner who does not know what is going on or a Hong Kong immigrant in an overseas country who can read Chinese and English will find the Bill flawless after reading it because it really embraces everything, from the appointment by the Government of a retired Judge to be the Commissioner to examine reports and receive complaints to the possible disclosure of the report by the Chief Executive upon its submission to the Chief Executive. If a person has never listened to Members' discussion and if he is to judge solely from the five or six initiatives I mentioned earlier, the Bill will surely appear to be good enough if he merely looks at its wording. I see that Mr Stanley YING is nodding his head too. Judging from its wording, the Bill is really good enough. However, we must look at its contents.

I remember I was elected a district board member in 1985 and became the Chairman of a district board in 1988. My first encounter as a district board member with the Hong Kong Police Force stemmed from some reports. As Members are aware, the Police Force submits its reports to district boards. For instance, a report might contain seven items, with each of them covering a quite an extensive area. There might possibly be 300 criminal cases and several hundred theft cases. Nevertheless, we cannot tell what have happened in some of those cases unless we know the details. After an extended argument with the Police Force, the so-called breakdown was finally provided years later. Why did I want to get a breakdown? This was to make it possible for me to get hold of the information in a more concrete manner. To present the figures in such a vague manner is simply not the desirable way of giving an account of one's work. The public can never raise reasonable questions as to what extent the so-called surveillance or the target of the legislation is, as stated by the Secretary, focused on the criminal side, for instance, to monitor big crooks and crime syndicates. We have no objection to this. However, is there anything else? How many such cases? Will further breakdown be provided? Without any breakdown, and as the figures are vague, it appears that someone is trying to conceal certain facts.

The Secretary will certainly deny this and say that he Chief Executive will naturally find it out after reading the report submitted to him. Of course, the Chief Executive can raise any questions. You as Secretary should know that the Chief Executive has the power to raise questions, whether any report is submitted or not. Yet the crux of the problem lies in the public's faith in this system rather than in the Chief Executive. How can the public have faith in this system? This is because, first, the system has failed to confer on us all the rights safeguarded by general legislation as mentioned in the debate over the past couple of days. Mr LAU Kong-wah said earlier that there was nothing to fear because people being eavesdropped would definitely know it. The sound of water seepage will certainly be heard if a hole is drilled on a wall. I have no idea why Mr LAU has suddenly turned into a detection expert. Both he and I are elected District Council members. This is the question elected District Council members and Members of this Council will definitely ask whenever a complaint is received, is there any water seepage? Is renovation being carried out by a neighbour? I wonder if Mr LAU has suddenly swapped his brain with someone else's. Has he swapped his brain with that of LEUNG Kwok-hung? Only LEUNG Kwok-hung will need to worry that he has been eavesdropped if a hole appears on his wall. It does not make sense for members of the public to suspect they have been eavesdropped because holes appear on walls, water

seeping or cracks are found on ceilings. The public will simply not behave in this way. Mr LAU might have made a fool of himself this morning. Excuse me, Chairman, it appears from his look that he has not slept well. All elected District Council members will ask whether there is any water leakage on receiving complaints from the public about problems with walls, light bulbs, ceilings, and so on, before referring the complaints to the Food and Environmental Hygiene Department for colour dye test or the Buildings Department for inspection. We will not tell the public on receiving their complaints that they might have been wiretapped.

As District Council members, we might occasionally receive complaints from many members of the public that they have been wiretapped. I do know that they are not entirely clear-headed when lodging such complaints. We know how to differentiate and will not say this and that on spotting the appearance of cracks on the walls in the same way as Mr LAU Kong-wah did. As members of the public can hardly access the relevant information, they hope that the reports submitted to the Chief Executive can be made open so that the breakdown can be made absolutely clear.

I suppose the Secretary knows this too. Having formerly served in the Immigration Department, he is now the Secretary for Security. Furthermore, he published reports when he was the Commissioner of the Independent Commission Against Corruption, and the breakdown of these reports was very clear. He should also know that the purpose of clearly itemizing the breakdown is for public information and monitoring. I certainly understand that he will not introduce amendments no matter what I say. I only want him to know that the first figure published by him will make him unable to answer questions raised by the public because this Council, the people and the media will ask him questions. Should he choose to provide vague figures without any breakdown, he has to get prepared to be asked legitimate questions by everyone, and he will then have to answer the questions. Thank you, Chairman.

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

**MR HOWARD YOUNG** (in Cantonese): Madam Chairman, as far as this amendment is concerned, we certainly understand that Mr James TO intends to use the figures to enhance transparency. Actually, such issues will be debated in this Council again and again every year.

I certainly know that the public in general are probably interested in the analyses of the relevant figures, and so are Members of this Council. However, even offenders who wish to escape from the Government's detection will be interested in the analyses too. I believe the masterminds behind such crimes being discussed at the moment, ranging from big ones like terrorism to not so big ones like money laundering or blackmail, are not stupid. They might even be brilliant management students, just like bin LADEN who engineered the September 11 attack, I think he must be a management genius. Before planning any actions, he will first figure out the loopholes in the law-enforcement agencies or the gaps there which allow him to capitalize on resources to accomplish his tasks.

Judging from the angle of transparency, I certainly know that the more the figures are known the better. After all, the offenders we try to detect will also be interested in knowing all the publicized figures so that they can make planning to identify weaknesses of the other party. What will they do if they find some figures are large and some are small? They might probably find that, with authorization by law, the Hong Kong Government can employ a number of methods in intercepting communications or conducting surveillance. Consequently, they will pinpoint a certain area by attack that weaker area and deploy their resources. On the contrary, if the figure of a certain area is small, they will make the best of their criminal resources in planning. It is therefore extremely difficult to strike a balance. Where should the point of equilibrium lie? On the one hand, more figures have to be provided to enhance transparency and, on the other, we must prevent the figures from helping the offenders we combat. It is therefore extremely difficult to draw a dividing line.

Amendments have been introduced to this provision by the Secretary for Security and Mr James TO, who seeks mainly to amend the provisions after subparagraph (xi). I am really quite worried that this will provide opportunities for the offenders we want to guard against instead of enhancing transparency. During a discussion held by the Panel on Security, when we asked the Government about the number of cases over the past several years involving interception or covert surveillance falling in the scope of this Bill, we were told that such figures were not available. However, my immediate response according to my intuition was that, unless there was suspicion that the Government was lying, the figures could not be so small, given the extremely high crime detection rates and crime rates in Hong Kong society where there are several millions of people. In the face of these figures, I do not really think that massive political surveillance has been conducted by the Government. At least,

I do not get this feeling from the reality. I therefore believe that the Government's amendment is an acceptable point of equilibrium to me. I will not accept the provisions proposed by Mr James TO to be added after subparagraph (xi) because I find the provisions worrying.

On the contrary, if we have huge figures of hundreds of thousand or even millions of cases involving interception of communication or covert surveillance each year, I will not worry that the breakdown will be exploited by the offenders. But because the relevant figures are really exceedingly low, at least, we can see from the information we have obtained so far that little has been done by the Government in this area, therefore, I support the Secretary for Security's amendments.

**MS MARGARET NG** (in Cantonese): Chairman, I asked someone earlier to get me a copy of a report prepared in the United States in 2005 on interception of communications. This is a copy of the information submitted pursuant to the law. Chairman, the executive authorities have not volunteered or undertaken to prepare the report. They are required to do so under the law.

Chairman, is such a comprehensive report a model? It has never occurred to me that we can look up to the United States as our role model. On the contrary, how can we do away with these figures, when even the United States has such figures? Members can see that not only does the report set out the overall figures and average duration of surveillance, it also gives the longest period of surveillance as 30 days, and stretching from 30 days in the beginning to 287 days, and the fact that surveillance will be conducted. Anyone who finds it inappropriate may pursue the matter in the Congress and ask why surveillance is warranted. Yet there are no such arrangements in Hong Kong.

The report also contains various categories of surveillance carried out in the United States, such as the types of telephones involved and the tendency. There is of course also a classification of criminal offences and major categories of surveillance. The report spells out three major categories of surveillance, including the interception of communication by telephone or wire communication, similar to the mode of interception of communications under the Bill, then oral communication between people and, lastly, electronic communication. Furthermore, the report contains information on the amount of expenses under each category, the number of people arrested, and the number of convictions made on the basis of the evidence thus obtained, and so on. It is not

considered that the disclosure of the information will affect national security or the confidentiality of the whole system.

Chairman, the appendices of their report are very detailed and contain a great deal of figures. Of course, I have no time to study them one by one, but we can at least see that, as authorizations are issued by the Court, it is required by law that the report should be submitted by the Court to make it clear how much has been done. We can also find out from the appendices information about the responsible Judge or Attorney General for each case, the applicants, the criminal offences targeted in the applications, the types of the wiretapping cases, the districts to which the cases belong, the date of submission of the applications, the processing time, the period of renewal, and the ultimate processing time. All these data are set out clearly. Unless it is said that the security of the system is not taken seriously in the United States, otherwise why can these figures not be published? Why it is impossible for these figures to be provided to enable the legislature and the public in general to understand the operation of the system?

Mr Howard YOUNG believes that offenders will be very interested in the figures. I really want him to tell us, or shoot a movie, or invite *South China Morning Post* or other newspapers to draw a cartoon depicting thugs seriously studying the figures in the hope that the police strength can be analysed. Actually, we pointed out in a meeting held by the Bills Committee that manpower had no bearing on the amount of work in covert surveillance and interception of communications. The reality turns out to be just the opposite. Should there be a need for an increase in manpower because of a rise in the number of crimes, the need for boosting manpower will naturally arise. Therefore, we have always considered that this Council should be responsible for giving a blanket approval for expenses incurred in this area. Members can see that the American authorities are to report to the Congress the amount of funding required for approval from the Congress. It can be noted from Britain's example that an ad hoc committee is set up under the Parliament to be responsible for the vetting and approval of the amount of expenses incurred by these operations. Such being the case, should the amount of public money spent be spelt out in the Commissioner's report? For these reasons, Chairman, the content of the Commissioner's report pursuant to clause 47 is far from adequate. As stated by Mr James TO, at least an analysis is required, so that detailed and comprehensive information can be provided.

Thank you, Chairman.

**MR JAMES TO** (in Cantonese): Chairman, over the past couple of days, the media began contemplating a comprehensive and overall review of the Bill. The media are certainly concerned about whether the work of journalists or freedom of the press will be affected. The Hong Kong Journalists Association has therefore issued a statement to express its great concern about the Bill.

Has freedom of the press been given special treatment under the Bill? Actually, I have made a special effort in proposing an addition to paragraph (d)(vi) where the annual number of cases involving the interception or surveillance of relevant lawyers or the protection of legal professional privilege was originally spelt out. In the meantime, I also find it necessary for statistics on interception or tapping of news reporters or on journalistic information to be presented. This is because in practice, (the privacy of communication in general is provided for in Article 30 of the Basic Law) among the numerous piece of laws, especially under every unique situation, the protection of the legal professional privilege as enjoyed by certain information is not used for protecting lawyers, but for protecting the legal professional privilege enjoyed by the public at large when they want to consult lawyers. This safeguard runs through a great number of laws. In other words, many laws do provide a safeguard in this area.

As regards journalists, according to Cap. 1 of the Laws of Hong Kong, if a special search is warranted, it should follow a special procedure and be conducted in public interest. We are now talking about an implicit search, not an explicit search. According to what is provided for in Cap. 1, an entire computer set can be removed during a raid on newspaper premises, or a notebook computer can be searched on the street. Theoretically, such searches can be considered explicit, as tangible objects are the targets.

However, as Members are aware, rapid developments in modern technology, operations, and so on, have made electronic exchanges possible. Even though a lot of information is scattered in every corner of the world, news tips can now be transmitted electronically between different places. Upon receipt of tips after several phone calls, reporters can now file news reports at any time in places outside the newspaper premises. It is simply unnecessary for reporters to keep their palm computers, PDAs, notebook computers, and so on, in newspaper premises because there is a chance of losing them. Furthermore, e-mails can be stored in an off-line or off-shore manner, or even in unidentified and faraway places. Given the enormous capacity of free mailboxes available at present, it is simply inadequate to rely solely on the procedures for searching

tangible objects to safeguard the operations. Actually, special safeguards for freedom of the press should be offered throughout the law. It cannot be said that public interest has not been stated explicitly here as in Cap. 1. This is why I consider it inadequate here.

Second, if general figures cannot be provided to give Hong Kong people (not just journalists) a concept that journalists are generally not subject to extensive control and surveillance (the surveillance is actually a form of political surveillance as well), Hong Kong people will find that they have poor eyes and ears, and we will be extremely worried. This explains why I make a special request here with respect to legal professional privilege, in addition to giving annual general figures, the numbers of cases involving journalist material being eavesdropped or monitored in the past should also be stated.

Another point to which I want to respond is the Government's remark that information is far more abundant in Hong Kong compared to overseas countries. However, Members must bear in mind, and I have repeated numerous times, that there is a special group under the American Congress. Therefore, in addition to the report, the special group can conduct hearings. Unlike the forming of select committees in this Council, they have set up a standing committee as a counterpart of their intelligence or law-enforcement agency, and that committee can summon these agencies for enquiries. The special group may conduct closed-door enquires if it wants to know anything about certain matters. So what is known is far more than what is visible to the public eye. It is precisely for this reason that their report does not have to be very comprehensive. And yet their report is so long, whereas in this Council there is no special group set up under this Council to conduct an enquiry behind closed doors!

Frankly speaking, the authorities would prefer an open dialogue to a closed-door meeting to discuss certain issues when it was requested to do so in the past. However, during an open dialogue, the authorities would say that a lot of things could not be discussed. The most absurd thing was that I originally thought that everything could be said during an open dialogue, but it was not like that in reality. Actually, nothing could be said during an open dialogue. Our request for the authorities to hold discussions in closed doors on how to strike a balance between law enforcement and giving an account to the people was refused as well. Actually, they were just trying to find excuses because they did not have the slightest intention of doing it, right? For the other people, they have a standing committee to do such things from time to time or all year round. They may even enquire about the details of cases in the event of a major incident.

Accountability in this area is extremely high in the United States. Of course, it can be said that the heads of those intelligence agencies would sometimes lie to the Congress. That cannot be helped. This is why many of them ended up in jail when they are old. Examples like this certainly exist. There are instances of the "number one man" and "number two man" of the intelligence agencies who have such experience. However, some of them were not impeached, prosecuted or jailed in view of their old age. In the end, even the Attorney General decided not to prosecute them.

They have at least had a system that makes it compulsory to account for the documents, money spent and even details of the operations. There is absolutely nothing like this in our own system. Without a system like that, there is absolutely nothing. Although Mr Howard YOUNG stated earlier that such figures were available, it must be remembered that the figures merely represent the numbers of applications lodged. An application lodged on the ground of safeguarding public security can involve the tapping of several ten thousand telephone lines, because a person under protection might say he is under serious threat as the relevant intelligence is not at all specific. It might also be said that the President of China must not be embarrassed during his visit to the territory. How terrible it would be should we carelessly allow someone to hang up a banner within his sight or throw an egg at him!

Lastly, it has been suggested that an analysis is possible if figures in hundreds are used to compare with thousands, and so on. I really want to ask how this is possible — it is simply impossible for Mr Howard YOUNG to convince me. We have been told by him that other people can naturally do it, only that he cannot. Perhaps the Secretary should tell us how is possible. I am not asking you to explain to me how many telephone lines were tapped last year and how an analysis was made. There is no need for you to cite an example. Or perhaps you put your example here to show us the pattern and situation. Please let me know if you succeed in making an analysis. Furthermore, no details will be published in the end. To put it bluntly, no analysis can ever be made. It is mainly because you will not say anything like this, right? If you can convince me, I may withdraw this amendment because of you.

Secretary, even as you are the Secretary for Security and you have headed two law-enforcement disciplined forces, you cannot use a simple method to illustrate to us. If you really consider it so complicated that you cannot tell me in a simplistic manner, Mr YING should have already said so. This is obvious from the piles of documents in the Bills Committee. Nevertheless, you may

give us a copy of the confidential documents. You may even summon — it should be "invite" — invite us to the police headquarters for a closed-door meeting and tell us that. And yet you have not said anything like that, have you? It is simply that you do not want to and cannot do so. As a result, you have tried to threaten the public not to make any such attempt, or else all the criminals will run away and they will be found everywhere on the streets. This approach is not helpful to rational thinking and argument.

**MS EMILY LAU** (in Cantonese): Chairman, I speak in support of Mr James TO's amendment.

Mr Howard YOUNG pointed out earlier that enhancing the transparency of the report would expose the weaknesses and loopholes of the authorities. I really do not understand how weaknesses and loopholes will be exposed should the authorities merely list out the figures and make themselves clearer in providing a detailed account to the public of the number of cases by different categories, though the Government's weakness of having a strong preference for surveillance and tracking the public may be exposed. Therefore, I very much hope that Honourable colleagues can support a more transparent system instead of finding excuses for the authorities to make it impossible for Members to sort out the entire matter.

The part concerning "public security" in Mr James TO's amendment is of most concern to me. The Secretary has said that — though he has refused to spell this out in the Bill — such acts will not be used for political purposes or targeted at the offences yet to be legislated under Article 23 of the Basic Law. The fact that he is merely willing to talk about it without putting it down in the Bill simply cannot give people enough confidence. This is why I hope the figures in the report can at least be grouped under different categories and cases should be specified as related to public security, criminal offences, and so on. This is not how things are like at present with everything all mixed together. If the figures are broken down by categories, we will be able to tell the number of cases, say five or 15, involving public security.

During the scrutiny of the Code of Practice, we pointed out that "public security" was of grave importance and it include acts like terrorist attack, weapons of massive destruction and trafficking in ammunition. We will examine whether there are such cases or cases under investigation recently for

the purpose of making a comparison. If no cases involving weapons of massive destruction (except for Saddam HUSSEIN) are found, whereas some 10 to 20 applications involving public security have been lodged, does it mean that some people, say you or I, are being wiretapped? I suppose this should be made known to Members. Regarding the remark by Mr LEE Wing-tat that questions would be raised in this Council even if the report did not contain the data, I think that a reply will never be forthcoming no matter how many questions will be raised. He has already told us that the information will not have any transparency. How can we put our mind at ease when all the information is mixed together?

Furthermore, Mr James TO has also mentioned the issue of freedom of the press. The idea of enhancing transparency by spelling out what information is relevant to journalist material is certainly very inspiring. Furthermore, the vigilance of law-enforcement officers will be heightened as they know that their operations will be disclosed in the future. I believe vigilance will be enhanced in any society where press freedom is respected if it is found that 400-odd cases involve journalistic material. Under the present circumstances, however, all the information is mixed together. All the responsible persons know that it does not matter for no one will know how much they have done. Although the information may be known internally, it will not be disclosed to the outside world. In my opinion, this will not make the responsible persons become more vigilant. This is why I find these requests extremely reasonable. I also hope Honourable colleagues will not find excuses for the Government by saying that a great number of Members in this Council do not want to enhance transparency because they do not want the people to know too much. I do not think that is good.

As regards the remark by Mr James TO that congresses or parliaments in other places will set up special committees to handle these issues, I feel that one point is missing. I raised a proposal in a meeting of the Bills Committee and that was to submit the issues to the relevant panel for discussion. That proposal was accepted by Honourable colleagues at that time. I hope the authorities can complement our efforts. Now that this system is already in place, it is all the more necessary for a mechanism acceptable to the authorities and considered by the public to be fair to be set up in this Council. The Government should stop making lots of excuses. Whether the committee is similar to the statutory ones set up in Britain or established in a manner endorsed by Members, an account of the sensitive and confidential information should be given to the committee in

closed-door meetings. If we refer back to the report now, we will be extremely worried if the authorities are reluctant even to submit some basic figures, particularly those concerning "public security". I have been very worried and I believe many people are worried too. All information is at present mixed together. We can hardly put our minds at ease because we simply have no idea how much will be accomplished in future and who will be followed and eavesdropped.

Thank you, Chairman.

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

**MS MIRIAM LAU** (in Cantonese): Madam Chairman, owing to time constraint, I have originally not intended to join the discussion. However, there are a few more points I would like to raise to illustrate that we really should make a prudent balance between transparency and public security. There are several points we can examine. First, is it really the case that the information disclosed by the Commissioner's report is very little? We can see that the information required to be disclosed is actually quite a lot if we look at the amended clause 47 in the Bill.

Regarding the situation in the United States as mentioned by Ms Margaret NG earlier, the Bills Committee has at that time considered the practice of the United States and referred to the practices of Britain and Australia. In particular, we know that the United States requires publication of statistics on the monitoring of Courts by overseas intelligence agencies. Under the system practised in the United States, however, only cases involving judicial authorizations are published. Information on executive authorizations is completely lacking. In Hong Kong, however, statistics on all sorts of cases, be they involving Judge's authorizations or executive authorizations, they will all be disclosed in the report. This is point number two.

Third, the situation in Britain, an example we have referred to. A paragraph in a related document called the BIRKETT's Report reads: "We are strongly of the opinion that it would be wrong for figures (referring to figures on surveillance) to be disclosed by the Secretary of State (referring to Britain here) at regular or irregular intervals in the future. It would greatly aid the operation

of agencies hostile to the State if they were able to estimate even approximately the extent of the interceptions of communications for security purposes." Of course, we are not discussing national safety at present. However, we may still draw reference from its underlying principle. We have also referred to a number of reports by the Law Reform Commission and found no proposal for such a detailed disclosure. Naturally, there must be some reasons behind this. This is point number three.

These are what the Bills Committee has deliberated. After considering these points, we think that the information required to be disclosed by the Commissioner is already very detailed, and it is even very likely that an equilibrium has been struck in this way. Would it be the case that other countries see the reasons why they should withhold certain information or refrain from disclosing information in such a detailed manner while we have not been able to see the reasons why and so we have decided to make further disclosure? If other places prefer not to do anything, do we have to take such bold steps? All these are what we must consider carefully.

Thank you, Chairman.

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

**MS MARGARET NG** (in Cantonese): Chairman, the remarks made by Ms Miriam LAU just now give us an impression that this system is indeed seriously flawed.

First, Ms LAU has pointed out that there is a difference between an executive authorization and a Judge's authorization. Under the system, however, all authorizations are executive authorizations, because a Judge does not represent the Court and will not act in the capacity as a judicial officer. The remarks I have made earlier are meant to let Members know that a lot of things are to be disclosed under an authorization really issued by the Court. Such being the case, I wonder if the authorities are willing to differentiate between the two, that is, allowing a panel Judge to say more and disclose more. So, Chairman, I am of the opinion that there remains a gap between this part and perfection — forget about perfection — or an acceptable standard.

Chairman, I would like to make an elucidation concerning the remark made by Ms Miriam LAU earlier that the information is more detailed after the amendment. This is certainly the case. The authorities have merely provided in the Bill "the number of prescribed authorizations issued under this Ordinance during the report period, and the average duration of the prescribed authorizations", and nothing else. The numbers of renewal and rejected applications will then be expressed by overall figures. The amendment now proposed by the Secretary represents a finer breakdown resulted from lengthy discussions by the Bills Committee. However, these breakdown figures can still not tell us anything about the longest duration, from which we can have any idea about the extent of intrusion caused. As for public security, the Secretary has not yet given his response on that.

Therefore, I hope the Secretary can tell us later. He has admitted that it is necessary to do so.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I would like to respond to the issue of freedom of the press raised by Ms Emily LAU. I can assure Members that, the executive authorities are greatly concerned about press freedom in Hong Kong like Members are and will safeguard press freedom by all means.

Today's discussion focuses on, among other things, public security. The Bills Committee has also held lengthy discussions on this issue. One of the highlights discussed was whether abuse would be made to invoke the ground of public security to conduct the so-called "political surveillance". As I have emphasized repeatedly, under no circumstances will "political surveillance" be carried out by the law-enforcement agencies.

As regards the disclosure of information, I hope Members can take note of the fact that criminals and terrorists are from syndicates with abundant resources. Undoubtedly, they can keep track of the operations and capacity of law-enforcement agencies through the assessments conducted by the Government, including details of assessments conducted by local and overseas law-enforcement agencies, for the purpose of evading legal sanctions or doing things detrimental to Hong Kong's interest.

**MR JAMES TO** (in Cantonese): Can the Secretary tell us in greater details if he was referring to these several items only when he talked about details of law enforcement? Where does the problem lie if other details of law enforcement are not the focus of our discussion at the moment? Actually, it is absurd that the public has been kept in the dark.

I can tell Members that it is naive to think that criminals will read the report. Instead, they will, first, contact a large number of front-line law-enforcement officers — they often work in close collaboration with each other. Such encounters are indispensable for front-line officers often have no alternative but to collect information from criminals. According to rules, front-line officers are required to fill in forms to state the gangsters with whom they have contacted and how intelligence has been obtained. Therefore, criminals actually do not rely on such reports.

On the contrary, the public cannot feel at ease if those figures are not available. How can criminals get hold of any intelligence if they do not rely on the reports at all? If they are really prepared to commit crimes, what concerns them is absolutely not such things as capacity or figures but the eavesdropping operations conducted by the authorities and what operations they will carry out to counter such eavesdropping. They cannot tell from the figures anything about what equipment will be bought, how telephones will be switched, what measures will be taken, and so on. I hope the Secretary can stop making irrelevant comments by thinking that the matter can be sorted out with such a vague concept. The public will remain unconvinced, for the concept is totally irrelevant. I am not requesting the Secretary to list any of these cases. Frankly speaking, I have great respect for law-enforcement agencies because I have close contacts with them. I greatly appreciate the hardship they encounter in their work and I would call them my colleagues because of our common goal of serving the people of Hong Kong. Therefore, every briefing should be conducted behind closed doors. Furthermore, we must exercise great caution

and prudence afterwards and cannot divulge anything to reporters. This is because we must separate certain things from others. I cannot speak it out even if I know a lot about certain confidential operations, their capacity and what they are incapable of doing.

If those figures are totally irrelevant, then no one should be labelled. No matter what the reasons are, the Secretary may already have a pretty good idea of why he cannot provide a concrete reply or why he does not want to provide a reply. He may wish to allow some flexibility for himself due to pressure from the top. Otherwise, what can be done should he wish to do bad things like these in future? What can be done now if disclosure is being made all the time? The real crux of the problem probably lies here rather than the figures are different from other confidential information about the operations and that inferences can be drawn from these figures.

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

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

**CHAIRMAN** (in Cantonese): If not, I will now propose to Members the question on the Secretary for Security's amendment. However, before proposing the question, I would like to inform Members that if the amendment is passed, Mr James TO may not move his amendment.

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr LEE Cheuk-yan, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the amendment.

Mr CHIM Pui-chung abstained.

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

THE CHAIRMAN announced that there were 44 Members present, 28 were in favour of the amendment, 14 against it and one abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

**CHAIRMAN** (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Mr James TO may not move his amendment to clause 47, which is inconsistent with the decision already taken.

**CHAIRMAN** (in Cantonese): The Secretary for Security and Ms Margaret NG have separately given notice to move the amendments to subclause (4) of clause 47.

Committee now proceeds to a joint debate. I will first call upon the Secretary for Security to move his amendment.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendments to clause 47(4), as set out in the paper circularized to Members.

According to the Bill, if the Chief Executive considers that the publication of any matter in the report would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council. In the light of the recommendation of the Bills Committee, particularly that of Mr Alan LEONG, we propose to introduce an amendment to require that the copy of the report to be laid on the table of the Legislative Council to specify if any matter has thus been excluded from that copy without the agreement of the Commissioner.

As the amendment proposed by Ms NG to clause 47(4) is similar to the authorities' proposed amendment, I hope Members can support the authorities' proposed amendment.

Thank you, Madam Chairman.

*Proposed amendment*

**Clause 47 (see Annex)**

**CHAIRMAN** (In Cantonese): I now call upon Ms Margaret NG to speak on the amendments moved by the Secretary for Security as well as her proposed amendment.

**MS MARGARET NG** (in Cantonese): Chairman, actually I can withdraw this amendment because I have originally proposed a number of amendments to clause 47, including subclause (4). However, as some of my amendments are similar to those proposed by Mr James TO, I have sought permission from the Chairman before the meeting to withdraw some of my amendments which are similar to those proposed by Mr James TO.

The amendment to subclause (4) is just like a fish which has slipped through the net. As the proposal is specially raised by Mr Alan LEONG and has been accepted by the Government, so my original amendment has incorporated it. Chairman, there is no need for me to propose this amendment later.

Thank you.

**CHAIRMAN** (in Cantonese): Ms Margaret NG has withdrawn her amendment. Ms NG, are you prepared to speak again on the Secretary for Security's amendment?

**MS MARGARET NG** (in Cantonese): Chairman, there is no need for me to do so.

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

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

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(No hands raised)

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

**CHAIRMAN** (in Cantonese): It should now be Mr James TO's turn to move the amendment to add subclause (5A) to clause 47. However, as he is now not present in the Chamber at the moment, I now suspend the meeting until he is back. I hope Members will not go too far.

11.31 am

Meeting suspended.

11.35 am

Committee then resumed.

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to add subclause (5A) to clause 47.

Chairman, there is a limit to man's endurance. It has been from nine o'clock to more than eleven o'clock now — sorry.

I will not repeat the content of the annual report as we have already discussed it. With respect to the issues other than matters which the Commissioner is allowed by the Government to refer to in the report, I am of the opinion that, if the issues are excluded from the report submitted by the Commissioner to the Chief Executive, they should be reported to the Legislative Council under confidential cover.

What difference will it make in doing so? Actually, I consider a more desirable thing is for the Commissioner to directly state or explain to this Council in a confidential manner, as with the practice adopted by overseas congresses or parliaments. Under the present circumstances, I am of the opinion that the so-called confidential matter excluded from the annual report should at least be reported to this Council under confidential cover. This is purely a matter of trust. If the Government considers that the authority is still in its hands, even though this Council represents the public, then under no circumstances will it let this Council know. If this is the attitude held by the Government, it will definitely oppose this amendment. Otherwise, the Government should be able to, under the principle of equity, allow the Commissioner to submit to this Council in a confidential manner matters considered to be relatively confidential. Not only is it appropriate to do so, but accountability can also be enhanced as well.

*Proposed amendment*

**Clause 47 (see Annex)**

**CHAIRMAN** (in Cantonese): Members may now debate the amendment moved by Mr James TO.

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

**MS EMILY LAU** (in Cantonese): Chairman, I support Mr James TO's proposal in principle. However, I believe Mr TO is also aware that the Legislative Council's record in keeping secrets is not entirely good. Our so-called confidential information is actually not very confidential. For instance, the Public Accounts Committee report is actually a highly confidential and sensational document, however, it has already been disclosed while it is still being compiled. This is what I have frequently criticized, and I consider the situation terrible too. I have even suggested to the Committee on Rules of Procedure that discussion be held soon to come up with a mechanism to deal with persons responsible for leaking confidential information. Of course, it will depend on whether these persons can be detected. Some people have pointed out that these persons can never be detected. There is nothing we can do even if

that is the case, for we believe in evidence. However, if the person is detected, he should be punished with the harshest penalty laid down in the Basic Law, and his behaviour should be regarded as misconduct. The matter should also be debated in this Council and he should be removed from this Council. Hence, I am of the opinion that we have problems in this area as well.

The authorities will say something like this even if I refrain from doing so. They will invariably come up with many excuses. However, there are certain things we cannot deny. Nevertheless, this does not mean the authorities need not to be accountable to this Council. In my opinion, this Council should expeditiously discuss the setting up of a special standing committee on an ad hoc basis and, probably, other requests as well. Furthermore, relevant Members should be requested to give an account to the committee behind closed doors as when necessary.

As for Mr James TO's proposal to make a report to the Legislative Council under confidential cover, this Council may select a group of people or consider, upon the setting up of the Panel on Security or when the next session begins in October, whether the matter should be handled by this group of people. Frankly speaking, Chairman, should some confidential information be divulged after it is handed to us, the problem is not simply a problem with the integrity of a certain Member. The reputation of the whole Legislative Council will be damaged too. This Council will then be in great trouble if that happens. this is because such problems are found among Members now already. Incidents of leaking confidential information are bound to occur every now and then. Although you and I might not know the persons responsible for the leakage, the media know it.

I am certainly not encouraging this Council to summon reporters to testify. I will not act in this way. However, those Members who divulge confidential information should not think that no one knows what they have done. The media actually know the truth, only that they are keeping their mouths shut, and they are merely watching and smiling at these people. In particular, when these people make a public denial, the media will think that they have no integrity. Although the media will still report these Members' words — the media will certainly do so because as reporters, they will report what has been said, regardless of who provides the information. After the publication of the report, the people concerned will deny what they have done. Yet the reporters know they are responsible. Hence, I am of the opinion that such persons with no integrity should not continue to serve in this Council as Members. I have also

urged my Honourable colleagues to take note of the situation, yet we have been constantly plagued by such problems. We have discussed this matter in various panels. Chairman, sometimes we feel really frustrated.

Regarding Mr TO's proposal, I think if we can find a group of Members whom we can trust, we can let them receive the confidential information provided by the authorities. This is what we should do. In the long run, a designated committee should be expeditiously set up — we should not wait too long — to examine which mechanism is acceptable to the authorities and then all matters relating to intelligence, security, and so on, should then be formally reported to this Council.

Thank you, Chairman.

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

**MS MARGARET NG** (in Cantonese): Chairman, I also support Mr James TO's amendment. Of course, I still have some a lot of reservations. As Ms Emily LAU has pointed out earlier, the information should be made public. What Mr James TO wishes to do is to provide the Government with an additional mechanism. If the authorities really worry about the problem of confidentiality, the matter can be handled in a confidential manner.

Chairman, Ms Emily LAU has said just now that some Members do not observe the rules and are responsible for leaking confidential information. When we are walking in the corridor next time, we should watch out for Members who laugh most with reporters. Perhaps we can collect evidence to examine why the reporters would smile at these Members.

Chairman, I know that Mr James TO was forced to come up with the proposal of setting up this mechanism. This is because although Members have often kept the confidential information handed to them by the Government a secret, the Government has, on the contrary, often disclosed the information to the media, or leaked the confidential information to the media. Very often, government officials act in such a way that even a normal person should not have done. Although we are not responsible for the leakage of the information, we are often made to bear the consequences when such information has been divulged. Similar incidents have occurred before.

However, will it work if both parties are sincere? The proposal is absolutely feasible because under the Official Secrets Ordinance, a person who has leaked the confidential information he has obtained by virtue of his post will be held criminally liable.

Chairman, the proposal is therefore feasible provided that the authorities have such a policy and sincerity to report and be accountable to this Council — it is feasible under the mechanism proposed by Mr James TO. Chairman, I therefore support Mr James TO's amendment, though I also agree very much with Ms Emily LAU's view that disclosure should be made as far as possible and things handled behind closed doors should be minimized. Thank you, Chairman.

**MR CHEUNG MAN-KWONG** (in Cantonese): Chairman, I would like to respond to the misgivings expressed by Ms Emily LAU earlier. Actually, it is almost impossible for any government, assembly or community to achieve absolute confidentiality.

Therefore, while this Council is being doubted for its ability to keep a report confidential after receiving it, we have every right to doubt if government officials are capable of keeping absolute confidentiality too. If there were absolute confidentiality, there would be no spreading of rumours or uttering of whispers in this world to further a political end. Neither would there be any deliberate leakage of confidential information resulting from various political schemings to create expected political results or the existence of spin doctors in the Special Administrative Region Government. Therefore, it is not the case that, for the purpose of pursuing something like these, we deny the existence of a legal provision requiring the submission of confidential reports to this Council. Instead, we are talking about the imposition of legal sanctions should there be leakage of confidential information. But is this our purpose of enacting legislation?

Given that criminal liability is provided for in the Official Secrets Ordinance, anyone who is found leaking confidential information — despite the secretive smile he has received — will have to bear criminal liability. Let us then see who will be the last one to laugh. This is where the significance of legislation lies.

With respect to this issue, I think an extreme cannot be concealed by another extreme. In the end, the law should be taken as a yardstick. It is only proper that the person responsible for leaking confidential information, whether he is a Member of this Council or a government official, will ultimately have to bear criminal liability.

**MR RONNY TONG** (in Cantonese): I do not mean to oppose Ms Emily LAU's comment. We only wish to reiterate here that we are in the process of enacting legislation and establishing a system. We cannot assume that, because Members of this term might have integrity problems, Members of the next term will encounter the same problems. I hope Members of the next term and even the terms after the next will be better than those of the current term in integrity.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, the Government opposes the amendment proposed by Mr James TO to clause 47(5A) to expand the scope of the report to be submitted by the Commissioner to the Legislative Council. As I pointed out when introducing the authorities, amendment to clause 47 earlier, we have made a number of amendments to the matters covered by the Commissioner's report in response to Members' recommendations. We will also further provide that, if the Chief Executive excludes any matter from the annual report to avoid being prejudicial to the prevention or detection of crime or the protection of public security whereas the matter has been excluded without the agreement of the Commissioner, this should be stated clearly in the copy of the report submitted. Hence, arrangement for the submission of the report has been made as clear and transparent as possible.

I hope Members can understand that, owing to the confidentiality of the cases involving interception of communications and covert surveillance

operations, the report by the Commissioner or the reports by department heads in response to the Commissioner's recommendations may probably contain a lot of information involving public interest and are not suitable to be made public. According to our usual practice, such confidential information will be disclosed only to the person who has the need to know. We consider this policy must be implemented thoroughly. Therefore, we oppose Mr James TO's amendment.

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

**MR JAMES TO** (in Cantonese): Chairman, the last statement made by the Secretary just now is remarkable because he said that no disclosure would be made according to the usual practice. First, I am not talking about disclosure. I am merely requesting that the submission be made to this Council under confidential cover. Second, the Secretary said that disclosure would be made only to the person who had the need to know. Given its constitutional role, the Legislative Council does have the need to know.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I have no response to make.

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

**MR JAMES TO** (in Cantonese): A number of Members have not returned to the Chamber.

**CHAIRMAN** (in Cantonese): You need not worry. Please take your time, the proceedings of the Council will certainly take some time. *(Laughter)*

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

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

Functional Constituencies:

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

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

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 18 were present, nine were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CLERK** (in Cantonese): Clause 47 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 47 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 48.

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to clause 48. This amendment is relatively simple, as the one proposed earlier is related to the annual report, whereas clause 48 is related to a special report not submitted on an annual basis. For the same reason, I am of the opinion that any matter excluded from the scope of public knowledge should be submitted to this Council under confidential cover.

*Proposed amendment*

**Clause 48 (see Annex)**

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

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, the authorities opposes Mr James TO's amendment to clause 48. The amendment is based on the same concept of the one he proposed earlier to clause 47(5A). As my previous explanation of the authorities' stance is also applicable to this amendment, the authorities oppose this amendment.

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

**MR JAMES TO** (in Cantonese): Chairman, I do not think I need to speak again.

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

Functional Constituencies:

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

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Timothy FOK, Mr Abraham SHEK, Ms LI

Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 48 stand part of the Bill.

**CHAIRMAN** (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 49.

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to clause 49.

Clause 49 provides that if, in the course of performing his functions, the Commissioner considers that the Code of Practice (the Code of Practice is public information) should be revised, he may put forward his proposed revisions or make recommendations to the Secretary for Security, and the Secretary shall notify the Commissioner should revisions be made. According to my proposal, the Secretary shall notify the Legislative Council expeditiously. As the Code of Practice is a public document, the Legislative Council should be notified as well as part of the essential monitoring efforts. I do not see that any confidential matters are involved, which makes it necessary for objection to be raised.

*Proposed amendment*

**Clause 49 (see Annex)**

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

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, we disagree with Mr James TO's proposed amendment to clause 49.

It is perfectly natural for the Secretary for Security to notify the Commissioner of his decision made in the light of the Commissioner's recommendations. This is also helpful to the Commissioner in deciding whether further reports should be made to the Chief Executive. It is therefore appropriate to make it clear in the legislation. During the discussion held by the Bills Committee, the authorities agreed that should any revisions be made to the Code of Practice in future, the Legislative Council would be provided with a revised copy for reference. Actually, the Code of Practice will be gazetted for public perusal. The authorities therefore consider that it is not necessary for clause 49 to be amended.

Thank you, Madam Chairman.

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

**MR JAMES TO** (in Cantonese): Chairman, the Government only said that it was unnecessary but was not against it, neither did it consider the Code of Practice should be kept secret or that the proposal was impracticable. In short, this amendment only aims to confirm the statutory role of the Legislative Council to subject the Secretary for Secretary to the monitoring of the representatives of the public in the implementation of this piece of legislation. This is indeed a process and procedure rather than an amendment proposed for any other reason. But, the Government still opposes to such an amendment. In brief, the Government opposes everything. Therefore, the Government is indeed the opposition camp that opposes each and every issue.

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

(During the ringing of the division bell)

**CHAIRMAN** (in Cantonese): I now announce that I have just given permission for Mr LEE Wing-tat to move Mr Albert HO's remaining amendments, which originally are to be moved by Mr Fred LI on behalf of Mr Albert HO. We will not amend the script again, for doing so will waste a lot of paper, will Members please amend their script by their own.

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

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

Functional Constituencies:

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

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

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, five were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 49 stand part of the Bill.

**CHAIRMAN** (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**SECRETARY FOR SECURITY** (represented by the Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, I move the amendment to subclause (2) and (3) of clause 50. The content of the relevant amendments has been set out in papers which have been circularized to Members.

In response to the suggestions of the Bills Committee, the authorities propose an amendment to clause 50(2) to explicitly provide that the head of department should include in the further reports submitted to the Commissioner the measures taken, including information related to the disciplinary action taken by the department in respect of its officers.

We also propose an amendment to clause 50(3) to allow the Commissioner to submit the relevant recommendations or any other matters he thinks fit to any panel Judge in addition to the Chief Executive and the Secretary for Justice. This amendment is also made in response to the recommendations of the Bills Committee.

Madam Chairman, I hope Members will support the amendment of the authorities. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 50 (see Annex)**

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

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(No hands raised)

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

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to add subclauses (2A), (2B) and (2C) to clause 50. Clause 50 is about the recommendations made by the Commissioner to departments. My amendment requires that the Commissioner shall laid on the table of the Legislative Council a copy of the report in which he has made recommendations to the department concerned. However, if the Commissioner considers that the publication of any matter in the report will be prejudicial to the prevention or detection of crime or the protection of public security, he may exclude such matter from the copy of the report, but the matter excluded shall be reported under confidential cover.

In simple terms, those reports submitted to the departments concerned in the form of an open document should be submitted to the Legislative Council in an open manner. If the reports are confidential, they should be submitted to the Legislative Council under confidential cover. I think this amendment, like other amendments, will enable the Legislation Council to perform the role of a secondary regulator in the monitoring of interception matters.

*Proposed amendment*

**Clause 50 (see Annex)**

**CHAIRMAN** (in Cantonese): Members may now debate Mr James TO's proposed additions.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (represented by the Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, the Government opposes Mr James TO's amendment to clause 50 which provides that reports submitted by departments on measures they take in response to the Commissioner's recommendations should be submitted to the Legislative Council in addition to the Commissioner.

In earlier discussions, we have already explained our concerns about similar amendments proposed by Mr James TO to clauses 47, 48 and 49. Members may understand that owing to the confidentiality of cases involving interception and covert surveillance, reports submitted by the head of department in response to the Commissioner's recommendations may include some information which for the sake of public interest is unsuitable for publishing. It has been an established policy of the authorities that this type of confidential information will only be disclosed to those who need to know. We consider that we should adhere to this policy and we therefore oppose the relevant amendments.

Madam Chairman, we urge Members to oppose Mr James TO's amendment. Thank you, Madam Chairman.

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

**MR JAMES TO** (in Cantonese): Chairman, I will just say it in brief. Why should the report be submitted to the Legislative Council? This is because the Legislative Council has the responsibility to monitor the Government on behalf of the public, and monitoring the Government also includes the monitoring of issues which are relatively sensitive and confidential. I have pointed out clearly in my present proposal that information prejudicial to public order or public security may be reported to the Legislative Council under confidential cover, addressing both the concern for the need to know and that the relevant documents or information will not be disclosed or even published. Therefore, the Legislative Council should have the right to receive these reports.

**MS EMILY LAU** (in Cantonese): Chairman, I support Mr James TO's amendment.

Chairman, the authorities definitely have the responsibility to be accountable to the Legislative Council. Even if the information is highly confidential, involving public order or security, it still should explain this information to the Legislative Council. Therefore, the Secretary should set up a mechanism acceptable to all parties as soon as possible.

Since these reports are given to departments by the Commissioner, I believe there are lots of issues which we also want to know. First, whether the departments concerned have adopted all the recommendations made by the Commissioner, for we are also worried that the Commissioner does not have too much power. These are concrete opinions and recommendations offered by the Commissioner to the department concerned, these are what the Legislative Council should know definitely. I am talking about the Legislative Council and not just some unimportant nobodies. I think the Secretary must respond to this, particularly when he is also wearing another hat. He should know whether the Legislative Council has the role to listen to such information under our constitutional system.

Therefore, I think it is totally unacceptable when the Secretary said that the Legislative Council did not need to or should not know about this.

**MS MARGARET NG** (in Cantonese): I also speak to support Mr James TO's amendment.

Actually, Mr James TO is using a roundabout way to demand the authorities to be more accountable to the Legislative Council. If Mr James TO and me, or other Members, including Ms Emily LAU, could really do whatever we want, we would definitely prefer the inclusion of a provision in the Bill for the setting up of certain statutory committees, be they committees under the Legislative Council or independent committees with the participation of members of the public and Members of the Legislative Council, and to require the authorities must be accountable to these committees in respect of covert surveillance as a whole. However, Chairman, if we are to propose such an amendment, I believe the President will inevitably consider that amendment will

exceed the scope of the Bill. In addition, we cannot conjure up a committee out of nothing, for the public must be consulted in respect of the proper establishment of this type of committees. Therefore, there is nothing we can do.

Therefore, Mr James TO is just trying to make use of some compromise options within the scope of the Bill to cause the Commissioner to file more reports to this Council. Chairman, this approach is indeed a proper one, and the establishment of an ad hoc committee is a very proper step to take.

Article 30 of the Basic Law stipulates that the freedom and privacy of communication of Hong Kong residents shall be protected. In what way can this Bill protect the rights of the public in this respect? Chairman, please do not worry; I am not going to repeat the discussions held in the past few days. Let us figure that out. It turns out that only an authorization mechanism and a Commissioner would be established, and that is all. In protecting these rights, should representatives of the public be involved, or should there be organizations comprised of representatives of the public to protect this right of the public? Therefore, this is a very reasonable approach to take. However, since Mr James TO is under certain restrictions, he can only put forth this compromise option now. Chairman, since this option is in line with the target and it may possibly be the most I can do within the scope of this Bill, I think Members should support it. If a proper means for handling is available, this approach, which is too superficial and really too indirect, is certainly not a desirable one.

Thank you, Chairman.

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, Mr James TO proposes that the Legislative Council should monitor the authorities in enforcing this legislation to check against any blunder, omission or bias. By doing so, the Legislative Council is doing nothing more than performing its function of monitoring the Government.

In this Chamber, we are the Legislative Council. Actually, only two parties or two categories of persons will know about the confidential information concerned. One of which is the Government. The officials are responsible for law enforcement, and they will surely know. The other one is the Court, which

should be able to know about it originally. But the authorities have stripped the Court of this function. Instead, they find their own men, that is, the panel Judges who state they are not Judges, to perform such function, and for this reason, these men also know about the information.

In Hong Kong where the system of separation of powers of the three branches of government is practised, only one of these powers knows. Since the Government refuses to accept the arrangement of judicial authorization, only one of these three branches knows about the information concerned. The Legislative Council, upon stamping its permission to allow the authorities to infringe upon the freedom and privacy of communications of the people of Hong Kong in accordance with specific legal procedures and on specific premises, cannot even secure the final right to monitor. If it is said that the Legislative Council has no right to know or should not know, why does the Government need to know? For the Government is responsible for implementation. If so, why people who are not Judges will also know? It is because they are also responsible for implementation matters. They are also people in authority, they also have public authority. I thus think that at this stage, if the Government still says that the Legislative Council does not need to know or it still does not trust the Legislative Council, why do they come here today? If our Honourable colleagues are not qualified to know, or they are not worthy of knowing it or will not be of any use even if they know about it, then, what is the use of this Legislative Council? Should the Legislative Council only be responsible for stamping and nothing more? We are doing this stamping now, and if we do it slowly, they will also be unhappy. I hope our Honourable colleagues will say something for the sake of their dignity. Should we just tell the people of Hong Kong to leave it, for we have exercised our legislative power to confer the power on the Government, we cannot deal with it any more. Since the Government asks us not to bother about it, so we will not bother.

Mr James TO points out that this is exactly unacceptable. Anyone given the power should at the same time bear the responsibility. Since the Legislative Council has the power to stamp its approval, we have the responsibility to do our best to monitor. This is in fact a very simple principle. But the public officer concerned — today it has been changed to Secretary Stephen LAM — Secretary Stephen LAM said that it was impracticable without giving us any solid answer on what harm would be done if the Legislative Council was allowed to have the relevant reports. If among the large number of organizations in Hong Kong which have public authority, the Legislative Council is not qualified to know,

then which organization is qualified? The separation of powers has changed into concentration of powers in one single branch of government. The one who has caused the problem should be the one to solve it. Had the Government agreed to adopt judicial authorization from the very beginning, the Legislative Council would not have competed for the task. Therefore, I hope those Honourable colleagues who support the Government can think twice, for when they cast their votes today, they are indeed degrading the Legislative Council, turning it into a servant who can be ordered and disposed of at will, and regarding the Legislative Council as a rubber stamp that can be bought for just a few dollars.

This morning, when I read the newspaper cuttings, I found some reports stating that we were using a filibuster tactic; the description was so vivid as if it were true. But now, who is filibustering? For Secretary Stephen LAM, no matter what questions are put to him, he does not reply as to what the demerits of the proposal are. But we have already stated the advantages of the proposal. If Secretary Stephen LAM does not give an answer, another Member will ask him again. By then, this will be regarded as filibustering again.

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, please return to the amendment. You should not vent your emotions here.

**MR LEUNG KWOK-HUNG** (in Cantonese): This is not venting my emotions.

**CHAIRMAN** (in Cantonese): You are only unhappy with what other people write, but this is not related to this Council. You should only say a few words about this but should not dwell on it, all right?

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, thank you for your advice. I will say no more then.

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

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CLERK** (in Cantonese): Clause 50 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 50 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 51.

**CHAIRMAN** (in Cantonese): The Secretary for Security and Ms Margaret NG have separately given notice to move the amendments to clause 51.

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

**SECRETARY FOR SECURITY** (represented by the Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, I move the amendment to add subclause (1A) to clause 51.

In response to the recommendations of the Bills Committee, the authorities propose an amendment to clause 51 to explicitly provide that the Commissioner may request a panel Judge to provide him with access to any of the documents or records kept.

As the authorities have explained to the Security Panel and the Bills Committee on a number of occasions, having consulted the opinions of those who are concerned about the issue, we propose that the present Bill should only cover public officers. We do not think that a criminal offence should be introduced in the Bill at this stage. In future reviews, the authorities will follow up the various recommendations made by the Law Reform Commission on the criminal liability applicable to all in respect of certain infringements of privacy.

However, I must stress that any non-compliance with the legislation and the Code of Practice must be reported to the Commissioner. The Commissioner may report the relevant situations to heads of departments and even the Chief Executive, and set out in his annual report the compliance of departments with the legislation. The report will be tabled before the Legislative Council. On the other hand, all relevant ordinances and the common law will continue to be applicable to the departmental officers.

Therefore, we consider that effective measures have been included in the Bill to ensure that law-enforcement agencies and their officers will comply with the request of the Commissioner.

The authorities also oppose Ms Margaret NG's amendment to clause 51(3). Under clause 51(3), except as otherwise provided in the legislation, the Commissioner shall not be required to divulge or communicate to any Court, or to provide or disclose to any person, any information, document or other matter compiled by, or make available to, him in the course of performing any of his functions under the Bill. This provision aims to offer protection to the Commissioner, preventing certain people from applying to the Court to require the Commissioner to provide confidential documents. Certainly, if the Commissioner considers it appropriate and necessary, he may divulge or communicate to the Court the information, document or other matter concerned.

Madam Chairman, I hereby urge Members to oppose Ms Margaret NG's amendment to clause 51 of the Bill and support the amendment of the authorities. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 51 (see Annex)**

**CHAIRMAN** (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment as well as her own amendment.

**MS MARGARET NG** (in Cantonese): Chairman, the authorities said that having accepted the view of the Bills Committee, it had proposed amendment to clause 51 by adding subclause (1A). This is a good example showing us the numerous flaws found in the Bill.

Actually, regarding the question of ensuring the independence of the system, the authorities are not serious. Many issues are just put down as interim measures, but when we make detailed enquiries, we will find that they are not feasible. How has this amendment come about? The origin is simple. As to how panel Judges keep the document concerned confidential, we have discussed this earlier on. They have to lock up the relevant document and

prevent access of other persons to the document in accordance with Schedule 2. During the deliberation of the Bills Committee, we noticed that under such an arrangement, the original copy of the authorization of the panel Judge will be in the hands of the Judge all along and the law-enforcement officer making the application can only have the carbon copy of it. Thus, when the Commissioner conducts an overall review, he can only base his investigation on the carbon copy, for he does not have access to the original copy.

We asked how could this happen. The authorities said that the original copy and the carbon copy were the same, and even if the Judge did jot down anything, it probably would not be anything special. Chairman, you know that our proposals are negatived even if we have set out our reasons, am I right? Therefore, it is only by reading the notes written by the Judge himself on the documents, can one know on what considerations and reasons the Judge gives the approval. We thus queried if the Commissioner wanted to read the original copy, particularly when he considered the remarks of law-enforcement officers questionable or the documents provided were incomplete, how could the Commissioner obtain the relevant documents from the panel Judge? The documents can only be obtained by order issued by Judges. What excuse did the authorities use? The authorities used clause 51 as an excuse. They said the Commissioner could obtain the documents from panel Judges. When we asked how the Commissioner could obtain such documents from panel Judges, they said clause 51(1) stipulated that the Commissioner might, for the purpose of performing his functions, require any public officer to provide the matter concerned, while panel Judges are included under the category of public officers or any other persons. However, the word "require" is used in the English text of the Bill. A panel Judge is the one who gives the authorization, how can the Commissioner "require", that is, order or demand, him to produce the document? How can it be said that it will even amount to an offence if the panel Judge fails to provide such document? How can this happen?

To solve this problem, we have suggested to state explicitly that these are the functions of the Commissioner, so that he may make a request to the panel Judges and let the Judge order himself to provide the document to the Commissioner. Chairman, how indirect you think it is? If the authorities have really thought about it thoroughly and a mechanism is formulated which states how this should be done, we do not have to keep on arguing about this, nor do we have to put forward these amendments today.

Therefore, Chairman, when the Chairman of the Bills Committee reported to you at the very beginning that we had spent 130 hours on this Bill, you can imagine how much time has been spent on this issue. However, it is a matter of system. We can never say that the Commissioner can require a Judge to do certain things, though the panel Judge is not in the capacity of a Judge or judicial officer at that time, this should not be done. We never think that the investigation of the Commissioner will be so stringent that he will really have to look independently at the difference between original and the carbon copy (that is, the copy in the hands of the law-enforcement officer). We never think the Commissioner will act independently. We can see that the whole idea is just about a rubber stamp, which confines only to the form. Therefore, Chairman, we do not have any strong views on subclause (1A), for we think this is only an option in the absence of other alternatives.

Chairman, why do I have to add a few words to subclause (3), that is, "Subject to section 43 herein "? The heading of clause 51 is "Further powers of Commissioner", but subclause (3) in fact states that the Commissioner does not have much power, that is to say, what he can do is very limited. The wording in the English text is much stronger: "shall not be required". That means no one, not even the Court, can order the Commissioner to produce anything. Earlier on, when we talked about clauses 43 and 45, clauses which are disappointing to us and which deal with the power of examination of the Commissioner, we asked whether a standard for judicial review should be laid down. But now, from this clause, we know that despite an order from the Court, the Commissioner shall not be required to produce in any Court, or to divulge or communicate to any Court any information complied by him in the course of performing any of his functions under the Bill. In other words, the Commissioner himself is also subject to express restriction. First, he cannot present the information himself; second, the power of the Court cannot be extended to the Commissioner.

Chairman, under the common law system, the power of the Court all along is not subject to any restriction. However, if in the course of proceedings, the Court considers it necessary and rules that for the fairness of judicial proceedings, the Commissioner should be required to produce certain information, the executive authorities may apply for exemption when they consider the information concerned is confidential and that the production of which is prejudicial to public interest. We are quite familiar with this type of exemption which is applied on the ground of public interest. Therefore, if it is purely out of the concern of public interest, subclause (3) is thus uncalled for, for the Commissioner shall not be required to produce such information despite an order

from the Court. That provision is thus completely unnecessary. However, the present Bill is so tightly drafted that no one can order the Commissioner to produce the information concerned, nor can any Court order him to produce such information. Who can do so then? The Chief Executive can, for the Commissioner is appointed by the Chief Executive, he is thus responsible to the Chief Executive and he may produce the information to the Chief Executive.

A situation like this can be found here and there in the Bill. This makes the public feel that even if the Commissioner fails to act properly, no complaints or challenges can be made against him. Even if one wants to apply for a judicial review to the Court — the situation I am now referring to is not that described under clause 45. Even if a complaint is lodged with the Commissioner, the Commissioner may still turn a deaf ear to it. If so, will it be useful for the public to apply for a judicial review to the Court? The only person who knows all the information is the Commissioner, if the Commissioner is not required to follow an order from the Court to produce the information concerned, what should the public do when an application is made for a judicial review? The Court has stated that upon the receipt of application of a judicial review, it will examine the justifications of the application. If that member of the public fails to provide the justification, the application will be based only on a suspicion, the Court will not be able to approve this application from the public for judicial review.

Chairman, from this we know that panel Judges carry out vetting and approval in an executive capacity. Theoretically, they have the power to approve an application for a judicial review, while this Bill does not prevent them from having this power. But, in fact, subclause (3) is included under clause 51 to the effect that no evidence will be made available to them to enable them to approve a judicial review.

Chairman, if this is not sinister, then what is it? If this is not a blatant deprivation of the rights of the public, what is it? The only amendment we can propose to this clause is that subject to section 43 therein, the Commissioner shall not be required to produce the information. Chairman, clause 43 is related to the power of examination of the Commissioner. We propose that if the Commissioner, upon the receipt of a complaint, carries out an examination and identifies irregularities, he may give notice to persons whose rights have been affected and may invite the persons concerned to confirm whether they wish to seek compensation. The amendment I propose to clause 43 aims to provide for a more comprehensive scope of the powers of the Commissioner, but that amendment has already been negatived.

Chairman, perhaps Members will now see that my two amendments to clause 43 and clause 51(3) echo each other. Though my amendment to clause 43 has been negatived, I hope that my amendment to clause 51(3) may minimize the restrictions imposed by the Bill on the power of the Court.

Chairman, we have heard government officials telling us that they place great trust in the Court, in the Judges, in the panel Judges, as well as the Commissioner, for the Commissioner is a judicial officer, probably a retired Judge or a serving Judge. But is this really the case? Not necessarily. It is because explicit provisions are proposed to limit and undermine the monitoring power of the Court. Chairman, regarding the previous clause, we have made one compromise after another, the power of the public has been weakened, the power of the Commissioner has also been weakened. We try to put the Commissioner under the monitoring of an elected institution, the Legislative Council, but to no avail. Now, we request that the established power of the Court can be retained to do justice for the public, but again, we fail.

Chairman, if we fail to secure the passage of this amendment to this clause, the public should know that this Bill does not seek to protect their rights to the privacy of communication but instead undermine their rights to communication, depriving them of any channel of complaint. Thank you, Chairman.

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

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

**MR RONNY TONG** (in Cantonese): Chairman, perhaps this is the first time I cannot totally agree with what Ms Margaret NG has said. Even if the earlier amendment proposed by Ms Margaret NG were passed, it would not be of any help; besides, the amendment to clause 43 was negatived yesterday.

The remarks we make today mainly aim to explain to the public and colleagues how ridiculous the Bill is. We may say that the Bill provides no protection whatsoever to the rights of the innocent public. However, in respect

of the mechanism to protect the executive authorities against any possible abuse of power, we all see that it is foolproof and extremely comprehensive.

Clause 51(3) is only part of it. Clause 51(3) and clause 58 must be considered together. Clause 51(3) and clause 58 seek to ensure that in case of any fault on the part of the executive authorities, the public cannot initiate any proceedings or accuse the Government of omission in the Courts of Hong Kong. More so, Members should also pay attention to a point, that is, clause 51(3) in fact completely deprives the public of any chance of seeking redress in respect of the mistakes of the Commissioner. For law-enforcement officers at least have to follow the Code of Practice — regarding the effectiveness of the Code of Practice, we will discuss it later — but the Commissioner does not even have a code of practice to follow, nor does he have to follow any guidelines. He is only a person appointed by the Chief Executive. But what should be done if he makes mistakes? As in our discussion on clause 43 yesterday, the Commissioner can be said to be holding the power of life and death, if the right of any innocent citizen is infringed upon, whether the citizen concerned can seek redress is totally at his discretion. Then, if the Commissioner makes mistakes, what can be done?

The Administration pointed out yesterday that the public might seek judicial review. But as I pointed out yesterday, such a remark is ridiculous. How can the public seek any judicial review? Members should notice that no document can be produced to the Court, even the mentioning of such document in the Court is not permitted, given that, how can the public seek judicial review? Hence, we can see how ridiculous clause 53 is. The Bill as a whole only protects the executive, but the rights of the public have been wantonly trampled to the full. Given such a provision, if no sunset clause is included to restrict its use, I think no one in this Chamber can live up to their obligations to the public.

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

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, first, I have to declare that I am not giving vent of my emotions, I am now speaking.

Both the amendments proposed by Ms Margaret NG and Mr James TO to clause 51 are reasonable, for they aim to make the Commissioner to undertake

greater accountability to the public. We see that many people are appointed by the Chief Executive, the panel Judges and the Commissioner are appointed by him. In other words, both arms are under his control. However, as for certain citizens who may suffer as a result of this enactment, they will have no way to air their grievances. When we talk about the separation of powers, panel Judges are persons appointed by the Government and the task they undertake is clearly not the job of Judges, which means they are officers of the executive. They are only of the judiciary superficially but not in essence. If so, why can the Judiciary not require them to produce the information in their possession? If only they can possess such information, their power will be so great that they can take possession of other people's property, in other words, they can take anything.

If I am to apply for a judicial review, that would be very difficult. Perhaps when I suspect that I have been wiretapped or put under covert surveillance, I will ask the Court — I have also been there this morning — whether it is possible for me to apply for a judicial review. The Judge will certainly ask me how I am going to proceed with the judicial review. When I tell the Judge that I do not know, he will definitely refuse my application, for I am only suspecting that I am being wiretapped. I may tell the Judge that I suspect the Commissioner has information about me and I ask the Judge to obtain such information for me, but this is actually not allowed. If so, under the system of separation of powers, how can the Judges fulfil the function of exercising checks and balances on the executive authorities? First, the authorities undermine the function of checks and balances of Judges on the executive authorities by means of panel Judges. Then, the authorities create something like a palace guard of ancient China, that is, the Commissioner, shifting all matters to him. He is indeed serving as a safe. But the key of this safe has been thrown away by the authorities, and only the Chief Executive can open it, that means only the Chief Executive has the control of it.

Whenever we discuss this issue, we will return to an old question, that is, why the Government had to use this sophistry at the outset? They want to hand-pick the Judges themselves, even if those Judges are selected among Judges from the Court of Final Appeal. Actually, they assume control right from the beginning, and in the end, the channel for the public to fight for justice via the Court under other circumstances has also been removed. Of course, they dare not offend the Judiciary, but they state that the Commissioner does not need to produce anything even if asked and making such request amounts to an offence.

I have never heard of such things. The Legislative Council is not allowed to monitor the situation either. During our discussion of the previous amendment, the proposal to let the Legislative Council monitor has been negatived. And now, the ordinary people are not even allowed to file a complaint to the Judge. What else is left? What remain are the panel Judges and the Commissioner who are controlled by the Chief Executive. A minor wound untreated will cause grievous harm, this is exactly the case. At first, this may only be a minor scratch which seems to be no big deal, and one will not die of it. But it turns out that that scratch will be rubbed with salt until it bleeds.

Chairman, I am absolutely not giving vent to my emotions. In fact, what is wrong if I am really giving vent to my emotions? Who do not have emotions? Only a stamp does not have emotions. My stamp is put on the table. When I have time, I may give it a kick, step on it or wash it with tea. I can do whatever I want with it. But man has emotions. Our emotions in fact hinge on reason. Today, I am indignant. I am grieved that this piece of legislation blatantly allows a man elected by 800 people to establish a system, and the system is handed over to a small number of Judges handpicked by him but are not performing the task of Judges. He then finds someone to act as the Commissioner, depriving the judicial authority of the other side.

Secretary Ambrose LEE told us that he had secured the support of the judicial sector. I do not know whether he had shown the judicial sector the entire Bill. If he had, I bet my head that the judicial sector surely would not have accepted it. Originally, the judicial sector is vested with the power to monitor the executive authorities on behalf of the public, but now, they are denied of this power because of this Bill. Even if this Bill is passed, I may probably seek a judicial review. I will certainly find a Judge and give him the right to speak. I have mentioned many times that Judges are not allowed to say anything. The only thing we can do is to bring the case to higher levels of Court. It is until then the Judge will say, yes, this is in fact not quite proper. Why should Judges be stripped of all their authority? Will Members tell me why take all this trouble? The public wants to apply for a judicial review frequently, but they are compelled to do so. There is no justice here, am I right? When we ask the Secretary — this time, I follow the instruction of the Chairman and ask questions according to the provisions — but he does not reply. He cannot explain why the reliability of the entire judicial system cannot be compared to a Commissioner. He cannot explain why a person directly appointed by the Chief Executive is not better than a legal system which has been implemented for more than a century ……

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, do you have the "prompting note" with you?

**MR LEUNG KWOK-HUNG** (in Cantonese): Yes, I have. We are now discussing the amendment.

**CHAIRMAN** (in Cantonese): I would like to tell you that Mr James TO has already withdrawn his amendment.

**MR LEUNG KWOK-HUNG** (in Cantonese): No, I do not come across this in the "prompting note".

**CHAIRMAN** (in Cantonese): Since you have mentioned Mr James TO's amendment at the beginning, I wish to tell you now so that you know he has withdrawn his amendment. It is good that you are referring to the "prompting note", for you should know clearly what the amendments of Ms Margaret NG and the Secretary for Security are.

**MR LEUNG KWOK-HUNG** (in Cantonese): I understand.

**CHAIRMAN** (in Cantonese): So, please speak on these amendments.

**MR LEUNG KWOK-HUNG** (in Cantonese): Have I said anything wrong? Please correct me if I have.

**CHAIRMAN** (in Cantonese): Just now you have said a lot about ……

**MR LEUNG KWOK-HUNG** (in Cantonese): Do you wish to suspend the meeting to correct me?

**CHAIRMAN** (in Cantonese): You should have stated your opinions during the Second Reading debate, for you oppose the entire system. We are now discussing the amendments.

**MR LEUNG KWOK-HUNG** (in Cantonese): I understand. Chairman, I am a fair person. Many Members did in fact get off the point like me, but I am more than willing to listen to them. I make no noise, nor did I rise to raise a point of order to the Chairman. I am a real gentleman. I have listened to the speeches of many Honourable colleagues. I play back the recordings and I watch them every night after the meeting. Just like Secretary Ambrose LEE who hits the headlines by commenting whether meetings should be held for three overnights. Is this related to the Agenda? Is this related to his reply? I really cannot see how.

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, I have already told you, if you just say a word or two, I will not stop you, but now you are making lengthy comments……

**MR LEUNG KWOK-HUNG** (in Cantonese): Then, I will now say ……

**CHAIRMAN** (in Cantonese): You have spent a few minutes on comments which you should make on other occasions. I just want to remind you. You may continue.

**MR LEUNG KWOK-HUNG** (in Cantonese): Never mind. I declare again that I am very calm today, and I have already taken some tranquillizer before I come here. I am very calm, for I worry people may say that I am emotional. But I can do nothing about that, for that is called labelling.

Chairman, I must thank you for reminding me. This amendment indeed seeks to correct mistakes made by the Chief Executive. Why should we not request a reply from the three Secretaries of Departments and 11 Directors of Bureaux appointed by the Chief Executive? I think if Secretary Stephen LAM does not reply, it is wrong and improper. I now give him some time to reply.

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

(No Member indicated a wish to speak)

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

**MS MARGARET NG** (in Cantonese): Perhaps I will first see whether the Secretary for Security has anything to say.

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

**SECRETARY FOR SECURITY** (represented by the Secretary for Constitutional Affairs) (in Cantonese): Chairman, we do not have anything to add.

**MS MARGARET NG** (in Cantonese): Chairman, let me sum up a few points.

First, I have to thank Honourable colleagues for speaking to support my amendment. I would like to express my special thanks to Mr Ronny TONG who has supplemented one point, that is, a judicial review does not only involve executive officers. According to the general principles of law, the Commissioner is a public officer, and if he decides that the complaint of a citizen is unjustified, he does not have to entertain that person. Originally, that citizen can seek a judicial review, for it falls within the scope of judicial review, but owing to clause 51(3), it is highly unlikely for that person to initiate a judicial review action against the Commissioner. The system thus becomes more authoritarian and it is not an open and fair system.

Chairman, we can see that all governments act the same way, as the saying goes, all crows under the sun are black. Every man in possession of power wants to make the most out of it. Power tends to corrupt people. Indeed, every common law and democratic country very much wants to cross the line. Thus, the Court has to stop them from crossing the line frequently and they are not happy about it. A few years ago, Britain considered enacting certain laws to strip the Court of its power to conduct judicial reviews. They used a lot of terms, and their lawyers certainly were far better than ours, as they actually operated there. Their law was so stringent that judicial reviews were not

allowed no matter what challenge was posed. What was the result? Certainly, it aroused strong repercussions on the local political front.

To date, it is not feasible to add certain amendments to the Bill to deny the Court of the power to conduct judicial reviews, but this can still be done by making a detour, so that even if someone applies for a judicial review, he can do nothing. However, clause 51(3) can achieve that effect — so just let them apply for a judicial review, for unless under special circumstances, even the Commissioner who knows the incident cannot produce the relevant documents, so how can action for judicial review be initiated?

I can hear the dissatisfaction in Mr LEUNG Kwok-hung's voice and I do understand it. For he enters the legislature when he becomes aware that confrontation on the streets is no longer effective, but then he finds out that confrontation at the legislature will not work either. Therefore, Mr LEUNG Kwok-hung often applies to the Court for judicial review. But soon, he will find out that judicial review is not going to work either, for even if he wins, he will not be able to initiate action for judicial review, not to mention when he loses. He cannot initiate action for judicial review even if he wins because the Government can continue to act unconstitutionally while we have to suffer the bad consequences. Chairman, I would rather not dwell on this. However, clause 51(3) deprives Mr LEUNG Kwok-hung of the very opportunity of applying for judicial review. That is why Mr Ronny TONG has said that all channels of lodging a complaint to the Court have been closed to the people and the Secretary can only remain at a loss for words to speak in reply.

Chairman, again, we urge the public to support my amendment. Thank you, Chairman.

**MR MARTIN LEE** (in Cantonese): In fact, I have been in the Ante-Chamber listening to the debate all along. I suddenly remember that the subject of a judicial review cannot be a Judge. I wonder if the Government thinks that since the Commissioner will likely be a serving Judge of the High Court or the Court of First Instance, or even a Judge of the Court of Appeal — panel Judges are also Judges of the Court of First Instance — so judicial review should not be carried out on them? However, the Government must bear in mind that neither panel Judges nor the Commissioner are Judges, as even Magistrates are not Judges, for all of them are not judicial officers. Therefore, if any member of the public is aggrieved by the panel Judges or the Commissioner, he or she can surely bring an action in judicial review against them.

However, the Government is now invoking these pieces of legislation again and this has indeed rendered judicial reviews impossible. Though the entire plan seems to be prepared in great haste, it is not too bad after all, for it has at least blocked all channels of complaint from the public. This time, the Government is really remarkable, just like the water-tight defence of the Italian football team. No wonder the team has won the world championship. Though the preparation of the Government seems to be in great haste, it manages to be so crafty and well-engineered, barring every single means step by step. Though our amendments have been voted down one after another, the original text of the Bill is still as strong as the defence of the Italian team. If so, how can it provide any protection to the public in future? The Government can act unreasonably, but despite its excess, the public has no way to complain. This is the full picture for now. Thank you, Madam Chairman.

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

(No Member indicated a wish to speak)

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

(No public officer indicated a wish to speak)

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

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Dr Raymond HO, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the amendment.

Mr CHIM Pui-chung abstained.

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 amendment, 16 against it and one abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

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

**MS MARGARET NG** (in Cantonese): Chairman, I move the amendment to subclause (3) of clause 51.

*Proposed amendment*

**Clause 51 (see Annex)**

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

(Members raise their hands)

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

(Members raise their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CLERK** (in Cantonese): Clause 51 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 51 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 52.

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to clause 52. Under clause 52, it is stipulated that the department concerned shall report to the Commissioner if any irregularity or contravention of the relevant legislation or Code of Practice is found. However, I think that technically one point may be overlooked. That is the present wording of the clause will not be able to cover cases where authorization is obtained as a result of the submission of some misleading or false information. Therefore, I mainly aim to include a condition that in case it is found that authorization is obtained as a result of the submission of some misleading or false information, the department concerned shall submit a report with details to the Commissioner.

*Proposed amendment*

**Clause 52 (see Annex)**

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

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

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, the Government opposes the amendment moved by Mr James TO in relation to clause 52.

In the interpretation provisions of the Bill, "relevant requirement" means any requirement under any provision of this Bill, the Code of Practice or any prescribed authorization. The act of a law-enforcement officer submitting misleading or false information thus contravenes the relevant requirement. Under the present clause 52, the head of department shall submit reports to the Commissioner in respect of any case of failure to comply with any relevant requirement. We consider that the existing mechanism is already adequate.

Therefore, Deputy Chairman, we urge Members to oppose Mr James TO's amendment and support the amendment which the authorities will propose shortly. Thank you, Deputy Chairman.

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

**MR JAMES TO** (in Cantonese): Deputy Chairman, I have read the Code of Practice and the relevant legislation. In respect of the reference to whether the submission of misleading information will certainly amount to a failure to comply with the relevant requirement, I think the reference itself is not clear enough. Therefore, I still insist on proposing my amendment.

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

**MR MARTIN LEE** (in Cantonese): Since Mr James TO has asked this question directly just now, I believe the Secretary should answer it. As Mr James TO said that it was not clear enough, so the Secretary should at least tell us clearly that the provision is so written. Otherwise, how can we know whether it is the case or not?

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, I think our way of drafting is clear enough.

**MR MARTIN LEE** (in Cantonese): Deputy Chairman, I am now asking the Secretary why it is clear enough. The Secretary should at least read out one provision. If he cannot read out any provision, how can he say that it is clear enough?

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

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

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

**MR MARTIN LEE** (in Cantonese): He has nothing but contempt for this Legislative Council. How can he act this way? Members have already said that it is not clear enough, but the Secretary still says that it is clear enough. But now, when I ask the Secretary why it is clear enough, he fails to give me an answer. If the Secretary fails to answer again, he is indeed telling the entire world that, "I, the Secretary, cannot answer this, so I will just sit here and say nothing."

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, I do not have any intention of not respecting the Legislative Council. It is a matter of judgement between us.

**MR MARTIN LEE** (in Cantonese): Deputy Chairman, so the situation is clearer now. In other words, the Secretary is saying that he respects the Legislative Council, it is just that he can neither state the reasons nor prove why he said it was clear enough. He therefore continues to sit there and has nothing to add. Thank you.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, I do not agree with the remarks made by Mr Martin LEE.

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

**MR JAMES TO** (in Cantonese): Deputy Chairman, the point is as a rule, department staff is always said to be required to provide genuine, rather than misleading, information when making applications. This is, of course, a good subjective wish, and yet, it is again not feasible. What I mean is that, if there are legal provisions in this regard, the head of any department would be fully aware of "such stuff" — we called this "such stuff" — and that a report shall be submitted. By so doing, it will be clear to the head of department.

Therefore, it is necessary to make those unclear provisions clear, or just as what I said, to state what is already obvious. In fact, among the many amendments we have proposed, the Government sometimes also agrees that it is fine to state the obvious. The important thing is to dispel Members' worries, right? However, it will be very difficult for us to move one step closer if this is

the kind of attitude adopted by the Government. The Government may think if Members have such worries, then simply leave those worries to the Members. It will be OK if the Government thinks it is fine. Yet, I do not think this should be the approach adopted towards the concern expressed by the representatives of the general public.

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

(No Member indicated a wish to speak)

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

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

**DEPUTY CHAIRMAN** (in Cantonese): If no Member wishes to speak, I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 21 were present, 11 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendment to clause 52 as set out in the paper circularized to Members. The amendment proposed by the authorities to clause 52 is made in response to the suggestion by the Bills Committee, which states clearly that the report submitted by the head of any department to the Commissioner under that clause must include information about the disciplinary actions taken in respect of any officer of that department.

Madam Chairman, I hereby implore Members to support the amendment proposed by the authorities. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 52 (see Annex)**

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

**MR JAMES TO** (in Cantonese): Chairman, we will certainly agree with this point as it is raised by us. However, I wish to draw Members' attention to the point that the report submitted to the Commissioner will not disclose any information about the number of officers of the disciplined forces involved, the actions taken, the respective departments involved, the actual situation, and so on.

In fact, the Government is rather weird in this respect. It thinks that the Commissioner is specifically tasked to look into the details and confidential information, and this explains why we are convinced that the information in question should perhaps not be disclosed, whereas the officers of the disciplined

forces are only required to submit a report to the Commissioner, who will, however, not brief the Legislative Council on the breakdown by department. I think this is really too mean. As to the questions regarding the number of cases of abuse in enforcing this legislation on the interception of communication and the implementation of such by the relevant departments, members of the public are indeed totally in the dark.

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

(No Member indicated a wish to speak)

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

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

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 52 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 52 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 55.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendments to subclauses (1) and (2) of clause 55 and the addition of subclause (5A) to that clause, as set out in the paper circularized to Members.

First, we amend clause 55(1) in response to the suggestions by the Bills Committee to the effect that the review officer concerned may, at any time, cause the operation to be discontinued, and it is not necessary to wait until the completion of the regular review. Also, corresponding amendment will be made to clause 55(2).

Second, we suggest the addition of subclause (5A). This is a consequential amendment to the deletion of clause 2(7), which spells out clearly the arrangement when the original relevant authority is no longer performing the relevant functions of his office.

Third, we will also propose a further amendment to amend clause 55(6) later on to spell out clearly that the ground for discontinuance of a prescribed authorization under clause 55 exists if the conditions under section 3 are not met. We also agree that the conditions are no longer met if the purpose of authorization has been achieved. We therefore suggest the deletion of clause 55(6)(b) as this element is already included in that clause.

A Member of the Bills Committee is concerned that, there are cases when, say, the operation in question is not authorized or does not comply with the conditions of the authorization issued for that purpose, is it again possible to cause the discontinuance of authorization under clause 55? Just as we explained to the Bills Committee, clause 55 will apply if the situation has resulted in the conditions of section 3 can no longer be met. However, it would all depend on the merit of each case. If, for instance, the operation in question is actually not authorized, it should certainly be discontinued at once, and a report should be submitted to the Commissioner. However, since there is no authorization in the first place, there will be no question of the submission of report to the relevant authority or the revocation of authorization.

Madam Chairman, I hope Members will support this amendment. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 55 (see Annex)**

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

**MR JAMES TO** (in Cantonese): Chairman, the present drafting is definitely better than the Bill in its original form. However, at that time, we were still concerned about what did "as soon as reasonably practicable……, cause" the operation concerned "to be discontinued" mean? If it is specified that the operation fails to meet the conditions conceptually, the operation should indeed be discontinued. If, however, it cannot be discontinued at once in some cases, when should, say, the information obtained start to be destroyed? If there is an opportunity to extend the duration according to the planned operation, should the relevant information be handled in a more reasonable manner at the time scheduled for the discontinuance? Also, no detailed arrangement has been made in respect of these situations in the provisions, or the Code of Practice even. This would create an incentive for people to continue with the operation to collect information that cannot be done within a reasonably practicable extent, and the information will then be saved in the computer as intelligence. I think that such an approach will only encourage the emergence of this situation because the absence of any corresponding restrictions will create an incentive for the abuse of power.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I think that we are also very concerned about the problem of abuse of power. Therefore sufficient safeguards have been built in the Code of Practice and through the supervision exercised by the Commissioner in the aftermath.

**MR JAMES TO** (in Cantonese): Chairman, there is so far no mention of this in the Code of Practice because this is only a matter of fine details. If this is not yet done, there is still time for it. However, it is at least not mentioned in the Bill.

Furthermore, how long should the prescribed time of discontinuance be extended before it can be regarded as practicable or impracticable? With regard to these details, can the Commissioner get the job done properly? In fact, it is impossible for the Commissioner to read all the files that would be covered in the report. Only in some cases where certain files cannot reasonably be provided and the Commissioner is informed of the unavailability of those few files within a reasonable extent, will the Commissioner read the files with special care. Otherwise, how can the Commissioner read so many files?

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

(Members raised their hands)

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

(No hands raised)

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

**CHAIRMAN** (in Cantonese): Mr James TO, the Secretary for Security and Ms Margaret NG have separately given notice to move the amendments to subclause (6) of clause 55.

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

**MR JAMES TO** (in Cantonese): Chairman, I move the amendment to clause 55(6).

What is clause 55 about? It is about the discontinuance of interception or covert surveillance. In other words, if irregularities are identified in an operation or if it fails to meet the conditions under clause 3, the operation in question must be discontinued. In my opinion, the discontinuance of an operation is, generally speaking, because irregularities are detected. It is not enough only to say that the conditions under clause 3 are not complied with. Why? I can at least cite a few examples, among which, the most obvious and simple one is set out in clause 31.

Clause 31 provides that, when an authorization is issued, the Judge (that is, the panel Judge) considers that it is subject to conditions. For instance, I cited the same example yesterday, and that is, after striking a balance between privacy and law enforcement, it is considered that the installation of the closed-circuit televisions or audio-recording system in toilets or bedrooms should be prohibited, whereas installation of such devices in the living rooms or offices is permitted. However, if someone eventually installs such equipment in the bedroom or toilet, why should we not discontinue the operation? If the Government is of the view that only operation being carried out in bedrooms and living rooms should discontinue, then amendments should be made to provide for the installation of surveillance devices in bedrooms and living rooms instead. Conceptually, however, if the conditions are not complied with, the part of the surveillance work that does not comply with the conditions should discontinue. This is obvious enough.

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

If the Government even fails to include this into the Bill, or if paragraphs (c) and (d) concerning operation in excess of the prescribed authorization, which I am going to propose, will not be included, I think the Government is tantamount to telling all front-line officers that the conditions laid down by the panel Judge are mere conditions and they can simply be ignored. Even if those operations have been carried out, they will not be discontinued. Of course, if it is so unlucky that your files have been selected by the Commissioner for examination, it is inevitable that you will be given a "spanking". However, if you dare to work hard, I will decide on awards on the basis of merit and you can therefore make amends for your fault.

Certainly, you may say that you will not say these to them in such an explicit manner. And yet, such a culture will gradually be formed and evolved. People who strive for promotion, or for other purposes, will then turn this culture into an incentive inducing them to do so since there are no explicit provisions prohibiting such acts. With regard to the cases of giving an operation the green light and the discontinuance of an operation once irregularities are identified, if there is no need for the operation in the former case to be discontinued in spite of its obvious contravention with the conditions, I really have no idea of how the Secretary will monitor his subordinates, right? How can he monitor and prevent his colleagues from abusing power under different systems? How can you miss out such a basic requirement of mandatory discontinuance?

*Proposed amendment*

**Clause 55 (see Annex)**

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

**MS MARGARET NG** (in Cantonese): Deputy Chairman, my amendment actually bears some resemblance to Mr James TO's amendment.

Sorry, Deputy Chairman, my amendment bears much resemblance to that of Mr James TO's amendment. However, with my amendment, there are now a total of four conditions under which an authorization has to be discontinued. First, if the application for issuance or renewal of any prescribed authorization was in contravention of this Ordinance; second, if the interception or acts of covert surveillance carried out was in excess of the prescribed authorization; third, which are originally paragraphs (a) and (b), and that is, if the conditions are not met or the relevant purpose of the prescribed authorization has been achieved. I think that this will be more comprehensive. The amendment now proposed by the authorities is not only not comprehensive, but also..... Sorry, Deputy Chairman, I want to take a look at their amendment.

Compared with my amendments, their amendment is not comprehensive enough. Deputy Chairman, I therefore hope that Members will support my amendment.

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, the authorities do not agree with the amendment proposed by Ms Margaret NG.

If there are cases of contravention of this Ordinance or if the operation is in excess of the prescribed authorization and these are not covered by clause 55 (since clause 55 deals with operations with proper authorization), and assuming that the operation in question does not have proper authorization, say, Type 1 surveillance authorized by an enforcement authority, then the operation should not be carried out in the first place. Like other cases of unauthorized operations, apart from making a report to the Commissioner, the law-enforcement agency should also discontinue the operation in question. In this circumstance, in the absence of any proper authorization, there is no need to revoke any authorization.

Furthermore, if an operation is in excess of the prescribed authorization and where a person not covered by the authorization was wrongly put under surveillance, while all other people were correctly put under surveillance, then only the operation carried out against that single person need to be discontinued. A report should also be submitted to the Commissioner who will decide on the need to issue notice and make compensation as appropriate. Nevertheless, it should not have any impact on other operations that are not in excess of the prescribed authorization, neither should the whole authorization be revoked.

Besides incorporating the suggestions by Ms NG, the amendment proposed by Mr TO also provides that an operation should discontinue if the conditions specified in clause 31 are not met. Failure to meet the conditions specified in clause 31 will constitute non-compliance with the "relevant requirement" as referred to in the Ordinance. The law-enforcement agency is obliged to discontinue any operation that is in excess of the authorization and report the case to the Commissioner. In the light of the explanation given just now, we opine that cases where the conditions are not complied with will not necessarily have any impact on operations that comply with those conditions. The consequences of non-compliance should be dealt with separately, for instance, a report should be made to the Commissioner who will decide on the need to inform the relevant parties. Therefore, we consider that the proposed amendment of Mr James TO not appropriate.

Deputy Chairman, I hereby call on Members to oppose the amendments proposed by Ms NG and Mr TO. Thank you, Chairman.

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

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

**MR JAMES TO** (in Cantonese): Deputy Chairman, the speech made by the Secretary just now amounts to telling us that, using the examples cited earlier on, despite the conditions approved by the panel Judge are, among others, no interception or videotaping can be carried out in the toilet and bedroom, while the living room alone can be videotaped, but all the three places are actually installed with video-cameras, and in the end, videotaping in the toilet and living room still went on. Once detected, however, the report to the Commissioner would say that videotaping was carried out in the living room and the toilet as well. This is exactly the answer given by the Secretary. It is therefore downright incredible because the operation in question should be discontinued at once if it is really in contravention of the conditions, rather than merely reporting to the Commissioner that video-camera has been installed in the toilet and is still operating.

Why is this so? The explanation in law is that, if you think that the provision concerned implies a possible discontinuance of the whole operation, then you must amend it to incorporate this into your own amendment, and put in the words "to the extent" — if you consider this to be the desired effect. However, I do not think this effect can be achieved because I was referring to the part that is not complied with. If, however, it is the Government who refused to incorporate this point into its amendment despite its detection of irregularities, I hold that it is a default on the part of the Government. The Government knew that it was not permissible, but still rose to say, "Fine, we will report to the Commissioner. It will be OK if they are dealt with separately." I find such an attitude very irresponsible.

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

**MS MARGARET NG** (in Cantonese): Deputy Chairman, I do not quite understand the response made by the Secretary either. He merely opposes my amendment by pointing out that any authorization in contravention of this Ordinance should indeed be discontinued. He said that no operation could be carried out without an authorization. No operation will be carried out in the absence of an authorization, and if there is no authorization at all, of course, it cannot be discontinued. This sounds quite reasonable. However, we have examined clause 46A earlier on, and as far as this point is concerned, during our discussion in the Bills Committee — I believe the Deputy Chairman may also recall that we had discussed the numerous acts of covert surveillance carried out without authorization. So, what about this kind of operation? At that time, the officials also admitted that there were problems with this kind of operation.

We then asked what if the authorization concerned was based on false information and hence was wrong in the first place. Should there be an elaboration in subclause (1) of clause 46A? At that time, the officials advised us time and again that an authorization was wrong in the first place if the authorization principles were not adhered to. Or an authorization would not be recognized if it was based on false information. In other words, under these circumstances, an authorization is only one such in form but it has no legal basis at all, so it is tantamount to having no authorization at all. In this case, law-enforcement officers should discontinue the operation in question. What conflict is there? What is more, the amendments now proposed by the

Government have no mention of this at all. It is very hard for me to imagine the Government saying that an operation may discontinue if the conditions under clause 3, that is, the conditions under which the application is originally subject to, no longer exist, or do not exist entirely. I really do not understand why it can be derived that an authorization in contravention of this Ordinance cannot be regarded as an authorization. I do not see the logic of the Secretary's argument at all.

Furthermore, if the acts of covert surveillance and interception of communications carried out are in excess of the authorization issued, they also do not fall within the scope of the amendments now proposed by the Government. So, should an operation be discontinued if it is in excess of the authorization? Therefore, Deputy Chairman, I have no idea why the Secretary opposes my amendment at all.

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

**MR JAMES TO** (in Cantonese): Deputy Chairman, let me explain to Ms Margaret NG. It is because the Government is an "oppose-all party" and it will oppose everything.

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

(No Member indicated a wish to speak)

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

**MS MARGARET NG** (in Cantonese): No.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, I think that our objective is the same as that of the Honourable Members, and that is, we must prevent any possible abuse of power by the law-enforcement agencies. We oppose Ms Margaret NG's amendment because we think clause 55 deals with operations with formal authorization. If any operation carried out by law-enforcement agencies or officers are found to have no authorization at all, they must be discontinued in accordance with our Code of Practice. Take the conditions mentioned by Mr James TO earlier as an example. Since the Judge has only permitted the installation of surveillance device in the living room, will the surveillance operation being carried out in toilets be continued and then the case is considered to be settled if a report is submitted to the Commissioner in case the surveillance device installed by some front-line officers deliberately or inadvertently is detected? This is definitely not permissible. The operation in question, at least the part being carried out in the toilet, must be discontinued, as it is totally in breach of the authorization of the Judge.

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

**MR JAMES TO** (in Cantonese): Deputy Chairman, this is why these scenarios should be written down, and it is as simple as this. They should be provided for here so that you know what to do when these scenarios arise. This is the purpose of mandatory provisions. Of course, you may say that it is not very likely that these scenarios are identified only when a review is carried out. You may certainly say so. But the question is that, as a matter of concept or principle the operation concerned should be discontinued whenever these scenarios are identified, instead of saying that since the rules have been laid down, so the operations should have been discontinued — it is only that they should have been discontinued. If the operation concerned is found yet to be discontinued during the review and would not be asked to stop, but only required to report to the Commissioner, how ridiculous this would be.

**MS MARGARET NG** (in Cantonese): Deputy Chairman, perhaps I should make some clarifications again. Earlier, the Secretary has said that clause 55 deals with operations that have authorizations. Now, may I ask why cases with no authorization are also provided for in clause 55? This is what I have in mind.

Let me remind the Secretary, the so-called "no authorization" is attributed to two scenarios. One being the operation in question has not gone through any application procedure for authorization, then of course it has no authorization nor any authorization papers. Another scenario is the absence of a lawful authorization. In other words, despite that you have authorization papers confirming the authorization granted to you, but you have actually no authorization at all. There are a few reasons for this: first, you have made some mistakes with the facts; second, the authorization should not have been issued as it is in contravention of the provisions of this Ordinance, which is tantamount to not having any authorization.

This situation will be dealt with in my proposed amendment in subparagraph (aa), which states that as a matter of formality you have applied for an authorization and as a matter of formality the authorization has been granted to you. But the authorization is in fact unlawful. So the authorization is invalid and it is like there is no authorization at all. In this circumstance, the operation in question should be discontinued. This is what I have in mind. There is no contradiction with what the Secretary has said. What is more, if the Secretary really worries about the existence of abuse of power, he should accept the more stringent suggestions by me so as to ensure that nothing will slip through the net. Deputy Chairman, I hope that the Secretary will reconsider the case. If the policy remains unchanged, I do not think he has any reason to oppose my amendment.

My proposed amendment in paragraph (ab), in particular, which deals with the second scenario, is precisely the case where you are granted with an authorization after going through the procedures, and the operation concerned is, however, subsequently found to be in excess of the authorization when it is executed. Should the operation not be discontinued? The operation is in excess of the authorization, but it may not necessarily contravene clause 3 because it may concern with serious offences or public security, which can therefore be continued after consideration. It is just that a new authorization will be required. Why is a proposal like this opposed? This amendment aims to make our law more stringent. If you say that it is not your wish to see any abuse of power, you should better support my two amendments.

**MR RONNY TONG** (in Cantonese): Deputy Chairman, I want to briefly discuss two points only. After listening to the speech made by the Secretary, it seems to me that he totally agrees with the viewpoints of Ms Margaret NG. He

said that operations would be discontinued, but he prefers not to provide for it expressly. This approach is entirely inconsistent with a very basic principle and that is the rule of law, where restrictions imposed on executive power must be expressly provided for everyone to see, and for solicitors or people who want to challenge administrative decisions to see as well. This is the first point.

Deputy Chairman, the second point is that, just now the Secretary has said such provisions are written in the Code of Practice. But, the Code of Practice is indeed a shield, and I will have a lot to say on it when we have a chance to discuss it later on. Whenever there are suggestions by Members which the authorities accept on the one hand, but are unwilling to include into the Ordinance on the other, they will be dumped into this dustbin, that is, the so-called Code of Practice. The fact is that, clause 59 clearly provides that a failure to comply with the Code of Practice is not of itself to be regarded as a failure to comply with this Ordinance. There is, however, no mention of discontinuance in the Ordinance. So, what regulation in law is imposed on the Government? If, just as the Secretary has said, he has no intention of continuing with these unauthorized acts of covert surveillance, but since there is no such provision in the Ordinance, it will not cause any consequences even if the law-enforcement officers breach the Code of Practice, because this is not regarded as failure to comply with the Ordinance. What is this regarded as then? What should be our position with regard to whether or not regulation in law should be imposed on the executive authorities?

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

(No Member indicated a wish to speak)

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

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

**DEPUTY CHAIRMAN** (in Cantonese): Is there no other Member who wish to speak?

(No Member indicated a wish to speak)

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

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

(Members raised their hands)

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

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): I think the question is not agreed by Members returned by functional constituencies……

Mr James TO rose to claim a division.

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

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 21 were present, 11 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move the amendment to subclause (6) of clause 55.

*Proposed amendment*

**Clause 55 (see Annex)**

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

(Members raised their hands)

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

(Members raised their hands)

Mr Ronny TONG rose to claim a division.

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

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

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

Dr Raymond HO, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr

WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr LEE Cheuk-yan, Mr Martin LEE, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the amendment.

Mr CHIM Pui-chung abstained.

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

THE CHAIRMAN announced that there were 46 Members present, 29 were in favour of the amendment, 15 against it and one abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

**CHAIRMAN** (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Ms Margaret NG may not move her amendment to subclause (6) of clause 55, which is inconsistent with the decision already taken.

**CLERK** (in Cantonese): Clause 55 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 55 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 56.

**CHAIRMAN** (in Cantonese): Ms Margaret NG and the Secretary for Security have separately given notice to move the amendments to clause 56.

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

**MS MARGARET NG** (in Cantonese): Chairman, this is a very important amendment. So far, what kind of protection is offered to the "protected product" as referred to in this provision? First, protected product is a definition which cannot be comprehended by ordinary language. It is not a product that has any contributions to human beings after strenuous efforts are made. Rather, it is the audio and video taped information obtained by carrying out covert surveillance or interception of communications operations with authorization. This is the so-called "protected product". So, if Members cannot recall what it means, please refer to the relevant definition.

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

Clause 56(1) says that there are sufficient safeguards for the protected products. The Government comforted the public by saying that not only will the issuance of authorization be very stringent, the information obtained by carrying out operations with authorization, say, covert surveillance, will also be kept highly confidential and treated in strict confidence so that it will not be

disseminated or used by others. As a result, people may think that they can rest assured. But, the fact is that when the definition was discussed earlier on, the question as to why the Government has to use a definition was raised. I recall that during the public consultation exercise on this Bill, Mr ONG Yew-kim, who is a scholar on Chinese Law, was outraged by the name of the definition alone and asked why it should be called "products". He said that they were merely information obtained through covert surveillance, so why were they called "products"? This was indeed not Chinese, not the Chinese which human beings could understand. He failed to see that there are actually some differences between information and products. Products are raw information and they are protected, whereas the intelligence generated from information is not protected. First-hand information obtained will be analysed, integrated and inserted into other files, and subsequently stored in the database of people for their future use forever. This is a giant loophole. Given the closely inter-woven relations among Hong Kong people, a lot of people will certainly be put under covert surveillance in the future, through which the Government can collect plenty of personal information from the general public.

In the amendments I proposed, there are two points which mainly deal with subclause (1). First, subparagraph (ba) states that not only the raw information itself is put under protection, any information or record generated from these products is also subject to the same protection. Deputy Chairman, what kind of protection is actually offered? Members may like to refer to clause 56(1) and they will see that it aims to minimize the circulation, use and disclosure of such information, for instance, the extent the information is disclosed, to whom it can be disclosed, the right to make copy, when to make it, the number of copies to be made, and so on. And yet, this series of safeguards are indeed far from being comprehensive in spite of the efforts made to minimize those acts as claimed. As to what is meant by "minimize", it is really something that only the head of department knows but not other people.

The second question is: what is a head of department responsible for? What is the responsibility of a head of department in relation to the provision of these safeguards? All he has to do is to make arrangements, and he can then wash his hands off the matter after that. As to whether or not the objective can be achieved or there is any guarantee to it, these are not mentioned in the provision. He is only required to make arrangements to ensure that the extent the information is disclosed can be minimized. Just imagine how there can be so many loopholes?

Therefore, I am proposing these amendments to urge the Government to make such a guarantee, not by making any arrangements, but to make real efforts to do it. It should be held accountable if it cannot do that. Since it has such enormous power to infringe on privacy, it is necessary for it to offer some protection. Therefore, I propose these amendments to clause 56(1) to step up protection, such that although plenty of information in relation to Members or the general public is intercepted during the Government's covert surveillance operations, minimum protection can at least be provided to guard against the indiscriminate use of such information.

At the same time, I have added in paragraph (c) that not only the information obtained must be protected — as mentioned in other provisions, the Commissioner will preserve parts of the information and to determine what impact it would bring to the victims — it is added in the provision that not only the raw information will be protected, but also any intelligence generated from it should also be protected.

The Chairman will certainly say that provisions as such are too loose. How far do you expect people will go? To put it simply, it is all too natural that the presence of these provisions may ensure that copies will not be made indiscriminately, information will not be generated on a large scale and the extent of dissemination will also be restricted. A character in the martial arts novel *Eagle-Shooting Heroes* called OUYANG Feng often comes to my mind. This OUYANG Feng is called the Vicious Master from the West. He has an extraordinary snake which is highly poisonous, and just one bite can kill. What is more, since the blood of the person bitten will also become poisonous, so anyone who touches him will have the venom passed into his body as well. Just as the case at present, I think not only will first-hand information (that is, the raw information) affect people, it may also pass into the entire intelligence database like venom, whereby all information will be affected. If we can have a better safeguard to prevent raw information from turning into intelligence, it will be the best protection. This explains why it is a very important amendment. Without this amendment, the privacy of the public cannot be well protected. No matter what the reasons are, perhaps due to some proper reasons, say, "serious crime" and "public security", in particular, which have very wide definitions, authorization can be obtained easily in the upstream. This will in turn facilitate the collection of raw information to be turned into an infinite amount of intelligence. We must, therefore, provide some safeguards in the downstream to prevent abuse.

Furthermore, I also proposed to add subclause (1A). During the deliberation of the Bill, there has been grave concern about professional privilege. The purpose of adding this provision is therefore to the effect that if..... The simplest explanation is that acts of covert surveillance are sometimes not deliberately targeted at communications involving professional privilege in the first place. However, once any information is obtained, the party concerned, that is, the affected party, must be informed. The Commissioner should not only just inform the party concerned by giving him the first-hand information, but he should also tell him the intelligence generated from it, only by doing so can real protection be given. If only raw information is sent to the Commissioner after information involving professional privilege has been obtained through wiretapping, what is the point of providing the various safeguards (no matter it is preserved for detailed examination of its adverse impact on the content or for destruction) or even have those first-hand information destroyed? It is because the intelligence generated cannot be controlled. With regard to professional privilege, it has also the same effect.

Subclause (1B) is a new provision on penalties for "any person who intentionally or recklessly", which states that any person will be subject to criminal liability if he discloses the protected products while knowing such risks. Deputy Chairman, the amendment to clause 56 aims at specifying protection, that is, the protection offered to the protected products. The purpose of this amendment is to expand the scope of protection of protected products to cover intelligence generated from it. What kind of protection will be offered? Real protection will be provided only by adding subclauses (1A) and (1B). Thank you, Deputy Chairman.

*Proposed amendment*

**Clause 56 (see Annex)**

**DEPUTY CHAIRMAN** (in Cantonese): I now call upon the Secretary for Security to speak on the amendment moved by Ms Margaret NG as well as his proposed amendment. However, no amendment may be moved by the Secretary for Security at this stage. If the Committee has agreed to Ms Margaret NG's amendment, the Secretary for Security may not move his amendment.

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, we have proposed two amendments to clause 56. Firstly, the amendment to subclause (1) serves to provide in more express terms the protection of information that is subject to legal professional privilege (LPP). It provides that where any protected product contains any LPP information, the information should be destroyed when its retention ceases to be necessary for the purpose of legal proceedings. It is because the product obtained by telecommunications interception will not be used in legal proceedings and so, the relevant information should be destroyed as soon as possible.

Secondly, we propose to amend clause 56(2) at the suggestion of the Bills Committee, especially at the suggestion of Mr James TO, to allow the retention of a protected product for one year after its retention ceases to be necessary for the purpose of legal proceedings, and to provide for the retention of records relating to matters such as the application for authorization for at least one year after the completion of the legal proceedings.

We oppose the amendments proposed by Ms Margaret NG to clause 56.

Ms NG's amendments to clauses 56(1) and (2) will result in the same treatment for any information or intelligence generated from the protected product as that for the protected product itself.

As I pointed out in my speeches during the resumption of the Second Reading debate and on other relevant clauses earlier, the extension of regulation on the product to all the intelligence generated from it after analysis will cause tremendous difficulties in actual implementation and create a serious impact on the effectiveness of law-enforcement agencies in enforcement actions and maintenance of law and order. For this reason, we oppose Ms NG's amendment to clause 56(1).

We also oppose Ms NG's proposed addition of clause 56(1A) and deletion of clause 56(2). These two amendments will require the head of department to inform the persons who are subjects of operation if LPP information is obtained in the course of the operation. As we have reiterated, the law-enforcement agencies will not obtain LPP information on purpose. In this connection, we have proposed a series of amendments to further enhance the protection of LPP in the Bill. We, therefore, oppose the notification mechanism proposed by Ms NG. Even if information subject to LPP is obtained inadvertently, the original clauses of the Bill and the amendments we propose, together with the

arrangement of not allowing investigators to access such information, will have already provided sufficient safeguards.

We do not agree to Ms NG's proposal on criminality. At present, it is already an offence to disclose information which obstructs the prevention of or investigation into offences, or information which obstructs the arrest or prosecution of suspects. We do not see the need to formulate some other provisions for this purpose. Ms NG's amendment will affect everyone, not just law-enforcement officers. In other words, even if the persons concerned are not public officers, say, reporters, they may commit the criminal offence she has proposed.

In creating a criminal offence, a very basic principle is that the elements constituting the offence must be set out in most unequivocal terms. Ms NG's amendment fails to meet this requirement, because it does not clearly define the meaning of "deals with any protected product other than with proper authorization".

Under Ms NG's amendment, if the product of covert surveillance is disclosed to the defence in the course of criminal prosecution, given the lack of a definition of protected product in the wording of the provision which says "deals with any protected product other than with proper authorization". The product may also be provided by the defence to the media and the contents of the product are reported by the media. This may fall into the category of "deals with any protected product other than with proper authorization" and the person concerned may hence commit an offence.

In general, we consider that the Bill, together with the existing legislation, is already adequate. Ms NG's amendments are unnecessary.

Deputy Chairman, I urge Members to oppose Ms NG's amendments to clause 56 and support our amendments. Thank you, Deputy Chairman.

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

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

**MS MARGARET NG** (in Cantonese): Deputy Chairman, I wish to respond to what the Secretary has said on my amendments earlier.

First, the legal professional privilege (LPP) information which the Secretary talked about and how it was to be handled, is actually very much different. Let us assume that the Secretary was right in saying that it was obtained inadvertently, not intentionally. What happens if such information subject to LPP is obtained inadvertently in the course of wiretapping? According to the Secretary, his amendments mean that firstly, what they will do is to destroy the information; the information to be destroyed is the raw data, not the intelligence; secondly, it will not be destroyed immediately, as there is one year's time before it is destroyed; and worse still, in the event of criminal or civil proceedings being carried out, it will be destroyed one year after the completion of the proceedings. However, the time may be even longer, because subclauses 2(a) and (b) will result in……I really do not wish to make it so complicated. But these products can be retained continuously if the objective is not achieved. There is only one reason to retain these products and that is, for the purpose of prosecution, and their retention is not allowed for other purposes. So, this is primarily for the convenience of the law-enforcement agencies.

I propose to amend the clause to the effect that if LPP information is obtained inadvertently, first, not only the raw data, but also the information and intelligence generated from it shall be handled in the same manner. How will they be handled? They will not be destroyed and instead, they will be retained. Their retention is for one purpose only and that is, they will be retained for the Commissioner to decide whether or not they should be returned to the person entitled to the protection, so that he can decide how remedies can be made. This is very important, and my amendments attach great importance to the rights of the affected persons who have been infringed upon.

Deputy Chairman, with regard to the criminal offence, I do not quite understand why the Secretary would think that the provision on this offence is unclear and say that other people may inadvertently commit the offence. The relevant elements are very clear. First, it is "intentional or recklessly", which means that first, it is deliberate and not unintentional; second, by an even lower standard, it is done recklessly. In a legal sense, it means that a person commits an offence knowingly, or he is reckless and neglects the consequences. That is to say, he knows that it is a protected product and that it should be kept confidential and yet, he still discloses it without proper authorization. The

Secretary may say that he does not know the meaning of "proper authorization", but the entire Bill is meant to define correct and proper authorization. How come he does not know it?

Of course, perhaps it is because many friends from the media are listening to us that the Secretary asked what would happen if the media were involved in such cases. Honestly speaking, very often they would make use of the media. If the media are involved, should they also bear the consequence of criminal liability? If LPP is involved, the existing law also imposes such liability on them; actions can target at the media, and the media enjoy no exemption. With respect to my amendments, what makes the Secretary suddenly become so kind-hearted to the media?

Second, those who are the first to bear the brunt and most likely to commit this offence are mostly law-enforcement officers who do not comply with the rules and regulations. They are most likely to disclose classified information. Why can they knowingly disclose the protected products wantonly and deliberately to the neglect of consequences without having to shoulder criminal liability? What does the Secretary have in mind?

This provision does not only reflect my personal opinion, but also the opinion of the legal profession. The Law Society of Hong Kong states very clearly in its final submission to the Government that the creation of this criminal offence is necessary to adequately safeguard the victims' right of protection against infringement of their secrecy and communication.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, I only wish to add two points: for any LPP information obtained inadvertently, first, it will not be used as evidence by the prosecution; second, it will not be transformed into intelligence.

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

**MS MARGARET NG** (in Cantonese): Deputy Chairman, the Secretary said that the information would not be transformed into intelligence, and I am glad to hear that. But can the Secretary tell us which clause provides that the information cannot be transformed into intelligence? I would like him to tell me which clause it is, so that I can tell the legal profession that the information obtained inadvertently cannot be transformed into intelligence.

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

**SECRETARY FOR SECURITY** (in Cantonese): It is clause 58A; a CSA proposed by us states: "Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.".

**MS MARGARET NG** (in Cantonese): Deputy Chairman, what the Secretary has said is "information", not "product". What is referred to in clause 58 is no longer "product", but "information". My question is: why has he changed "product" to "information"? What I do not wish to see is that he will turn "product" into "information". The point is that it must not be turned into "intelligence". The "information" that he has been referring to can actually be transformed into "intelligence", only that the intelligence will be further dealt with after its transformation. As for the punishment under subclause (1B), what I mean is that irrespective of whether it is intelligence or raw data under protection, any intentional disclosure should be made a criminal offence.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, during our discussion in the Bills Committee, the executive authorities had provided papers to Members to explain our position. With regard to clauses 30A and 56 relating to the protection of LPP, we submitted a paper to the Bills Committee. Paragraph 8 of this paper is about minimizing retention of LPP materials, and we

had explained our position. In one of the paragraphs it is said that "If the operations are not followed by court proceedings, all products subject to LPP will be destroyed; and if the operations are followed by court proceedings, such products will be retained for as long as they may be required for disclosure in the proceedings. Information subject to LPP will be retained to ensure a complete record of the products. Such products will remain unavailable to investigators and prosecutors and may only be made available to the person to whom the LPP belongs." In other words, we will not transform the information into intelligence, because intelligence is provided for use by investigators only.

**MS MARGARET NG** (in Cantonese): This is what we must make clear here. First, clause 58 mentioned earlier by the Secretary, which we will discuss at a later time, concerns the hearing in Court or under what circumstances will criminal prosecution or other proceedings be instituted. But the first thing that I am going to do now is to make the point that any intelligence generated from a product obtained should be subject to the same protection mentioned in clause 56(1A) and also the protection I mentioned earlier on. If we do not provide for such protection, nobody would know to what extent the information is transformed into intelligence. So, this is a very important point. Moreover, what is to be destroyed as the Secretary has said earlier is the product. Therefore, the product will be destroyed, but the intelligence still exists. The product can be transformed into intelligence at the earliest opportunity and it can still be retained.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, in the Bills Committee and in this meeting today, I already made a statement that we will not transform these LPP materials into intelligence.

**MS MARGARET NG** (in Cantonese): Deputy Chairman, I hope Members clearly understand that his remark of not turning a product into intelligence is not legally binding, and as far as the provisions are concerned, that is, in the clauses of the Bill, we can see that the product will definitely be transformed into

intelligence, because it has already become information in many cases, and the so-called information is intelligence. In the Bills Committee we asked whether control would still be applicable if the product is transformed into intelligence? The answer was "no". When it becomes intelligence, it will not be subject to any control, and it definitely cannot be controlled within the scope of this Bill. What can be protected is the product and by its definition, product does not include intelligence.

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

**SECRETARY FOR SECURITY** (in Cantonese): Deputy Chairman, perhaps let me say once again that we already explained this in paragraph 147 of the report of the Bills Committee. In the discussion of the Bills Committee, we already explained the position of the Government in detail, and that these issues would be reflected in the Code of Practice.

**MS MARGARET NG** (in Cantonese): What turns up at the end of the day is still the Code of Practice. In order to have protection in law, this protection.....The Secretary said that it was very difficult to provide this protection. But never mind, I have written such protection in a clause, and all that we need to do is to state that the products include all the information that I have mentioned and this will serve the purpose. With regard to the information, records, texts, documents, and so on, obtained, all the Secretary should do is to give protection to them all. Concerning protection, if the products obtained at the very initial stage, that is, first-hand information and raw data, can be given this treatment by the Secretary, rather than just giving protection to the raw data only, in which case anything generated from the raw data can be traced back to the raw data, thus not allowing it to reproduce indefinitely, they will be subject to the same protection and that would be fine. This can be achieved by means of law. However, the Secretary does not deal with it by way of law. Rather, he prefers to deal with it in the Code of Practice. We have no idea how much protection can be provided, for after all, it is not legally binding. We consider this approach improper, or else we would not have proposed to the Secretary to formulate a clause on criminal liability.

Deputy Chairman, Honourable colleagues, please accept my apology. But I believe many Members understand that when it comes to this point, especially as it involves LPP, the objective is to protect the right of the person to privacy of communications and so, we really cannot lower our guard. Please tell me honestly: in the "特務守則" (code of spies) — sorry, not "特務守則", but "實務守則" (Code of Practice), *(laughter)* sorry……I do not mean to tease the law-enforcement officers. I do not call it "特務守則" (code of spies) on purpose. It should be "實務守則" (Code of Practice). If the Secretary is going to deal with it in the Code of Practice, nobody can really feel assured. Secretary, I hope that you will accept this amendment. This amendment is actually very reasonable and it can strike a balance, so that you will become very careful and vigilant right at the outset, and even if a mistake is made, you will know very quickly what information or intelligence is implicated. Then you can either destroy or retain the intelligence.

**MR JAMES TO** (in Cantonese): Deputy Chairman, the Secretary told us earlier that if there was anything not dealt with, we did not have to worry about it because there was the Code of Practice. On this point, given that it is of the same nature, there is a need for it to be destroyed and what I am referring to is intelligence. The purpose is to prevent the information from being transformed into intelligence, and I think they should be treated in the same way. The argument or approach used by the Government to handle this now is "one law, two systems" or "one material, two systems". Why? The reason is clause 24. What is clause 24 about? It is emergency authorization. If there is no confirmation, destruction of the information will follow. Not only will the raw data be destroyed, but also all the intelligence derived from such data will be destroyed. This is the approach used where an emergency authorization is not confirmed, and this is written expressly in law by the Government. This is "one law, one system".

However, what we are discussing here or what Ms Margaret NG was referring to earlier is the protection of LPP. Ms Margaret NG proposed to write it down as in the case that I mentioned earlier, that is, the information shall be destroyed if emergency authorization is not confirmed. But the Government treated this as a different situation and opposed her proposal. So, is this not "one law, two systems"?

Things that are of the same nature should be handled by the authorities in the same way, should they not? If, worse still, its destruction is considered

necessary but it is not destroyed, would it constitute a criminal offence? However, there is no such wording as criminal offence in clause 24. The argument of the authorities may still be barely reasonable and yet, it does not mean that its destruction is unnecessary or it is unnecessary to ensure its destruction, as that would be a problem. It is easy to understand the situation. For example, a person is looking for a lawyer and then they talk on the phone. He may think that he has legal professional liability to protect his client as he is handling a criminal case and he may mention other people in the conversation; some lawyers may mention other matters because he is handling other cases of the same type or similar cases (such as when his friends are referring cases to him). It is absolutely possible that many people may be affected. So, it is not true that no intelligence can be obtained in this conversation.

In fact, many law-enforcement agencies, one in particular, very much like to tap the conversations of lawyers. Why? It is because they think that they can obtain information by tapping their conversations. They will know how to fight against him in a lawsuit and make preparations after knowing what tactics the lawyer will adopt in Court. That is why prosecutors may sometimes find it strange as to why law-enforcement agencies can often remind prosecutors not to argue the case in a particular approach. Why do they come up with this idea? They even seem to know before the proceedings what the other party would do to argue the case. These prosecutors later became barristers, and in retrospect, the reasons behind come to light.

So, is it that the law-enforcement agencies do not wish to tap LPP information and then transform it into intelligence? This is absolutely not true. I can tell Members that there are so many cases of abuse of powers. If this is not clearly written down now, even if a provision is later drafted to the effect that when a person is arrested and if a lawyer is approached, the case will be submitted to the Judge for reassessment to consider whether it is necessary to attach additional conditions to the order or to repeal the order, that would still be useless because as long as this is not written down, it is still possible that the information obtained will be transformed into intelligence. Frankly speaking, if he can obtain such intelligence, he could have many options of how actions could be taken accordingly.

Moreover, in that paragraph of the paper read out by the Secretary earlier, it is stated that the information will remain unavailable to the investigators. But concerning what is mentioned here, does it mean the provision of information to

investigators who have just started following up the case? The intelligence may not be related to this team of investigators. It may be related to other formations, such as the Narcotics Bureau. Even if it is stated that the information will remain unavailable to all investigators, it may still be given to the "paparazzi", and "paparazzi" in this sense means the Criminal Investigation Bureau or CIB. Based on the intelligence, it will still narrow the scope of tracking or the scope of information to be gathered. These are also operations by themselves, and it is not the case that only investigation can be considered as operation. To the CIB, intelligence collection is also an operation. It is an operation to collect intelligence. That is why we say that the "paparazzi" is different from other general investigative formations, such as the Narcotics Bureau, the Organized Crime and Triad Bureau, and so on. If such intelligence is not destroyed, the CIB may still use it to launch other operations to collect intelligence. So, in this regard, if the Bureau does not explicitly provide for criminal sanction, the CIB may still abuse its powers.

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

**MS AUDREY EU** (in Cantonese): Deputy Chairman, the clause under our discussion now, namely clause 56, concerns the protection of protected products. I wish to remind Members of what are included. Deputy Chairman, I remember that when we first debated the relevant definitions here, we actually debated this issue too. Many people think that the products involving interception of communications or covert surveillance are protected but in fact, this is not the case. It is because by definition, protection is given only to products of authorized interception of communications and authorized covert surveillance. Those without authorization are not protected under clause 56.

Second, earlier on when we debated clause 55, we were very well aware of the problem. What constitutes authorized interception of communications or authorized covert surveillance? In fact, this is open to question, because as also pointed out by Ms Margaret NG earlier, even if authorization is given in writing, what if an operation is carried out in excess of the prescribed scope? Ms Margaret NG considered that the operation must terminate if it goes beyond the prescribed scope, but the Secretary explained at the time that termination of operation was unnecessary. Why? It is because if it goes beyond the

prescribed scope, then it is not considered to be an authorized operation. This means the products obtained from interception will not be protected under clause 56. So, I think Members should look at these two points very clearly.

(THE CHAIRMAN resumed the Chair)

The third point is, I think, very important and a point that must be raised, because I can see from recent press reports that *Ta Kung Pao* and *Wen Wei Po* are still criticizing the legal profession, asking why we should have a legal privilege. In fact, this is misleading to the public, because the LPP is not a privilege given to lawyers. I do not know why those newspapers which like to criticize lawyers, especially these two newspapers, are often misleading. They said that it is a professional privilege of the legal profession and sounded as if the legal profession has a superior status. This is not true. The LPP we are discussing now is related to the basic protection under Article 35 of the Basic Law. I think I must make this point clear because when discussing this Bill, we often mention Article 30 of the Basic Law but in fact, there is also this very important Article 35 of the Basic Law which relates to confidential legal advice. This is why I do not like this term in Chinese — 法律專業特權 — because it can be easily used to mislead the public into thinking that the legal profession has a special privilege, which is not the case in reality. Rather, it is related to Article 35 of the Basic Law which provides that the general public shall have the right to confidential legal advice. It concerns the basic right of the person seeking legal advice. I think it is necessary to make this point clear.

Here, I must remind Members why this Bill is discussed here in this Chamber. To a certain extent, it is because of two court cases heard last year in which the Government had lost. In one of the cases it was said that the law-enforcement officer had obtained by theft or interception information of the subject when he was seeking professional legal advice. Finally, the Court even used wording to express great indignation, saying that the law-enforcement officer should not obtain information by illegal means. It is under such circumstances that the Bill was introduced.

In this connection, as Mr James TO has also said earlier on, many members of the legal profession have often complained about being wiretapped.

This is actually proven in the case that I have just mentioned, and from other cases, we can also see that law-enforcement officers do intercept communications between lawyers and their clients. It is another issue as to how the information will be used afterwards and whether or not it will be used as evidence, but the fact is that the authorities do intercept communications. So, Members must pay attention to the fact that this involves not only Article 30 of the Basic Law, but also the basic protection provided under Article 35 of the Basic Law.

Moreover, I wish to make one more point. Chairman, I must point out that Ms Margaret NG proposed in her amendment the addition of subclause (1B) which provides that "Any person who intentionally or recklessly discloses the contents of or deals with any protected product other than with proper authorization commits an offence punishable by 2 years imprisonment.". The addition of this subclause is proposed at the suggestion of the legal profession. On this point, Chairman, I really do not see why the authorities refuse to accept this proposal. They explained that people may be inadvertent, that is, people may breach the law inadvertently. But the authorities should be able to understand these words in the amendment: "Any person who intentionally....." — Why say "inadvertent"? It is intentional, or recklessly as also explained by Ms Margaret NG. If we ask the ordinary citizens on the street, they can tell the difference between careless driving and reckless driving to the authorities. Ms Margaret NG did not put down "carelessly discloses" or "discloses with negligence", but "recklessly discloses". Therefore, the scope is already narrowed, that is, the protection of products generated from interception is subject to a very limited scope, and it is proposed that any person who intentionally or recklessly discloses such products commits an offence. Yet, even this is considered unacceptable to him.

Chairman, I think I should remind Members of one more point. In our discussion of this Bill, the Government has divided it into two stages on purpose because as the authorities told some Members of the Legislative Council, this law had never existed before. This legal vacuum has existed for many years, and it is because the Government has lost two lawsuits and even for a third time in Court that it is willing to enact legislation. The authorities also said that as they had to rush the legislation through, they would divide it into two stages. The law-enforcement officers and public officers would be dealt with first while the private sector would be dealt with gradually at a later stage.

If it could be dealt with in one stage only, instead of two, I would have some confidence that the Government will accept this clause which provides for criminal sanction to any person who intentionally or recklessly discloses the contents of the protected product. Normally, people in breach of law will be punished, but the authorities will include a provision to exempt public officers from punishment. So, this explains why, in this debate which only concerns public officers and when we are to enact legislation to govern public officers, we have proposed to include this clause to clearly provide for criminal liability for intentional or reckless disclosure of protected products. Even such a reasonable demand is not acceptable to the Government. If our discussion could cover both domains, that is, both ordinary citizens and law-enforcement officers or public officers, the authorities would accept this clause but exemption would be given to public officers.

So, this is very clear. During the Second Reading debate, the public would feel puzzled as to why the Government would consider such reasonable amendment unacceptable and why it would refuse to accept it, and worst still, without giving a good reason. What we are talking about is to protect products obtained from infringement on other people's privacy and to use them for a specific purpose. It is fine if criminality is not imposed because there is, after all, a specific purpose to be served. That is why this Bill allows the use of products of interception or products of surveillance for a specific purpose. But if they are used for a purpose other than the specified purpose and if intentional or reckless disclosure is not even considered a criminal offence, Chairman, on this point, I think the Administration should give an account or a reasonable explanation to the public. Thank you, Chairman.

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

**MS MARGARET NG** (in Cantonese): Chairman, I only wish to add a point or two to subclause (1B) and to what Ms Audrey EU has just said. Let me cite a very simple example. When the police or the Independent Commission Against Corruption arrest a group of people and if one of these people is an undercover agent who would bring with him some wiretapping devices to a meeting with his lawyer, it would constitute a Type 2 surveillance under the Bill, for he is a party to the meeting. During the meeting when everyone talks about what has happened, he makes a recording of what the others are saying, and the tape is a

protected product. Let us not talk about transforming the product into intelligence for the time being. If a person intentionally and recklessly discloses this protected product or information subject to LPP without proper authorization, is this not even considered a criminal offence? And under such circumstances, if these protected products do not include intelligence generated from the products in the first instance, what is the use of protection? What is the use of providing protection for LPP?

Chairman, these are examples that many members of the legal professionals had cited to me before. It is not the case that lawyers cannot protect themselves. Lawyers certainly will be very careful with what they say, but they cannot protect their clients in the same room and this will cause considerable problems to their criminal defence in the Court in future. This will deal a direct blow to the judicial system and undermine impartiality in it, and this will also deal a direct blow to Article 35 of the Basic Law. So, what we are discussing now is that covert surveillance will deal a blow not only to the right to privacy of communication, but also to other similar basic rights. Thank you, Chairman.

**MR JAMES TO** (in Cantonese): Chairman, I only wish to remind Ms Margaret NG that a more horrifying situation is that the undercover agent, together with other members of his gang, meets the lawyer before the trial but he forgets to bring with him a tape recorder. So, he writes down what he can remember when he goes home at night. In that case, nothing would need to be done because this situation does not even fall within the scope of regulation of the Bill. Then, whatever products or whatever protection would be meaningless. He can even write down notes when he goes home at night. This is even more horrifying.

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

(No Member indicated a wish to speak)

**CHAIRMAN** (in Cantonese): If not, Secretary for Security, do you wish to speak again?

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

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

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

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, four were in favour of the amendment, 22 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 21 were present, 11 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move the amendment to clause 56.

*Proposed amendment*

**Clause 56 (see Annex)**

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 56 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 56 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CHAIRMAN** (in Cantonese): Mr James TO, Ms Margaret NG and the Secretary for Security have separately given notice to move the amendments to clause 57.

As Ms Margaret NG's and Mr James TO's amendments to subclause (2) of clause 57 have the same effect, I will only call upon Mr James TO to move his amendment. Ms Margaret NG may not move her amendment irrespective of whether the amendment moved by Mr James TO is passed or not.

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

**MR JAMES TO** (in Cantonese): Chairman, Members may recall that in our earlier debate on the Commissioner's annual report, I proposed that in order to make members of the community understand whether or not the Government will conduct political surveillance as rumoured, the total number of telephone lines, facsimile lines, e-mail accounts, persons who are subjects of surveillance and premises under surveillance, and so on, should all be disclosed. As expected, the amendment was negatived. In other words, the law does not provide for the publication of these reports and it is not mandatory to do so.

With respect to clause 57, the Commissioner should at least know the total number, should he not? I am not talking about members of the community, but the Commissioner appointed by the Government. If the Commissioner is required to report these total numbers, the next step would be to require the departments to retain such records. As to whether the departments shall retain such records, in theory, if the Commissioner is given the authority, he can require the departments to submit the information. This relates to clause 51 and is certainly possible, but I do not wish to do it this way. Even if the Commissioner can provide assistance to the public covertly, the departments should still retain the records as far as possible. Then, after reading the law, the Commissioner would know that these records are kept by the departments and he would know that he may get them anytime. These records include the total number of telephone lines, the total number of facsimile lines, the total number of e-mail accounts, the total number of Internet Protocol (IP) addresses

under surveillance, the total number of subjects of surveillance and premises under surveillance.

On the other hand, in relation to clause 57(2) which specifies the period for retention of records, the Government states in the Bill that information relating to authorization, such as affidavits, statements, and so on, shall be retained for two years. As Members have heard earlier, the Commissioner will have to rely on such information in conducting a review, and the Commissioner will also require such information in conducting random inspection. If such information is retained for two years only, generally speaking, it is possible to cause problems to the examination work, as the evidence may have been disposed of. When all the information has disappeared, how can it be possible to trace responsibility, not to mention judicial review which would be very difficult because there are all sorts of restrictions?

So, it is absolutely inadequate to retain the information for two years only. I propose to amend the period of retention from two years to 10 years. Why should it be 10 years? It is because these are very initial applications for authorization, and in many cases, information relating to these applications is kept for a very long time. Moreover, compared with information that can be further collected from intelligence after transformation as we discussed earlier, these initial applications for authorization are much less confidential. This is information of applications at the very initial stage, not evidence obtained by a warrant. The latter may involve plenty of information, as 100 to 200 hours and tens of millions of telephone lines may be involved. I am talking about information of the applications, and it should be kept for a longer period of time. In this way, the Commissioner can obtain the basic information for whatever examination or cross reference purposes and even for analyses stretching several years to study the trend. To conduct some specific studies, it is necessary for him to obtain such information, or else it would be impossible to conduct these studies.

So, I propose this amendment to Members to specify the period for retention of records by the departments. Members please note that such information will not be made public.

*Proposed amendment*

**Clause 57 (see Annex)**

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

**MS MARGARET NG** (in Cantonese): Chairman, my amendment is similar to that of Mr James TO. It mainly seeks to extend the period for retention of records. Chairman, as I said earlier, the Government should serve the public, rather than just working for its own convenience. To facilitate members of the public to lodge their complaints, records should be retained where necessary, and these records are actually records of a very limited scope. The Secretary has said earlier that the records will include plenty of information involving privacy, but these records do not come under the category of protected products, and they are documentary files. It is necessary for the Commissioner to gain access to such information in order for him to carry out his duties properly.

Chairman, I hope that Members will support my amendment.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, our major amendments to clause 57(2) are proposed at the suggestion of the Bills Committee to the effect that the protected product can be retained for one year after its retention ceases to be necessary for the purpose of legal proceedings, and the records relating to application for authorization shall be retained for a period of at least one year after the completion of the legal proceedings.

The Government opposes the amendments proposed by Ms Margaret NG and Mr James TO.

Ms NG and Mr TO have proposed that the records relating to a department's application for authorization and renewal of authorization be retained for at least 10 years, rather than for a period of at least two years as proposed in the Bill.

In principle, such detailed information concerning covert operations should be destroyed as soon as possible, in order to protect privacy and confidentiality of the operations. We propose in the Bill that such records be retained for at least two years because the Commissioner may need to make reference to them in preparing his annual report, conducting reviews and examination. We expect that the annual report, reviews, and so on, should

generally be completed within this period of time. The Bill already contains provisions to deal with special circumstances, including the retention of the relevant records for the Commissioner to conduct examination or relevant legal proceedings. At the suggestion of Mr James TO, we have also proposed some amendments to clause 56 to require the retention of the protected product for one year after the completion of the legal proceedings.

As the relevant information will involve the data of persons who are subjects of surveillance, retention of such information for a long period of time will constitute considerable intrusion into the privacy of the persons concerned. Therefore, the amendments proposed by the two Members to mandatorily require the unnecessary extension of the retention period substantially should not be passed, nor is it appropriate to pass these amendments.

As for Mr TO's proposal of including records concerning the detailed numbers of various interception of communications and covert surveillance operations in the records kept by the departments, we have already explained why we do not agree to it when we discussed Mr TO's proposal to extend the coverage of the Commissioner's annual report.

Moreover, Mr TO has proposed an amendment to include new clause 57(1A) to require the head of department to submit the record as set out in clause 57(1) to the Commissioner every year. The Bill already stipulates that the Commissioner may require any public officer to submit any information or document for the purpose of execution of any of his functions under the ordinance. Therefore, we consider the proposed addition of new subclause (1A) unnecessary.

As for Ms NG's proposal to delete part of clause 57(1), it relates to her earlier amendment to delete the stipulations on oral application. Since the Committee decided earlier to retain the procedure of oral application, Ms NG's proposal is therefore inappropriate.

Madam Chairman, here I urge Members to oppose the amendments proposed by the two Members to clause 57 and endorse our amendments. Thank you, Madam Chairman.

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

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

**MR JAMES TO** (in Cantonese): Chairman, the Secretary's reply is indeed amazing. He said that he had explained in the earlier debate why he opposed the provision of the total numbers of facsimile lines, telephone lines and e-mail accounts. But please bear in mind that in the debate earlier, the reason given was that if these numbers are to be made public, it would open an opportunity for criminals to exploit. This is the argument made earlier, and it is irrelevant to what we are talking about now. Secretary, please do not mix it up. What we are talking about now is that these figures to be prepared by the departments will not be made public. They will only be provided to the Commissioner. The Commissioner will not publish these figures and so, what reasons are there to oppose their provision? I hope that the departments under the Secretary can retain more information in these aspects. Why? It is because in the past few years, I have been pursuing information relating to this piece of legislation. Like me, Ms Emily LAU has also asked for such information. The Government, of course, comes up with two arguments: the first and the most basic argument is that such information cannot be made available to other people; second, the authorities do not retain such information.

The question before us now is that if the departments are mandatorily required to keep these figures and they are mandatorily required to provide such figures to the Commissioner, certainly, there is still a scenario that may arise, and why do I consider it so important? The reason is that even if we look at clause 57 — not clause 57, but clause 47 — even if it is not a must to provide such information in the annual report, but if such information can be made available to the Commissioner and if the Commissioner finds something wrong after looking at the figures, say, when noticing a sudden drastic increase in the figures, when he suspects that something is wrong but does not know the reason, he may tell the Chief Executive about this anomaly. The Commissioner should then report to the Chief Executive, so that the Chief Executive will not be "wronged" as not having exercised proper monitoring. If that is not the case, the Commissioner of Police will have to be notified. If there are problems with these figures, does it indicate any infiltration or he is blamed for the problems, which may really happen. So, it is very important for the Commissioner to have access to these figures.

The second possibility is that when the Commissioner has looked at these figures and if he does not agree with the Secretary that there are problems with security or law and order, since he has these figures with him, he can tell the Secretary that he has studied the statistics. During the Second Reading debate and the Committee stage of the Bill, a number of Members, including James TO, Margaret NG, and so on, had kept on asking for these figures, and the Secretary had given this reply at the time. But after he has read the statistics and if he considers that if this will really give cause to concern, discussion can be conducted in detail to find out why there will not be any problem. Even if the figures are not to be published every year, can they be published once every few years? Even if they are not to be published once every few years, some rough figures can be published. For instance, is it possible to provide some rough figures? Or is it possible to announce the percentage of increase, similar to what the Hongkong and Shanghai Banking Corporation does when announcing the growth percentage when publishing its results? It is then unnecessary to make public the exact figures. If the Commissioner has these figures, he will have a picture in mind and when he realizes that Members and the community are concerned about this point, he can discuss it with the Government and then design a suitable way to write it down in clause 47(2)(e), which means that a judgement can be made having regard to the overall implementation of the legislation and compliance with the provisions. He can conduct assessments, and with the other relevant information at hand, he can discuss with the Secretary and subsequently arrive at a decision.

However, if we do not make it mandatory for departments to collect these statistics, or if we do not make it mandatory for them to send these statistics to the Commissioner, attention cannot be drawn specifically to the fact that the Legislative Council is concerned about this or members of the public are concerned about this. Does the Commissioner have any special comments to make after studying them? If he has comments to make, he can submit an open or confidential report to the Chief Executive, or he can submit a confidential report to the department concerned. All these can be done. I think these can be reflected. But the Government has said that this is unnecessary because the Commissioner can obtain the information under clause 41 if such need arises. But this is not what we are talking about. What we are talking about is that there are issues which members of the public are particularly concerned about, and so attention must be specifically drawn to them and information must be collected for that purpose but it will not be made public.

So, the Secretary must not say that what we have discussed just now have already been discussed. If the Secretary has a new argument, he should tell us, rather than adopting the policy of three "nos" as he did yesterday, that is, no argument, no debate and no reason. The Secretary invariably replied that the arguments had already been explained, that they had been explained in the Bills Committee, and that they had been explained earlier. Would the Secretary please listen to the arguments carefully? Although the Secretary has the scripts written by his subordinates which give the same explanation to all issues, on this point, our Honourable colleagues have raised many new viewpoints in the debate, and on many of these viewpoints, a full debate can be conducted. He should not just read out what is written on the scripts by his colleagues for him.

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

**SECRETARY FOR SECURITY** (in Cantonese): According to Mr TO, it seems that the Commissioner cannot obtain the information if we do not write it down in the ordinance. In fact, under clause 51, not clause 41, it is provided that the Commissioner has the power to require any public officer to provide any information to him for the purpose of performing any of his functions under the ordinance. My colleagues also reminded me that this clause had been discussed in detail in the Bills Committee. At that time, Mr TO requested us to remind the Commissioner of his power to obtain the information after the ordinance is given effect. With respect to this point, we have undertaken to do it.

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

(No Member indicated a wish to speak)

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the amendment to add paragraphs (fa)(i), (ii) and (iii) to subclause (1) of clause 57 moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU,

Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, four were in favour of the amendment, 19 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 22 were present, 11 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the amendment to add paragraphs (fa)(iv) to (vi) to clause 57(1) moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

**CHAIRMAN** (in Cantonese): Mr LEE Wing-tat, are you not going to vote?

(Mr LEE Wing-tat cast his vote)

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr

TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, four were in favour of the amendment, 19 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 22 were present, 11 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the amendment to subclause (2) of clause 57 and addition of subclause (1A) to that clause moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr Ronny TONG voted for the amendment.

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment, 20

against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 22 were present, 11 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move the amendment to subclause (2) of clause 57.

*Proposed amendment*

**Clause 57 (see Annex)**

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 57 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 57 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clauses 58 and 65.

**CHAIRMAN** (in Cantonese): Mr James TO has given notice to move the deletion of clause 58 and amendments to clause 65. Ms Margaret NG has separately given notice to move amendments to these clauses and to the definition of "protected product" in clause 2(1). The Secretary for Security has also given notice to move amendments to clauses 58 and 65.

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

**MR JAMES TO** (in Cantonese): Chairman, I move the deletion of clause 58 and amendments to clause 65.

Chairman, during the discussions on the Bill, clause 58 is one of the clauses which relatively few people mention (or relatively more people overlook), but which may lead to very serious consequences, including the adverse effect on fair trials and the exposure of acts or phenomena of abuse of power and dereliction of duty.

Why do I say so? Under existing legislation, there is no provision which prohibits or mentions the interception of communications and the product,

evidence or materials obtained by such acts. As a result, what happened in the cases of CHAN Kau-tai and Kwong Hing can always occur when trials are conducted and matters handled under the existing legislation. This explains why the legislation is put before us for enactment today. The reason is that after all the cross-examination and the Government's presentation of arguments in Court, and also because of court orders and disclosures, lots of evidence has been uncovered, proving that the Government has committed many unconstitutional and unlawful acts. Some may of course wonder why I should be talking about unconstitutional and unlawful acts. This is actually the verdicts found in court judgements. However, if clause 58 is passed, all these will no longer be possible. I am not saying that abuses of power will no longer be possible. Rather, what I mean is that the exposure of abuses of power will no longer be possible.

Why? The reason is that under clause 58, no one shall ask any more questions about all these; no one shall seek any evidence to prove that such acts have been committed, or that such acts are unlawful and constitute abuses of power. All these will no longer be possible. The Government says that it wants to have a "brilliant" solution. This Bill is quite a "brilliant" solution, and clause 58 is a very "brilliant" part.

This Bill has been drawn up because the Court has uncovered something. The passage of clause 58 will mean that nothing can be uncovered from now on. What a "brilliant" idea! It is really brilliant: all the grass is removed together with its roots, so the situation cannot be reversed once again and there will be no recurrence. The Government can then put its mind at ease, without any fear that its acts may be disclosed. Of course, one many think that even when nothing can be disclosed in Court, disclosure should still be possible elsewhere. However, I am sorry to say that one who wants to invoke other ordinances must look at our consequential legislative amendments — they have all been passed already. I am talking about the Official Secrets Ordinance. Therefore, one must not defy the law! All avenues are now closed and banned because the Official Secrets Ordinance prohibits all other kinds of disclosure. The Court itself will not allow any offences, so it will never be possible for one to disclose certain information to prove one's innocence or to prove another person's offences.

For this reason, the Government can put its mind at ease. In the future, no person shall disclose any abuses of power such as the interception of communications either in Court or elsewhere unless he wants to defy the law, or

unless the cultural circles of society, such as the mass media, help him do so. But then, those who help him must have enough nerve. Do you recall a recent case? This case was about the disclosure of the identities of witnesses, and the people concerned were even imprisoned. Of course, we must ask, "Is public interest involved? Is public interest used as a defence? Does our social culture support it? Should we disclose such abuses of power, dereliction of duty, unlawful wiretapping and covert surveillance? Where can we discuss all these acts?"

Another point is that the Government is very clever in its choices of words. It argues that it is stated in clause 58(1) that any such product shall not be admissible in evidence in any court proceedings. Therefore, it argues, since both sides cannot produce any such products in Court, no one will stand to lose. It is a tie. However, I wish to remind Members that under the existing legislation, both sides, that is, both the prosecution and the defence, can produce evidence in Court. But as already explained by the Secretary, their policy is not to admit any telecommunications interception product as evidence in Court. The Secretary is not being nice, nor does he care for other people or sympathize with them. Rather, he is just unwilling to disclose the details of the operations. He has even remarked that clause 58(1) must be enacted, or their secret operations may be disclosed and serious consequences will result.

We have not yet passed the Bill. Maybe, it will be passed in just a few hours from now, or it may be tomorrow. Is law and order in Hong Kong in such a bad shape today? The Secretary does not think so, claiming that we have always been doing just fine. There have been no court case similar to those of CHAN Kau-tai and Kwong Hing being exposed. Well, even if there are such cases, the only thing we need to do is just to reform our laws. We certainly should not talk as if our law and order were in a state of chaos. Why do I say so? The reason is that such matters will not be disclosed in Court easily. They will be disclosed only when their disclosure or otherwise will greatly affect the guilt or innocence of a defendant, and when it so happens that there is a need to use such evidence. If not, they will not be disclosed. I therefore hope that the Secretary can refrain from claiming that if there is no prohibition, chaos will follow and law-breakers will stand to benefit. If what he says is true, why is the present situation not like this?

What actually is the sole purpose of the Bill? The authorities think that although they will not use such evidence, they must nonetheless enact this

legislation, so as to bar people from using such evidence to substantiate their defence, and to prove their innocence. Such is the situation, and this is what they mean by fairness. The authorities are actually saying that since they will not use it anyway, they want to enact a piece of legislation to forbid people to use it. This is what the authorities mean by "fairness".

Basically, evidence or information pertaining to wiretapping and covert surveillance is very useful to the defendant, for it can be used as a defence and prove his innocence. It is of course very difficult to obtain such evidence, but despite such difficulties, they still want to cut off such a route completely. Why?

It is already very difficult for the defendant to obtain such evidence because it can be destroyed very easily. In some past cases, the defendant knew that certain evidence was relevant to his defence, so he wrote to the authorities, even including the Chief Executive and the Commissioner, explaining the relevance of such evidence, and asking for its retention. However, it was precisely just several days after the issuing of the letter that the evidence was destroyed. Of course, when the defendant told the prosecution that certain evidence was relevant to his defence, he was in fact asking for something which would make it difficult for the authorities to prosecute him successfully. For this reason, the latter would just destroy such products. This happened not just to one case but also to many other cases. Consequently, they have come up with this brilliant solution — introducing clause 58(1) to make it impossible for both sides to present any such things in Court.

People need not ask any more questions because clause 58(3) is intended precisely to prevent anyone from doing so. And, all such products will also be destroyed at once. As a result, all evidence will simply vanish, as if nothing has happened. But in a way, this is not exactly the situation. I am sorry to say that the law-enforcement agencies will still make use of such products in practice. But they will not use them as evidence in Court or a means of enabling the defendant to prove his innocence. Rather, such products will be reported, and all wiretapping information will be examined to check whether it is possible to find any other evidence or ascertain who may probably have any evidence. This will provide a direction for further investigation.

How about the defendant? I am sorry to say that while the defendant could see the use of such products as court evidence in the past, this will no

longer be the case in the future. Or, sometimes, the defendant may suddenly recall certain information. Although such information cannot be presented as evidence of innocence in Court, it may still remind the defendant of how he should offer his defence. For instance, he may have the alibi to prove that he was really elsewhere on the night in question. The defendant may not clearly remember where he was on 8 June last year. But the Independent Commission Against Corruption may have wiretapped his telephone conversations with others on 8 June last year. At that time, he told his friend (or wife) that he was in Sham Shui Po. Of course, he might be lying to his wife. But the point is that after thinking about the whole thing over and over again, he may recall why he told his wife that he was in Sham Shui Po. He may recall that he was really at the home of his mistress in Sham Shui Po. Understandably, he does not want to tell his wife that he has a mistress. But then, he may still summon his mistress to appear before the Court. In that case, his mistress may recall that she was spending time with him on the night of 8 June last year. However, the defendant will no longer be able to use such products of wiretapping. He will no longer be able to organize or prepare his defence by using what he can recall from the products of wiretapping. There is no way that he can do so any more.

What purposes can such evidence serve? Even if the Judge thinks that such evidence is in favour of the defendant, he will only consider how the prosecution should revise the charges or rearrange the facts surrounding the charges against the defendant. Or, he may even dismiss all the charges under extreme circumstances. But the Judge will do all this without notifying the defendant. He will only think from the prosecution's perspective and give instructions to it on how it should proceed with a so-called fair trial. The prosecution is not able to ask the defendant any questions either. It will only be told that the defendant was in Sham Shui Po on the night of 8 June. It will not know why Sham Shui Po and his mistress should have any relevance to the defendant's defence. How is the Judge going to negotiate with the prosecution and instruct it to agree on things that are conducive to the conduct of a fair trial? He cannot possibly do so. What can he do? In some cases, he may be able to make it, but he may not be able to do so in all cases. In other words, this may give rise to unfair trials.

To sum up, although the legal analysis mentioned above may be rather difficult to understand, I must tell Members that clause 58 is in fact the most brilliant one in the whole Bill and the most powerful of all weapons. It is the provision that will produce the most far-reaching impacts on our legal justice, judicial system and rule of law.

*Proposed amendments*

**Clause 58 (see Annex)**

**Clause 65 (see Annex)**

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

**MS MARGARET NG** (in Cantonese): Chairman, Mr James TO is right in saying that clause 58 is really a very crucial clause of the Bill because it involves the principle of fair trials.

Chairman, the right to fair trials is a basic human right, and its protection is given special emphasis in the Hong Kong Special Administrative Region. Why do so many places set down clear provisions and principles to protect fair trials? One reason is connected with human nature. Whenever the police arrest a person and bring him before the Court on the strength of a wide variety of evidence, or when that person must be kept under custody due to various reasons even before the trial commences, the public will tend to look at that person negatively. Many people think that there is no smoke without fire, and since the person has been arrested, there must be something wrong with him because it is unlikely that what our police do is always wrong. The public will tend to form a preconception right at the beginning and look at the person negatively. Second, the person concerned is just an individual, but those who arrest and press charges against him are from a mammoth organization.

Those working behind the Director of Public Prosecutions, be they investigation or prosecution personnel, are all equipped with huge powers and resources in their handling of the person. However, what the person can do is very limited; what he knows is very limited; and, the powers he has and can exercise are also very limited. For this reason, in our laws or human rights covenants, all these people are accorded protection to ensure that they will be not be deprived of legal representation through lack of means. For this reason, the time when fair trials play the greatest role is not when the general public are convinced of a person's innocence, but when many people in society think that

the person must have done the thing in question. For this reason, Chairman, whenever fair trials are mentioned, no one in the legal profession can refrain from being moved. Lawyers will invariably stand forward to oppose anything that will affect the conduct of fair trials. And, this very clause is opposed strongly by the legal profession.

What amendment do we want to introduce? The main reason for our amendment is that the practices stipulated in this clause will alter our existing trial procedures. There is one fundamental principle here. A defence counsel has the right to ask questions on all relevant information and materials during the court proceedings. Therefore, in case the prosecution possesses any information obtained from covert surveillance or interception of communications but does not present it in Court, the defence counsel shall have the right to ask for access to such information as long as it is relevant to the court case. The defence counsel shall have the right to peruse all such information and ask questions on it unless the need for maintaining the confidentiality of such information is so great that the prosecution has filed a separate application to Court for its non-disclosure. This is how the system is and has been operating. The only way in which the defence counsel can protect his client is by cross-examination. Mr Martin LEE, a Member who has several decades of experience in criminal cases, can testify that cross-examination is his only weapon. When an innocent person is faced with various charges and when there are many witnesses to testify that the person is guilty, cross-examination is the only weapon with which his defence counsel can protect him. The proposed clause 58(3) will, however, curtail the power of cross-examination, forbidding cross-examination in certain areas, notably those involving covert surveillance and interception of communications. Why should cross-examination be forbidden in these areas? What is the reason for further curtailing the power of cross-examination?

On the other hand, can the defence counsel have access to the materials not of any use to the police? There is another provision which states that the defence counsel may not be provided with such materials. And, if the interception of communications is involved, it is even expressly provided that no information shall be provided. But how about the prosecution? The prosecution may have access to the protected products of interception. It will be asked to give a reason for accessing the information concerned. It can then reply that this is to serve a proper purpose, the purpose of ascertaining whether there is anything that may affect the conduct of a fair trial. In that case, under

the system proposed by the Government, the prosecution may lodge an application with the Judge, requesting him to order that certain facts must be disclosed if the trial is to proceed any further. The hearing will of course be conducted in the absence of the defendant and his counsel.

In brief, how will the new system alter the existing one? First, it is certain that despite all the direct relevance of any telecommunications interception product to a certain case, the accused shall not use it as long as the prosecution does not make use of it. This will alter a very fundamental principle. However, the prosecution will be aware of all the contents. This is the second unfair aspect.

Third, the Judge is supposed to play a neutral role, the role of an umpire, in a court trial. His role will be the same both in civil and criminal cases. Court hearings are open to the public. There are always the prosecution and the defence sides, whether in civil or criminal cases. If you want to accuse a person, you must present evidence. In a bid to defend himself, the accused will have to cross-examine you or present his own evidence. The Judge will then decide who is right and who is wrong on the spot and rule whether the accused is guilty as charged. What the Judge knows will not be more than what the accused and the prosecution know. The evidence presented in Court will be all that the Judge knows. Therefore, in many cases, the defence may know many things that the Judge is unaware of. And, likewise, the prosecution may know many things that the Judge is unaware of. The reason is that the Judge will base his decision solely on the evidence presented in the open trial. However, under the new system, the defence will have to wait outside while the prosecution informs the Judge of the materials in its possession during a closed-door hearing. As a result of this, the Judge will come to know more than the defence does. In other words, the prosecution and the Judge will be the ones who are going to decide whether anything is fair or unfair to the defence. Even if I put aside the fairness or otherwise of this system for the time being, I must still say that it will fundamentally alter our existing system.

There will be such a major change to the system, and such a change will be unfavourable to the defence. For this reason, how can we be expected to implement the change in a matter of just six months? One simply cannot say that after studying the relevant clauses, the legal profession is satisfied. One simply cannot say that the legal profession finds all these clauses acceptable, as things have always been like this and the only difference is that the Government

has just tried to make it all clear in the form of written provisions. The situation is not like this at all. There is very strong opposition from the legal profession instead. But how about the authorities? They have only revised the wording a bit. They still want to continue with what they have been doing.

Chairman, my first reason for opposing clause 58 of the original Bill is that it will curtail the right of the accused. This will lead to doubts about whether trials will be fair. The second reason is that the authorities are trying to alter the existing system. Any change to the existing system must be preceded by adequate consultation and a period of mooting. It will not be acceptable to introduce such a fundamental change under such circumstances. The authorities must satisfy the very basic requirement of conducting consultation.

In the Bills Committee, the Bureau claimed that such a system was also found in the United Kingdom. It further argued that since the system was also adopted in the United Kingdom, it must be desirable and acceptable to all. This argument may be right, or it may also be wrong. But the most important question is: can the authorities deny that they are trying to alter the existing system? If they are indeed doing so, there must be consultation. We can notice from the information available to us that when it comes to the prohibition of cross-examination, that the Judge and the prosecution can determine behind closed doors whether something is fair or not to the accused and also the non-admissibility of telecommunications interception products, there have actually been huge controversies. And, detailed discussions have been held by the legal profession of the United Kingdom (including Judges and lawyers) and in the Parliament. This has also been discussed in many select committees.

In Hong Kong, however, we have never undergone such a process. How can the Bureau introduce such a fundamental change to the system and the right of the accused to fair trials without first going through the above process? Therefore, Chairman, I am strongly opposed to this clause.

Therefore, Chairman, our amendment is just a very modest one. We only propose to add clause 58(1A), which reiterates the principle of fair trials, specifying that this clause should not be construed as having any impact on the principle of fair trials. Second, we only seek to insert words into clause 58(1) to ensure that the right of the accused will not be altered in any cases, and that

the accused may apply to the Court for access to telecommunications interception products. The most important part of the amendment is the deletion of subclauses (3), (5), (6) and (7), that is, those subclauses on the prohibition of cross-examination on the interception of telecommunications and the power of the prosecution to discuss the principle of fair trials with the Judge behind closed doors.

Chairman, this amendment is of immense significance to the legal profession. I sincerely call upon Members to support it. Given adequate consultation, the clause concerned may be put forward again for discussions. But under the present circumstances, it should not be passed. Thank you, Chairman.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, the authorities' amendment to clause 58 has been introduced in response to the relevant concern expressed by the Bills Committee. It seeks to introduce a change whereby it shall be mandatory for the prosecution to disclose to the Judge any information and arguments that may be helpful to the defence, with a view to providing further protection to the defence. The amendment also provides that the Judge may make any order that he deems necessary for ensuring the fair conduct of legal procedures. In response to the concern expressed by some Members, especially Mr Ronny TONG, we have also introduced an amendment to specifically provide that in the event of any such order having been made, the prosecution shall disclose the order to any Judge responsible for handling the relevant legal procedures, including the appeal procedures.

We oppose the amendment put forward by Ms Margaret NG to clause 58 relating to the non-admissibility of telecommunications interception product. The amendment proposed by Ms Margaret NG will in effect substantially alter the original intent on the non-admissibility of telecommunications interception product. The information obtained from telecommunications interception shall not be exempt from disclosure under the amendment, and we are of the view that this will not be conducive to the protection of privacy. Besides, if only those facing criminal charges are allowed to apply to the Court for the disclosure of telecommunications interception product while the prosecution is not given with such a right, the principle of equality for both the defence and the prosecution will be violated.

Under the relevant clause of the original Bill, both the prosecution and the defence shall not present any telecommunications interception product as evidence in Court. Both sides are therefore on equal footing in this regard. Besides, there is also a special provision in the Bill that provides protection in case there is any information beneficial to the defence. The authorities have also further enhanced the relevant clause in response to the views of the Bills Committee.

The clauses of the Bill will not compromise the right to fair trials of the defence. As a matter of fact, the clauses of the Bill are modeled on the relevant legislative provisions of the United Kingdom, which also practises the common law and the non-admissibility of telecommunications interception product. The European Court of Human Rights has already ruled that such legislative provisions will not compromise the right to fair trials.

In contrast, under Ms Margaret NG's proposed amendment, any person facing criminal charges may apply to the Court for the disclosure of any telecommunications interception product. As a result of this, some accused persons may "try their luck" by filing an application. And, in some cases, criminal elements may thus know the operational details of law-enforcement agencies. This will seriously affect the efficacy of law-enforcement agencies in the future.

The authorities also oppose Mr James TO's proposal on deleting clause 58 which provides that any telecommunications interception product shall not be admissible in evidence in any proceedings before any Court. As a result, the policy on the non-admissibility of telecommunications interception product cannot be given expression in any legislative provisions.

The authorities' amendment to clause 65 seeks to delete the reference to clause 58. This means that the telecommunications interception product obtained before the commencement of the Ordinance will not fall under the ambit of the provisions in clause 58 that specify the non-admissibility of telecommunications interception product in any court proceedings. We also propose to add a new clause 65(2A), specifying the Ordinance itself shall not be construed as authorizing any act of telecommunications interception carried out before its commencement.

The authorities' other amendments to clause 65 are consequential amendments, and these amendments will also achieve the effect of the amendment to clause 65 proposed by Mr TO.

In regard to the interception of telecommunications, Ms Margaret NG's amendment to clause 65 and the Committee stage amendments proposed by the authorities will produce similar effects. However, since the mail interception and covert surveillance conducted before the commencement of the Bill and also the relevant product will not be covered by the transitional arrangements set down in clause 65, therefore, the clause and even the entire Bill will not have any possible effects on all these materials. The authorities are of the view that Ms Margaret NG's inclusion of all these acts in her amendment to clause 65 is not only unnecessary but may also cause confusion. Therefore, the authorities oppose Ms Margaret NG's amendment to clause 65.

Madam Chairman, I hereby call upon Members to oppose the two Members' amendments to clauses 58 and 65 and support the authorities' amendments. Thank you, Madam Chairman.

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

**MR RONNY TONG** (in Cantonese): Chairman, Article 39 of the Basic Law affirms the legal status of the International Covenant on Civil and Political Rights (ICCPR) in Hong Kong. The ICCPR is thus also a document offering protection to our constitutional rights.

Article 14 of the ICCPR provides that everyone shall be entitled to fair trials. Actually, all of us know that even without the ICCPR, fair trials are still the cornerstone of our judicial system and rule of law. For this reason, any legislative provision or law that will affect this cornerstone of fair trials will necessarily cause very, very significant changes to the law. That being the case, we cannot understand, first, why the Administration does not respect the relevant views of the legal profession, especially criminal lawyers; and, second, why it does not conduct a comprehensive consultation exercise.

Chairman, I do not want to repeat all the arguments presented by Ms Margaret NG just now. I think all such arguments are necessarily true by themselves. One point I want to add is that what we are talking about is not any information which can prove that a person has committed a crime, broken the law, disturbed our law and order and endangered social stability. What we are talking about is basically the kind of information that can do justice to the accused and prove his innocence.

What we are talking about is fair treatment to the defence. The authorities claim that they have introduced amendments. Admittedly, some improvements have been made, but all these improvements are simply of no use to the defence. Why? The reason is that as pointed out by Ms Margaret NG just now, the Judge is always the person who knows the least. Actually, the Judge himself always hopes that he can be the one who knows the least, because knowing more will greatly affect his judgement and impartiality. If the Judge is dragged into the so-called lawyers' arena, he will find himself facing more difficulties.

Actually, Chairman, the most important point is that while some small bits of news or information may appear totally irrelevant to a case, it may nonetheless induce those who are familiar with the case, that is, the defence or the defence counsel, to start a whole series of investigation. In legal parlance, it can be said that such news or information may "lead to a train of inquiry". The train of inquiry induced by some small bits of information may eventually enable the defence to obtain some concrete evidence that can dismiss the charges against the accused and prove his innocence. Therefore, I simply cannot understand why anyone should say that only the Judge or the Court, that is, the person who knows the least, should be notified of such information and vested with the power to determine whether the information should be given to the defence.

I have pointed out that some tiny bits of information may lead to a train of inquiry which can prove the innocence of the accused. I am not saying that we should give the defence opportunities of exploiting loopholes of the law. I must make this very clear. We do not have any worry about this. Chairman, our worry is that an innocent person who is wrongly accused may fail to get hold of some important information that can restore justice to them. This is our worry. The reason is that tiny bits of information are all about facts and should have nothing to do with any loopholes of the law. If some tiny bits of information can enable the accused to follow other clues and eventually lead to the discovery

of evidence that can prove his innocence, I suppose that even the prosecution should express its welcome, because I do not think that it should be the duty of the prosecution to throw innocent people into prison. It should be the duty of the prosecution to bring guilty people to justice. It should never seek to convict innocent people.

Therefore, Chairman, the Government's current proposal is far from being satisfactory, whether from the perspectives of legal arguments, the rule of law, fundamental humanitarian values or basic logic. What we ask for is nothing but a comprehensive review. I hope that we will be able discuss the so-called "sunset clause" later today. During the discussions, we will quote this as an important argument. I hope the authorities can accept Ms Margaret NG's amendment. I hope that they can give the legal profession and all Hong Kong people a chance to discuss thoroughly whether such a practice should be adopted. Thank you, Chairman.

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

(No Member indicated a wish to speak)

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

**MS MARGARET NG** (in Cantonese): Chairman, I wish to respond to several points made by the Secretary for Security.

To begin with, Chairman, the Secretary claimed that this was the proposal of the Bills Committee. Of course, the proposals of the Bills Committee should merit our consideration. Actually, we very much hope that if consideration is to be given to the enactment of legislation and how the legal profession should be consulted, the advice of the Law Reform Commission must be sought beforehand. Nothing should be done in the absence of any studies — the Law Reform Commission has made its recommendations and conducted a consultation exercise, but these cannot possibly replace the consultation exercise, or even the public consultation exercise, required for this Bill. Everyone should be enabled to realize the changes to our law and system. This is the only way to win the acceptance of all.

Chairman, all along, the Secretary has never refuted my viewpoint that this will change our system. Since there will be a change, he should not listen to the recommendations of the Law Reform Commission alone. The Bill today would not be like this had he not done so.

Chairman, the Secretary also said that he opposed my amendment because allowing the accused to apply to the Court for the disclosure of interception product would not be conducive to the public interest. According to him, other people's privacy will be infringed upon because the interception product disclosed may involve other people. Chairman, first, I must point out that the Court will not lightly approve the disclosure of anything; approval will be given only when the information concerned is relevant to the case. When a person asks for information relevant to his case, he may inevitably come across the information concerning other people. It simply does not stand to any reason if even the information about this person is not to be disclosed just because others are involved.

In many cases, the process of prosecution will inevitably infringe upon other people's privacy. Mr James TO certainly knows of many such cases. The reason is that in order to prove that a person has done something in a certain place, the information about others must inevitably be divulged. If you accuse a person of corruption or leading a certain kind of private life, you must inevitably put the person in the limelight, and other people who are connected must even give evidence in Court. Will the same reason or the fear that the prosecution may do so induce you to refrain from presenting any evidence, so as to avoid exposing other people's privacy? Rape cases are the most controversial. In such cases, the witness will suffer the greatest harm. But the prosecution will not thus refrain from summoning witnesses or initiating prosecution. In any process of prosecution, immense harm may be inflicted on many people. But we must never forget the principle that the most important consideration should be whether or not there is any fair trial for the accused.

Chairman, the Secretary also claimed that his proposal would not compromise the principle of fair trials because the same practice was adopted by Courts in the United Kingdom and Europe. I have already commented on the case of the United Kingdom. As for the view of the European Court of Human Rights that there will still be fair trials, I want to voice my objection for the same reason. Can there be any fair trials? Can there be any fair trials by the

standards of our own place? The matter should be decided by the people here, not by any European Court. One must, in particular, bear in mind that the European Court of Human Rights must take account of the many different judicial systems in Europe. Under some of these judicial systems, Judges are responsible for investigation. How much can our own system directly adopt from the rulings of such Judges? I believe that the arguments advanced by the European Court of Human Rights should merit our consideration. But they can never replace the consultation required for introducing such a major change to our system, nor should they be allowed to dictate our decision.

Chairman, the Secretary for Security also remarked that allowing the accused to apply to Court for access to telecommunications interception product might lead to a fishing expedition. This was not his exact wording. He said that when looking for information, the accused would try everywhere to check whether there was any other information. If one applies to Court in this way, one will not be granted any approval. As for the possibility of law-breakers making use of this as a loophole, I must say that the remark is indeed very interesting. What I mean is that during the scrutiny of the Bill, we always had the feeling that we were not actually discussing people's rights under the Basic Law. Instead, we felt that the common people were all treated as thugs, and that any concessions in the drafting of the legislative provisions concerned were regarded as potential opportunities for law-breakers. All people who are the subjects of the law-enforcement agencies' investigations are treated as thugs. Even if they are not, the focus will still be on the assumption that they are thugs. I find this very regrettable. Chairman, I am not criticizing the Secretary because security is his responsibility. As the Bureau Director responsible for security, he must naturally consider things from this perspective. President, I therefore think that when it comes to such law reform and changes, law-enforcement agents should not be asked to determine the contents of the Bill. Rather, the authorities responsible for managing the whole judicial system and upholding the principle of fairness and constitutional rights should be required to put forward the Bill. Unfortunately, our justice authorities are simply treating themselves as a mere service-provider. Such is the situation, and this is the case to a very great extent. This is not the first time. I find this very regrettable.

Chairman, I wish to add one point because it seems that I have forgotten to discuss clause 65, though you are now also handling a part of clause 65. One of my two amendments to clause 65 is the deletion of paragraph (b) on the

definition of "relevant matters". The reason for this is very straightforward because this subclause makes reference to clause 58(3) of the Bill. Since my amendment proposes to delete clause 58(3), the paragraph must naturally and consequentially be deleted.

However, the other amendment of mine proposes to add a new subclause (1A), specifying that the ordinance should not be construed as authorizing any illegal acts done in the past. This is not directed entirely at clause 58. Rather, it is intended to be a formal transitional arrangement. Chairman, I suppose we should now consider subclause (1A), right? I do not know whether we have any more time for discussing clause 65 later on. If not, I shall discuss it now. Will we discuss clause 65 from the overall perspective? Chairman, that is because clause 65 is very complicated ……

**CHAIRMAN** (in Cantonese): You may discuss it now because as far as I can notice from the script, I do not know when we can discuss clause 65.

**MS MARGARET NG** (in Cantonese): Chairman, in that case, our staff or the Secretariat should perhaps look into it when they have time. What is the purpose of the transitional arrangement? All is because there will be a new ordinance. We all know that before the commencement of this Ordinance, the authorities conducted lots of covert surveillance and interception of telecommunications. How are they going to handle the products obtained? This question can precisely highlight the immense significance of the transitional arrangement. At the very last stage, following the Court of Final Appeal's ruling, the authorities amended clause 65 again. Therefore, there is an amendment to their amendment.

The main point is that since the Court has made a ruling, all such acts in the past should be considered unconstitutional. What were unconstitutional in the past should still be unconstitutional now. The Court has not ruled that unconstitutional acts in the past will be given exemption and treated as if they were perfectly lawful now. This is not the case. All such acts in the past will still be unlawful when the ordinance commences. For this reason, I propose to add a new subclause (1A), stating that no provision in this Ordinance shall be construed as making any unlawful acts in the past lawful. This is what is meant by generality.

As for the amendment of the authorities, frankly speaking, Chairman, I myself also find it very difficult to understand. But I think it is mainly targeted clauses 56 and 58. What is the point of targeting clause 58? The point is that any materials obtained unconstitutionally by way of interception of telecommunications and covert surveillance in the past will be regarded as having been obtained pursuant to a prescribed authorization following the commencement of the Ordinance. This greatly contradicts the intent of our proposal. The materials obtained may still be used as relevant matters under this clause. It is really very difficult for me to accept the underlying principle of this amendment. Chairman, this is not only a question of principles but also a question of facts.

We have repeatedly discussed whether a price has to be paid for the unconstitutional acts of the Government. We have said that the Legislative Council and the public must pay a price for the Government's unconstitutional acts. Why? I have already discussed the views of Mr McWARTON. But I must still mention their special relevance here. According him, materials obtained constitutionally may still be presented in Court because the Court's acceptance or otherwise of such evidence will have nothing to do with their constitutionality. When a case is brought before the Court in a trial, the Court has only one duty — the duty of conducting a fair trial. The Court is not supposed to determine whether the evidence presented is unconstitutional unless the evidence will affect the conduct of a fair trial.

However, the legislature and the executive will look at this from a different angle. We should insist that materials obtained unconstitutionally in the past should not be used at all. The passage of the Bill should not give the authorities any justification for its past acts and render those affected unable to redress their grievances. This explains why we want to introduce a general amendment to the transitional arrangement clause. The reason is that unless there is a generality provision, two scenarios may emerge. First, the transitional arrangement clause proposed by the Government may immediately turn some unconstitutional materials into constitutional ones. In that case, I must call upon Members to support our amendment because the arrangement is not in line with our principle. If its principle is the same as mine, I urge the Government not to oppose my amendment.

The Administration's amendment is about the last part of clause 65 — no matter how careful one is, it is still impossible for one to get together all the

required documents today. I do not have a marked-up copy on hand, but I can remember the content clearly. The amendment is not very clear, but we can still see that a provision is added only to the last part of clause 65. Subclause 2(A) reads: "Nothing in this section operates to validate or authorize any telecommunications interception carried out pursuant to an order referred to in subclause (1)." Subclause (2A) is placed after other provisions. There may be something missing in between.

Chairman, I hope the Government can state clearly that although its provision is drafted differently from my subclause (1A), the effect will just be the same. If the Government can make a guarantee, we will at least have a bit more assurance. Of course, I must add that I very much hate the replacement of meticulous legislative provisions by remarks made by a Director of Bureau. But since we are hard pressed by time and my professional expertise is very limited, I can only try my best, Chairman. Thank you.

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, first, I must clarify that we have not sought to turn anything "unconstitutional" into something "not unconstitutional" in clause 65.

Second, we do not agree with Ms Margaret NG that the ruling of the European Court of Human Rights is of no direct relevance to the situation in Hong Kong. We are of the view that the ruling, that is, the point that both the prosecution and defence shall not have access to telecommunications interception product and cite any such product as evidence, will not affect the conduct of fair trials. We of course agree entirely that it is very important to ensure the conduct of fair trials. For this reason, the Bill expressly provides that the non-admissibility of telecommunications interception product shall not override the duty of prosecution personnel to take all necessary steps to ensure the conduct of a fair trial. Although it is our policy to refrain from using telecommunications interception product as evidence by the prosecution and in many cases, such product is evidence obtained by the prosecution, we must point out clearly that even if the evidence is favourable to the prosecution, we will not make use of it. If such product is favourable to the defence, as stated in the relevant Committee stage amendment, we will certainly notify the Judge.

**MR MARTIN LEE** (in Cantonese): Madam Chairman, I hope the Secretary can tell Members what will happen in case the prosecution wiretapped a certain telephone conversation of the accused. Although the product of such wiretapping is very useful, the prosecution will not use it as evidence. But during the trial, the accused gives false evidence after taking an oath. In other words, the accused lies. In that case, can the prosecution make use of the information obtained by wiretapping when cross-examining the accused? In other words, the information obtained by wiretapping is not used as evidence, but since the prosecutor is aware of certain facts, he knows how to cross-examine the accused. As a result, the accused may be led to think that even the prosecutor is aware of what he did. Such cross-examination will be very favourable to the prosecution, but the accused cannot have access to the information concerned. And, although the prosecution is in possession of the information, it does not use it as evidence. Instead, the information is used for cross-examination to assist the prosecution counsel. The prosecution does not present the information but it is aware of certain facts concerning the accused. It then cross-examines the accused step by step on the basis of such information. Can the prosecution do so?

**MR JAMES TO** (in Cantonese): Chairman, Mr Martin LEE is really very brilliant. Although he did not attend our meetings, he could already point out the crux of the problem in just a few words. Actually, the crux of the problem, as I explained earlier on, is that the Government all the time claims that it will be very fair because both sides will not make use of such information. In other words, the Government thinks that it will be very fair when both sides do not present such information as evidence in Court. But, as pointed out by Mr Martin LEE, the Government will in fact use such information. To begin, I must point out that instead of using such information during cross-examination in Court as described by Mr Martin LEE, the authorities can already use the information long beforehand. Why do I say so? The reason is that such information will have been used for gathering other evidence or in the police station or elsewhere. It will not be necessary to use the information during the trial. But the defence will be left in a very miserable position. The accused will be kept in the dark all the time, not knowing of the existence of any such tape-recording. Some of the materials may have value as evidence and can be used to prove something, to prove that someone actually knows of a certain incident, or that he was not aware of something at a certain time and place. Such information may be able to prove his motive and may thus be very useful to him.

Besides, such information may also be used to refresh his memory, reminding him of where he was on the night in question, and whether he has any alibi. But he will never know of such information because it is all in the hands of the prosecution. There is also a third possibility. Such information may help him recall certain incidents and prepare for his cross-examination of the defence witnesses. However, the defence cannot make use of all such information. Is it fair? I frankly do not understand what is meant by fairness.

Another principle we uphold is that we must avoid wronging the innocent even if this may mean the escape of the culprit. Whenever there is any degree of doubt about anything, we must give the benefit of doubt to the accused. We would rather let him go because the prosecution and the investigation agencies are supported by huge resources, manpower and various systems. Sometimes, several prosecutors may even join hands to study a case. In contrast, the accused is completely powerless. Under our criminal law procedures, such as the existing rule, that is, if we do not pass clause 58 of this Bill, the prosecution will not present such evidence in Court. But in the course being cross-examined, the defence may discover certain information that may prove his innocence. Or, he may even make use of such information as a means of challenging the other evidence presented by the prosecution. But that has already upset the balance and all is connected with the Government's talks about trying one's luck. According to the Secretary, if the accused is allowed to ask questions, he may decide to try his luck, question the authorities on this or that and whether there has been any wiretapping. In this way, he will know what the authorities have been doing.

But what is the real situation now? Clause 58 has not yet been passed, but is it really true that every accused person has tried his luck before? An accused person can always try his luck now because subclause (1) of clause 58 has not yet been passed. Can an accused person thus try his luck and check whether the Government has wiretapped the conversations of anyone? This is simply not the case in reality. Are all acts of wiretapping and covert surveillance "detected"? This is simply not the case in reality. Why have they advanced such an argument? It is entirely lame and unconvincing. At present, accused persons are permitted to do so, but have all of them tried their luck? Or, have any thugs thus managed to get any information obtained by wiretapping? No. Therefore, it is not true to say that the current practice can enable thugs to know how to escape.

Lastly, what has the Government put forward to justify the enactment of clause 58, especially clause 58(1)? It is claimed that it is necessary to set down their policy in legislative provisions. We have been holding discussions for a very long time, and we have already discussed some 50 clauses. We have now come to clause 58. When we ask for clear legislative provisions, the Government replies that this is not possible. When we say that the original rule should be adopted, the Government refuses and says that there must be clear legislative provisions. What is its intention anyway? Its attitude is that whenever there is any benefit for the Government and law-enforcement agencies, clear legislative provisions must be enacted to bar others from doing anything. But if law-enforcement agencies will be restricted in any way, no legislative provisions should be enacted, so that they can enjoy more flexibility and leeway. All that should be included in the Ordinance is turned into subsidiary legislation. All that should be contained in subsidiary legislation is shifted to the Code of Practice. All that should be covered by the Code of Practice is rejected on the ground that disciplinary actions are available. And, disciplinary actions are further described as unnecessary on the grounds that the Basic Law already forbids the Chief Executive to commit any offences, and that the Chief Executive will be "fired" and impeached if he commits any offence.

In this way, all provisions which can restrict the power of law-enforcement agencies and bring about a greater degree of fairness are rejected. When it comes to this particular clause, the Government argues that there is already a legislative provision on its policy. I think that since the very beginning of this debate, the Government's mentality has remained just the same. It would be most desirable for the Government to hold all the power. If there is no alternative and it must surrender a certain power, it will consider various tricks to make sure that less power is surrendered. It does not want Judges to decide everything, for example. If approval is to be given by Judges, then it wants to select the Judges. It wants to extend its hands to the Court and select the Judges. Then, it wants to see whether it is possible to find any policy justifications for security checks. Since the very beginning, its attitude has remained unchanged. Anything that may affect the conduct of covert surveillance and wiretapping must give way. Everything, including fair trials and fair treatment for the innocent, must give way.

Is the situation in Hong Kong very critical? Frankly speaking, I agree that different approaches may be required in different periods of time. Some people say that several decades ago, when Britain was faced with the ferocious

Irish Republican Army, the laws applied to Northern Ireland, including the trial system, were indeed very harsh. But are we facing such a situation now? How can we possibly sacrifice the most fundamental principles of fair trials and fair access to information? We must not talk only about trials because if we do so, the Government will claim that Mr Ian WINGFIELD has already been asked to work out some solutions. But that again, I must point out that some people have already pinpointed the problems. What I am talking about is something lower in level. I am not talking about trials and the admissibility of evidence. Rather, I am talking about fair access to information. The reason is that access to information will produce impact on many criminal and civil cases in the past, and there are other effects as well. The person concerned may, for example, make use of such information and uncover cases of abuse of power and dereliction of duty. He may even receive compensation and apply to the Commissioner for review and investigation. But, the possibility of all these will be eliminated. What kind of fairness are they talking about anyway?

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

**MR ALAN LEONG** (in Cantonese): Chairman, as a number of Members have mentioned, the Government's usual tactic of selling this Bill is to argue that similar provisions can also be found in other countries. On clause 58, the Secretary makes it a point to say that the United Kingdom also adopts a similar concept. I have done some simple research. In the United Kingdom, the relevant law is called the Regulation of Investigatory Powers Act 2000. The wording of section 17 of the Act is admittedly very similar to that of our clause 58. But if we examine the Act closely, we will notice that there are in fact many exceptions. In other words, there are many exceptions to the non-admissibility of telecommunications interception product as court evidence.

Naturally, it is impossible and not quite appropriate for me discuss the whole Act here. But I must say that the worst thing to do is just to copy part of the Act and then tell this legislature and Hong Kong people that the concept is already implemented in the United Kingdom, that since the idea works in the United Kingdom, it will of course work in Hong Kong, and that since the United Kingdom can make it, we can rest assured. I think this kind of reasoning cannot quite depict the whole picture. If they really want to copy from the Act, it will be best for them to copy the whole Act. If they do so, they will see that there

are dozens of provisions in the Act, or more than 56 provisions. All the provisions are closely related to one another. Even in this Act, there are very few provisions, such as from sections 18(7) to 18(9), which mention the circumstances under which only the Judge and the prosecution are to be notified. Under most other circumstances, this will not be the case. Unless they do not want to make use of any telecommunications interception product, they must always inform the defence except under the very restricted conditions mentioned from sections 18(7) to 18(9).

What is more, Chairman, I also want to point out that such a practice of the United Kingdom is not entirely free from criticisms. I have done some research, and I discover that when the Act was debated in the House of Lords in 2000, at least one Law Lord said that after studying how other countries handled the evidence from telecommunications interception and related acts, he found that their approaches were quite unlike that of the United Kingdom, which accorded priority to protecting the confidentiality of telecommunications interception so as to prevent criminals or potential law-breakers from getting anything from interception product. During this debate in the House of Lords, this Law Lord also mentioned some cases that happened in France, Germany, the United States and Canada and questioned whether the approach of the United Kingdom was the most appropriate.

Chairman, many academics have also queried the approach of the United Kingdom, that is, the appropriateness of the non-admissibility of interception product. These academics are of the view that interception product can serve as a powerful weapon against criminals, but if such a weapon is to be used, attention must be paid to fairness. In other words, all the details must be disclosed. Of course, if one does not want to disclose the details, one can always choose not to collect evidence through such a means. If one wants to adopt this means of evidence collection and subsequently uses the relevant information for prosecuting a criminal, one must let the criminal know that his communications have been intercepted and such interception has led to the charges laid against him. Of course, I do think that this is already a separate policy direction. I also agree with Ms Margaret NG that it is a bit of a rush by whatever standards when we must start from scratch and complete the drafting of this piece of legislation within just five months.

Major policy discussions of such a nature will take time. All stakeholders and those to be affected by the policy change should be given sufficient opportunities to hold discussions. They should be asked to state their

stands only after gaining an understanding of the issue. And, a more prudent approach should be to listen to all kinds of opinions before formulating a policy direction. Despite the time constraint, many criminologists, practising solicitors, barristers and senior counsels all expressed their concerns in the past few months. Chairman, I wish to point out that we have not actually copied the whole of the Act enforced in the United Kingdom. Therefore, there is always the possibility of omission. The reason is that I believe that clause 58 or any individual clauses should not be made the sole concern of the scrutiny of the Bill. Rather, we must examine the whole Bill to see whether it can really protect the privacy of communications of all the 7 million people of Hong Kong.

To sum up, it is a fact that not the whole Act is copied. Second, even in the United Kingdom, there were discussions on two different policy directions at the time of the enactment of the Act. But in Hong Kong, we are unable to get the same right to conduct all such discussions. For all these reasons, I strongly support the two Members' amendments. The reason is that I believe that on the basis of the information available to us, we cannot rest assured that the major policy change brought about by clause 58 will not impact our right to fair trials and the related arrangements. Therefore, Chairman, I will support the two Members' amendments.

**MR MARTIN LEE** (in Cantonese): Chairman, as I was listening to Members, I actually wondered whether the Bill put forward by Mr James TO before the reunification in 1997 could do any good to the public. The Government did not allow the Bill to become effective. Then, in the first court case, it was ruled that the Government should not do any wiretapping. This led to a series of arguments. Having listened to so many speeches, I really wonder whether it is better not to have any protection than having any protection.

If this piece of legislation is enacted, the Government will be empowered to intercept communications in the course of criminal investigation. The authorities claim that such interception is necessary for tracking down criminals. However, such interception will involve many other people because wiretapping a person will necessarily mean wiretapping his friends. Thus the privacy of many people will be infringed upon. In other words, their right under Article 30 of the Basic Law will be violated.

The Government is empowered to invoke this Ordinance even when investigating a very minor crime, because the maximum penalty is just a prison

term of three years. And, in the end, the Court may even rule that no prison sentence is required. Therefore, the practice of the United Kingdom in this regard is in a way justified. This is not adopted as the standard. Instead, once the accused is ruled guilty, he must be imprisoned for such a number of years as specified even though he may be a first-time offender. This can show the seriousness of the crime. As Members all know, according to human rights legislation and the international covenants on civil rights, before any legislation involving the violation of human rights is enacted, care must be taken to check whether there is such a need and whether the law concerned is too harsh, as this may lead to numerous lawsuits in the future. Is there really a need for such a law?

People in certain other countries are very worried, especially after the September 11 incident. But has the September 11 incident ever affected Hong Kong in any way? It is therefore obvious that if we follow the examples of these countries, the law we enact will be much too harsh. This is because other people's concerns are entirely different from our worries.

Consequently, if a law is to be enacted in this way, would it be better not to enact any laws at all? The Government is to be vested with extensive powers. Even if it does anything wrong or acts against the conditions set down by panel Judges or the Commissioner, it will not be liable for any consequences. It will not have to face any consequences for many of its acts.

There will be full protection for the Government. But this legislation is supposed to protect the people, so the opposite result will be achieved. I just wonder whether it is worthwhile to protect our rights through the enactment of this legislation. It was thought that the enactment of this legislation could protect our rights, but then we now find to our dismay that our rights will instead be curtailed after the enactment of this legislation.

**MR LEUNG KWOK-HUNG** (in Cantonese): Mr Martin LEE remarked that things would be better if I had not challenged Donald TSANG. If I had not challenged Donald, it would not have been necessary to enact any legislation today and no one could have used this as an excuse for enacting a draconian law.

I have said many times that I do not look at the matter that way. A draconian law is also a law, so although it is draconian, we can still voice our

objection to it. In the past, however, there was the absence of any relevant law, so the situation was similar to that during the Cultural Revolution. The one in power was able to do what he wanted simply by giving an order. When Donald TSANG had any spare time, he could always invoke section 33 of the relevant ordinance; in this way, he could keep several million people, including you and me, under surveillance. Now there is to be a law, and although it is draconian, they must somehow respond to questions. Even though they will repeat as much as possible that they do not have anything to add, they must somehow say a few words more every now and then. Therefore, there is certainly a point in that. If members of the public have followed this matter really closely, instead of simply focusing on who treated whom to what kind of food as reported by the mass media, they would realize the significance of the enactment of legislation this time around.

Honourable Members, during my childhood, I once heard a story in church about a bunch of people who listened to the Gospels. These people saw from afar a neon sign with these words: "信耶穌得水牛" (Believe in the Lord and get a buffalo). They thus hurried to the church. However, it turned out that the neon sign was out of order, so the original words "永生" (eternal life) became "水牛" (buffalo). Anyway, they rushed into the church. The case of this legislation is very similar. We are still talking about a very slight difference, but this slight difference can already turn "民主" (democracy) into "民亡" (death of the people). Therefore, the question is not so much about the extent of amendment. The main question concerns whether the amendment will lead to any qualitative change, whether a slight qualitative change will lead to a whole world of difference. Two lines that are not parallel to each other will need only a very slight change in position to intersect.

We are now examining clause 57 today, and we can see that throughout the whole process, the Government's logic has been that it must first get hold of the powers which it could not obtain through the enactment of legislation in the past. When people ask for protection, it will seek to pose various obstacles. It may seem that it is giving people something, but in practice, they are made to beat numerous enemies and overcome countless hurdles first and they can get through only after sustaining heavy injuries. Can this be called protection for the people? All is just like fighting a fierce battle and going through Herculean tasks, we can get it only if we can survive. Worse still, he may even laugh at us when we cannot survive, saying that he cannot do anything in that case.

All this really puzzles me a great deal. We have been arguing with the Government over practically every clause, saying that when the Government takes certain something away, there cannot be full protection of our rights, or there will be no protection at all. However, it invariably replies that it does not matter so much because there is just a slight difference. But I must point that many a little makes a mickle. This will be fine if we are talking about savings. We will surely become a millionaire one day this way. But we are now talking about many slight bruises turning into grave injuries. We can see that this kind of logic will in the end lead to the disappearance of even the standard of proof in law. When something can only be used by one but never by another, how can we say that there is fairness?

At this juncture, I suddenly remember something …… It is almost five in the afternoon. If we go to the waterfront, we will see the beautiful slanting sun — sunset. The "sunset clause" is highly significant. We may compile a book on all our arguments with the Government over clauses 1 to 57. A year later, when it is time for a review, we can show the book to the public. Or, we may also ask RTHK to edit footages of our meetings for public screening. This may well be a very good lesson on civic education. This is a very good way of showing what kind of rule of law they are talking about. One concrete action is worth more than a dozen guiding principles.

Therefore, I urge Members to note that one day, they themselves may receive such unfair treatment, because they should know that people must put up their own defence. In other words, if anyone of them is arrested and wants to hire a lawyer, the lawyer will say to him, "Buddy, I really cannot help you. What I could use in the past can no longer be used now because of this Ordinance. Once things like that are involved, nothing can be done." This exception is very terrible. If anyone of them becomes the accused in the future, they will realize that by casting a positive vote today, by stamping a seal onto this Ordinance, they are in fact signing an indenture to sell themselves and heading for hell.

Therefore, with regard to clause 58, I hope that the Secretary can do more thinking. I urge him not to merely make a reference to it in clause 65. Others have deleted it from clause 65. He should just let it be. It is obvious that others have deleted the reference, but he has sought to mention it elsewhere. Does he think that this is a game of Sports Chess? This is exactly how a game of Sports Chess runs: moving up to grid 17 from grid 2; proceeding from grid 17 and then gliding down to grid 9, for example. This chess game is for children only. Laws must all be very clear and one must not be made to search here and there for cross-references.

Therefore, from the perspective of fairness, I must say that Mr James TO's two amendments are all very clear. Clause 58 and the reference to it in clause 65 must be deleted. In other words, all must be deleted, so as to remove the root of the grass to prevent from budding again. The amendments therefore merit Members' support. I am not saying that Ms Margaret NG's amendment does not merit our support. We are allies and this happens to allies all the time. One should not mind when there is any unintentional harm inflicted.

Therefore, I hope that Members can think about the whole thing seriously. Even those Members intending to support the Government must also think it over again. Actually, I must say that the need is universal. We are not the only ones who have such a need. Oh, I can remember it now. The game they are playing is very much like what WITTGENSTEIN talked about. It is also like two cyclists trying to out-compete each other in a "who is the slowest?" contest — they therefore try crazily to brake their bicycles. They have made the legislation very difficult for people to understand. Things are cut here and there, with the result that the rule of law is entirely eradicated, or made to fade out gradually. I hope that the Secretary can do a good deed for just once. I hope that he can respect the rule of law and support the amendments of Ms Margaret NG and Mr James TO. A good deed a day will certainly lead to rewards. He does not need to go to church to get a buffalo. He will have eternal life.

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

(No Member indicated a wish to speak)

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

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

**MS MARGARET NG** (in Cantonese): Chairman, I am very grateful to all those Members who want to render their support. I only wish to add one point, a point on Mr Alan LEONG's reference to the example of the United Kingdom. The Secretary describes the whole thing as a fair deal, explaining that since clause 58(1) provides that any telecommunications interception product shall not

be admissible in evidence in any court proceedings, it is only fair to ask the other side to suffer a bit and forbid it to do any cross-examination on such product.

Chairman, we should actually look at the matter from the opposite angle. Mr Alan LEONG reminded us just now that the non-admissibility of such product as evidence in Court is itself a highly controversial topic. Members in this Chamber are not supposed to make any decision for the general public. For this reason, no matter what we are going to do, we must first consult the public, not least because this matter is highly contentious. In the past colonial era, we copied things from the United Kingdom all the time, and there was never any controversy. We would copy purely technical things or measures that had been in operation for a very long time without experiencing any problems. However, we cannot possibly accept any wholesale copying in the case of such a controversial matter.

I have also read the Act mentioned by Mr Alan LEONG. I am of the view that the two are not totally the same, though there are some similarities. Therefore, Chairman, such a decision cannot be justified, whether we are talking about the concept of fair trials mentioned by the legal profession or the doubts the public has on the non-admissibility of telecommunications interception product as evidence in Court. The Secretary, who is in charge of the law-enforcement agencies, now tells us that such information will not be presented as evidence in Court. But, honestly, what is their motive? Their motive is not to treat the accused more fairly. They simply think that if they present such product, their inside information may be known to others, so they would rather not do so. This was precisely the point that led to huge controversies in the United Kingdom. Some people thought that the country's public security system would not be seriously impacted, so the authorities did not need to worry so much. Chairman, this matter is therefore highly contentious. Putting two controversial issues together will not mean their contentious nature will disappear. I therefore urge Members to support my amendment.

Thank you, Chairman.

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

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

(Members raised their hands)

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

(Members raised their hands)

Mr James TO rose to claim a division.

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

(The division bell was interrupted by noises)

**CHAIRMAN** (in Cantonese): The noises are caused by a vibrating pager put near the loudspeaker. Please switch off your pagers and this will not happen again.

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

**CHAIRMAN** (in Cantonese): Mr Albert CHAN and Mr LEUNG Kwok-hung, please cast your votes. Mr LEE Wing-tat, please also do so. We shall wait for them first.

(Members pressed their buttons to vote)

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

Functional Constituencies:

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

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

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 25 were present, 14 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**MS MARGARET NG** (in Cantonese): Chairman, I move the amendments to clauses 58 and 65.

*Proposed amendments*

**Clause 58 (see Annex)**

**Clause 65 (see Annex)**

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

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 25 were present, 14 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move the amendments to clauses 58 and 65.

*Proposed amendments*

**Clause 58 (see Annex)**

**Clause 65 (see Annex)**

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clauses 58 and 65 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clauses 58 and 65 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendment to subclause (4) of clause 59 as set out in the paper circularized to Members.

The authorities' amendment seeks to provide more clearly that officers of the departments must obey the Code of Practice. This amendment has been put forward in response to the suggestion of the Bills Committee. Madam Chairman, I hope that Members can vote for this amendment. Thank you, Madam Chairman.

*Proposed amendment*

**Clause 59 (see Annex)**

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

**MR JAMES TO** (in Cantonese): I only wish to put down on record that this amendment is put forward by me. *(Laughter)*

**CHAIRMAN** (in Cantonese): Does any other Member wish to speak? We are now debating subclause (4) of clause 59.

**MS MARGARET NG** (in Cantonese): Chairman, clause 59 is about the Code of Practice, not any code of secret agents. The authorities' amendment aims only to require any officer of a department to adhere to the Code of Practice by replacing "have regard to" with "comply with". This is just a mere

embellishment. What is the difference between the two expressions? Are they saying that "have regard to" is different from "comply with"? The latter is more precise, and it is of course always better to be more precise in wording. There is such a wry expression on the Secretary's face. He seems to be saying, "I have made an amendment according to your suggestion. Why do you still argue with me?"

Therefore, we must get to know what happened during the whole process. All is very simple. We find that many clauses of the Bill are very loose and many of the definitions are much too vague. Chairman, I do not think that I should repeat all the points here. If I do so, even three more days of discussions will not be enough. However, as Members are aware, there are many grey areas. What is the definition of public security? What should one do in order to satisfy the requirements of this Bill? We are of the view that laws must be precise. But the authorities refuse to do so, saying that only a code of practice should be drawn up for the purpose.

Actually, the Hong Kong Bar Association has also put forward its views. It considers that the Code of Practice should be turned into a piece of subsidiary legislation. The reason is that the Code is just a set of rules and it is not enforced according to any regulations. This is the very nature of a code of practice. Therefore, even though the Code of Practice makes everything very clear, it will not be binding. Whichever expression is used, whether "comply with" or "have regard to", the Code of Practice will not be legally binding. But the authorities are very firm in this regard. This is the only compromise it is prepared to make. Anyway, a 0.005% discount is offered as a means of saving Members' face. Chairman, we do not want any face-savers. The most important thing is to enact a sound piece of legislation. Of course I know that the drafting of the Code of Practice has not yet been completed. The legislation has not yet been passed. The authorities do not how to handle the wording, so the drafting is not yet completed.

But when we first read the Code of Practice, we were extremely disappointed because the authorities failed completely to include any provisions which could make us think that the authorities had reminded law-enforcement agents to give priority to people's privacy when handling such things. Chairman, many Members have spent lots of time on reading the Code of Practice. Many of them may think there is the need for greater stringency here and there. Or, they may think that the Code of Practice should serve certain

purposes. I am not going to repeat these views. I just want to put forward two main points. First, the Code of Practice is not a substitute for legislative provisions. There should at least be a set of subsidiary legislation. Second, as far as we can observe now, the Code of Practice is just slightly better than having nothing. It is still unsatisfactory in many ways. Thank you, Chairman.

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

**MR RONNY TONG** (in Cantonese): Chairman, a code of practice is nothing but a set of guidelines. We cannot accept this in principle. Why? It is because there is a big difference between violating this set of guidelines and contravening the Ordinance, especially when it is a piece of legislation formulated to protect people's rights under the Basic Law. It is especially worth mentioning that as I explained before, section 5 of the Ordinance already provides that violating the Code of Practice is not regarded as contravening the Ordinance. I therefore think that this is not acceptable.

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

**MS MIRIAM LAU** (in Cantonese): Madam Chairman, I do not want to repeat what I have already said. Members seem to insist that the Code of Practice is not legally binding at all and does not have any legal effect. However, under the Ordinance, violating the Code of Practice will be the same as contravening "relevant requirement", and there are three aspects to "relevant requirement": first, the Code of Practice; second, the Ordinance itself; and, third, "prescribed authorization". Any violation of any one of these three aspects may lead to disciplinary actions against the law-enforcement agents concerned. The Commissioner may also take follow-up actions and compile a report. Then, lots of other things will have to be handled as a result of the violation of the Code of Practice. And, many consequences will ensue as well.

I want to reiterate that although violation of the Code of Practice in itself is not the same as contravening the law, it is wrong to think that there are no consequences. Many of the consequences are already set out clearly in the legislation. Thank you, Madam Chairman.

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

**MR JAMES TO** (in Cantonese): Chairman, violation of the principal Ordinance will not entail any criminal penalties. And, there is no mechanism for civil claims. In that case, can it be anything serious to violate the Code of Practice? What consequences can there possibly be? Can there be any serious consequences? I think it can be said that there are indeed some consequences. But, in any case, they will just be something like embellishment.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I do not think I need to speak again.

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 59 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 59 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clauses 60, 62 and 63.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendments to clauses 60, 62 and 63. The details of the relevant amendments are set out in the paper circularized to Members.

The amendments to clause 60 proposed by the authorities are drafting changes of a technical nature. Amendments to clauses 62 and 63 are proposed in response to the requests of the Bills Committee to change the negative vetting procedure of the relevant subsidiary legislation to that of positive vetting.

Madam Chairman, I hope that Members will pass the amendments. Thank you, Madam Chairman.

*Proposed amendments*

**Clause 60 (see Annex)**

**Clause 62 (see Annex)**

**Clause 63 (see Annex)**

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

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clauses 60, 62 and 63 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clauses 60, 62 and 63 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): New clause 30A What a prescribed authorization may not authorize.

**CHAIRMAN** (in Cantonese): The Secretary for Security and Ms Margaret NG have separately given notice to add new clause 30A to the Bill.

Committee now proceeds to a joint debate. I will first call upon the Secretary for Security to move the Second Reading of new clause 30A.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move that the new clause 30A be read the Second time. The details of the relevant clause are set out in the paper circularized to Members. The new clause is introduced with the aim of providing additional safeguards to legal professional privilege.

There were a lot of discussions carried out by the Bills Committee on the issue of protecting legal professional privilege. Although our law-enforcement agencies will not knowingly seek to obtain information subject to legal professional privilege, we cannot completely rule out the likelihood that any information protected by legal professional privilege will not be inadvertently obtained.

Taking into account the proposals of The Law Society of Hong Kong, the Hong Kong Bar Association and some Members, we have proposed Committee stage amendments in which several clauses are added in order to offer a more comprehensive protection of legal professional privilege. The new clause 30A is one of them. The clause sets out that unless exceptional circumstances exist, interception of communications or covert surveillance carried out at an office or other relevant premises or a residence of a lawyer shall not be authorized. The exceptional circumstances are circumstances when there are reasonable grounds to believe that the lawyer concerned, or any other person working in his office or any other person residing in his residence is a party to any activities that constitute a serious crime or a threat to public security, or the communications in question are carried out "for the furtherance of a criminal purpose". As for other relevant premises, they refer to premises ordinarily used for the purpose of providing legal advice. After taking into account the amendment proposed by Ms NG, we have also listed some common examples of relevant premises.

We oppose to the new clause 30A proposed by Ms NG. Building on the protection clause proposed by the authorities on legal professional privilege, Ms NG's amendment limits the exceptional circumstances under which covert operations are allowed to those that include covert surveillance to be carried out in respect of oral or written communications and postal interception taking place at the residence of a lawyer only. Moreover, the requirements set under these circumstances are extremely high. Authorization can only be approved if there is credible evidence to justify a reasonable belief that the lawyer concerned is a party to any activity which constitutes a serious crime or a threat to public security and the communications concerned are for the furtherance of a criminal purpose. If the relevant clause is passed, interception or surveillance operations by the authorities on telecommunications or communications or criminal activities taking place in that lawyer's office would be totally prohibited. Although we agree that legal professional privilege should be given sufficient safeguards, and this view has been fully reflected in the Bill and the amendments proposed by the authorities, the amendment proposed by Ms NG practically gives all communications of a lawyer a safeguard that is close to absolute protection. This has greatly exceeded the area of protection given by common law to legal professional privilege instead of offering a chance of achieving an equilibrium. In view of this, we oppose the amendment.

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

Deputy Chairman, I now appeal to Members to support the amendment proposed by the authorities. Thank you, Deputy Chairman.

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That new clause 30A moved by the Secretary for Security be read the Second time.

**DEPUTY CHAIRMAN** (in Cantonese): I now call upon Ms Margaret NG to speak on the motion moved by the Secretary for Security and the new clause 30A proposed by Ms NG herself. Unless the motion of the Secretary for Security is negatived, I will not ask her to move the Second Reading of her new clause 30A.

If the motion of the Secretary for Security is passed, Ms Margaret NG may not move the Second Reading of her new clause 30A.

**MS MARGARET NG** (in Cantonese): Deputy Chairman, this is a clause of great concern to the legal professionals. As the Bill creates an enormous impact on the privilege of confidentiality of the legal profession, the Secretary has to make certain formal concessions to the legal professionals.

Deputy Chairman, Ms Audrey EU has just said that legal professional privilege is not a privilege of the legal profession. It is only because we have to discharge our responsibilities that our clients have the right to be protected. Basically this kind of right is the foundation of public justice. If a person is to sue another person, but the former is deprived of a completely confidential environment where he can discuss his case with his lawyer unreservedly for legal advice, then how can he effectively defend himself? This is particularly so when criminal charges or legal liabilities are very complicated matters under various laws. If a person is not fully protected when he is seeking the opinion of a legal adviser, the foundation on which we build our judicial system and public justice will be shaken.

Deputy Chairman, why do we consider the present new clause proposed by the Secretary for Security not adequate? Superficially, it seems to be adequate. Subclause (1) sets out that no authorization may authorize postal interception and covert surveillance at a lawyer's office, residence and even premises he ordinarily used for the purpose of providing legal advice to other clients. However, there is an attachment to this clause, and that is, "unless exceptional circumstances exist". What do exceptional circumstances refer to? The exceptional circumstances are set out in subclause (2). If it is suspected that any person is a party to any criminal activity which constitutes a serious crime or a threat to public security at a lawyer's office, or any person is a party to such illegal activities in a lawyer's residence, then all circumstances as set out in subclause (1) shall not apply. In other words, with the inclusion of subclause (2) in the Bill, the stringently set out circumstances in subclause (1) no longer exist. Let us think about this. If there is one lawyer in a lawyer's office — and there are many large law firms in Hong Kong — who is suspected, the whole firm will lose the protection. If there is one family member who is suspected, no matter which family member it may be, the whole family will lose the protection. What I am concerned at the moment, is not the lawyer, but the

client. If I go to a lawyer's office to seek legal advice in a conference room behind closed doors and discuss the case with a lawyer, how will I know if the lawyer's office is safe? How will I know whether a conversation taking place in the office is protected in confidentiality or will there be any eavesdropping? I have absolutely no way to know. How will I know whether a lawyer in the office is involved in illegal activities, rendering the loss of protection for the whole office? How will I know if one such lawyer exists in such a large office? I am particularly concerned with telephone lines. Deputy Chairman, I do not think a client can be free from these worries when he enters the office to talk to a lawyer or calls home from the lawyer's residence. We are only demanding that the client can be free from these worries.

Deputy Chairman, the Secretary has just said that according to the amendment proposed by Margaret NG, it was completely impossible to carry out detection in a lawyer's office. This is exactly what we are hoping for. In the event that detection is allowed to be carried out in a lawyer's office, many people will be affected. The lawyer concerned will not be able to give any assurance to his client. Let me tell you, Margaret NG has never done anything illegal and has never been involved with any serious crimes or activities that threaten public security. I have never been a party to any such activities. However, how can I guarantee that not one person in the whole office is suspected of being a party to these activities? As I cannot guarantee, I am unable to assure my client that the conversation between us will be kept in confidentiality. Even if our conversation is completely normal legal consultation, I will not be able to make such an assurance. Furthermore, there is not one place that I can make such a guarantee. What are the reasons for that? It is because I cannot even guarantee the telephone lines of any home (apart from the homes of those who live alone) are free from interception. My home is rather different, except for the cat I keep, there are so few people there, sometimes even the cat is not there. So how can I make any assurance to my client? Despite the fact that I am an upright and law-abiding person, I cannot guarantee that law-enforcement agencies are not suspicious of me. This is particularly so because we do not even know what the definitions of serious crime and public security are. This makes it even more difficult for me to make any assurance to anybody.

Deputy Chairman, if this is allowed in law, legal professional privilege will no longer exist. The main reason for this is that we can no longer guarantee anything. I know the authorities will certainly say that this will not always happen, and that only under exceptional circumstances are they allowed

to take place. However, how do I know when exceptional circumstances apply? In any case, I can no longer make any assurance to my clients.

Moreover, the Secretary said that the amendment proposed by Margaret NG had greatly exceeded the area of protection given by common law to legal professional privilege. Deputy Chairman, during our debates at the meetings of the Bills Committee, there were some confusion about two things and this was about what was being protected by legal professional privilege. There have been a lot of legal controversies surrounding this issue. I must admit the issue involves a lot of legal controversies. I have asked the opinions of many barristers who have in-depth understanding of this issue. Among the circumstances they have described, many are not clearly specified. Not all conversations between clients and lawyers are privileged. Then what is its intent? It is very difficult for an ordinary law-enforcing officer to make a judgment. If we are guided by our conscience to make a judgement, probably I will not be protected. If you think otherwise, you will have to be responsible for the protection. I am not talking about definitions in law. I am talking about how we can protect communications between clients and lawyers in terms of policy, so that genuine legal consultation can be protected.

It is true that my amendment has excluded one of the exceptional circumstances. And that is, if the lawyer concerned is involved in those crimes, in the case of his residence..... why should it be in the case of his residence anyway? In fact it is hoped that his client will not call the lawyer's residence. If the client is truly worried that the lawyer is under investigation, it would be better not to call his home. But at least visiting his office is safe. Of course, as credible evidence has to be given, there will be queries of whether this requirement is too lax, with excessive protection given to legal professional privilege and excessively tight protection. Deputy Chairman, credible evidence is, in fact, not a harsh demand. Frankly speaking, subclause (3) sets out that certain requirements must be met before application can be submitted for an authorization to carry out covert surveillance and interception of communications. Even if the clause has not spelled this out, I hope that the Code of Practice will specify that credible evidence has to be provided with the submission of the application. It should not be a case of unfounded suspicions. It is true that if the lawyer concerned is involved in these activities, and his communications are possibly related to these criminal activities, then the protection given to the client may truly be excessively tight. However, this is an issue of great importance. And when we cannot draw the perfect line, we

would prefer the line to be always on the side of protecting the fundamentals, and in this case, fair trial in the judicial system.

Today, all our attention is focused on covert surveillance in the Interception of Communications and Surveillance Bill. It seems that we have forgotten that there are many methods available to the law-enforcement agencies to carry out their jobs of detecting crimes and safeguarding public security. Why must wiretapping telephone calls be carried out in a lawyer's office? Why must surveillance be carried out in a lawyer's office? There are many other methods for the authorities to carry out their jobs instead of doing these. Do they really have to rely so much on the information they can obtain from the legal consultations between lawyers and their clients? When a person asks to be defended, will the authorities send out undercover agents to sneak into conference rooms and record meetings secretively? According to the protection provided by legal professional privilege, information obtained this way remains inadmissible as evidence. However, information obtained and knowledge gained cannot be transformed into unknowns. That is why my amendment is a necessity. The Law Society of Hong Kong has already indicated in writing that the amendments proposed by the Government are unreliable. So the Government cannot say that the two professional bodies in law have been consulted. They simply do not accept the amendments because eventually they do not feel safe with them. Before the Government does such things, it must inform the public first — I have to reiterate — though this is not perfect, it is already the lesser of the two evils.

Deputy Chairman, I would like to point out that one of my amendments is about the issue of lawyers paying visits to prisons, that is, lawyers visiting persons in detention. Places where persons in detention meet their legal representatives should also be protected. According to my understanding, the Secretary will definitely say that overhearing will not be carried out in those places. Of course it does not mean that I do not trust the Secretary, but I would rather have these circumstances covered and protected by clearly written legal provisions.

Deputy Chairman, I am asking Members to understand one point. I strive to protect the rights of lawyers not because I am the representative of the legal profession, but because as a legal professional, I am very sensitive to the assurance of confidentiality required from our clients. I only hope that the authorities will allow us to discharge our legal responsibilities. Thank you.

**DEPUTY CHAIRMAN** (in Cantonese): Members may now debate the motion on the Second Reading of new clause 30A moved by the Secretary for Security as well as new clause 30A proposed by Ms Margaret NG.

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

**MR RONNY TONG** (in Cantonese): Deputy Chairman, I would like to clarify two points. Firstly, legal professional privilege is not a privilege for lawyers. Ms Audrey EU has just spoken on it, but I would like to spell it out more clearly. The phrase "not a privilege for lawyers" means that it is not because a person is a lawyer, the things he does by himself will enjoy certain privileges. The purpose of giving this privilege is to protect the communications between lawyers and clients. Therefore, it is a privilege of a client and a privilege of the public, not a privilege of a lawyer. This is of utmost importance. I will point out why it is so important when I later discuss the next part

As this kind of privilege is a privilege of the public, it should be mainly determined by the public as to whether there is a need to be protected by the privilege. Thus, usually a lawyer cannot waive this kind of privilege on behalf of his client, unless he has the consent of the client. Nevertheless, as we are lawyers who have handled this kind of cases before, and have more knowledge and experience in this aspect, we will tell our experience to our clients that they should persist with their privilege. Let me reiterate once again, this is not a privilege for lawyers. This is the first point.

Deputy Chairman, the second point is that "Hong Kong residents shall have the right to confidential legal advice" has been written clearly in Article 35 of Basic Law. No exemption is written in Article 35 of the Basic Law. There is no written provision which specifies that no confidential legal consultation can be obtained unless the client is in a lawyer's office or a lawyer's residence. Deputy Chairman, there is no such written provision. As this is a protection to the right of our residents provided by the Basic Law, it should not be limited only to a lawyer's residence or office while confidential legal advice given in other places will not be protected.

Right from the beginning and up until now, I still do not understand why the authorities propose the current amendment on protection. Obviously,

having protection is better than having none. But this kind of protection is illogical. Just now I have pointed that out, and Ms Margaret NG has also mentioned it briefly in her speech. Her view is a bit different from that of mine. However, we are only reaching the same goal by different ways. If we understand that the relevant privilege is a privilege of the client, then possibly there will be two scenarios. Firstly, a lawyer and a client collude to commit crimes. Secondly, a lawyer commits crime by himself. Deputy Chairman, if a lawyer commits crime, it follows that there is no privilege at all. Just as I have explained before, the privilege is not a privilege of the lawyer but that of the client. Therefore, if a lawyer commits crime by himself, there will not be a scenario where the lawyer provides legal consultation to anyone. If a lawyer commits crime, no matter where he is, he will be investigated. A lawyer is just a human being. He is also a member of the public who is not entitled to any privilege. If only he is regarded as an ordinary member of the public, then he can be subject to detection, surveillance or interception of communications. There is no difference at all. That is why we are not talking about this.

The only scenario we are going to consider now is the scenario when a lawyer colludes with a client. What should be done then? As I have just pointed out, the privilege refers to the privilege of a client. If a lawyer colludes with a client, the target of surveillance will be the client instead of the lawyer. However, if the authorities have the knowledge that the client may collude with the lawyer during their communication, so putting the client under surveillance may mean the lawyer is put under surveillance as well. But when the target of surveillance is the client instead of the lawyer, the surveillance operation should not be carried out in the lawyer's office where everything he does will be put under surveillance. This is because the only reason for the lawyer being put under surveillance is that he has liaison with this particular client, and not because he has liaisons with all the other clients. Thus, it is beyond doubt that what Ms Margaret NG has said is totally correct. The authorities should not go to the lawyer's office to carry out surveillance and interception of communications between the lawyer and all his other clients simply because he has a lawyer-client relationship with one particular client who commits crime. This kind of action is against the Basic Law. Deputy Chairman, as I have just pointed out, Article 35 of Basic Law sets out that every Hong Kong resident shall have the right to confidential legal advice. And exercising this right is not limited to a lawyer's office or residence.

Deputy Chairman, this mechanism of protection is not only illogical, difficult to comprehend, but also against the Basic Law. So what is the reason behind this? Is it because without this mechanism, there will be no other ways for surveillance to be carried out in cases where a lawyer colludes in crime with a client? Obviously this is not the case. Before this clause is introduced, there are already other clauses that specify surveillance can be carried out if crime is involved. In view of this, the area of surveillance should not be extended to the lawyer's office and residence.

Deputy Chairman, there is another illogical thing. And that is, even if the allegation concerned is that a lawyer is involved in criminal activities with a client, there can also be two possibilities. Firstly, the lawyer commits crime and he involves his client in it. Secondly, the client commits crime and he involves his lawyer in it. In terms of the level of involvement of crime, there is a difference between the two. Different levels of surveillance activities should be carried out according to different levels of involvement on the part of the lawyer. Extensive surveillance activities should not be carried out in the lawyer's office or residence if he is only peripherally involved. It follows that another mechanism should be introduced with this mechanism concurrently. Under this mechanism, surveillance activities should be determined in accordance with the level of the lawyer's involvement in crime.

Deputy Chairman, I consider the amendment proposed by the authorities unacceptable. Considering from the aspects of the principle, the Basic Law, and the fundamentals of legal professional privilege, that is, the right to confidential legal advice, the amendment is unacceptable. Therefore, I support Ms Margaret NG's amendment.

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

**MR LI KWOK-YING** (in Cantonese): Deputy Chairman, since this Bill has touched on issues of privacy and basic rights of an individual, there were a lot of discussions at the district level and among the public during the scrutiny of the Bill. People were very much concerned with the issues. Someone had asked, "Will this create white terror? With the "Big Brother" watching you, you will not be able to do anything. The world will then become a world of terror." This view is too pessimistic.

However, I have also heard some other views of the public. They think that as they are living in Hong Kong, they would like to be protected by the law. They are of the opinion that law-enforcement agencies charged with the responsibility of legal protection should try their best in the prevention of crimes. I believe that the Bureau has conducted a detailed and thorough study and discussion in the job of balancing privacy and protection.

Ms Margaret NG has just mentioned that many practising lawyers were very much concerned whenever professional surveillance was mentioned. I would like to inform Ms NG that I am a practising lawyer too and I do mind very much about being the target of surveillance. That is why I have a particularly strong feeling against it. As part of the general operation of a lawyer's office, when a client comes for legal advice, very often I say this when I first meet him, "You must be frank about the whole case. You must tell me frankly about all the details, no matter if they are to your advantage or to your disadvantage, or whether you have actually done it. You will have to tell me frankly. Only when you have told me clearly the details of the whole case can I give you formal views and instructions of what you should to do." Under these circumstances, when a client begins to talk to me, I often tell him, "It is all right. What you are going to say will only be between you and me and the four walls that surround us. No other person will know about it." Hence, the confidence of a client is built. So when they come to see us, they will usually tell us frankly about the details of the whole case. This is what we refer to when we talk about protecting and upholding legal professional privilege.

Deputy Chairman, since I have to build up a client's confidence in me when I meet my client, I have to protect him as well. However, I remember what my instructor told us when I was under training in the United Kingdom. He told us that at the very moment when a client told us about the whole case, we had to follow some principles, morally, this meant that justice should be upheld. If the client confirmed that he had done the wrong thing, we should tell him to confess it. The most we could do was to teach him how to get a mitigation. But if the client insisted otherwise, and refused to admit he had done anything wrong, we would have to tell him, "I am sorry, I cannot represent you. You will have to find another lawyer." This is what a lawyer should do properly in the fine tradition of upholding fairness and justice in law.

I think this act is to be done righteously. But as Mr Ronny TONG has pointed out, a lawyer is just a human being and not a machine. We have emotions and thoughts. We are not angels with a halo above our heads. We do commit wrongdoings. Mr TONG also said that there were two scenarios when detection had to be carried out. Firstly, a lawyer commits crimes by himself. Secondly, a lawyer and a client collude to commit crimes.

Ms Audrey EU said that as this privilege was not a privilege of a lawyer but of the public, it had to be protected. But lawyers are all members of the public. If a lawyer has committed a crime, is he entitled to the privilege? Mr Ronny TONG also asked since a lawyer was not restricted to committing crimes in a certain place, so why detection should be conducted in his office. This is where the second question is. For instance, if a lawyer has truly conspired with a client and committed a crime, an ordinary person is not exempted from surveillance in any specific places. Surveillance can be carried out on an ordinary person in any place if application for surveillance has been submitted. Under this circumstance, if a lawyer has committed a crime, why should his office be exempted from surveillance? If it is done according to what Mr Ronny TONG has suggested, will it not turn a lawyer's office to a criminals' paradise? Since no one can eavesdrop what is said in a lawyer's office, the lawyer can invite his client to come to his office to discuss anything. The office is a place definitely free from detection. If this is the case, how can we prevent crimes from happening?

If a privilege of the public has become an individual privilege of a lawyer, it is not surprising to find that newspapers are starting to query whether lawyers are really a class apart, why they are entitled to special treatment, and why they are not treated as ordinary people. It is only after listening to our views expressed in the meetings of the Bills Committee that the Bureau has taken away the clause which specifies surveillance is not allowed in a lawyer's office. Let us look at the amendment to clause 30A(1)(a). It sets out that postal interception and telecommunication interception are not allowed in an office. This is the right of protection which a good citizen who has not committed any crime is entitled to. However, the authorities have listened to views that this privilege is not the privilege of a lawyer but that of the public. So they have stated in the following provisions that exceptional circumstances exist if there are reasonable grounds to believe that a lawyer, or any other lawyer practising with him or any other person residing in his residence commits a crime, surveillance will be allowed to be carried out in his premises. This is the key area where the amendment proposed by the authorities is different from the amendment

proposed by Ms Margaret NG. Ms Margaret NG's amendment allows us to see that she is carving out in life a paradise for criminals for the lawyers who commit crimes — as mentioned by Mr Ronny TONG — to do whatever they want to. Based on this reason, I cannot support the amendment proposed by Ms Margaret NG.

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

**MR RONNY TONG** (in Cantonese): Deputy Chairman, as Mr LI Kwok-ying does not seem to understand the main point of my speech just now, I would just like to clarify. As a matter of fact, what I referred to were the two scenarios of lawyers committing crime. The first scenario is when a lawyer commits crimes by himself. If this is the case, it does not involve any legal privilege. But if a lawyer commits crimes with a client, the client is the focus. If this is the case, law-enforcement officers should not be allowed to carry out extensive wiretapping or covert surveillance in a lawyer's office. This is the main point of my speech.

**MS MARGARET NG** (in Cantonese): Deputy Chairman, I am really shocked. Both of us are legal professionals, how can Mr LI Kwok-ying think that I want to carve a lawyer's office into a paradise for criminals? This is not my proposal. This is a proposal of The Law Society of Hong Kong. Does The Law Society of Hong Kong want to carve a lawyer's office into a paradise for criminals as well? Certainly this is not the case. If there is a black sheep in a lawyer's office, others in the office should be angered because he has brought shame upon the whole office and the whole legal profession. So how come they will ask the representative of the legal profession to carve a paradise for criminals? Does Mr LI think that giving the exemption would turn all lawyers' offices in Hong Kong into a paradise for criminals? He absolutely should not raise the issue to that level.

It is, of course, difficult to draw a line and to draw a distinction between policies. If the policy laid down is too stringent, it would mean sacrificing circumstances with obviously sufficient justifications for conducting wiretapping. The question we are asking is what should be sacrificed. If a lawyer has truly committed a crime or conspired with others in crime, does it

mean that the protection given by the people and the legal profession of Hong Kong to clients has to be sacrificed? Does it mean that because one of the lawyers of a lawyer's office commits a crime, the clients who come to this office for legal advice have to take the risks? Furthermore, I am not referring to just one office or a number of offices. Until now, the public has much confidence in legal professional privilege. They know that consultation with legal advisers will be kept confidential. However, if the Bill is passed, they will not know when it will be kept confidential, and when there is no longer any confidentiality. This is what I am referring to.

I am not transforming the privilege of the public into my own privilege, and ask the public of Hong Kong or a minority to bear the evil consequences of my own crime. According to the authorities, a lawyer can collude with clients in a lawyer's office. This is doing something totally unnecessary. I wonder how many lawyers collude with clients in a lawyer's office and whether the corresponding conviction rate of these cases is high. However, if the protection of legal professional privilege for the clients is rendered ineffective just because of these cases, it will be an issue of our greatest concern. Where is the line to be drawn? If certain things have to be sacrificed, I would prefer making sacrifices similar to those proposed in my amendment. Covert surveillance is different from searching a lawyer's office and seizing documents from it. The latter two are regulated in the current legislation. Though we do not like the difference, there is still a difference between the two. For instance, under the Organized and Serious Crimes Ordinance, the box containing the objects seized can be sealed. It will be argued later in the Court to determine whether or not the documents can be browsed. It is different with interception of communications. When you have intercepted and heard the communications, you have heard them already. It may be possible that protection is provided for the products of the interception. But when the products are transformed into intelligence, the protection will no longer exist.

So right now we have to handle the issue of drawing a line which has never appeared before. In the past, we have never considered legislating to legalize covert surveillance, including wiretapping telephone calls at a lawyer's office and residence. We have never legalized these actions. Today we have to legalize them, and a real line has to be drawn. However, this line has not been supported by the profession. Then why does the Government still insist on drawing it? Deputy Chairman, I do not wish to get agitated over it. Neither do I wish to talk with a severe tone of making queries. But the rationale is, in

fact, very clear. We must safeguard the confidence of the public in the legal system of Hong Kong. So I hope that the Secretary will no longer ask Members to oppose to my amendment. I also hope that Mr LI Kwok-ying will not consider this as a professional privilege of a lawyer, but as a right to protect good citizens. We are not turning the right of the public into our own right. In many cases, other methods can be employed to carry out detection. This is a way to protect the clients. If even a practising lawyer does not understand this, it will be useless for me to explain any further. I hope the Secretary will understand that with his action, not only is the judicial system in danger of destruction, but also the basic principles of common law are threatened. I am not talking about the limits of legal professional privilege and the legal definition concerned, but how can protection be given in respect of policy, and how public confidence in this system can be sustained. Thank you, Deputy Chairman.

(THE CHAIRMAN resumed the Chair)

**MR LI KWOK-YING** (in Cantonese): Chairman, after hearing the speech of Ms Margaret NG, I would like to make a brief clarification as well. I have immense respect for the people of my own profession. I trust they will not do anything bad. So I have not said anything like this from the outset. However, Mr Ronny TONG has mentioned two possible scenarios of crime. Based on the respect and trust I have for the people of my own profession, I believe that out of 100 lawyers, 99 of them — as newspapers have reported lawyers committing crimes, I dare not say all of them — are law-abiding. In other words, there are only very few lawyers who commit crimes. And consequently, the number of those lawyers under surveillance would be very few indeed. So if there is a lawyer who has truly committed crimes — just like Mr Ronny TONG has said — why do we allow him to avoid surveillance under such circumstances? Why do we allow him to do whatever he wants in certain places? This is my key point. I have no intention of alleging that lawyers in Hong Kong will do anything illegal. I would like to clarify this, because I have immense respect for the people of my own legal profession in Hong Kong.

But if the target of detection is the client, just like what Mr Ronny TONG has said, there are no reasons why the lawyer who colludes with him is not under detection as well. Chairman, I think both the accomplice and the principal offender should be punished.

**CHAIRMAN** (in Cantonese): Does any other Member wish to speak? Mr Martin LEE.

(Mr Ronny TONG urgently requested for clarification)

**CHAIRMAN** (in Cantonese): Mr Ronny TONG, as I have just invited Mr Martin LEE to speak, I would like to ask you to speak later.

**MR RONNY TONG** (in Cantonese): But I would like to clarify.

**CHAIRMAN** (in Cantonese): I will allow you to speak. Mr Martin LEE, since he insists so much, could he be allowed to speak first?

**MR MARTIN LEE** (in Cantonese): Yes.

**CHAIRMAN** (in Cantonese): Mr Ronny TONG, you may speak first.

**MR RONNY TONG** (in Cantonese): Probably due to the fact that it is already 6 pm on the fourth day of the discussion, our minds are not so clear any more. I have not said anything about the two points which Mr LI Kwok-ying said I raised before. Firstly, I did not say that lawyers who committed crime should not be under detection. I believe the Chairman may also remember what I have said before. In fact, this is just contrary to what I said. I said that if a lawyer committed crime by himself, there would not be a scenario of the privilege to confidential consultation. So there was no need at all to discuss this as law-enforcement officers would be able to use methods generally employed to investigate into the lawyer concerned. What I said was that if a client was involved in crime, law-enforcement officers should not carry out detection in the whole lawyer's office just because of this client. This is my argument from the outset. Chairman, I have never said anything about the two points Mr LI Kwok-ying just mentioned.

**MR MARTIN LEE** (in Cantonese): Chairman, I would like to discuss the issue of prison visits.

Once I visited a friend who was a lawyer sentenced to imprisonment. I did not visit him in the capacity of a lawyer, but in the capacity of a member of the public. I talked to him through a barrier made of materials similar to laminated glass. He told me a minister visited the prison every Sunday. He would really like to listen to his sermon. But the attendance of each sermon is limited to less than 20. The administration of the prison said that this was to prevent the situation from getting out of control, and too many inmates attending the sermon would cause that. My friend considered that explanation hardly justified since it involved the serious issue of religious belief. As the incident happened in the era when Hong Kong was still under British rule, my friend asked me to talk to Governor Chris PATTEN about it. I answered, "Yes, Governor Chris PATTEN is a devoted Christian. Let me talk to him." Unfortunately because I was too busy, I did not mention the incident. After some time when I visited my friend again, he said, "Thank you, Martin. Things have changed. Now any number of inmates can attend the service." At that moment I did not know how to react. (*Laughter*) Obviously that conversation between us was eavesdropped. So sometimes eavesdropping is beneficial. (*Laughter*) This is the first point I would like to raise. Sometimes eavesdropping is beneficial.

As for the second point, what will happen if I visit in the capacity of a barrister? I would like to tell Mr LI Kwok-ying — it seems that he has depicted solicitors as angels and saints with only a few barristers wanting to turn a lawyer's office into a paradise for criminals — when we visit our clients in prison and learn that a client has truly committed a crime, in fact, he has told you he has committed a crime, of course we have a responsibility to persuade him into pleading guilty. But whether he pleads guilty eventually is his own decision. Once a client told me he had committed a crime. But due to certain reasons, he could not plead guilty. If he had pleaded guilty, it would have certain impacts on his father who held an important post in a company. I told him, "If that is the case, I will not ask you to testify in the witness box. But I can represent you to cross-examine all the prosecution witnesses." Fortunately, we won the case eventually.

As a lawyer, we cannot ask a client whether he has committed a crime from the outset. We cannot force him to swear and tell us whether he has committed a crime. If he admits that he has committed a crime, we cannot tell him to plead guilty or else we will leave. This is not the case. We have to understand what our responsibilities are. After understanding this point, when

we visit the prison, we know that we will be eavesdropped. First and foremost, we will ask our client (that is, the prisoner), "Now that you are accused of committing this crime, would you tell me whether you intend to plead guilty or not?" If he says he will not plead guilty or not, we will have no reasons at all to ask him whether he has actually committed the crime. We cannot do that. We have to tell him though he says he has not committed the crime, judging from the testimony, witnesses of the prosecution will certainly say he has. Since witnesses testify like this, he will have to tell me what actually has happened. He will then willingly tell me the facts.

What should we do if this conversation is being recorded? How can we successfully represent our client and win the case? If there is eavesdropping from the start, it will be clear which part is true and which part is false, which part is not okay and which part needs to be addressed and corrected. That is why we can be eavesdropped during our visits to prisons. This the point I wish to make. Otherwise, it would be difficult for us to do what should be done. Thank you, Chairman.

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

**MS MIRIAM LAU** (in Cantonese): Chairman, I believe all the Members sitting here, be they solicitors or barristers, will not wish to turn a lawyer's office into a paradise for criminals.

Ms Margaret NG is indeed very clever. Many terms she has used in her amendments are very similar to those used in the amendments proposed by the Government. Nevertheless, even a very small difference — "a minimal error of a hairbrush can result in a wide divergence of a thousand *li*" — my knowledge of the Chinese language is not very good, but I think the above wording is a relatively appropriate description.

The amendment of Ms Margaret NG accepts a principle in the first place, and that is, if a lawyer has committed a crime, legal professional privilege will no longer exist because under common law, this is an exceptional circumstance. According to the general principle, if the communication between a client and his lawyer constitutes a part of a criminal plan, or a part of a production with the purpose of covering up an offence or committing fraudulence, the

communication concerned will not be subject to the protection of legal professional privilege.

Therefore, Ms Margaret NG sets out some circumstances in subclause (2) of her new clause 30A under which covert surveillance and interception of communications can be carried out if a lawyer's premises or a service used is involved. These circumstances include the lawyer being a party to any activity which constitutes a crime, or a threat to public security. But what actually are included here? Certain telecommunication services are not included.

She sets out in subclause (1) that any communications taking place in a lawyer's office or residence or other premises where a lawyer meets his clients as specified in the first part shall be protected. The second part sets out that any telecommunications, that is, any telecommunications services, including the telecommunications services in a lawyer's office and residence as specified in subsection (1)(a)(ii) shall not be intercepted. I have no idea whether this is also applicable to parcels. However, it is definite that telecommunications services shall not be intercepted under Ms Margaret NG's amendment.

Subclause (2) allows partial interception of communications or covert surveillance on a lawyer to be carried out, but such operations are restricted to his residence only. These operations shall not be carried out in his office or other premises where he meets his clients. In other words, covert surveillance can only be carried out in a lawyer's residence. As interception of telephone communications of a lawyer is definitely not allowed, I really do not know what can be intercepted. Since interception of a lawyer's telephone communications is definitely not allowed, the remaining areas where surveillance can be carried out are very few indeed.

To a certain extent, I agree with the argument of Mr LI Kwok-ying that a loophole will be created. In other words, if a lawyer is truly a party to criminal activities, the places where interception of communications or covert surveillance are exempted, as specified in Ms Margaret NG's amendment, will be used for criminal purposes. This is because these are the places where communications will not be intercepted or covert surveillance be conducted. It is possible that the lawyer himself has done something wrong. As a practising lawyer, I cannot guarantee everyone of the legal profession will not do anything wrong. I really cannot provide this kind of assurance.

Of course, there is another scenario. A lawyer's client may use a lawyer's office as a refuge — I would not say a paradise, but just a refuge, a place similar to a safe haven — to carry out illegal activities. Do we want to see this? We have agreed on the basic principle. But if the principle is practised like this, a very large loophole will be formed. How will this loophole be used? At this moment we do not know. We do not know at all.

Chairman, I would like to return to the issue of legal professional privilege. As a practising lawyer, I clearly understand and highly respect legal professional privilege. Pardon me for saying this, but we were amazed when the Government submitted the original Bill to the Bills Committee for scrutiny. There was not much substantial content. What protection could be provided then? Would we rely on common law principles only? And what would happen in the future? We were worried. It has been after a lot of discussions on various aspects that leads to the specification of a series of protection for legal professional privilege in the current Bill.

Firstly, the areas where legal professional privilege will not apply have been expressly provided. In other words, the lawyer concerned, or any other lawyer practising with him in his office, or any other person residing in the residence of the lawyer concerned is a party to any activity which constitutes a serious crime or a threat to public security. These circumstances will fall into the category of exceptional circumstances. At common law, these circumstances are exceptional circumstances and they should be specified.

According to subclause (1) of clause 30A proposed by the Government, unless exceptional circumstances exist, no interception of communications shall be carried out in a lawyer's office, a lawyer's residence, and premises where a lawyer ordinarily meets his clients. No covert surveillance shall be carried out in his office, that is, a lawyer's office, and other premises where he frequents. In other words, only under these exceptional circumstances expressly provided in the Bill, can corresponding actions be considered. This is the first point.

The second point is that when a law-enforcement officer applying for Type 2 surveillance learns that the case involves legal professional privilege, he should immediately apply for Type 1 surveillance, which means immediate application for authorization from a Judge. This is the second level of safeguard.

The third level of safeguard is provided in the Code of Practice. The contents of the Code are detailed. There are eight paragraphs setting out actions law-enforcement officers should take in case they encounter areas which involve or possibly involve legal professional privilege. If innocent people are involved — people completely unrelated to the case may be involved when operations of covert surveillance are carried out — protection of legal professional privilege may also apply. Regarding these circumstances, the Code of Practice has expressly provided that the dedicated unit will screen out that person first before handing the case over to investigators.

I hope that the Secretary for Security will pay attention to this point. Though there may be a dedicated unit in the future — we will believe for the moment that there will be such a unit. The Secretary assures us that this unit will be well experienced in handling this kind of cases, but I believe the confidence of the public in this unit must be enhanced. According to my understanding, even to The Law Society of Hong Kong, the arrangement of the Government is not totally unacceptable. There are only queries of who will be in charge of this dedicated unit, and whether innocent people who are involved with legal professional privilege will be screened out and not affected by the operations. The Law Society of Hong Kong is worried about this, and I consider their worries reasonable. I hope that the Secretary will make appropriate arrangements in this regard so that confidence of the public — the legal professionals in particular — in this proposal of the Government will be enhanced.

I would also like to discuss another point. We have to empower law-enforcement officers to carry out covert surveillance and interception of communications while we have to ensure that legal professional privilege will be protected, how are we going to strike a balance between the two? In other words, how do we strike a balance between legal professional privilege and public security? We should draw reference from overseas examples. But there are hardly any examples of this kind in overseas countries. It is difficult to find one. I would ask our Honourable colleagues or any barrister or lawyer to show us an example, if there is one, on how overseas countries handle issues of this kind.

Canada is the only overseas example we can find. The Canadian mode is exactly the model adopted by the Government at present. It is the foundation on which the Government has built the Committee stage amendment to clause 30A regarding operations in a lawyer's premises, residence or work place, and under

what circumstances can interception of communications and covert surveillance be carried out. It seems that no other case law or overseas example is available for our reference. The current arrangement may not necessarily be the most satisfactory, neither is it able to address all the anxieties of the legal profession. But once again, I have to say, it has already succeeded in striking a balance between legal professional privilege and maintaining public security by means of covert surveillance. I think in the future, the Government should enhance protection through the experience gained with the actual implementation. I believe it is a task worth doing. After all, we are still worried while we agree that legal professional privilege is not a privilege of the lawyers, but that of the clients and the public.

It is right to enhance the confidence in the communications between the public and lawyers. But we cannot afford creating a loophole in order to achieve this. I have to say this again, we cannot afford providing a chance for people and criminals to take advantage of. We do not wish something like this will happen.

The Liberal Party considers that a certain degree of safeguard has been provided in respect of legal professional privilege under the new arrangement of the Government. Thank you, Chairman.

**CHAIRMAN** (in Cantonese): Members and public officers, I would like to say a few words at this juncture. Originally I intended to say this after the completion of the joint debate on this amendment. But I would like to inform you earlier. Some Honourable colleagues have suggested we should continue with tonight's meeting. But after consulting with a number of Members who represent various parties, I would think if the meeting is allowed to continue on and on, the Members who have proposed the majority of the amendments will be most affected as they will not have any time for dinner. So we have agreed to suspend the meeting from 7.30 pm to 8 pm, allowing us some time to eat something. We also welcome public officers to come to the Dining Hall upstairs where a buffet will be served.

At 8 pm, we will come back to continue with the meeting. Then at around 10.30 pm, I will inform you whether the progress of the meeting would allow us to continue with the meeting tonight. I hope that we will be able to complete the scrutiny of the whole Bill before 2 am. I will inform you of my

decision at around 10.30 pm. Now the debate is resumed. Does any Member or public officer wish to speak?

**MS MARGARET NG** (in Cantonese): Chairman, I would like to respond to the speech of Mr LI Kwok-ying. He said that he had confidence in the legal profession, and believed that there were only very, very few lawyers who would commit crime. The number of lawyers required to be put under surveillance would also be very, very few. If this is the case, the sacrifice we make will also be very minimal, will it not? Those who are required to be put under surveillance will also be very few. In this case, let us forget about it. Though Mr LI Kwok-ying has much confidence in the legal professionals, does the public have similar confidence in the legal professionals? The right of a member of the public is very important. If he believes that every lawyer in the world is a good person, and that every lawyer in a lawyer's office — though there may be 300 lawyers in the office — is absolutely free from crime, then we have nothing to say. However, if the public do not have this kind of confidence, they will not know what they will encounter once they have walked into a lawyer's office. Furthermore, we have to see if the Government has confidence. Obviously, the Government does not have confidence in lawyers. It believes that there will be disasters and big sacrifices if lawyers' offices are not put under surveillance.

I am not sure if I understand the argument of Ms Miriam LAU. She said that if lawyers' offices were not under surveillance, a big loophole would be created. In the unlikely event that a lawyer's office or residence has turned into a hotbed of crime, this loophole would be very large indeed. However, I do not see any sign of this at the moment.

I would like to tell Members, and Ms Miriam LAU in particular, that I have no intention of protecting lawyers. As a lawyer, I only wish to protect my clients. And as a Member of the Legislative Council, I only wish to protect the fundamental system of public justice.

Actually, it is not important whether my amendment is written with wisdom or not. Chairman, the chance of my amendment being passed is really minimal. But let us look at the amendment proposed by the Government. The question is not whether lawyers — after reading the amendment — believe that their legal professional privilege will be threatened or whether their clients will be affected, but whether the public will feel assured after reading the amendment proposed by the Secretary for Security.

The exemption provided by the first paragraph of the amendment proposed by the Government is very stringent and secure. However, the exemption is subject to exceptional circumstances which I have discussed before. I hope that Members will assess this from a substantial viewpoint, that of the public and not from the viewpoint of the legal provisions *per se*. We are not talking about legal provisions, instead, we are discussing when the public would feel safe to visit a lawyer's office and when they would feel unsafe to do so. What does the word unsafe mean? The word unsafe refers to a situation when other lawyers working in the same place or office are involved in criminal activities. This is one of the situations. But how does a member of the public know about this? Does he have to require the office concerned to provide him with a guarantee, ensuring that all lawyers in the office are free from crime?

This provision is not too difficult to comprehend. Despite a certain level of difficulty, some explanations will make people understand. It means that not one single lawyer in a lawyer's office is involved in criminal activities. If a lawyer's residence is referred to, it means that not one person is his family is involved in crime. Not only has he never been involved in criminal activities, but also never been suspected of doing so. And how can a member of the public be assured of these? If he is not given that assurance, then he will not know what to do. Unless he is particularly close to certain lawyer's offices — the principle of "different affinities" is applicable even to lawyers' offices — and the highest authority of the office provides him with a Certificate of No Criminal Conviction, stating that all lawyers in the office are absolutely free of suspicion at that very moment. It really sounds ridiculous just by mentioning it.

Chairman, if we believe that the circumstances of a lawyer committing crimes or a lawyer colluding with his client in criminal activities are rare, the sacrifice is not significant. If such a huge loophole really exists, and these circumstances are thought to be real, then the public should be told that these are places of high risks and no longer entitled to legal professional privilege. This will provide a sense of security to the public when consulting lawyers.

Chairman, what I have to say is endless. But our debate has to come to an end. Despite the fact that I still have a lot to say, I will not drag on. Thank you.

**MS MIRIAM LAU** (in Cantonese): Madam Chairman, I do not want to drag the debate on either. But Ms Margaret NG does not seem to understand why I have

said there is a loophole. Meanwhile, she herself has introduced to us where the loophole is. It exists in clause 30A which she has proposed. The loophole exists in a lawyer's office where neither interception of telecommunications nor covert surveillance is allowed.

But I do not want to argue any more. I would only like to mention a point that I have left out earlier. I think the worries of many lawyers are not groundless. There are some large law firms occupying several floors of a building in which several hundred lawyers work. It will be unacceptable to lawyers if the target of investigation is just one lawyer, but because of this lawyer, offices located on different floors of a building, or branches located respectively in Hong Kong, Kowloon and the New Territories are also put under surveillance.

Of course, a barrier is still in place, and that is subclause (3), which I have mentioned many times. This is where the essence of the Bill is. The authorities have to assess what should be done during the process of granting approval. It will have to determine the scope of covert surveillance to be carried out, the kind of device to be used, and the extent of interception to be conducted. The authority for approval has to assess the situation and timing before making an appropriate decision in accordance with various circumstances of the case concerned.

Though we have read the Code of Practice, the final edition is not yet available. I hope that the Security Bureau will set out clearly the area of authorization requested when it examines once again the Code of Practice. This will prevent any vagueness in its request which may result in a similar vagueness in the approval granted. Since the area involved may be very extensive while the scope may be very broad, it may not be able to meet the actual needs of the case. Based on these reasons, the Bureau should narrow down the scope, for instance, to the lawyer concerned, or a certain office, or a certain floor. This will prevent people from panicking. I believe the Secretary will be able to give some assurance to us when he responds to our speeches. Thank you.

**MS MARGARET NG** (in Cantonese): So does a client have to ask us which floor is safe this time before he comes to a lawyer's office? How can we tell the public which floor is not safe? I think this is not practicable at all. I am sorry, Chairman.

**CHAIRMAN** (in Cantonese): Mr James TO, I think……

(Mr James TO thought the Chairman would not allow him to speak)

**CHAIRMAN** (in Cantonese): No, you can speak now.

**MR JAMES TO** (in Cantonese): Ms Margaret NG, Chairman, I think this is simple enough. Perhaps the Government should conduct a security check, just like what is done to a panel Judge. This is simply ridiculous.

**CHAIRMAN** (in Cantonese): As the Chairman, I should not have so many ideas. But it seems we often try to do the job of the Government. Members, it should be the job of the Government to consider how this can be done, should it not?

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, personally I have immense respect for lawyers. But I remember during my service with the disciplined forces for over 30 years, I had arrested a number of lawyers. Some of these lawyers might have committed criminal offences themselves. Lawyers may also be used as instruments or media for criminal offences. There were indeed cases like these in the past.

According to our experience, there are cases of lawyers participating in international terrorist activities. In safeguarding legal professional privilege, it is impossible to exempt lawyers and their clients completely from the possibility of being lawfully — I have to emphasize the word " lawfully" — intercepted or put under surveillance. Otherwise, a lawyer's office or residence or places he frequents will become a zone free from regulation, where criminal activities are perpetuated.

If the amendment proposed by Ms Margaret NG is passed, even with the availability of strong and powerful evidence indicating that a lawyer or an

employee of a lawyer is committing a serious crime or constituting a threat to public security, covert operations cannot be carried out in the lawyer's office. Since it is provided in the legislation, even with the consent of lawyers of the same office, this kind of operation is still not allowed.

In my opinion, even if we must take all preventive measures to ensure that the right of clients to confidential legal advice is sufficiently protected, the relevant measures cannot be unlimitedly extended to allow a lawyer, his clients or employees not to be subject to the regulation or investigation of law-enforcement officers who have been properly authorized. I believe that the amendments proposed by the Government have provided sufficient safeguard already. Compared with the measures of other common law jurisdictions, the protection provided by these amendments is even better. Thank you, Madam Chairman.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That new clause 30A moved by the Secretary for Security be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

**MR TAM YIU-CHUNG** (in Cantonese): Chairman, when you told us about the dinner time arrangement, not many Members were in the Chamber. I am worried that they have mistaken about the time. Thinking that they have one hour of dinner time, they will not hurry back to the Chamber. The meeting may then have to be aborted. Since there is still some time left, would you please repeat once again the arrangement?

**CHAIRMAN** (in Cantonese): Thank you, Mr TAM Yiu-chung. As there is still some time before the division, I am going to repeat: I will suspend the meeting from 7.30 pm to 8 pm. Members may go to the Dining Hall upstairs to enjoy "a meal of ease and comfort". You are to come back at 8 pm to continue with the meeting. Meal time is 7.30 pm to 8 pm. Are there any other questions? Since we still have some time before the division, if you have any questions, please raise them now.

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

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

Mr James TIEN, Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the motion.

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the motion.

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

THE CHAIRMAN announced that there were 51 Members present, 31 were in favour of the motion and 19 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 motion moved by the Secretary for Security has been passed, Ms Margaret NG may not move the Second Reading of new clause 30A, which is inconsistent with the decision already taken.

**CLERK** (in Cantonese): New clause 30A.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move that new clause 30A be added to the Bill.

*Proposed addition*

**New clause 30A (see Annex)**

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 30A be added to the Bill.

**CHAIRMAN** (in Cantonese): I now put the question to you as stated. 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): New clause 54A Contravention of this Ordinance.

**MS MARGARET NG** (in Cantonese): Chairman, I move that the new clause 54A be read the Second time. Chairman, this is also an amendment to protect the right of the public. Although our amendment to set out that any contravention of this Ordinance and any interception and surveillance conducted without proper authorization shall attract criminal liability has been negatived, we still believe that any contravention of this Ordinance which results in the infringement of the right of the public should be regarded as civil tort and be subject to civil liability. The person concerned has the right to take civil action whereby equitable relief as well as damages can be awarded.

Chairman, probably other Honourable colleagues are familiar with this provision. As lawyers, we hope that the right of the public can be protected. After this Bill is passed, the public will not be able to take legal actions against public officers for damages caused by their wrongdoings or actions in contravention of this Ordinance. The public may not have the right to do that.

Thus, we wish to set out in the Bill that members of the public may take civil actions against any person who has infringed upon the right of the public under this Ordinance. In other words, if a public officer is in contravention of this Ordinance — this Ordinance only regulates public officers while other people are not involved — and has carried out covert surveillance or interception of communications, hence causing damages and other problems to the public, members of the public have the right to take legal actions in accordance with this Ordinance. Whether the legal actions are successful will depend on individual circumstances. Nevertheless, at least the right should be provided to the public. This provision will provide a legal basis for the public to take actions against the Government.

In view of this, I ask those Members who wish to safeguard the right of the public to support this amendment. We have mentioned before, and this is not the first time we say that the right and freedom of communication of the public are protected by Article 30 of the Basic Law. But how will this Bill safeguard such right? This provision will, at least, be able to provide to the public the safeguard of civil liability. Thank you, Chairman.

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 54A be read the Second time.

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

**MR RONNY TONG** (in Cantonese): Chairman, I think this is a minimum requirement of our respect for the right provided by the Basic Law. I cannot see any reasons for the Government to oppose this.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, we oppose the amendment proposed by Ms Margaret NG to add a new clause 54A.

We have explained to the Bills Committee that the Bill will not deprive the public in Hong Kong of the rights provided by other laws, be they statute law or common law alike. I must point out especially that this Bill will not affect the right of the public to seek civil remedies in accordance with law of tort or law that safeguards privacy.

In respect of this Bill, a tight monitoring of covert operations carried out by law-enforcement officers has already been provided by the current mechanism, and sufficient safeguards are given to prevent abuses. The area covered by the statutory infringing acts, as proposed by Ms NG, is too broad and too vague. Neither has Ms NG specified that legal action can only be taken when damage is caused. If circumstances arising from contravention of the Ordinance have truly caused damage to the right of the person concerned, he can seek civil remedies in accordance with the existing law of tort and law that safeguards privacy. In view of this, the authorities consider the amendment proposed by Ms Margaret NG unnecessary. Thank you, Madam Chairman.

**MS AUDREY EU** (in Cantonese): Chairman, the Secretary said in his speech that the present Bill was proper. It has provided not only sufficient measures and all the necessary safeguards, but also prevention of abuses. Nevertheless, Chairman, I believe the Secretary will never commit himself to making a guarantee that abuses will not happen. No matter how properly written the legislation may be, there will be circumstances of abuses. At present, he holds the post of a Director of Bureau, but as time goes by, there will be other persons holding this post. It is impossible for any person in his capacity of the Director of Bureau to guarantee that under his supervision in the future, among all law-enforcement officers (though there are many), not one of them will abuse his authority.

No matter how proper the Bill is, there will be circumstances of abuses. The issue we are discussing is about circumstances under which the Ordinance is abused. The proposal in clause 54A is about acts of contravention of the Ordinance. The authorities cannot say that since every ordinance passed by the Hong Kong Legislative Council is good and proper, there will be no offences against the law. It is not possible for the authorities to say something like this, for there will be incidences of human errors and offences against the law. The question is how we deal with circumstances under which offences are committed.

I believe the Secretary for Justice will inform the Secretary that according to common law, when a person has contravened the requirements of the statute law, it does not necessarily mean that civil remedies will be automatically awarded to the person affected. This is the reason why Ms Margaret NG has proposed the newly added clause 54A. She hopes to expressly provide that any person under the regulation of this Ordinance may become a party sought after in a case of civil claims. Now the Secretary believes that the Ordinance is properly written, and sufficient safeguards are provided. The Secretary has also indicated that there will be consequences if any law-enforcement officer has left out a procedure through carelessness or rashness, or by intention or non-compliance with the Code of Practice. But what are these consequences? We have proposed the entitlement to civil claims for the member of the public whose right has been infringed upon as one of the consequences. Our proposal is that simple.

The Secretary said that the rights under common law had not been deprived of. Since other rights under the common law are not issues involved in the present discussion of clause 54A, I am not going to discuss these with him. The present problem is that although the current regulations provided in the Bill are to regulate law-enforcement officers and public officers, the authorities are unable to guarantee that any action of every law-enforcement officer or public officer will not contravene the relevant requirement, rule or the Code of Practice, or exceed the scope of authorization. The proposal of Ms Margaret NG sets out that in the event of such circumstances, the relevant victim or member of the public will be entitled to civil claims. It is not a certainty that he will win the case. He must undergo the procedure of proving in a Court where a lot of evidence are to be submitted. This is different from lodging complaints to the Commissioner. Suspicions will be sufficient for requests of an investigation by the Commissioner. The person concerned will need to go through the procedure of proving and a trial by an independent Court. Only

when the Court rules that his rights have been infringed, will remedies be awarded to him. This is certainly a very reasonable request.

Why does the Secretary think that such circumstances will not take place simply because the drafting of the Ordinance is in order? If such circumstances take place, should the member of the public be entitled to civil claims? And why should that be a threat to the Government? Thank you, Chairman.

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

**MS MARGARET NG** (in Cantonese): Chairman, I would like to respond to the speech of the Secretary. The Secretary said that the Ordinance was well-written, and he believed that law-enforcement officers would not contravene this Ordinance. Since such circumstances rarely take place, what is wrong in providing a remedy or a safeguard to the public in the event that it really takes place?

Chairman, the Secretary said that this Bill would not deprive the public of its rights and would not affect various rights of the public. But is this statement accurate? During the scrutiny of clause 29 earlier — the Chairman may recall that clause 29 is a clause concerning incidental powers — Ms Audrey EU pointed out that originally illegal actions might become legal because the authorities wanted to carry them out. In other words, law-enforcement officers are allowed to carry out illegal actions under authorization. The transformation of an illegal action into a legal action itself has already affected the rights of the public. This is particularly so when clause 29 authorizes the entry, by force if necessary, onto any premises of the public. The power of the authorities has been substantially increased by the clause. This clause has obviously deprived the right of the public for preventing the entry of the authorities onto their premises. In view of this, it is unfair to the public if the authorities refuse to put in place a mechanism under which a safeguard is provided to them.

Chairman, I would like to emphasize once again, when we propose all these amendments to this Bill, we are trying every trick to ensure remedies will be awarded to the public in the event that their rights are infringed upon. Furthermore, the amendment concerned does not involve the Government. It

involves civil claims only. If law-enforcement officers will not make mistakes, this will not happen at all. Then why does the Secretary oppose this amendment? I ask Members to support our amendment. Thank you, Chairman.

**MR JAMES TO** (in Cantonese): Chairman, I speak in support of Ms Margaret NG's amendment.

In fact, this is a touchstone because it has to do with the consequences of violating this piece of legislation. We have frequently asked what the consequences would be, however, it turns out that there are in fact no consequences. A law that does not specify the consequences is a toothless tiger and it represents a standard that nobody can comply with — the authorities say that even providing for civil claims is not feasible. Earlier on, the authorities said that it would not do to prescribe criminal offences and they even presented some specious arguments, saying that the Legal Reform Commission would later on deal with criminal offences which all sorts of people may get involved in. However, since law-enforcement agencies have the resources, the system and the organization, and since they do this sort of work everyday, if no restriction or penalty is prescribed, how can it be ensured that they will abide by the law?

If even such a simple thing as the failure of an owners' corporation of a building to display its certificate of registration in a prominent location in the building is regarded as a criminal offence, why is it not necessary for a police officer who carries out interception and surveillance unlawfully to face any consequence, and this is neither regarded as a criminal offence nor does he have to assume any civil liability? How can things be like this? How can this be fair to the Hong Kong public? I cite this example because I am scrutinizing the legislation concerning building management and it turns out that this is really the case. If the certificate of registration is not posted in the lobby, the owners' corporation and its members have committed a criminal offence.

Why is not necessary for a police officer who carries out interception unlawfully to bear any consequence and the public does not even have the opportunity to make a civil claim? This is really strange. I hope the Government can reflect on whether doing so is against its conscience or not. How can a piece of legislation be drawn up to allow tens of thousand

law-enforcement officers to carry out the work in this regard, yet even when some of them violates this piece of legislation, there is no need for the officer concerned to assume any criminal or civil liability, or face any other kind of consequence?

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, even lawyers may make mistakes and I dare not guarantee that officers in the disciplined forces will not. It will not be surprising if someone among the tens of thousand officers in the disciplined forces makes a mistake, will it? For this reason, we have already put in place adequate safeguards in the legislation. If they carry out interception or covert surveillance unlawfully, according to our legislation, the public can lodge a complaint with the Commissioner. If the Commissioner finds on investigation that the complaint is founded, first, he can notify the target person; next, a claim for compensation can be made. In addition, as I have said, this Bill will not affect the right of the public to seek civil remedies in tort or under the laws on the protection of privacy. In view of this, I believe the present measures are adequate.

**MR RONNY TONG** (in Cantonese): Chairman, I wish to say in response that members of the public would not have any idea that interception has been carried out on them at all, so how possibly can they lodge any complaint? Even if they complain, since all our earlier amendments have been negatived, Members all know what will happen after a complaint is lodged. Introducing such a provision will have a deterrent effect. What I mean by deterrent effect is that when the officers concerned see such a provision, they will know that they have to bear considerable legal consequences, therefore, such a deterrent effect should by no means be underestimated. We hope that with such a deterrent effect, the likelihood of law-enforcement officers making mistakes or even abusing the power conferred by this piece of legislation will be minimized.

**MS MARGARET NG** (in Cantonese): Chairman, I wish to respond to the Secretary's remark made just now that even lawyers make mistakes. He reminds me of a piece of legislation passed last year that allows lawyers having seven years of practice to serve as civil celebrants. It is said that this will be highly beneficial to lawyers as their business opportunities will increase and they can make money just by celebrating marriages. We all know that not much money can be made in this way. However, do Members know that even as lawyers are empowered to serve as marriage celebrants, how much criminal liability they have to assume as a result? Even now, the Chairman of the Bills Committee concerned, Ms Miriam LAU, is still feeling very displeased. She believes that it is only about officiating in marriages, so why should such a lot of criminal liability be attached to it?

The present Bill is in fact all about authorization, however, it turns out that in exercising such a power, there is no need to assume any criminal liability. Worse still, it is now said that it is not acceptable even to prescribe any civil liability. However, on the other hand, in allowing lawyers to act as celebrants of marriages, if they do not submit the relevant forms within the specified period or provide certificates when they apply to get such qualification, they will have to assume criminal liability. Why is it like this? Does it mean that when conferring any new power on non-government officers, they have to assume criminal liability, however, even though law-enforcement officers are given very intrusive powers, they do not have to assume any civil or criminal liability? I believe doing so will not make our laws credible to the public. Thank you, Chairman.

**MR JAMES TO** (in Cantonese): Chairman, since the views that I wanted to express are the same as those of Ms Margaret NG, I am not going to repeat them.

However, even if we subscribe to the Secretary's remark that everyone makes mistakes, the present state of affairs is that even if public officers make mistakes and even for such intrusive behaviour, they do not have to assume any liability, be it civil or criminal liability. For people who are not public officers, even though they only serve as marriage celebrants and only charge a fee of several thousand dollars or several hundred dollars, they still have to assume criminal liability. The situation is as simple as this. The problem now is that everyone makes mistakes, but public officers do not have to assume any liability for their mistakes, whereas if people who are not public officers make mistakes, they have to assume a great deal of liability. This is how the situation is like.

**MR ALBERT CHAN** (in Cantonese): Chairman, when I heard about the extent of liability, I also referred to the Building Management Ordinance (Cap. 344) to see how the share of liability among the members in a owners' corporation is like. I found in comparison that things cannot be more ridiculous. Members of owners' corporations all work on a voluntary basis, however, its members have to assume shared criminal and civil liability for the responsibilities assumed by and decisions made by owners' corporations and it is possible that this may lead to their financial undoing. People who serve as members of owners' corporations are only responding to the call of the Government to properly manage one's own building by taking part in the work of its owners' corporation. However, since a lot of legal issues are involved, these members may end up going to prison due to an oversight in procedure or negligence in decision-making. Moreover, it is possible that an accident caused by a contractor resulting in injuries to pedestrians may lead to claims. In that event, they can only sigh and ask heaven why such things should have happened to them. This kind of work is purely voluntary in nature, however, the liability they have to assume is severe and extremely heavy.

The Secretary said that it is only human to err, however, why do members of owners' corporations, who serve on a voluntary basis, have to assume criminal and civil responsibility, whereas officers of the Government's disciplined forces do not have to assume any civil or criminal liability if they make mistakes? What yardstick is this Government applying when measuring social order and social norms? This is probably due to the fact that these matters fall within the ambit of different Policy Bureaux. One of them is the Home Affairs Bureau and the other is the Security Bureau. Police officers have the greatest sway and security matters more than everything else. This situation is becoming more and more similar to that of our great Motherland, where public security and national security matters more than everything else. If this is the Government's criteria, such a yardstick and value judgement represent a criterion that the 7 million people in Hong Kong find highly unacceptable when the liability under this piece of legislation is to be determined.

I hope the Security can explain a little bit. Although it is only human to err, there must be a yardstick for determining liabilities in all legislation for mistakes made. Why is it necessary for people who undertake voluntary work in property management to face such dire and serious consequences even though they are performing a public service in response to the Government's appeal? Being a police officer is a paid occupation and the monthly salary of an officer in the rank of Superintendent of police may exceed $100,000, so why are people

with such status, in such senior positions and earning such high salaries not required to assume any civil or criminal liability even when they make mistakes? Compared with members of owners' corporations, does the Secretary find this ridiculous to the extreme? This will also make the Hong Kong public query what the Government is actually doing. The Government does not offer any assistance on building management after it has helped establish owners' corporations for buildings, just like a mother who does not take care of the children to whom she has given birth. When owners' corporations ask the Government to give advice and support, the Government does not offer anything but when there are problems, it wants the members to assume liability. However, under the present Bill drawn up by the Government, even if government officers make mistakes and other people are affected, they do not have to assume any liability in this regard. In other words, police power is supreme.

If people possessing police powers do not have to assume any liability, they are tantamount to the scoundrels in the past. Are they not like the scoundrels in the films with ancient setting, who brandish their poles and are domineering to the extreme. If they were the "sworn sons" of a certain eunuch, they could even play the tyrant in the capital. They did not have to assume any liability and they only had to sound their title and claim that they were the "sworn sons" of an eunuch or "faggots" — I mean a "sworn brother" — sorry, Chairman, I have gone a bit too far in what I said.....

**CHAIRMAN** (in Cantonese): Mr Albert CHAN, do not stray too far. Please go back to the motion.

**MR ALBERT CHAN** (in Cantonese): Chairman, this is relevant and the situations are quite similar. The senior police officers are just like people who were protected by the privileges granted by the emperor and they do not have to assume any liability. The most ridiculous of all are the royalists among the Members of the Legislative Council. If they also support the idea of not having to assume any liability, they are condoning excessive police power and it is as though we had returned to the feudal age when an emperor reigned. If the situation is like this, then the authorities must standardize all legislation, including the Building Management Ordinance, other relevant legislation and the legislation on lawyers who act as marriage celebrants, which was mentioned just now. In that case, the same should apply to Members and they do not have to

assume liability even if they make mistakes. For people who knocks someone else down while driving, they do not have to assume any liability either. Can things be like this? If things are like this, this society will become an anarchy. If this is not how society is like and the other scenario applies, then it will be a society with a privileged class.

I hope Members of The Alliance will go outside and discuss whether the rationale suggested by me is sound or not. How can things be ridiculous to such an extreme? Even though there is no need to assume criminal liability because traditionally, there is no need for civil servants to assume criminal liability, there is no reason why they do not even have to assume civil liability. I call on the Government to give us an explanation on what peculiarities there are with regard to the concept, structure, theoretical basis of this Bill and with regard to the determination of relationships among social groups, classes and civil servants in this Bill that warrant exempting the officers concerned from civil liability.

I hope the Secretary can explain this point clearly because I think other civil servants are also furious and they query why they have to assume civil liability for making mistakes if they serve in other positions but these positions can be so special that there is no need to assume any civil liability. I hope the Secretary can explain clearly. Thank you, Chairman.

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

**MR MARTIN LEE** (in Cantonese): Chairman, there is no need for Honourable Members to get so furious. Members should not force our venerable Secretary to answer this question either, asking him to explain why this is so and that is so. In fact, our wise leader has already given the answer, that is, there is a difference in affinity.

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, there is no need for Mr Albert CHAN to be so furious. First of all, I must declare that our disciplined forces, just like the Hong Kong public, are regulated by all criminal

and civil laws and they are not above the law. It is true that we have not prescribed any criminal offence in this Bill. As regards why this is not done, we have already given the reasons a number of times. It is not true that they do not have to face any punishment. We have already specified in the Code of Practice that if they make mistakes, they will be subject to the disciplinary action of the department concerned. Therefore, I hope members of the public will not describe them as the scoundrels of the past. This is not how the situation is like. I believe this is not the public's impression of the Police Force either.

**MS MARGARET NG** (in Cantonese): Chairman, I wish to draw Members' attention to clause 61, which contains many conditions on exemptions. Law-enforcement officers are granted a lot of exemptions therein but the only responsibility on which no exemption is granted has to do with entering premises without permission or interfering with other's property by law-enforcement officers. However, the exemptions for them are already granted in clause 29. Therefore, the scope of exemptions is highly adequate. In other words, it is only when the officers concerned violate this piece of legislation in spite of these exemptions that they have to assume civil liability. Chairman, if in all matters, people should assume liability for the power they hold, then even if they do not have to assume any criminal liability, still, they should assume civil liability. This is only reasonable.

**MR JAMES TO** (in Cantonese): Chairman, the comments made by the Secretary just now is very misleading. He said that at present, the officers concerned are already required to abide by existing criminal laws. This is correct. However, today, we are enacting a piece of legislation in which clause 61 exempts the officer concerned from any civil or criminal liability, provided that the conduct is carried out pursuant to his duties in compliance with the requirement made under the Ordinance and in good faith of any function under the Ordinance. Such a piece of legislation has been drawn up to grant exemptions, and furthermore, to grant exemption to them from the liability prescribed by criminal laws. The existing criminal laws mentioned by the Secretary do not provide that if the officers concerned violate any rights, they do not have to assume criminal liability. Moreover, there is no reference in them to the exemptions granted by clause 61 which we are about to deal with, that is, exemptions will be granted regardless of whether civil or criminal liability is involved. It is for this reason that we are so furious. What makes us so

furious is the fact that the authorities really put civil servants and law-enforcement officers above the law and in the drafting process, they are deliberately exempted from any liability. However, at the same time, this is not the case with other laws. For example, if an owners' corporation does not post a form, even this will constitute a criminal offence. Such is the truth of the matter.

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

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

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That new clause 54A be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Functional Constituencies:

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

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

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 28 were present, six were in favour of the motion, 21 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 24 were present, 13 were in favour of the

motion and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the motion was negatived.

**CLERK** (in Cantonese): New clause 55A Reports to relevant authorities following arrests.

**CHAIRMAN** (in Cantonese): The Secretary for Security and Ms Margaret NG have separately given notice to add new clause 55A to the Bill.

Committee will proceed to a joint debate. In accordance with the Rules of Procedure, I now first call upon the Secretary for Security to move the Second Reading of new clause 55A.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move that my new clause 55A, as set out in the paper circularized to Members, be read the Second time.

This amendment provision was drawn up after consulting the Bills Committee and the legal profession and it is another safeguard for legal professional privilege. The clause provides that where the subject of the surveillance has been arrested, the law-enforcement agency shall cause to be provided to the authorizing authority for consideration a report assessing the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the surveillance. The relevant authority shall revoke the relevant authorization if it considers that the conditions for the continuance of the relevant authorization are not met.

The authorities oppose the new clause 55A proposed by Ms Margaret NG. This amendment is based on the concept of the amendment proposed by the authorities but Ms NG proposes that it should be specified that a prescribed authorization shall cease to have effect automatically upon the arrest of the subject.

We believe that the amendment proposed by the authorities is more appropriate. In some cases, although the target person has been arrested, the

goal of the operation is still not attained. For example, the target of the relevant operation is not confined to just one person, so the entire operation should not be terminated upon the arrest of one target person. Moreover, it is also possible that the target person is arrested for another crime not related to the operation. In these circumstances, the authorizing authority may consider that there is still ground to continue with the covert surveillance. Therefore, to mandate that the operation has to be terminated on the arrest of the target person is not appropriate. The authorities believe that the appropriate arrangement should be to allow the relevant law-enforcement agency to evaluate, according to the latest conditions, the likelihood that the target person may possess information subject to legal professional privilege and report to the authorizing authority, so that it can consider whether the authorization should be revoked.

Madam Chairman, I call on Members to support new clause 55A proposed by the authorities and oppose Ms Margaret NG's amendment. Thank you, Madam Chairman.

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That Secretary for Security's new clause 55A be read the Second time.

**CHAIRMAN** (in Cantonese): I now call upon Ms Margaret NG to speak on the motion moved by the Secretary for Security as well as her own proposed new clause 55A.

**MS MARGARET NG** (in Cantonese): Chairman, indeed, members of the legal profession holds strong views on continuing with the covert interception on a person after he has been arrested, therefore, members of the legal profession have voiced their concerns. However, members of the legal profession have also pointed out that after a person has been arrested, the authorities should no longer carry out covert interception on him. There are two reasons, one of them being that the original goal of the authorities in carrying out interception is to arrest him for a certain offence and since the goal has been attained when the person is arrested, the interception should not continue any further.

Another reason is that after the arrest of this person, it is highly likely that he will make preparations for his own defence. During this time, the authorities

may hear him admit having done certain things. However, as we know, this happens without the administration of any caution, so this is not fair to him. Since so many problems are involved, we think that a more proper approach is to end all covert interception because the risks for the administration of justice is indeed too great if interception is not terminated.

Another point is that in the meetings of the Bills Committee, we queried why it was still necessary to make a report since the goal had been attained and the suspect had been arrested. Since someone has already been arrested, how can the authorities continue to carry out interception on him? At that time, the authorities pointed out one difficulty, saying that sometimes, even though they want to terminate the operation, it may not be possible to do so immediately, for example, the device has been installed or an undercover agent has been assigned, so it is not possible to end the operation immediately.

I also understand this, therefore, what I request in my amendment is not that the authorities should stop doing everything abruptly but that the law-enforcement officers in charge should take all necessary steps to stop all actions of interception and wiretapping immediately. Of course, I am not asking the authorities to accomplish everything in one stroke. However, at any rate, it is necessary to start taking steps to terminate all actions.

What the Secretary means is that sometimes, the goal of the operation has not yet attained because the people on which surveillance is carried out are not confined to that person alone and other people may also be involved. The solution is very simple. If another target person is involved, the authorities may have already obtained an authorization. If no authorization has been obtained, the authorities are probably carrying out interception on a third party through the arrested person. If this is the case, the authorities should apply for authorization to carry out interception on this third party. The authorities can continue to carry out interception all the same, however, if this third party has any communication with the arrested person, of course, the authorities must pay attention to the other issues involved.

For the above reasons, we think that there is really no need to allow the authorities to continue with the interception and carry out further evaluation only when a report is available. Rather, the operation should be terminated upon the arrest of the person concerned and another application for the purpose of carrying out another operation should be made when necessary. Thank you, Chairman.

**CHAIRMAN** (in Cantonese): Members may now debate the motion on the Second Reading of new clause 55A moved by the Secretary for Security as well as the new clause 55A proposed by Ms Margaret NG.

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

**MR JAMES TO** (in Cantonese): Chairman, concerning the preparation of reports, I raised the following viewpoint in a meeting of the Bills Committee then and I hope the Secretary can also take note of the following situation.

This issue has to do not just with referring the matter to the authorities concerned for action because it will take some time for the matter to be referred to the authorities concerned after the arrest of the person. I hope the Secretary can state the following clearly in the internal guidelines. If the authorities continue to follow up the case after the arrest of the person concerned, the authorities will definitely pay close attention to the places that this person visits. If he goes to a lawyer's office, of course, the authorities cannot assume right from the beginning that the lawyer is also a criminal. It cannot be like this — unless the authorities have very strong evidence, otherwise, they should end the operation because that person has been arrested and it is possible that the authorities will lay charges against him. Of course, he will seek legal advice and this is only normal. Moreover, it is also true that he goes to a lawyer's office. However, the authorities do not want to stop there and even say that they want to continue to carry out the interception. I believe that in actual deployment, the Secretary has to explain this matter clearly and in detail to his colleagues responsible for tracking and surveillance. Otherwise, before the case is handed over to the authorities concerned for consideration, they may have already obtained a lot of information relating to the defence to be put up by that person.

Ms Miriam LAU also said earlier that some time ago, when the Secretary replied to queries concerning the legal professional privilege, that is, the privilege of the public in seeking confidential advice from lawyers — I should put it this way as it may be clearer in this way — it is said that a paper said another team would be responsible. However, I wish he will understand that although the Government says that another team will be responsible, since these people also collect this sort of criminal intelligence from time to time, if this

person discloses some information on crimes related to himself when he is seeking professional legal advice and when this person is still in the process of seeking such advice, the relevant "paparazzi" (that is, the Criminal Intelligence Bureau) will also be very interested in continuing to listen to this sort of things. However, it does not mean that they will hand the information over to Miscellaneous Enquiries Sub-units after they have heard such information. This does not follow.

Therefore, specifically, after the Criminal Intelligence Bureau has obtained such information, how will it distinguish this information from the rest? It should not even check the information against its own files and then embark on the investigation of another case. I believe that if they do so, this will not be appropriate.

If the authorities violate legal professional privilege, that is, the right of the public to seek confidential advice, regarding the information obtained under such circumstances, it should be dealt with in the same way as an application for emergency authorization was made to the authorities but it is rejected and approval cannot be obtained. In other words everything should be destroyed. I hope the Secretary will state this more clearly in the internal arrangements.

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

(No Member indicated a wish to speak)

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

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

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

**SECRETARY FOR SECURITY** (in Cantonese): We thank Mr James TO for his views and we will consider them.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the new clause 55A moved by the Secretary for Security be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

**CHAIRMAN** (in Cantonese): Will Members please check their votes. Members are now very clear about the question put, are they not? *(Laughter)* Voting shall now stop and the result will be displayed.

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the motion.

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the motion.

Mr CHIM Pui-chung abstained.

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

THE CHAIRMAN announced that there were 51 Members present, 31 were in favour of the motion, 18 against it and one abstained. 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 Second Reading motion moved by the Secretary for Security has been passed, Ms Margaret NG may not move the Second Reading of new clause 55A, which is inconsistent with the decision already taken.

**CLERK** (in Cantonese): New clause 55A.

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move that new clause 55A be added to the Bill.

*Proposed addition*

**New clause 55A (see Annex)**

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 55A be added to the Bill.

**CHAIRMAN** (in Cantonese): I now put the question to you as stated. 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): New clause 58A Information subject to legal professional privilege to remain privileged.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move that new clause 58A be read the Second time.

We have explained in past meetings of the Bills Committee that the Bill does not override legal professional privilege. Therefore, information subject to legal professional privilege obtained in the course of a duly authorized covert operation is to remain privileged. For the avoidance of doubt, the authorities have proposed to add the clause providing that any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.

Madam Chairman, I hope Members will pass this amendment. Thank you, Madam Chairman.

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 58A be read the Second time.

**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 as stated. 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): New clause 58A.

**SECRETARY FOR SECURITY** (in Cantonese): Chairman, I move that new clause 58A be added to the Bill.

*Proposed addition*

**New clause 58A (see Annex)**

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 58A be added to the Bill.

**CHAIRMAN** (in Cantonese): I now put the question to you as stated. 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): New clause 66 Expiry.

**MS MARGARET NG** (in Cantonese): Chairman, I am sorry, can I have one minute? This is because the leader of our party was speaking to me and I could not concentrate. There may be a problem……

**CHAIRMAN** (in Cantonese): Ms Margaret NG, we are actually dealing with the new clause 66, that is, the so-called "sunset clause".

**MS MARGARET NG** (in Cantonese): Chairman, I know, but I……

**CHAIRMAN** (in Cantonese): Ms Margaret NG, I think you cannot listen to what your party leader has to say now. You have to get on with the work of the Council.

**MS MARGARET NG** (in Cantonese): Chairman, I am sorry. I am really very sorry.

Chairman, I move that my new clause 66 be read the Second time. Chairman, this is the "sunset clause" that we have discussed for a long time. Of course, in our legal system, we will not use such terms, therefore, this provision is called an "expiry clause".

Chairman, perhaps allow me to explain a little first. What does a "sunset clause" mean? In fact, a "sunset clause" means that certain provisions will

expire by a certain time. Chairman, it is now 7.15 in the evening and it is probably also the time of sunset now. To discuss the "sunset clause" at this time seems to take on a special meaning.

Having discussed so many provisions for so many days, why do we want to propose a "sunset clause" today? If this "sunset clause" is passed, it will not have the effect of making the entire Bill and all the provisions there invalid. Only some of the provisions will become invalid and those are the provisions relating to authorization. That means that after the expiry date, it will not be possible to obtain any new authorization. However, even though the power of the Commissioner to protect members of the public is very limited, it will continue to be effective.

Chairman, the time of sunset I propose is 8 August 2008 and Members will probably all think that this is a very propitious time to hold a sunset ceremony at that time. Before the sunset, what kind of work should we do? In the provision I propose, the Commissioner is to carry out a review before the sunset, not just on the information obtained up to that time, but most importantly, he is to carry out a full public consultation to enable members of the public in various sectors to express their opinions on whether the protection given to them is adequate, and consider whether they find the balance struck between the protection on the freedom and privacy of communications and the overall public security and order in Hong Kong to be satisfactory.

Chairman, the Basic Law was drawn up for the general public and the residents of Hong Kong. If the rights given to them are restricted in any way, they should have the right to speak up. I have pointed out in subclause (3) of the provision that the Commissioner may, after gathering the opinions and conducting reviews, refer his findings in the reviews and facts, and make recommendations to the Chief Executive. The Chief Executive may propose an amendment according to the recommendations and consultation findings to amend the provision that has been passed or declare that the entire piece of legislation be redrafted. So the criteria are very flexible.

If by then, after we have carried out a great deal of consultation, we consider the legislation to be generally speaking practicable and it is only necessary to include the amendments proposed by Ms Margaret NG back in that year to make it completely satisfactory (although I myself do not find them quite

satisfactory), or consider that it will be quite satisfactory if Mr James TO's proposals are included. This will also be fine. However, it is even more likely that the public wants a clearer and improved piece of legislation which can protect their rights fully. It will also be possible to make amendments during that period of time.

Chairman, why do I set the time at 2008? This is because the term of office for Members will expire in 2008. Of course, our term of office will expire before 8 August 2008, so why did I set the time down on this particular date? Chairman, this is because, as the people who see the passage of this piece of legislation today, we are very concerned about it. We have done a lot of work on this Bill and we are the people who are the most familiar with this Bill.

Chairman, I believe that during the debate in the past few days, you might felt very much at ease because the Legislative Council did not give the public an impression that Members who proposed their amendments did not know what they were talking about. Therefore, since Members have devoted such a lot of time, when it comes to carrying out a review of this provision, they should be the people who are most well-acquainted with it. In that event, people who have done a lot of work now will not see their efforts wasted. Therefore, this is the best arrangement.

Chairman, in proposing this provision, I am making a final appeal. I am not proposing it in anger, rather, I hope that a peaceful solution can be identified so that on the one hand, the problem of a legal vacuum can be solved immediately; on the other hand, members of the public would not have to wait forever, not knowing when the authorities will find the time to amend a piece of legislation that we believe is fraught with problems. I hope Members will all support it.

Chairman, I have indicated before and I now wish to have it put on record that we want to propose a "sunset clause", mainly because this piece of legislation has a bearing on the many fundamental rights of the public. But unfortunately, we did not consult the public formally.

Chairman, in the past 10 years, we did not consult the public to ask them how they would want this piece of legislation to be like. The Legal Reform Commission (LRC) have indeed done a lot of work. However, the first report of the LRC is very different from the last one and its last report is also very

different from the present Bill. We have looked at all the provisions. Even the Government itself has made a lot of changes. Throughout the process, no White Bill was published, nor was any paper published to consult the public formally. We cannot possibly give up the rights of the public under the Basic Law on their behalf.

Chairman, in this Bill, we can see that not only is Article 30 relating to the freedom and privacy of communication is involved, Article 35 concerning the freedom to confidential legal advice, Article 29 on the freedom of one's premises from being violated, as well as the freedom of privacy. In the event of violation, Article 39 which is about a lot of our freedoms under human rights covenants, is also involved. Therefore, this is a very fundamental matter. However, after deliberating this piece of legislation for several days, we can see that there are a lot of major problems in it.

Chairman, I will only talk about these in a general way. This can be divided into four phases. Firstly, concerning the threshold, what kind of threshold should it be or what kind of threshold should be overstepped before law-enforcement agencies can carry out covert surveillance or the interception of communications? We can see that matters relating to serious crime and public security are full of uncertainties and it seems that the scope is boundless. To set it at three years will in fact give law-enforcement agencies an option.

The second thing is the scope of regulation. Since the definitions are very narrow, we can see from the definition on covert surveillance, and members of the legal profession have also voiced their views to the mass media that since the scope is so narrow, it is doubtful whether the requirements of Article 30 of the Basic Law can be met in practice. On the mechanism for authorization, although it is necessary to obtain authorization from panel Judges or internally, there are a lot of doubtful spots and also a lot of room for manoeuvre. Therefore, can such a complaints mechanism ensure that the powers will not be abused? We have raised a lot of queries. Not only can this mechanism not put people's minds at ease, but Judges also have to use their reputation to back up a mechanism that is problematic.

Thirdly, in the unlikely event that there are problems with this mechanism, what complaints channels are available to members of the public? Do they have full right to lodge complaints and seek compensation? It is also very limited.

Fourthly, in respect of the monitoring carried out by the Commissioner and the ultimate monitoring of the entire system, there are many areas in which the Commissioner cannot exercise his power and there are also a lot of restrictions.

Chairman, we have raised a lot of queries on these four areas by means of amendments. However, the Secretary cannot provide a satisfactory answer to any of these queries. In fact, it can be said that the Secretary has practically not provided any genuine answer. After some reasonable and important questions were raised, the Secretary could not provide a satisfactory answer. As a result, a lot of doubts still linger. Therefore, there are a lot of doubts in many important areas and this makes people feel very uneasy.

Therefore, Chairman, in view of these problems, we can see that if privacy cannot be stringently protected, this will have a great impact on society. We have already mentioned at the resumption of the Second Reading debate of the Bill that since Hong Kong is a very open international commercial city, under the "one country, two systems" principle, we enjoy a high degree of freedom to information and this kind of freedom is protected. The executive authorities cannot exercise their powers at will. If this piece of legislation on secret surveillance is passed, it will have a major impact on the freedom of this city.

What we take exception with the most includes the impact that the operation together with other mechanisms will have on the Judiciary. Chairman, when it comes to this matter, we really find it difficult to keep our mind calm. We cannot remain detached and serene at the mention of this issue and we cannot help feeling agitated. Therefore, at this stage, I do not intend to repeat what I have already pointed out. I can only say that if we want to make an evaluation, on the one hand, we have a very dubious mechanism, while on the other hand, we will have to pay what is probably a heavy price. If we weigh it in this way, in fact, the longer such a system operates, the greater the risk we will be exposed to.

Therefore, the only feasible course of action is to put in place a sunset mechanism as we pass this Bill, that is, a mechanism that sets an expiry date. Before the expiry, we can carry out genuine reviews and public consultations and genuinely propose amendments that we find necessary or draw up a piece of legislation that is new and more satisfactory.

Therefore, Chairman, I move this amendment and make a final appeal, in the hope of securing Members' support. 8 August 2008 will be a day of beautiful sunset. Thank you, Chairman.

**CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That new clause 66 be read the Second time. It is now exactly 7.30 pm. I now suspend the meeting and will meet Members in the Dining Hall.

7.30 pm

Meeting suspended.

8.03 pm

Committee then resumed.

**CHAIRMAN** (in Cantonese): A quorum is not present. Will the Clerk please ring the bell to summon Members back to the Chamber?

(After the summoning bell had been rung, a number of Members returned to the Chamber)

**CHAIRMAN** (in Cantonese): A quorum is now present. Mr James TO, please speak.

**MR JAMES TO** (in Cantonese): Chairman, we are now debating the "sunset clause", or what is called the expiry clause. Chairman, when the Bill was read for the Second time, the Democratic Party voted in favour of it. Why? Our rationale in voting in its favour was that we believed that as there were hundreds of amendments, be it the amendments proposed by me or Ms Margaret NG, they could all improve the law — I dare not say the improvements would be significant but at least, some of the amendments can improve the law, including

this "sunset clause", to which we attach a great deal of importance. If the important amendments can be passed, as a compromise, we are willing to enact a piece of temporary legislation. Although this Bill has not been crafted to perfection, we are willing to lend it our support. It is with this principle in mind that we voted in support of the Second Reading of the Bill. However, the position of the Democratic Party is that the "sunset clause" is our last stand, our last line of defence in view of the prospect that all our amendments will be annihilated.

I work in the legal profession and am also a Member of the Legislative Council. I know very well that in law and under the rule of law, one word or one line can have great bearing on the interests of a great number of people, on tyranny and benevolence, on abuses of the law and wronging the innocent. I cannot help but exercise extreme caution and take every step carefully. I will neither allow criminals to harm people nor the Government to abuse power. This not only requires the exercise of great care on the use of words and phrases in law but also my loyalty to and conscience regarding the rule of law.

Chairman, in these few days, in our debate, I have pointed out that there are a lot of loopholes and doubts in this Bill. However, unfortunately, the amendments I moved earlier on were all negatived and many of the important amendments Ms Margaret NG moved were also negatived. Having deliberated the Bill up to now, I can only draw the conclusion that since there are these following problems with this Bill, we cannot support it: it does not provide for independent vetting and approval by the Court; and legally, interception can be carried out by invoking Article 23 of the Basic Law or on economic grounds; the Commissioner does not have sufficient power of investigation; the public does not have sufficient information to know about the actual state of affairs with regard to surveillance or interceptions, in particular, whether surveillance on political grounds has been carried out, whether the rules of fair trial have been fundamentally altered and whether the possibility of exposing in Court the abuse of power and bugging carried out by the Government has been completely excluded.

These issues are by no means much ado about nothing, as the Government claimed in an attempt to tarnish us, rather, it is the concern shown by us, and me in particular, as a Member who has been highly concerned about the interception of communications and covert surveillance for more than a decade, as someone who has considerable understanding of security matters and disciplined forces

and as the person who drafted the relevant legislation in 1997. My concern and emotions are more intense than those experienced by many Honourable colleagues and even officials here. Therefore, I long for a good piece of legislation and I yearn to see an answer can be found for all the questions, the loopholes can be plugged, and the most reasonable responses and remedies can be put forward.

However, in these few days, I am really disappointed by the Secretary and the Security Bureau as well as the Department of Justice. I am feeling ashamed of the unreasonableness and ineptitude of the bureaucratic system. This is a heart-breaking debate, a debate with ostriches and a debate with a stony wall. In this hollow and spacious hall of the Legislative Council, every bit of our conscience and sincere concern is like the setting sun sunk into the vast ocean, engulfed by a black hole of eerie silence. Our cries are in vain and there is no response from the bureaucrats.

Chairman, I can only hope that the public can be awakened to the truth. In the past few days, some members of the public have sent some e-mails and letters to us. I believe some concerned members of the public are still watching the event near their radios and televisions, by bits and pieces they note and hear the sincere exhortations we make. These are the voices for the rule of law and human rights, the powerful last lines of defence in fighting crime as well as the very foundation of Hong Kong's welfare. I know that the public can hear and see us and we will persevere. We will not be silent and we will go on fighting though we are defeated every time.

I know that the "sunset clause" will probably also be doomed. Although the rule of law has been eroded, the people have not lost hope because judicial review can still be sought, Members of the democratic camp are still here and the public is still vigilant.

Chairman, today, in moving my amendment, it is hoped that a report can be submitted to this Council after more than two years' time (that is, 27 months), so that Members of this Council can make a decision after reading the report. If they consider that there are serious problems, they can revoke this piece of legislation. The bottomline of this amendment is even lower and humbler than that moved by Ms Margaret NG. If even such a humble amendment is doomed, this is further proof that our Government is domineering and high-handed. However, we will not back down. We will return and fight on bravely.

**MR RONNY TONG** (in Cantonese): Chairman, we have been expressing our views for four days — I do not call it a debate because regrettably, we have had no debate in this Chamber for these four days. After expressing our views for four days, I hope that we have already made our views on this piece of legislation very clear.

Not only does this piece of legislation impact on the rule of law in Hong Kong, but it also impacts on the legal system in Hong Kong. This piece of legislation is full of things that should not be found in any enactment of law on examination, we found that it has violated the fundamental principles in enacting legislation, that is, nearly all the definitions are neither fish nor fowl and they are also illogical. It turns out that the interception of communications has excluded most methods of modern communication and an interception of e-mails only refers to any that lasts 0.1 second or 1 second.

We also find some provisions that run counter to social justice. There is no need to give any reason for the decision to grant an authorization; members of the public have neither the right to lodge any complaint nor do they have the right to seek redress through the legal process; and the privacy of the public is not worth a penny and the rights under the Basic Law are trampled upon. We can find some illogical provisions, for example, the products obtained illegally through wiretapping or covert surveillance are not protected, whereas products obtained legally shall be protected.

Chairman, in the past four days, we could see that several hundred amendments which we considered to be rational and logical were negatived one by one. Amendments, ranging from major ones designed to protect the rule of law and the legal system in Hong Kong to minor ones involving problems in English grammar, were all negatived. On some of them, the Secretary even said that he would go back and consider them and it is obvious that he considered what we said reasonable, however, in the end, they were also negatived.

Today, the feeling is that sheer power is having its way and truth is put to shame. From the attitude of the SAR Government, we can see that its verbal promise to conduct a review after several years is just worthless empty talk. What we want is down-to-earth promise set down in writing, so that this piece of legislation, which is unfortunately full of mistakes and oversights, will be made satisfactory and perfect one day.

Mr James TO is right in saying that at this moment in time, we cannot possibly expect our amendments to be passed. Here, I want to salute Mr James TO and Ms Margaret NG.

I believe we should not be disheartened. We should be more determined and we want to change this system, this uncivilized system. We must establish a responsible government and a rational legislature. One day, we will be able to return to this legislature, improve on this piece of uncivilized legislation, so that all the amendments that have been negatived can see the light of the day again. Only in this way will we be able to live up to the true meaning of the "sunset clause" we demand today.

**MR CHEUNG MAN-KWONG** (in Cantonese): Chairman, I am speaking for the last time and it is essential that I speak.

Not only is today's "sunset clause" in no way romantic, but it also exposes the SAR Government's pride and prejudice, its red tape and dereliction of duties, the degeneration and pathetic nature of the Legislative Council, as well as the difficulties and regrets of the democratic camp.

Regarding these four days of sleepless and endless debate, my heartfelt thanks go to Ms Margaret NG and Mr James TO. They fought every inch of the ground using reason as their arms, so that the weak vanquished the strong. Although the amendments, including those on the elegant English grammar proposed by Ms Margaret NG, were all annihilated, the rhetoric and righteousness of the Members command my great respect. I am not a Christian, however, the Book of Amos in the Bible says, "But let judgement run down as waters, and righteousness as a mighty stream.". This has been manifested in the amendments proposed by Ms Margaret NG and Mr James TO and in their arguments.

However, public justice will never vanish. It will take root in the hearts of the public. In these few days, I have been reading the letters that Mr James TO received from members of the public as well as e-mails from friends. Although each of them may consist of only a few words or lines, all of them are deeply touching. This is what is called "faith can move mountains". I know that the perseverance and inspiring efforts of Ms Margaret NG, Mr James TO and many of our Honourable colleagues will definitely not be wasted. We should be rightly proud of them. Now, this four-day debate is coming to the

final and the most attention-grabbing "sunset clause". Ms Margaret NG proposes that if amendments are not made to some of the provisions in this piece of legislation in two years, they will become invalid on the expiry date. Mr James TO proposes that the Government is to submit a report in 27 months and if the Legislative Council passes a motion not to accept the report despite a division, this piece of legislation will also become invalid.

The "sunset clause" proposals of Ms Margaret NG and Mr James TO are, frankly speaking, the last attempt to do something out of good will, having taken into account the need for a compromise between the prospect of a legal vacuum and making improvements to the law. In this row lasting 10 years involving the Interception of Communications and Surveillance Bill, the Government has made one mistake after another. For a long time, the Government did not ratify the Bill proposed by Mr James TO before the reunification, it was not willing to enact legislation on the interception of communications and surveillance and did not stop violating the Basic Law and the covenants on human rights — these disgraceful "three nots" can be attributed to the failure of Regina IP and Ambrose LEE to perform their duties and the connivance of the two Chief Executives, TUNG Chee-hwa and Donald TSANG. The Executive Order issued by Donald TSANG even made the mistake of being unconstitutional, so in the end, the Court had to give the Government a way out by setting 8 August as the deadline in passing an Interception of Communications and Surveillance Bill that would be constitutional. This is the reason for convening a meeting of the Legislative Council during the summer recess in a departure from convention and holding a record-breaking marathon debate for four consecutive days.

However, the debate has exposed even more problems and there is no need for me to repeat what Ms Margaret NG and Mr James TO have said. Members of the democratic camp have raised a lot of powerful and irrefutable queries, however, it is as though the Government were a bureaucratic black hole and to the queries put by the democratic camp, it did not give any reply, put up any defence or offer any explanation. It only seeks to conclude the matter quickly and pass a piece of legislation in great haste, one that is full of doubts, loopholes and risks of being challenged in judicial reviews. If the legislation had to be drawn up because something unconstitutional was done, would this piece of legislation be struck down because something unconstitutional is done? If the deadline of 8 August becomes a trap that leads to the doing of something unconstitutional, will more haste lead to less speed? Will the destruction of the Basic Law be something of one's own making? How possibly can the Government not think twice?

Be it the so-called "sunset clause" proposed by Ms Margaret NG or by Mr James TO, both of these proposals are designed to safeguard the rule of law and improve the law. Members must think about it, all Members must think about it! Why is it necessary to brazen it out for the sake of a piece of legislation to which hundreds of amendments are made, a piece of legislation that requires frequent suspensions of the meeting held to ponder on it, a piece of legislation that has not been thoroughly debated and expounded upon by those for and against it, a piece of legislation which even the Government has undertaken to conduct a review after four years? Why is it necessary to throw out all the well-meaning amendments made by Members? Why is it necessary to let the "sunset clauses" proposed by Members sink into the black hole of bureaucracy? Why should we give up a golden opportunity to mend the loopholes in the legislation? Why is it necessary for the Government to insist on its domineering ways and obstinacy in order to save face? I call on the Government to think twice!

With these remarks, Chairman, I support the amendment.

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

**MR CHIM PUI-CHUNG** (in Cantonese): Chairman, concerning clause 66, since I am worried that I will not have the opportunity to speak when the Bill is read the Third time, therefore, I, as……the part concerning 27 months in clause 66 can by no means be passed. Even though it cannot be passed, I still hope very much that a review can be carried out. Although the Government undertakes that a review will be carried out after three years, is it not possible to carry out a review after two years? Why is it necessary to be so high-handed and insist on doing so only after three years? It is even possible to carry out a review after one year. A review must be carried out at any time if there is any mistake.

Chairman, the reason that I speak is to give an explanation on behalf of the many Members here who have abstained from voting in this debate. Personally, I believe this Bill is just like the "wicked legislation on securities" which our sector was very concerned about. That piece of legislation was passed many years ago and members of our constituency were given unfair treatment. I believe this "sunset clause" will not be passed later on.

Chairman, if you have any views, you can criticize me and I will not mind. You can remind me a little. It is true that I am shifting to another line of thought but my comments are also relevant to this Bill. Therefore, concerning this Bill, originally, I want to remind the Government that when this Bill was introduced to the Legislative Council for scrutiny and during the trial in the Court of Final Appeal, the authority of the Hong Kong Government was eroded. We understand that the attitude of the Government is to totally disregard the Legislative Council, however, we are required to see this Bill through.

Of course, I want to remind the authorities that I have been present in these four days and I wish to take this opportunity to express my admiration for Members whose attendance rate is higher than mine. However, if the deliberation on this Bill cannot be concluded today, then sorry, I will be on leave tomorrow.

**CHAIRMAN** (in Cantonese): Mr CHIM Pui-chung, every Member should speak to the question.

**MR CHIM PUI-CHUNG** (in Cantonese): I am, what I often mention……

**CHAIRMAN** (in Cantonese): Do not stray too far.

**MR CHIM PUI-CHUNG** (in Cantonese): ……is the expiry. Therefore, this expiry idea is where the crux of this Bill lies. What I want to talk about most of all today is the criticism that a lot of people have levelled at me, saying that one either supports or opposes the legislation and there is no reason for one to abstain from voting, that this is also the case regarding this amendment and I should either vote for or against it. In fact, at the bottom of my heart, I oppose any piece of legislation, however, I do not want others to regard me as one of the pan-democratic camp, *(laughter)* therefore, I choose to abstain from voting, including on this amendment concerning expiry. Chairman, I will not make things difficult for you.

**MR FREDERICK FUNG** (in Cantonese): Chairman, I have seldom spoken in the entire debate until this minute except once in the resumption of debate on

Second Reading. But I have actually given my support to all the amendments moved by Mr James TO and Ms Margaret NG.

The entire Bill has shown me that the HKSAR Government has ignored one of the conditions of the rule of law, that is, the Government shall abide by law. This is the most important legacy the British rule or the colonial government has left for Hong Kong that no one, not even the Central Government, can deny.

Until now the Chinese President has shown his support for the SAR Government to govern Hong Kong by "two laws", that is, the rule by law and the rule of law. The whole system has been established for over 150 years under the British rule and has remained here today. I believe no one will deny that the system is worth our efforts to continue to pass it on and have it upheld.

However, from the time this Bill was submitted to the Legislative Council to the debate here today, I have witnessed two breaches committed by the Government. First, the issue was actually raised by Members of this Council 10 years ago. However, the Government turned a deaf ear to them despite their constant warning. Second, the Judge also ruled that this was in contravention of the Basic Law. On the first occasion, the Government thought that the legal vacuum could be filled by the Executive Order issued by the Chief Executive. However, it was made aware that this did not work in the second trial. Subsequently, this Bill was drafted in haste. I do not understand why the Government is so insistent on not wanting to have it done; not getting it done and not willing to have it done.

The conduct of the authorities has told me that they do not want to have it done. Ten years have passed. If they had wanted to have it done, why was there no action whatsoever taken during the past 10 years? This is really a disappointment to me because apart from a few Directors of Bureaux, how many SAR government officials at present are not those transferred from the government under the British rule, the Chief Executive included? The whole Government — the majority of it — comes from the team during the days of the British rule. Theoretically speaking, their thinking, their feelings, particularly their feelings towards the rule of law should be stronger than mine. However, in this regard, I cannot see or I absolutely cannot sense that officials holding office from the colonial years until now cherish the rule of law and the rule by law handed down over a hundred years ago.

The second problem is the formulation of the legislation in great haste, that is, within half a year. We are also aware that a legal vacuum will be created after 8 August if there is no enactment of legislation. This is also our concern. We do not wish to see the appearance of a legal vacuum in Hong Kong either. Neither do we wish to see the Government fail to use this power when it is essential for the investigation of crime or the handling of major issues due to the presence of this legal vacuum. It is also my wish that the Government can fill this legal vacuum. It is only half a year from the time the legislation was drafted, under deliberation and submitted to the Legislative Council. This is certainly done in great haste. Due to such haste, there must be loopholes. I believe Members must be aware of such loopholes. Perhaps Members know such loopholes are inevitable too. In the past, it took us a lot of time — one year, two years, three years or even three to five years to discuss legislation with far fewer provisions. However, this Bill has to be completed from the beginning to the end within half a year. And it has to be perfect in our eyes. I do not believe this is possible at all.

Therefore, I think even the presence of loopholes does not matter. Most importantly, we agree that loopholes do exist and need to be rectified. In the case where we agree to have the loopholes rectified, I think there are two possible channels. First, the Government accepts amendments proposed by Honourable colleagues when the Bill is scrutinized by the Bills Committee. Second, amendments are proposed in the Legislative Council Meeting. Two of our Honourable colleagues have proposed nearly 200 amendments. I do not believe all of these nearly 200 amendments are so "outrageously" wrong that Members consider not even one of them is right. Anyway, the amendments have all been opposed, opposed and all of them have been opposed. Are these two Honourable colleagues idiots? Have they just talked nonsense and proposed amendments offhandedly? Have they really deserved a deaf ear? Regarding the second point, that is, to legislate in such a hasty and urgent manner, and to demand all the provisions be passed and to turn a deaf ear to other people's comments, I really find it unacceptable.

The third problem is that in the past, it would take generally more time for a piece of legislation to be processed, including the issuance of a White Bill to be followed by a Blue Bill, and then the submission to the Legislative Council. In the process, there is a stage at which the public can hold discussions and put forward their submissions. If it is still not to their satisfaction, there is a stage at which petitions and demonstrations to government departments can be

organized. However, in this case, it is likely that the Bill will be passed today or tomorrow against the backdrop that the people do not even understand the direct impacts on them, the rights they are entitled and the rights that are damaged by this Bill. The third problem is that in the whole legislative process in the past, great importance was attached to public opinions but we have failed to do so this time. Do we just let the failure go? Do we process the legislation and ignore the failure as if nothing happens?

I consider the present amendment to clause 66 specifying "the ceasing of effect upon expiry" can exactly strike a balance. Given 8 August is what I would call the "time of death", but a lot of problems, in our view, have remained unsolved or fallen into the grey area, or we find some issues wrong but not the authorities, the public need time to sort them out and voice their opinions. How can a balance be struck between these two situations? If a deferral is impossible, "the ceasing of effect upon expiry" is a very effective means. The Bill will be passed first, and then the process I have just mentioned will be made up for in the subsequent two years so as to perfect the Bill that is likely to get passed either today or tomorrow.

I do not know what is in the mind of the Government. However, this is exactly a win-win option in which both the political and legal requirements can be met. Therefore, I think these two amendments, irrespective of whether they are moved by Mr James TO or Ms Margaret NG, are worth the consideration of the Government and my Honourable colleagues.

Lastly, in the absence of a political system in Hong Kong, I think the rule by law, for the time being, remains to be quite an integrated system that is cherished by the people of Hong Kong and even the Central Government. In fact, no matter how Hong Kong will develop in the future, the rule by law will set a significant example to Hong Kong or the Mainland. I hope this example will not be tarnished by this incident. Chairman, I support the amendments.

**DR FERNANDO CHEUNG** (in Cantonese): Chairman, this is the first time, and maybe the only time, I speak in this four-day debate. I hope the Chairman will give me the greatest allowance.

Chairman, the proposal of the "sunset clause", in my view, is actually too humble. If full attention is paid to the debate of these four days, we can clearly

see that this Bill is a piece of draconian legislation. If this Bill is to be passed, a lot of the basic rights of the public will be damaged or lost. It seems that the spirit behind this Bill aims to enable the Administration to deal with criminals and terrorists. However, it is a great pity that after the passage of the Bill, its target will cover the whole community of Hong Kong. This has reflected the presumption and mentality behind the governance by legal means of the present-day Government. This has also reflected the difference in the governing philosophy or rationale between a modern society and a totalitarian society. It is a pity that we are now witnessing a government-led step-by-step move of our governing philosophy and rationale towards totalitarianism instead of greater democracy and openness.

The proposal of the "sunset clause" is far too humble because if the Bill itself is unreasonable and unable to protect the basic rights of the people, it should not be passed in the first place. We are now so humble that we allow the Bill to be passed first and merely request a review to be conducted of it two years later. This is a very humble request indeed.

I read today an article written by Mr LO Kin-hei, a member of my profession, who is now teaching in the Department of Social Work and Social Administration of the University of Hong Kong. This well-written article is titled in Chinese "Alas! Legislative Council", in which more than a dozen questions are raised. I would like to take this opportunity to share them with my Honourable colleagues. There are only over a dozen simple questions:

"1. Why should the Legislative Council now take up the responsibility of the Government when the latter has refused during the past some 10 years to sign the relevant Bill for its implementation?

2. Why has Mr LEUNG Kwok-hung eventually been labelled as a 'trouble-maker' by the public when he was ruled the winner in his application for judicial review in either the District Court, the Court of Appeal or the Court of Final Appeal?

3. Why is it not necessary for the Chief Executive to take up any constitutional or political responsibility after he acted unconstitutionally to issue an Executive Order? Why did he not have to offer any apology or explanation?

4. Why is the Government shameless enough to press for the passage of this Bill when the Legislative Council has only got five months for its scrutiny as a result of the unconstitutional conduct of the Government?

5. Why is it that after the judicial review aimed at the protection of human rights has won, the Government has run counter to the judgement and formulated a Bill that gives law-enforcement officers unbridled power?

6. Why has the Government only focused on 'administrative convenience' and neglected the precision of the legal provisions?

7. Why have Ms Margaret NG, Mr James TO and other Members been criticized as 'arguing for the sake of argument' and the critic being Mr James TIEN, the Chairman of the dignified Liberal Party when they have taken great pains to study the Bill in detail, to propose amendments, to raise questions and to toil in the Chamber for the purpose of perfecting the legislation?

8. Why did the majority of Members who opposed the amendments moved by the pan-democratic camp fail to bring up their reasons for opposition?

9. Why did some of the Members stay away from the Chamber in the course of the entire debate but go back immediately on hearing the bell and cast a sacred vote without hesitation?

10. Why has the Government again shifted the responsibility of failing to legislate on schedule to Members of the Legislative Council, particularly those who did their duties to raise questions based on their reasonable queries about the Bill? And should it not be the responsibility of the Government in its delaying the enactment of the legislation? And should it not be the responsibility of the Government in acting unconstitutionally to promulgate an Executive Order instead of enacting the legislation?

11. Why has the deadline for the examination of bills by the Legislative Council not been set by the Council itself but by the executive authorities in a society like Hong Kong where the concept of 'division of power' applies?

12. Why have some of the Legislative Council Members taken no notice of good or bad and kept giving their support to the SAR Government that pursues

strong governance in a society like Hong Kong where the concept of 'division of power' applies?

13. Why have the amendments moved by Secretary Ambrose LEE been passed without hiccups despite the fact that he has been rendered speechless under questioning?

14. Why have Members of the Legislative Council, who are representatives of public opinion, enjoyed a more inferior status than that of the officials who are representatives of the Government? Why does the passage of bills and amendments introduced by the Government only require a simple majority vote of Members while the passage of those introduced by Members require a majority vote of each of the two groups of Members returned by functional constituencies and those returned by geographical constituencies through direct elections?

15. Why did Mr WONG Yan-lung, Secretary for Justice, sit in a trance and remain silent when the executive authorities rode roughshod over the judicial authorities and placed the judicial authorities in a position that undermined the rule of law? Was it not his declaration to uphold judicial independence and the rule of law when he first assumed office?

16. Why has the Government always given us verbal guarantees and promises but refused to put them down in black and white in the provisions?

17. Why has the enactment of legislation depended on 'trust'? Is 'the rule of law' itself not founded on the mistrust of 'the rule by man' of the government?"

These are 17 very good questions. I cannot but be proud of this member of my profession. He has got a great insight. I went home after twelve the night before last and had a talk with my daughter. She is eleven this year and is going to a secondary school this coming September. I tried to explain to her why I was home so late. I told her that we were examining a very important piece of legislation. Although I was not an expert in the legal field, I knew this Bill would have great impacts on the public once it was to be passed. She asked me what the impacts were. I said this legislation would allow the Government to eavesdrop and to peep, and even to grab her things to read. She asked how

the Government could dare to do this. My daughter said this was unreasonable. Why did the Government do this? I explained to her it was necessary for the Government to take such actions sometimes because there were bad guys and terrorists doing evil things and the Government really needed to listen to their conversations and look at their belongings secretly to maintain public order. And this Bill aimed to impose some restrictions on the Government in this respect so that the Government would not be given limitless authority and the basic rights of the general public would not be infringed upon. But I told her it was a great pity that not even one of the hundreds of amendments moved under the great efforts of Members of the pan-democratic camp in the hope of perfecting the Bill had been passed. After listening to this, she made a simple conclusion, "Wow! The Government should not see itself as the greatest; and the Government should not see itself as a king!" A conclusion was then reached for our conversation on this issue.

I hope the Government will learn from the conclusion drawn by my 11-year-old daughter. I would also like to take this opportunity to tell the public that unfortunately, I believe this Bill is going to be passed. *1984*, it seems that the Orwellian world of *1984* is soon to be here. May every one of us take care. Thank you, Chairman.

**MR LEE WING-TAT** (in Cantonese): Chairman, I speak to support the "sunset clause" proposed by Ms Margaret NG and Mr James TO.

I said before although I was not a member of the Bills Committee, I would try my best to find time to attend the meetings to listen to the debate. In fact, listening to a debate enables people to gain more knowledge and increase their understanding of some issues. If we regard the debate over the past few days as a debate, we will find it disappointing. Sometimes when we were invited to be adjudicators of debates held in secondary schools and universities — perhaps we were invited because we were regarded as very smart persons — we found the speakers present their arguments and debate in an eloquent manner. In the course of the debate, the stance of every speaker is clearly defined and the issue is thoroughly discussed. However, as I have mentioned to Mr Ronny TONG, it is a pity that there was actually not much debate over the past few days. Instead, it was just like having a lecture in class with two, three or four Honourable colleagues of the Legislative Council explaining to us the various provisions.

Of course, I understand the major issues. But I find it difficult to understand some of the technical points. Like what a number of Members have said, I am most disappointed with the brief responses of the Government. Sometimes it is only a repetition of its own point of view without any specific response to specific questions raised. In fact, this should be the response expected in the Chamber. But some Honourable colleagues may say this should have been conducted in the Bills Committee. However, perhaps due to the insufficient time in the Bills Committee, these problems have remained unsolved.

Regarding the major issues, even a Member who has not joined the Bills Committee can see after paying full attention to this four-day debate that many things have gone wrong with the definitions. For instance, regarding the appointment of the panel Judges, are the Judges chosen through a selection process? As I have said in the debate on that day, the selection of Judges on the basis of affinity will create this problem and its impact on the foundation of the rule of law will remain an unknown. The Commissioner system established has actually not been provided with any authority, which is just like "a tiger without teeth". With the process so loose and so much omission in the contents, the reporting system has, in fact, failed to meet the requirements of accountability and transparency.

I forget whether I said this morning or yesterday that this piece of legislation seemed to have all the areas covered in general. To someone who was not familiar with either its contents or the process of this debate, this legislation would be considered as acceptable. When I was saying this, Mr Stanley YING nodded his head — but I hope you will not nod again as I was very unhappy when I was saying this.

I do not think this legislation has really gained the support of the international community or people of great insight in Hong Kong. I think both the Secretary of Departments and the Director of Bureau should note an editorial in the *South China Morning Post* (I forget whether it was published two or three weeks ago) stating its agreement that as opinion was divided on this issue, the enactment of a "sunset clause" was quite a good way to deal with it. I do not think the *South China Morning Post* will put nonsense in its editorial. The Bar Association (of which Secretary for Justice WONG Yan-lung was a member in the past and I believe he is still a member now) has also prepared a lengthy report to express its many views on this legislation. I do not think the Bar Association has prepared the report out of any political consideration.

In fact, on many occasions, some of these opinions are either viewed as reference viewpoints or public opinion. In the case where public opinion has such a strong view of this legislation, I hope the Secretary of Departments and the Director of Bureau would be aware of it. In fact, this legislation has not met with the approval of some of the local influential organizations and newspapers that, in my view, have an understanding and knowledge of the legislation. Of course, you can say that when we look at newspapers over the past few days, we can see criticisms of Members of the pan-democratic camp have prevailed. I do not wish to make any comments on this. I think the viewpoints and editorials of those newspapers have been biased to such an extent that they are not worth any discussion. I am only more disappointed because the Government has failed to take the opportunity to make an effort to seek a compromise with Members of the pan-democratic camp.

The Government has often said that both the pan-democratic camp and the Democratic Party are always against everything the Government does. The proposal of the "sunset clause" is, in fact, not entirely against the Government. They have put forward a lot of proposals in the hope of finding some common ground with the Government so that the legislation can be passed by the two sides on good ground. If I do not remember wrongly, some Members from the pan-democratic camp have even said they will consider giving support to the Bill if the "sunset clause" can be enacted. Why can this not be discussed? Why does the Government turn every occasion into a friend or foe situation?

When the pan-democratic camp is criticized by the newspapers or the Government as always against everything the Government does, the Government is actually aware of the support of the pan-democratic camp given to over 90% of the bills. I have often heard the Secretary say that many Members of the pan-democratic camp have lent their support to the Budget prepared by the Government, whether it is the Budget of this year or last year. Does it occur to Members that in overseas countries, how often will the opposition party support the budget prepared by the ruling party?

In this regard, it is a pity that if the Government gives up the attempt to seek a consensus in this Council once it gets enough votes. It is like building itself a barricade to alienate forever those who have the potential to become its friends. I think Members of the pan-democratic camp have tried their very best to make every effort on this occasion. I do not think they should have any regrets as they have made themselves accountable to history.

A Member who has been giving his support to the Government from Wednesday onwards has had a brief exchange with me, saying even the Government itself has proposed scores of amendments to this Bill. Would Members seriously consider whether this is a good piece of legislation when it has been formulated in such a haste and even the Government itself has taken the initiative to propose nearly 100 amendments? Therefore, is it very outrageous for us to put forward these proposals? We from the Democratic Party have discussed among ourselves that a consensus is intended to be sought in a certain area. But our hope has shattered. Therefore, Mr James TO has gone to great pains to work. Ms Margaret NG has worked on the plan A while he has worked on the plan B and plan C. Therefore, plan C is now available for Members' consideration.

Regarding the "sunset clause", the version proposed by Ms Margaret NG is the clearest and most straightforward, which specifies the Ordinance will cease to have effect after two years. The amendment proposed by Mr James TO aims to seek support from the procedure. My amendment makes the least demand. I only request for a consultation to be conducted and have it specified in the legislation. I know even my amendment is not going to be passed because the Government has all along opposed it.

Of course, some people have called us fools. Why have we gone to so much trouble? Why have we resorted to three different means to deal with the same issue with the sole purpose of seeking the co-operation of the Government to work with the democratic camp in some areas? However, the answer is disappointing. Even such a mild and reasonable amendment (my amendment only requests for a review to be conducted in 27 months) will most probably fail to gain the support of the Government. The Government considers putting such a request in a law as inappropriate.

Chairman, many people think it seems to be futile for us to spend so much time on these issues, to which I disagree. Some of our friends, including those with different political views, have often asked us, "Why do you insist on talking about democracy when you have failed every time even since you talked about democracy in the '80s?" I have never looked at outcomes in the short term. I think this should not be our concern. Should I consider whatever is right, I will insist on fighting for it. Therefore, I hope all my friends of the pan-democratic camp will not, and I believe they will not, give this issue up. No matter whether it is on the "sunset clause" or the democratic political system, as long as we insist on voicing our opinions to the general public, I believe it is difficult for

the Secretary of Departments and the Director of Bureau not to hear them. The Chief Executive sometimes said that after the constitutional reform proposed last year failed to be passed, he would not talk about the constitutional system within this half year but focus on the people's livelihood and the economy instead. However, what has he been doing now? When he was on the ATV, he said the implementation of universal suffrage in 2012 was also an option.

Chairman, I know what I should talk about. I wish to tell all of you that do not think everything will end with the defeat of the "sunset clause". I hope the Government will not have this idea too. In fact, members of the democratic camp have stood the test of time. For whatever we have all along insisted on, we will really insist on them. Mr Martin LEE has involved himself in such work much earlier than me. But I have worked on that for not a short time too. However, if the Government also has the sincerity in doing such work, I hope it will reflect in a positive manner: why are we still unable to find any common ground for us to walk on together even when we have already reached the stage of examining the "sunset clause"?

Chairman, in fact, at the beginning of the discussion on this issue, Members have talked about history. Mr James TO has made a lot of effort. He started to discuss this Bill 10 years ago. "Long Hair" has also made a lot of effort. He has filed many lawsuits. However, the Government sometimes refuses to do anything until the very last moment. It is like what the general public will say, "it will not shed a tear until it sees the coffin". After losing the lawsuit, the Government resorted to an Executive Order. And after the Court ruled the Executive Order ceased to have effect, the Government formulated the legislation in haste.

In fact, as I said in the last debate, when those who exercise public authority have made a mistake, they must admit they are wrong. I was a science student. EINSTIEN's theory of relativity is renowned in the world. However, his theory is not without flaws. For a long time, he has developed the theory of black holes, which is a topic of discussion of HAWKING. For a very long time, one of his theories was wrong. For a long time, he did not admit his mistake until one day he finally admitted he was wrong. In fact, the more famous and the more powerful should have courage to admit their mistake. In this regard, both the Chief Executive and Secretary for Justice Mr WONG have failed to do so. I hope they will take some remedial actions after the passage of the "sunset clause".

Thank you, Chairman.

**DR KWOK KA-KI** (in Cantonese): Chairman, I am also not a member of the Bills Committee. But I have sat in most of the time. Of course, occasionally I have skipped the meetings. Sorry about that.

However, I am getting more disappointed as I listen to the debate. I have seen our Honourable colleagues, particularly Ms Margaret NG and Mr James TO, make a lot of effort which actually should be the responsibility of the Government. They have examined every detail, every point and even every English word in the Bill so meticulously and critically. However, the response of the Government sometimes looks quite ridiculous.

Secretary, you are a good guy. You give me the impression of a gentleman. That is no doubt about it. However, you have spoken very little on this Bill. I have so far not heard any replies or explicit legal concepts from you or your colleagues including the Secretary for Justice that will give us an assurance to pass the Bill.

In fact, we sit here because we wish to be informed of the considerations given by the Secretary of Departments or his colleagues to every provision and every detail in the process of the formulation of the law. However, I am very disappointed. No matter how our Honourable colleagues have pressed like squeezing toothpaste out of a tube, the Secretary kept saying, "I have nothing to say." Or sometimes he said, "I believe it has been discussed in the Bills Committee." However, many Members said this was not true. I am, of course, not in a position to have it verified.

I met a retired policeman today. He was in the same occupation as the Secretary because he was a policeman. He said he was also in support of this Bill. I believe every Member present consider that it is necessary for Hong Kong to enact a law on wiretapping activities. Other than giving his support, he also said, "It seems that this Bill is enacted in quite a haste. It is reasonable for you people to propose a 'sunset clause'." He was of the view that if something was right, it would still be right after two years. If something was wrong, it would be good to have a chance to rectify after two years. I have a strong feeling that he might have actually carried out wiretapping operations a number of times in the past. He was duty-bound to do so and he could tell us that. In order to avoid a legal vacuum, the Bill has to be examined in such haste. The High Court ruled in February this year that the relevant Executive Order was unconstitutional. And the Court of Final Appeal again reversed the temporary validity order on 12 July this year. Therefore, it is necessary for the

Government to fill the gap within such a short time. And this is something we all know.

However, with only six short months to go, Members of the Legislative Council were forced to hold frequent meetings and do unusual things including calling overnight meetings as the Chairman has just told us. Of course, as a doctor, I am against overnight meetings because it is much against healthy. However, we still have to do it. Why? Because it is our wish to have this Bill passed but not in the way of merely raising our hands. It is also my wish to have a chance to reason out the provisions and identify necessary rectifications in the particulars. The Government has also proposed some scores of amendments. Of course, all the amendments moved by the pan-democratic camp have been negatived so far.

Moreover, to my utter amazement, I have finally witnessed how to oppose for the sake of opposition. Secretary, I really want you to move over to our side. Whenever the Chief Executive talks about some people oppose for the sake of opposition in the future, I will definitely think of you. Secretary, it is because you have opposed every single point. Every time when you stand up and speak, you ask us to oppose the amendments moved by Mr James TO and Ms Margaret NG. It is really ridiculous. Now I have another old friend who opposes everything for the sake of opposition.

I have given a number of provisions some serious thoughts. Chairman, I wish to point out that some provisions are particularly necessary, they include the "sunset clause" and matters concerning the liability of carrying out illegal wiretapping which we have had a long debate. Secretary, you know that at the beginning, we consider that it is necessary to add provisions specifying criminal sanction. In the case where someone, including law-enforcement officers of the Government, knowingly carry out illegal wiretapping activities without any authorization, apart from disciplinary action, he also has to subject to legal sanction. It is of great importance. However, this provision has failed to get passed.

Second, we have proposed that claims for losses and violations of rights and interests can be made through civil proceedings by the victims. But this has also not been passed. Various Bills have just been quoted by some Honourable colleagues. Chairman, I have joined not many Bills Committees but just a few of them. I can name three, one of them is to examine the Undesirable Medical Advertisements Ordinance, in which a breach carries a penalty of imprisonment

for six months; another is to examine the Animals and Plants (Protection of Endangered Species) Ordinance, in which a breach carries a penalty of imprisonment for one year; the third is to examine the legislation concerning the disposal of clinical waste, in which other than the penalty of a fine at level 6, the right to take civil action is also specified. In the case where losses are resulted from a breach of this legislation, claims can be made through civil proceedings. This is clearly specified in the legislation concerning the disposal of clinical waste. Regarding laws of such a low level, the Legislative Council has still imposed the highest threshold, including criminal liabilities, to specifically provide in the law people's right to claims.

However, regarding the conduct of the infringement on rights, which is open to abuse, to our surprise, it is considered unnecessary to do so. Why is such a high threshold needed? Chairman, you are also aware that the application for wiretapping activities is kept in the dark. Such activities are carried out in secret. Most people are bugged without their even realizing it. However, this is one of the human rights. Government officials must be empowered to exercise the authority rightfully. It is necessary for Hong Kong to have a strict set of laws in place to safeguard any lawful conduct undertaken by the law-enforcement agencies. Such conduct includes wiretapping. However, the law-enforcement agencies should be given this authority to carry out activities in a reasonable and unsuspicious manner. It is not for their convenience. Why is it necessary to set so many checkpoints, including the Judges? Why is it necessary to stipulate such a lot of legal liabilities? It is aimed at nothing but to put a system in place so that restrictions will be imposed by law to prevent law-enforcement officers from overstepping the limits. In fact, there should not be too wide a divergence between the Government and us.

Regarding the "sunset clause", Chairman, I do not know whether it is under the great pressure of the two Members or the other Members that the Secretary has undertaken to conduct a review in 2009. I believe the Secretary would also agree that the Bill is vastly inadequate. Otherwise, scores of amendments will not be proposed. A member of the legal profession (who is actually a barrister) said today that after the passage of the Bill, he would expect and foresee follow-up actions to be taken in Courts to declare the legislation was still unconstitutional. Secretary, why bother? Why are you doing this? None of us opposes the enactment of the legislation on wiretapping activities. None of us wishes to see the public order of Hong Kong deteriorate. This is neither the intention of the Legislative Council nor mine. Protection provided

by the law is needed. But we have never agreed to achieve this purpose in the legal spirit that provides no restrictions and no protection from acts of infringement on rights.

A number of essential points have actually been left out. In fact, they have been under considerable discussion recently. But the topic of the media and freedom of the press have seldom been touched on. Although Members of the Legislative Council have been made an object of ridicule in many newspapers including the pro-government ones, criticizing us of wasting time on debate and causing delay, I believe one of the purposes of our action is to protect the freedom of the press and the media's freedom to report. These are what the people of Hong Kong attach great importance to and intend to uphold.

In any event, no matter how many loopholes there are in the Bill, the "sunset clause" has actually provided a very good opportunity, a very good mechanism, and an expressly-stated, legally-binding and timeframe mechanism for review. Chairman, the Government has left out a number of issues, including a detailed consultation, the view of the public, the problems faced by the Government and the law-enforcement agencies in carrying out wiretapping activities over the past two years, and the hundreds questions raised by Members on problems that may arise. In fact, it is possible that the outcome of all of the above will be identified in the actual enforcement in the coming two years. The "sunset clause" can provide safeguards for the Legislative Council, members of the public and the Government. This provision will provide a statutory opportunity to perfect this piece of legislation. I do not see why the Government will want to negative it.

I also urge all the Members of the Legislative Council, regardless of their political stance and their affiliation to which political party, to give it a serious thought. The "sunset clause" does not request for any amendment to this Bill. This provision only specifies a mechanism and a timeframe to give the Legislative Council and the public an opportunity to have an in-depth discussion on a piece of legislation that has already been passed, with a view to perfecting it. We have only aimed to better the legal system of Hong Kong and to safeguard our public order.

With these words, I support the amendments proposed by the two Members. Thank you, Chairman.

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

After this marathon debate of four days, I believe this issue will soon come to amend. However, if the authorities believe they can then heave a sigh of relief, I hope they will think further. As the debate of the last few days has revealed a number of problems, I hope they will attract widespread debate and discussion in the community. They are not something deliberately stirred up by those who oppose the Government or oppose for the sake of opposition. I believe after thinking over these arguments, anyone who is sensible will think the authorities have gone too far.

An Honourable colleague has just opined that the Secretary is a gentleman. He may be right. However, the Secretary has given me the impression that he cannot quite manage the entire policy. Perhaps he is able to do so but he just refuses to say so. However, his performance has definitely been much better than that of Secretary Regina IP. Permanent Secretary Stanley YING has also been very competent. The present scenario is the presence of a gentleman, a competent civil servant and the media that have no interest whatsoever in what has happened.

Some media people said this issue was very complicated. How could they know how to have it covered? Chairman, why can they not know how? What will be more complicated than Article 23 of the Basic Law? Every day when we wake up, we have to face seven, eight or even more newspapers opposing us. Regarding what we have said, they have always gone in the opposite direction of our words. However, this is a phenomenon of Hong Kong society. There is no need for the authorities to be complacent and think that they are capable of manipulating the media into refusing to give extensive coverage of this issue.

Regarding these issues, Chairman, if members of the public are clearly informed of the crux of the matter, I believe they will be very concerned and they may even be very worried. This is because it is possible for anyone to be bugged or being bugged and be kept under covert surveillance. Acts of this nature seriously infringe upon the privacy of the people. Why is there so little response in the community? It is exactly because not many people are aware of it. Please read the newspaper and watch the television, what exactly has been covered during these past few days? All the reports have just been on the "paparazzi" or whether overnight meetings would be held.

This has given us a great surprise. It does not matter to me when some of the information has been regarded as interesting sidelights. However, in a debate of several dozens hours, I do not believe it is impossible to identify information concerning the Bill or to record a few sentences of 30 to 40 seconds in our speeches to discuss the crux of the matter. Is it so difficult, Chairman? I do not consider our media are so ignorant as that. They just refuse to do so. I do not know the number of invisible hand or visible hand that is now manipulating our electronic media and printed media. But I believe it is impossible to deceive everyone all the time.

This Bill is going to be passed. But I urge members of the public to be on the highest alert. I also believe the Secretary is not a bad guy. Therefore, Secretary, you have to see how your law-enforcement forces will enforce the legislation in the future and whether privacy of the public will really be infringed upon. The Secretary for Justice may disappoint the public a bit because when he first assumed office, many people had great expectation of him. However, on this occasion, a lot of queries have been raised by various members of the legal profession. And it seems that the Secretary has been at a loss for a reply. We hope very much that the authorities will show us with action that they really care about the protection of privacy in the people.

This "sunset clause" aims to require a review to be conducted within a certain period of time — particularly within this term of the Legislative Council, that is, before our term of office ends. However, even this cannot receive any kind response from the authorities. Chairman, why do we have to expect them to conduct a review? If a review is really necessary, is the Legislative Council not able to conduct one? The Rules of Procedure of the Legislative Council states that a select committee can be set up to conduct a review and it can be vested great authority. However, the exercise of such authority depends on the views of the Members who support the Bill today. Will they agree to the setting up of a select committee with such great authority to review the Bill? I hope Honourable colleagues will monitor the progress of the events and not to oppose this proposal without a second thought because there is a chance that anyone will become a target.

I would like to pay my tribute to Ms Margaret NG and Mr James TO for their hard work on this Bill. I believe Honourable colleagues of the Legislative Council and members of the public in Hong Kong will thank them. I also believe their efforts will not be wasted. As Secretary IP told us before, "You just wait and see who lies to you." Although these activities are carried out in

secret, Chairman, I think you know a saying, "Though eggs are so tight, chickens can be hatched from them." I very much hope that every member of the public will keep vigilant.

Some Honourable colleagues have opposed the "sunset clause". I remember one Honourable colleague — I forget the name — who said then that there was some doubt about the credibility of the words of the Secretary. And some examples were cited to indicate his failure to honour his pledges, which probably include review of the Ordinance concerning the IPCC. In response, the Secretary said, "In most other cases besides these examples, it can be seen that we have indeed kept our promise." Sometimes the Secretary is so cute. Chairman, the Secretary is very honest. But the Secretary has to frankly admit that some promises made by you and the former Secretary have not been fulfilled. Therefore, you said today a review would be conducted three years later. Frankly speaking, I do not know the whereabouts of the Secretary three years from now. But it is possible that the Secretary will remain in office. The Secretary is now holding an important position and having great authority. However, Secretary, you have to see this point, will the public put their trust in just a few words of yours? We do not want to see that after the enactment of the Bill, the remaining work will be wound up in haste. Then law-enforcement officers will be able to infringe upon our privacy by means of such an authority so fraught with problems. The public gives its support to you to maintain public order. But you have to understand the people have these concerns too.

Some said that all of these recommendations were made by the Law Reform Commission (LRC). But it is not true to say these are all LRC recommendations. I do not believe the LRC has recommended the requirement of the Judges to go through political vetting. Therefore, on many occasions, concepts have been passed off as some other things whenever necessary. All in all, even if these recommendations have been made by the LRC, they have neither gone through public consultation nor put to any test. Therefore, they do not really mean anything.

Now we can see that the Bill has attracted a lot of criticisms and responses in the few months since its release. But what is the reaction of the authorities? It is total disregard. They have just accepted a little bit. They have just said all right, you see we have already proposed scores of amendments. In this regard, I wish to stress that please allow us to propose our own amendments by ourselves in the future. Please do not give the public an impression that the amendments moved by Members of the Legislative Council will always fail and

only those moved by the authorities will succeed. This will be of no benefit to the improvement of the relationship between the executive authorities and the legislature.

Chairman, I believe this "sunset clause" is doomed to failure. However, we of the pan-democratic camp will never give up. As Mr LEE Wing-tat has said, some of us who are more senior have fought here since the '80s, how can a clause like the "sunset clause" give us a resounding defeat? We will keep going. And we will keep a closer watch on you. Of course, you may have us bugged or tracked. Many of us would expect this scenario. However, we urge members of the public to keep vigilant. We will make a concerted effort to fight for a mechanism that will both facilitate law enforcement on your part as well as protect our own freedom.

Thank you, Chairman.

**MR ALAN LEONG** (in Cantonese): Chairman, the motion moved by Ms Margaret NG seeks to provide for a new clause requiring all legislative provisions authorizing interception of communications and covert surveillance to cease to be effective on 8 August 2008. In addition, all authorizations and warrants shall likewise become ineffective on the same day. She has also requested the Commissioner to conduct a comprehensive consultation on the implementation of the Ordinance and submit a report and proposals on legislative amendment. Mr James TO has, on the other hand, moved a motion to make it mandatory for the Chief Executive to submit a review report within 27 months for this Council to consider whether the Ordinance shall become invalid by way of resolution.

As with other amendments to the Bill, the Secretary for Security has continued to raise resolute opposition on the ground that the continuity requirement of the legislation should not be doubted because of the wish to instruct the Government to review the legislation. Furthermore, the Government's goal is to submit a report to the Panel on Security of the Legislative Council by end 2009. In other words, the Government has made an undertaking with respect to reviewing the legislation. It is thus unnecessary for the Legislative Council to peg the review with the abolition or otherwise of legal effect.

Chairman, the periods of review proposed by Ms Margaret NG and Mr James TO are two years and two years plus three months respectively, whereas

the Government has counter-proposed three years. Whether or not the SAR Government's bargaining is reasonable, perhaps we should first see before deciding whether we should bargain with the Government whether the Government is an honest and trustworthy party to bargain with.

Chairman, despite the passage of the Interception of Communications Ordinance by this Council in end June 1997, the Chief Executive in Council resolved 11 days after the reunification that the Ordinance would not be implemented until the relevant issues had been reviewed. After waiting for two years, the community finally saw the setting up of an inter-departmental group to carry out the relevant review.

Five years later, the Security Bureau cited to the Panel on Security in March a wide range of reasons frequently heard in this Council recently, such as rapidly-changing technological developments and the September 11 incident, to substantiate its claim that the Security Bureau had to accord priority to work in terrorist sanctions and thus, the matter had to be further procrastinated. Yet the Government would strive to explain the relevant policy initiatives during the 2004-05 legislative year.

Well, in early 2005, nearly a year after the Government's previous undertaking, the Legislative Council Secretariat submitted a research paper to the Panel on Security on how covert surveillance is regulated in a number of countries. Yet no action by the Government was taken. In April last year, the District Court ruled that the Independent Commission Against Corruption (ICAC) had acted unlawfully in a case in obtaining a tape recording. And yet the Government made no response. In July last year, it was again ruled by the District Court that the ICAC had acted unlawfully in secretly taping the conversation between a lawyer and his client, and a permanent stay of proceedings was even granted.

These two successive rulings have finally forced the Government to take action. However, the subsequent action taken by the Government was not to submit a new Bill. Instead, the Government proposed a so-called executive order. Six months after the promulgation of the executive order by the Chief Executive, the High Court ruled that the executive order and the existing legislation cannot be treated as the legal basis of Article 30 of the Basic Law, and instructed the Government to enact a new law within six months. It was only until then that the Interception of Communications and Surveillance Bill was

finally submitted to the Legislative Council by the SAR Government. The Government has even started rallying for public opinion to impose a six-month deadline on this Council for the passage of the legislation.

Chairman, after deliberating for half a year, what we have got is a Bill, which is laid before us, allowing the Chief Executive to appoint Judges to approve covert surveillance powers for certain cases, a Bill allowing law-enforcement agencies to authorize most of their own covert surveillance operations, a Bill putting defence lawyers in an extremely disadvantaged position, a Bill that makes it no longer possible for conversations between lawyers and their clients to be protected as they used to be. But then, this Council is given only six days at most for the Second and Third Readings and deliberations of the Bill.

While it takes the SAR Government two years to set up a study group and another five years to conceive a policy package for submission to this Council, the Government has requested this Council to complete deliberations within five months and six days at most for the Second and Third Readings and deliberations of the Bill. When problems were found by Members in the course of deliberations, the Secretary for Security would simply respond by making such remarks in effect, "I urge Honourable Members to oppose the amendment", "the Bills Committee has already discussed it", "I have no response to make", and so on. Even some very minor amendments and amendments which will absolutely not undermine any of the Government's existing policy stances have to be eradicated.

Chairman, I still recall the extremely vulnerable response made by the Secretary for Security in deliberating Ms NG's proposed addition of new clause 8(1C) instructing a Judge to state his decision and relevant reasons in writing. The Secretary said to this effect, "It is not necessary as the Bills Committee has already discussed the matter, and we consider what we have got is adequate". Has the Secretary responded to the counter-arguments put forward by Members? Perhaps this is already treated as a response. However, I cannot tell which point has been responded.

It is absolutely not a rewarding task to bargain with such a government which has been procrastinating its own promises and acting evasively when confronted with queries. However, the ones who suffer most are not Members sitting in this Chamber, but all the people of Hong Kong, who will be governed

by this piece of law and this Government. How secure can our rights be when a government can substitute law with an executive order and when it can give the community a mere five months to discuss a Bill pertinent to the basic rights of a citizen? How many more times should we trust this government?

Chairman, despite the Government's impressive pledge to explain its stance on its interception of communications policy in 2004-05, has the Government done this in the end? No. We have merely got an executive order instrumental to dealing with the Court or acting perfunctorily in face of the people. On what basis can we believe in the Government's pledge which does not need to be fulfilled until 2009?

One way to force the Government to honour its pledge is to impose a deadline on its pledge by way of a "sunset clause". Given the importance attached by the Secretary to the continuity of the legislation, as pointed out by him clearly in his speech, he should seize the time and review the implementation of the legislation in its entirety immediately. The legislation can naturally be retained if the Government is able to give the public and this Council a satisfactory outcome of a review within two years or 27 months from now.

I do hope to put my mind at ease in giving government departments long-lasting and consistent powers. I do not want to hold marathon meetings again in two years. However, the SAR Government has really performed too badly in honouring its pledges and consulting the public. It is simply extremely difficult for me to cast a vote of total confidence in the SAR Government. What is more, I am worried that the SAR Government has to trouble the Court again to impose another deadline before it knows that it has to embark on a legislative process which should have commenced earlier.

Chairman, looking back at the meetings over the past four days, none of the amendments proposed by the Government has been rejected; yet none of the amendments opposed by the Government has been passed. If the Government is so confident of its own proposals, why is there such a worry that two years later it has to prove to this Council and the public its commitment to public security and human rights? Compared with such an impossible task forcibly imposed on this Council by the Government during the same period, the deadline imposed on the Government by us is really much more reasonable. It is simply unjustified for the Secretary to thwart the passage of the "sunset clause".

Chairman, soon after dust has settled on the "sunset clause", the Secretary and government officials can leave peacefully and, from tomorrow onwards, they can exercise the power conferred on them with peace of mind. Members responsible for voting in support of the Government might feel relieved too. However, how can the public put their minds at ease when they see the power conferred on government officials by law and yet they can see no guarantee ensuring that the Government will conduct the review in concrete terms?

Chairman, I sincerely and earnestly hope that the Government can grasp this last opportunity to retain in the Bill a clause which can revive people's confidence by supporting the expiry clause, that is, the "sunset clause". I also sincerely and earnestly hope that all Members responsible for voting in support of the Government can leave the Bill a prospect of allowing society to continue to perfect the legislation on covert surveillance.

Lastly, Chairman, I would like to take this opportunity to extend my gratitude to my Honourable colleagues, Ms Margaret NG and Mr James TO. The tremendous effort they made over the past five months has saved much of the credibility of this Council. I am convinced that their effort will not be wasted.

With these remarks, Chairman, I support the amendments proposed by Ms Margaret NG and Mr James TO.

**MR ALBERT CHAN** (in Cantonese): Chairman, now that we have come to the "sunset clause", the four-day discussion is drawing to a close, and curtains will soon fall on the Legislative Council for this Legislative Session. However, with the passage of this eavesdropping Bill and the rejection of the "sunset clause", the expression of "the rule of law" will take on a new meaning, that is, "the law will be used to serve power governance".

With respect to this Bill, a number of Members and, in particular, many legal professionals, have repeatedly pointed out that the Bill is special in the sense that a number of arrangements, responsibilities and ideas which should be laid down in the form of legal provisions are substituted by executive orders, thus dealing a fatal blow to the rule of law. Our great Motherland has been best known for its executive investigation power, executive arrests, and so on. The public security authorities enjoy unlimited power on the Mainland precisely because they can invoke executive power. Their power and

responsibilities, however, are not delineated by provisions which are put down in black and white and have been formally endorsed by the National People's Congress of the People's Republic of China. Under the "one country, two systems", the system as practised in Hong Kong has gradually shifted towards our Motherland. This is probably one of the significant missions to be accomplished by Donald TSANG and many of the politically-appointed Secretaries of Departments and Directors or Bureaux.

Yesterday, a few Members from the pan-democratic camp have taken turns to thank Ms Margaret NG and Mr James TO. I would like to take this opportunity to thank the two Members too. I have not attended the meetings held by the Bills Committee. As a Member from the pan-democratic camp, I am proud of their effort and outstanding performance. Their proposed amendments and legal arguments put forward in the debate will be recorded in the Official Record of Proceedings of the Meetings of the Legislative Council as historic literature. I believe the remarks they made in this Chamber today will surely be quoted by many scholars and students in their research in future.

Chairman, after listening to the debate for the past four days, I personally have a strong feeling that, for many years in the past, authoritative opinions, particularly those expressed by authoritative professionals and academics, have been highly respected by various sectors of Hong Kong, particularly also by the Government in its formulation of many policies and laws. It is amazing that we have four veteran barristers in the pan-democratic camp, and it seems to me that all of them used to be the Chairman of the Hong Kong Bar Association. I believe the Government had to pay to consult them before they joined the pan-democratic camp and it had probably formulated many pieces of legislation and policies according to their advice. I believe the Government had also in the past relied on them in winning a lot of lawsuits.

Now the Government has completely exposed its barbaric and unreasonable attitude by turning a deaf ear to the free professional advice offered by these four Members. In particular, a great number of legal professionals have, in the course of the debate, raised questions that overwhelmed the authorities with their poignant reasoning. They also expressed their views. Yet the Government has been absolutely powerless in fighting back. If this is what strong governance is supposed to be, this may well be taken as a perfect counter example showing that there is simply no strong governance.

Against the background of so-called strong governance and the power and influence of the "grandpa", royalist Members have lopsidedly supported all the orders delivered by this Government without any hesitation. Even when the Chairman of the Liberal Party, Mr TIEN, left this Chamber, he was asked where he would go and when he would be back. I guess even his wife would not ask him such questions when he was at home. I suppose all through his life he has rarely been asked when he would return. *(Laughter)* This is what strong governance means. Actually, this eavesdropping Bill is simply unnecessary. At present, the autonomy of this Council has already been encroached upon. Chairman, I believe you should as well review this situation, because we feel that we are being insulted. We are now being counted by the staff of the executive departments at every junction in this building. I recall after I finished my meal upstairs, I heard someone say Mr Albert CHAN was coming out. *(Laughter)* I guess there is a central department responsible for co-ordinating information gathered at each junction. Every movement of ours has been recorded. However, when I left this building, no one asked me when I would return. They probably wish that I will never come back. *(Laughter)* Hence, I do not think that this eavesdropping Bill would produce much impact on this Council, as the movements of Members of this Council would be recorded anyway. I suppose Members have to wear a satellite navigation tag in future, so that our whereabouts would be made known to the authorities.

Hence, the changes in the rule of law are utterly horrifying. Furthermore, the disrespect shown to the advice of legal professionals is an extremely serious blunder too. Despite the open remark made by the Hong Kong Journalists Association that the harm done by this Bill is no less than that by the attempt to enact legislation to implement Article 23 of the Basic Law, the Bill can still be expected to be passed smoothly and in silence, with the masses in particular keeping their mouth completely shut. I guess the Government should be credited for its control over the media.

When I chatted with Raymond WONG earlier, he told me that should he be allowed to speak with a microphone for five days, the Bill could not be passed so easily *(laughter)*. The Government has destroyed these two "cannons" by muffling the voices of Raymond WONG and Albert CHENG from the media. Now the media would merely discuss what desserts they would prefer, whether they would like to have egg tarts, coconut nuts, sweet soups or doughnuts. I have eaten three doughnuts, the Krispy Kreme doughnuts are especially delicious. *(Laughter)* Chairman, although I am very full, my rage can still not subside. *(Laughter)* Chairman, I will try my best to gradually suppress my emotions. Mr CHEUNG Man-kwong has repeatedly reminded me not to be too emotional.

If we refer back to the sunset clause in its entirety, we will find that, as pointed out by many Members (such as Dr Fernando CHEUNG), it is extremely humble. It is so humble that, in my opinion, it can simply not go any further. The "sunset clause", if rejected, would symbolize the formal onset of a dark age in Hong Kong politics. The night will fall after the sunset. The authorities can only take darkness if they cannot accept even the setting sun with all its splendour.

However, pan-democratic Members fear no darkness. We will continue to fight back in darkness. No reactionary power or reactionaries' victory will make us back down because we know it only too well that after darkness will come dawn. Reactionary power, including royalist Members in this Chamber, will be completely eradicated someday. I happened to read a biography of Rosa LUXEMBURG earlier, and I admire the great courage she demonstrated in the socialist movement. What Hong Kong needs at the moment is precisely the upgrading and promotion of socialism, rather than those people who seek to clamp down on people's power by pretending that they are leftists but what they want is just to expand their influence. They put themselves well above the people to make their status and wealth grow. This kind of "pseudo-leftists" must be clamped down.

Chairman, Dr Fernando CHEUNG has earlier read out an article written by a social work student, not a student but a teaching staff in the social work department. The article, entitled "Alas, Legislative Council" in Chinese and published in the *Apple Daily*, has put forward a total of 17 questions. Raymond WONG has high praises of the article. He is greatly surprised that even a person from the social work department can raise these 17 questions, whereas he has no idea what some Members in this Council are talking about. He has listened to those Members' speeches for a few days and still find that the speeches are not up to standard. I have originally intended to read out the entire article, but Dr Fernando CHEUNG has already read out those 17 questions. Hence, I will only concentrate on the last and the most important paragraph of the article. It says in Chinese:

"Why does the Legislative Council have such a poor image? It is not because of those Members of the 'opposition camp'. Nor has it anything to do with the integrity of Members or the failure of the Legislative Council to make a decision after discussions held. Those who are largely responsible for the poor image include the Government which has been indiscriminately trampling on and insulting the Legislative Council, and those rubber-stamp Members who are

found resting or dealing with their private business outside the Chamber throughout Council meetings, without paying any regard for the debates conducted inside the Chamber and would raise their hands or cast their votes simply in response to the Government's appeal."

I hope to put this paragraph, representing the comments of some of the Hong Kong people on this Council, on record. It is precisely because of these Members that the Government has been able to act so blatantly and it continues to trample on this Council. What is pathetic to the extreme that some Members of this Council should have allowed the Government to wilfully trample on this Council.

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, first, I would like to thank Ms Margaret NG and Mr James TO for their hard work. In fact, I am the one who has set off all the evil. Had I not brought the case to the Court, we would not have to sit here today.

Indeed, it is a bit sad when I recall events of the past. That night, when I was sitting there, had I not come to the thought that the Chief Executive was wrong and that I had to apply for a judicial review, this problem would not have come up and all of us would not have to hold these marathon meetings. As a catch phrase goes, we would have "horse racing and dancing as usual". Why does the Council have to spend so much time on this debate? This Council should fulfil the function of enacting legislation as the representative of the people, but in Hong Kong, since an executive-led system is adopted, Members of the Legislative Council basically have no power to enact legislation, as we can see this from Article 74 of the Basic Law and our House Rules. This is why it is so sad. In this Council, we have to accept Bills submitted by other people, and no matter how bad the Bill is, our discussion must follow the clauses in it, this is simply sad to think about it.

I recall that three years ago, this Legislative Council nearly had to extend its session owing to the enactment of legislation on Article 23 of the Basic Law. That time, all of us felt glad for the power of the people won. This time around, we try to reason this out with the Government, but why can the Government not reason with us? It is because the Government does not see that we have any public support. This is the way with this Government, it will not set its eyes on reason but on power.

I remember that three years ago, when in her hurried departure, Regina IP was so carefree and even dropped the line "till we met again". In our discussion of the issue, we wondered whether this strange remarks of hers — "till we met again" — was appropriate. Unexpectedly, we really do meet again three years later. Also, I can see that Regina IP's protege at the time, that is, the Secretary Ambrose LEE of today, has outperformed his mentor. Regina IP is in fact a genuine mean person, for she will get flared up and rebuke people immediately when she is criticized. But for Secretary Ambrose LEE, he does not talk back when he is scolded. I have not yet hit him, so he needs not fight back. We are just talking to a wall. What we have heard are in fact the echoes of our own remarks. When comments made by a Member of the Legislative Council cannot get any response from government officials, it is actually an insult.

As I have said before, power does not mean everything. This is so in the case of King SOLOMON and King DAVID. Why will the wisdom of men deteriorate as their power grows? It is because they will then think that they are omnipotent, that they are the likes of God. In this Council, there are people who act like God today, for they can order other people to do anything and they can have votes at a wave of their hands or a wink of their eyes. This is the system we are now facing.

Honourable Members, some people say that this Government is good, for at least we are allowed to give comments. VOLTAIRE once said, "I disapprove of what you say, but I will defend to death your right to say it." However, this was not what VOLTAIRE actually meant. He said, "It is because you have spoken that I reply." We all know that he is a rationalist. He knew that mankind would make no progress without rational dialogue. Today, we speak in this Chamber not because the Government practises that principle but because we are returned by the people of Hong Kong to this Chamber. Therefore, it must listen to us.

I notice that during the debate on the enacting legislation to implement Article 23, many Members defended their own stance. The legislature is not like that. Now, this Council wants to achieve its goal by hook or by crook. It has now become a machine. This machine is called the "state apparatus". It is terrifying. At that time we could see the gradual formation of this state apparatus. However, the people of Hong Kong were aware of this. They did not want this state apparatus, they took to the streets to show that they did not

want any legislation on Article 23, they did not want TUNG Chee-hwa any more, nor did they want Regina IP. They removed some screws from this state apparatus to stop it, so that it could not be started again. Knowing that it would no longer cause any pollution and make any noise, they went home to sleep. This is really pathetic. Finally, in the year 2004, they cast their votes to Members of the pan-democratic camp to entrust them to take action. In fact, sometimes, I come across some citizens on the streets who say to me, "'Long Hair', I have voted for you. Now I will count on you."

Honourable Members, today, we are bullied, we are oppressed by this state apparatus. But actually, it is the people of Hong Kong who give up their own rights. I read about the media reporting on the food we eat and which senior government official is giving a treat. Is eating a coconut tart more important than the contents of our discussion? This is extremely pathetic.

We see that since 2003, despite the removal from this state apparatus of a few screws by the people and its being cursed by the people, it has been gradually pulling itself together. The first thing it did was forcing the two famous talk show hosts off the air. This is something we overlooked. We only know by now that the first thing the Communist Party will do is to cut your throat, so you can make no noise no matter how hard they beat you.

I took the case personally to Court without telling the people of Hong Kong, I am really sorry about this. Last night, when I took stock of what I had done in the past year, I noticed that I never talked about the legislation on eavesdropping. I never mentioned the difficulties and danger the people of Hong Kong were facing. This is my failure. I remember many people told me, "'Long Hair', work hard, you have my support." However, my application for judicial review has unexpectedly revived this state apparatus, it is really paradoxical. I then applied for another judicial review, seeking the interpretation from the Court on another issue. But what is the use of it? The Court only gives fair comments, while power can only be harnessed from the streets. I hope Members of the pan-democratic camp can draw a good lesson from this incident. I am not saying that they are incapable, I just say that I am incapable. I think we really should reconsider our strategy and our way of doing things. We should go to where the people live and tell them what is happening in Hong Kong now. With regard to this sunset clause or sun down clause, I believe, up to now, they still do not know what it is all about. This is the most pathetic of all.

Today, a kid has in fact given me this prop which he made and asked me to play it here. But, I am not going to show it here tonight. The kid hopes that I can use this prop to make the Government listen to the suggestions of Members and accept this sunset clause. I really do not expect that the Government can get so completely unreasonable at this crucial moment.

When I ran in the election of the Legislative Council, my platform demanded that TUNG Chee-hwa should step down. He did step down in the end, but I should not be the one who gets the credit. As a Chinese saying goes, "a thousand pointing fingers will bring a man to his downfall". Those practising bad governance will surely invite a thousand pointing fingers. His successor, Mr TSANG, let us have a taste of an executive order issued by him as soon as he assumed power. But I again sought judicial review, which slapped him right on the face again. But what is the point of it? The system cannot be changed. Though we manage to ward off a bandit, a thief has sneaked in through the backdoor. Therefore, I hope this incident can put us on alert. I also wish to let the people of Hong Kong know that if they give up their own rights, no one can save them.

That is the first time I come to a close encounter with this state apparatus in this Council. I know what the state is, for I have been suppressed by it before. But this state apparatus, this state apparatus with such an ideology, is the first of its kind I have ever seen.

Recently, I have been under fire practically every day. It turns out that my name is mentioned more frequently in the *Wen Hui Pao* than in the *Apple Daily*. I was rebuted every day. However, when I look back, I think it is really worthwhile. As Mr Albert CHAN has mentioned earlier, Rosa LUXEMBURG, a politician and a revolutionary, once said to this effect, "When you are praised by your government, you must reflect on yourself to see if you are wrong in anyway." The famous Russian writer, CHEKHOV, once said to this effect, "One would rather be killed by a swine than praised by a swine." I can say no more. I just want to tell the people of Hong Kong, "I am sorry".

**MR LEUNG YIU-CHUNG** (in Cantonese): Chairman, although many Honourable colleagues have already expressed gratitude to Ms Margaret NG and Mr James TO, I still think that I really must express my heartfelt appreciation to them. Why do I say so? In 1997, I took part in the scrutiny of a Bill to amend the Housing Ordinance, and I felt that it was never an easy task. Not only did it

require painstaking effort, but also plenty of time and hard work. Today, I see that the two Members have proposed many amendments, and I do appreciate the hard work and the painstaking effort that they had devoted over the past few months. Here, I would like to sincerely pay tribute to the two Members once again.

Indeed, it is not easy to introduce amendments to these clauses as it takes a lot of time and a lot of information will need to be collected. It is also necessary to have a thorough understanding and full knowledge of the entire Bill, and the two Members have really done this. This is only the second time that I have spoken in the meetings over the past few days. One of the reasons is that as other Honourable colleagues have said, I do not have a very good understanding of these clauses. Another reason is that I think the result will be better in practice if these clauses are dealt with by the two Members mainly because they are very experienced in handling court cases and proceedings, and they have in-depth knowledge of this issue. That is why I think they should be given this responsibility.

However, does it mean that all I really need to do is to listen without taking part? I do not think so, because this Bill involves not only offenders. Many of our friends and members of the public will also be affected. Therefore, when we, as Members of the Legislative Council, are here to endorse this Bill, we must be serious about it and be responsible, and we must be vigilant gate keepers, or else other people would be deprived of their rights as a result.

Concerning this topic under our discussion today, I have spent a lot of time listening, in order to understand the clauses. Unfortunately, when I talked about this with other friends, I found that members of the public actually do not understand the contents of this Bill. Why is it so? This is entirely an achievement of the media. Mr LEE Wing-tat said earlier that the issues raised by the media (especially in the editorials) are actually not worth mentioning. Chairman, it is certainly pointless to mention their comments which are merely a rehash of other people's ideas, but I think we cannot make no mention of the problem that they are misleading the public.

Many people have said to us that we are making troubles and that we oppose for the sake of opposing to the neglect of the future law and order in Hong Kong. They said that without this legislation, how could law and order be maintained in Hong Kong and how could governance be effective? Chairman, I am not the first person to say this, as many Honourable colleagues have already

stated time and again that we in the pan-democratic camp do not oppose this Bill and that what we oppose is only some of the clauses in it. "The devil is in the details", so to speak. Our major principle is that we agree to the enactment of this legislation on wiretapping, so that law-enforcement officers can safeguard law and order. But regrettably, members of the public do not understand this point, and this is precisely an accomplishment of the media. This accomplishment of the media also reflects a benevolent policy of our Government and that is, our Government can influence the media, making them confuse right with wrong, neglect reason and facts, and deliberately smear the view held by the pan-democratic camp on the Bill. This is what we consider saddening.

Mr LEUNG Kwok-hung has said earlier that it is very saddening that members of the public do not know what the "sunset clause" is about. Chairman, we think that it is not important as to whether or not people know what the "sunset clause" is all about, and it is not at all saddening. What we consider most saddening is that this Bill on wiretapping will deprive members of the public of their rights but they do not know about it. They know nothing about it because the media have not done their publicity job properly. Apart from the fact that the media fail to do their publicity job properly, this also shows another major problem and that is, the Government has not conducted any consultation.

Ms Emily LAU commended the incumbent Secretary earlier on, saying that he is doing a better job than his predecessor. This is true, Chairman. He has really performed even better, for he has learned from the mistake made by the former Secretary. What mistake is it? The former Secretary turned a blind eye to the actual circumstances, she was bold in taking actions. She conducted consultation and made explanation wherever she went, to enable the public to understand the provisions, so that when they had understood the provisions, they could express their views and positions. We all know what happened to her ultimately. Having learned from this mistake, the incumbent Secretary, therefore, refrained from conducting any consultation on the Bill. As there is no consultation, members of the public do not understand the clauses and they, therefore, will not join force to express their opposition. There will be no scenes like the mass rally on 1 July when hundreds of thousand people took to the streets to voice their opposition. That is why this Bill can be endorsed smoothly in this Chamber today. Indeed, he is really very clever and competent, because he has reviewed the past and he can identify a new direction from past blunders and hence avoid making mistakes. This enables the Bill to be endorsed.

This is exactly what is happening. If the Government has the guts, or if Secretary Ambrose LEE is as bold as Regina IP, why does he not properly conduct a consultation on this legislation? Or why does he not even publish a White Bill, as I suggested during the debate on the resumption of Second Reading, to enable the public to have more understanding and discussion? Let us take a look at the present situation. Of course, he may say that time does not allow it and that we must hurry to enact the legislation. But Chairman, as many Honourable colleagues have said, this problem does not arise only today. Mr James TO had proposed a Bill on the subject before the reunification. The Bill was endorsed by the then Legislative Council but regrettably, it has not been assigned an effective date, and it seems that the Bill has been put inside the refrigerator and become frozen. So, the responsibility lies with the Government, because the Government has turned a blind eye to the problem and it has turned a deaf ear to it and has simply ignored it. But today, it is forcing us to endorse the Bill by means of "executive hegemony" and through this "executive hegemony", it is telling the people not to know too much and saying that the Bill would be dealt with for the benefit of the people. This is in effect to keep the public in the dark, so that the people do not know what is happening and they have no opportunity to express their views.

Certainly, the Secretary may argue that this is not true and that the Government did conduct consultation and in particular, they had, in this Council, listened to the views of various sectors of the community. Chairman, it is true that the Government has done this, and if it fails to carry out even such basic work as this, it can no longer be called a government. But Chairman, the Government has not carried out any even more basic work, and it has not conducted any general consultation on this issue which is closely related to all Hong Kong people, not even consulting the District Councils (DCs). What else can it say? This issue is so inextricably linked to the people. Why are the DCs not even consulted? It is good to see Secretary Stephen LAM now in this Chamber, as he is responsible for the constitutional system. Does he think that the DCs have the duty to express their views on this issue? If so, why are the DCs not consulted? What is the Government afraid of? Certainly, he may argue on the ground of time constraints. Chairman, time can be created, and this "sunset clause" before us now is precisely meant to give us time by providing that a review be conducted two years later. But regrettably, the Government is unwilling to accept it.

Certainly, we understand the need to enact this piece of legislation. This is why Members, especially the two Members who have proposed the

amendments, have worked very hard in putting forward many amendments, hoping that the Government will understand that we are working in concert with the Government to accomplish a task. However, we can see that the Government has again adopted the attitude of Chief Executive Donald TSANG, and that is, "strong governance", which means to do what he says. "Strong governance" is the equivalent of dictatorship, which means to do what he says. Now, other accountable officials have also upheld this major principle in their work, that is, to do what the Government says, with a view to achieving the objective of dictatorship.

Today, many Honourable colleagues kept on saying saddening, saddening, saddening. Indeed, it is really saddening to us, because while we keep on stressing the need of further constitutional development — Chairman, as you may have noticed, many consultation papers mentioned the need to further develop the constitutional system — but it finally turned out to be moving towards dictatorship. In fact, we hope that a democratic political system can be developed, and we would never have expected that its further development means dictatorship. Although there is the right to vote in this Council on the surface, this is, in fact, nothing more than a trick, and we can see that we are here only to put up a show with a foregone conclusion. We really do not wish that this Council can know the result in advance. Like the Bill I proposed to amend the Housing Ordinance back in 1997, I had never thought that it would be endorsed. Regarding the Bill proposed by Mr LEE Cheuk-yan on the right to collective bargaining and the original legislation on wiretapping proposed by Mr James TO, I think they would never have thought that the Bills would be endorsed. It is only because there was greater democratic representation in this Council back then that the Bills were endorsed, which did bring us pleasant surprises.

Chairman, these pleasant surprises were premised on a democratic system. Certainly, it was not very democratic back then, but it was still relatively more democratic and this also explains why there was such an outcome. However, it is not going to happen today, because there is not sufficient democratic representation in this Council; even the method for the vote to be taken later is undemocratic, as this separate voting system of ours is unique in the world and it makes it impossible for amendments proposed by Members to be endorsed. So, as I come to the end of my speech today, I can only conclude with one word — "saddening".

Chairman, I so submit.

**MR LAU KONG-WAH** (in Cantonese): Chairman, several Honourable colleagues read out a letter from newspaper earlier on. The letter is worth reading and so, I took a look at those 10-odd questions in it. I saw that towards the end of those 10-odd questions, it said, "I respect Miriam LAU and LAU Kong-wah, for they had genuinely participated in the debate and expressed their views courageously.". Chairman, I will continue to express my views courageously. Meanwhile, I hope that my speech can address some of the questions asked by this student, and what I am going to say is what I must say.

Today, a number of Honourable colleagues criticized this Bill to the extent that the Bill was worthless. But is it true? Since I took part in the scrutiny of the Bill up to the present, I am fully confident that this Bill can strike a balance between protecting privacy and maintaining law and order in Hong Kong. I have full confidence to recommend this Bill to all Hong Kong people, and unlike what the opposition camp said today, this Bill is not worthless. Some Members in the opposition camp who did not participate in the scrutiny of the Bill made this gesture only to express their political stance today and to put up a big show later.

Chairman, before the scrutiny of this Bill, I wrote an article on the three strokes commonly used by the opposition camp. I can see them all today. What are these three strokes? First, pretending to be fighters for human rights; second, smearing people who are not in the opposition camp; and third, disguising themselves as the oppressed. From my observation over the years, it appears that these three strokes are used in cycles over and over again. And today, we see another cycle of them. I do not think that Members in the opposition camp are the only persons who care about personal rights and protection of privacy.

Mr Ronny TONG and I have both taken part in the scrutiny of the Bill. He should understand very well that we have been resolutely upholding personal rights and we will never give up. The Security Bureau has accepted over 100 amendments which we also supported during the scrutiny of the Bill. But while it is necessary to respect the rights of individuals, we cannot neglect the rights of the public at large as well as law and order. This is a point over which the opposition camp and I are basically divided in our opinions. A balance is absolutely necessary, especially if attention is given only to the rights of the bad guys. The more the rights of law enforcement agencies are undermined, the easier the bad guys will have their way and the greater the suffering of the people will be. This is unacceptable to the public.

In fact, Members can see that if the majority of the amendments — I dare not say all of them because some are indeed very carefully written — are endorsed, the capacity of law-enforcement officers would be greatly undermined. I was asked by the media what would happen if the legislation was enacted, or what would happen if those amendments were endorsed. I replied that there would be big troubles once they were endorsed. So, over these past 30 days or so, disregarding whether we were said to be the royalist camp or a force supporting the Government and law and order in Hong Kong, or a force supporting stability in law and order in Hong Kong, we have maintained our stance firmly, not budging an inch and not allowing one single amendment to get passed. Our purpose is to stop the opposition camp from doing anything to disrupt law and order.

The second stroke is smearing people from outside the opposition camp. Chairman, as you can see, Members from the opposition camp have kept on attacking government officials during our debates over the past few days. A most typical example is to brand government officials as shameless — where is the Secretary? No, I do not mean you. I mean Secretary Ambrose LEE. The Secretary immediately responded that the public could judge whether it is Mr James TO or the Secretary who was shameless. This remark does carry some significance. Some Members said that the Secretary was ignorant. This is really something, and I finally come to realize how knowledgeable Mr James TO is. Mr James TO is certainly more knowledgeable than I am, and this is a fact. But how can he and his several friends in the disciplined forces know more than the entire security system and all officers in the disciplined forces? This has truly opened my eyes. Sometimes, when one knows how to build a model aeroplane, it does not mean that he can fly a fighter plane. Our disciplined service officers are now operating fighter planes to hunt down criminals and combat crimes, not making empty talk. This is something we cannot neglect.

Besides, the target of their attack and smearing is certainly Members like us who support the Government. We have a major contradiction, over these past few days……

**CHAIRMAN** (in Cantonese): Mr LEE, please state your question.

**MR LEE WING-TAT** (in Cantonese): I have been listening to him outside this Chamber for six minutes 30 seconds. He should be speaking on the "sunset

clause", but these six minutes 30 seconds that he has spent on his speech are not about this amendment.

**CHAIRMAN** (in Cantonese): It is true, and you are right. In fact, many Members have done the same when they speak on this "sunset clause". Since I have allowed other Members to do it, I have no reason not to allow Mr LAU Kong-wah to do the same. So, Members, please reflect on yourselves, rather than making a point of order. Mr LAU Kong-wah, please go on.

**MR LAU KONG-WAH** (in Cantonese): Chairman, this does not strike me as strange anymore, and getting so worked up is not worth it. It is often the case that while they can say whatever they like, they do not allow other people to say anything. I thank you very much for allowing me to go on with my speech.

In the face of their attacks on other Members, we have thought about what tactic we should adopt. Honestly speaking, my staff and I have prepared a pile of arguments but then, we thought about whether or not I should speak. I tried to speak earlier but during my speech, there were five or six hands raised. When I spoke for another time, five or six hands were again raised. This is fine if we have the time. But obviously, they were adopting the filibustering tactic with the objective of dragging the debate to beyond 8 August, so as to embarrass the Government, to plunge the Government into a state of not knowing what to do and to preclude the enactment of law in Hong Kong, thereby causing a legal vacuum and damage to law and order. This is intolerable. When we chose to speak in brief or not to speak, they would strike again by criticizing us for not responding, not answering their questions or not knowing how to answer the questions. How can it be true that we do not know how to answer the questions? I think we have only chosen the lesser evil on this occasion. But today, it does not matter anymore, and we can say whatever we like, especially as they are prepared to put up a big show. However, it is most worrying that when asked by the media what would happen if filibustering by the opposition camp would drag on for two more days beyond 8 August, Members from the opposition camp said that they did not care if it would drag on for two more days, and that if there would be no law, then let it be so. Would all Hong Kong people please listen to this, if there would be no law, then let it be so. This was what Members from the opposition camp had said. They are so irresponsible. We cannot let this happen.

Today, I also heard comments which constitute another instance of smearing when Mr LEE Wing-tat started to rebuke and smear the media, saying that the media were biased. Ms Emily LAU, who started out as a member of the media, also took the media to task, saying that the media failed to keep tabs on their pulse. Must the media listen to her and do as she told them to? Not necessarily. She had said before that independence and autonomy were essential to the media. Why has she changed today? Ms Emily LAU even said that the media was being manipulated. This remark is destructive to the media. I hope that the media can respond to what these two Members have said.

Their third stroke is to disguise themselves as the oppressed. Chairman, the credibility of the opposition camp is already very low now. They oppose for the sake of opposing, and cases of their doing damages rather than being constructive have not ceased. The only way to save them is to pretend to be the oppressed, but the public can see more and more clearly that they are just pretending to be so. Chairman, you may remember that before 1997, somebody said that he would be in Qincheng prison after 1997 and that people would have to visit him in Qincheng prison, but he is still sitting here. At that time, some people said that they would have to leave Hong Kong after 1997 and they would not be able to return, but they are now all sitting here too with freedom to come and go. Today, they have said that the enactment of this Bill would mean the end of the world. They are here blowing their own trumpet again, and they consider themselves to be the oppressed. More often than not, they may even leave the Chamber to stage a protest. Chairman, you may as well be prepared for it, for I do not know if they are going to do it or not later. When they step out of the Chamber, they would naturally tell reporters that today is the darkest day for Hong Kong. This is just another cycle. I do not know whether or not this will happen. Chairman, I think in this Chamber, they can tamper with anything, but they must not tamper with law and order in Hong Kong. If they want even to tamper with law and order in Hong Kong, Members of the opposition camp would be most vicious and guilty of all.

Chairman, a number of Members have paid tribute to two Honourable colleagues, Mr James TO and Ms Margaret NG. So would I, and I really mean it. I have been telling other Honourable colleagues in private that I admire very much Members' hard work. This is a fact. They have made great efforts. But in the meantime, I must also pay tribute to all government officials, because they have worked very hard too. Never have I seen them respond so promptly, and my tribute goes to them. Besides, I also wish to pay tribute to Chairman

Miriam LAU. I was the Deputy Chairman, and she was the Chairman. My responsibility was over 10 times less than hers. I must say that she is very tough and resilient, although she told me at some point in time that she was afraid that she could not hang on any longer. It is true that we all had a very rough time.

However, the harder a person works and the more persevering he becomes and the more he clings onto things not in the public interest, the more dangerous it will be. As I have said before, with respect to the imposition of penalties, that which is liable to an imprisonment of, say, three years or more should be considered a serious offence and surveillance is, therefore, warranted. But some Members proposed that the threshold be raised from three years to seven years, thus precluding law enforcement agencies from conducting surveillance on operators of vice establishments, people engaging in counterfeiting banknotes, hackers, and so on. Can even such an amendment be considered acceptable? Certainly not. Another example is that the information collected cannot be used as intelligence. Is this kind of amendment acceptable? It is even impossible to carry out detection by legitimate means on lawyers suspected to have committed an offence. Can such kind of amendment be considered acceptable? No, never. This is against public interest. How can we give it a green light?

Finally, I must pay tribute to all disciplined service officers. They have worked very hard to maintain law and order in Hong Kong. They must have a sword in their hands. If they have a sword in their hearts but not in their hands, it would still be useless. So, I think we must give them legal powers to do it. All the more, I should pay tribute to all Hong Kong people, because they work conscientiously every day, hoping to live in peace and work in contentment, and to achieve stability in society and in Hong Kong. These are what the Bill can do for them.

Chairman, I now speak on the sunset clause which is about conducting a review. Dr Fernando CHEUNG asked in his speech earlier why even the proposal of conducting a review two years later could not be accepted. He got it wrong again, or perhaps he did not listen at all. Members who participated in the scrutiny of the Bill know very well that a review will be conducted in 2009 and that it will be a comprehensive and practical review. Mr James TO's amendment proposes that the review should be conducted two years later, while the Government's proposal is three years. Do they consider even this unacceptable? Chairman, as you can see very clearly, there is just the difference between two years and three years in the end. Since Mr TO can

propose that a review be conducted two years later, why has he criticized this Bill to such extent as if suggesting that the Bill is worthless and that the Bill is wrong in its entirety? This is not true. What is the difference between two years and three years? In the Bills Committee, we suggested to conduct a review after the Commissioner had submitted two full reports in two years, as this could provide a more solid foundation, and that is all. Furthermore, generally speaking, there are also cases that a review is proposed to be conducted three years later. These are common cases.

Therefore, Chairman, if the opposition camp again bundles up the problems in putting up their opposition, I believe this will deal a blow to law and order in Hong Kong.

**CHAIRMAN** (in Cantonese): Mr LAU Kong-wah, your time is up.

**MR LAU KONG-WAH** (in Cantonese): This reminds me that I must pay tribute to the Secretariat for their very hard work. Thank you.

**CHAIRMAN** (in Cantonese): Time is up. Please sit down. I promised to tell Members at around 10.30 pm tonight my decision as to what I would do. According to what I have learned from all sides, I think I do not need to say much about it, because for some reasons, the deliberations can certainly be completed tonight. I have been watching the computer and I have watched the news. So, I now declare that the meeting shall continue.

**MR ANDREW CHENG** (in Cantonese): Chairman, I am not a member of this Bills Committee. However, in the course of the marathon debate over the last few days, I have listened to Members' speeches and the Chairman's rulings, and noticed the forbearance of the Chairman and the steadfastness and persistence of two Members. All these I find admirable.

My wish is for the Chairman to also let me make some comments on the speeches delivered by certain Members just now. Mr LAU Kong-wah just now used the term "opposition camp" to describe pro-democracy Members, saying that at our disposal were just three strokes. In fact I have seldom seen LAU

Kong-wah so agitated. He has been quite agitated this evening. He often wears a smile, and presents his views gently. However, today he got himself "emotionally involved". I think Mr LAU Kong-wah has been exaggerating.

In the first place, I believe, never have pro-democracy Members regarded themselves as human rights fighters. We hold different views. Being part of the ruling coalition, they hold their own views in supporting the Government. Those of our democratic camp are elected by the people. If we regard some view to be the view of the people, we will remain firm on our stand in that respect.

According to him, it appears that we care particularly about the rights of the bad guys, thus causing sufferings to the general public. Chairman, after listening to him, I consider that to be a very serious accusation. First, how can we only care about the rights of bad guys? Who is to determine whether a person is good or bad anyway? I have worked with Mr LAU Kong-wah in the Council for more than 10 years. Never have I labelled him as a bad guy. At most, I just disagree with him. With regard to his political views, I cannot help but make a response whenever he rises up to speak. That is all.

Debates are held in the hope that there can be more clarity as the debate progresses. There should be no personal attack. With regard to the Bill today, what we are talking about is the spirit of the rule of law. Behind this is the idea that a person shall not be taken as guilty so long as there is no conviction by the Court. The Court does not determine whether a person is good or bad, it just says whether or not that person is guilty. With regard to the Bill today, the issue under discussion is what evidence is to be adopted to determine whether a person is guilty or not. How possibly do we care particularly for the bad guys and thus impacting law and order?

Many members of the public were watching the direct telecast of the meeting these few days and they heard the words of Mr LAU Kong-wah of the DAB. Good gracious! So those from democratic camp are like that, are they not? They are actually holding onto power and unwilling to give it to the police, and they forbid wiretapping in order to help the bad guys, are they not? Sorry, Mr LAU Kong-wah, that is not the case. Just now Mr Jasper TSANG whispered to me, saying, "It goes without saying so". I hope that he will stand up later and speak loudly instead of whispering to me. However, I would like to clarify one point. If he said in a loud voice earlier on, he definitely could not,

that they supported stability and so not a single amendment moved by the democratic camp should be allowed to get passed.

Next, I just now asked Mr James TO as I am not a member of this Bills Committee. I remember that James TO once stood up and said, "Chairman, the Government's amendment is in fact my amendment". I asked him how many of the amendments adopted by the Secretary were actually his. He said he was not exaggerating, but half of the Government's amendments are ideas either from James TO or Margaret NG. If this is really so, how can it be said that not a single amendment from the democratic camp should be allowed to get passed? Indeed, he also should not let the amendments then proposed to the Government by Margaret NG or James TO of the democratic camp be approved today — he is shaking his head. That is because the Government has taken over the amendments. *(Laughter)* The answer is this simple.

Ms Emily LAU once cracked a joke here. I am not sure which day it was because the meeting has been in session for four or five days. She cautioned me not to have such a state of affairs for the forthcoming Bills Committee on the anti-smoking Bill, of which I am the chairman. Chairman, please do not worry. If there is to be a debate on the resumption of the Second Reading of the Bill on anti-smoking on 18 October, it definitely will not turn out to be something like this, the reason being that the various amendments I have proposed have already been adopted by the Government. When the time comes, the ruling coalition will surely vote for it.

So, to call us human rights fighters only shows that we are unyielding. We just differ in our beliefs. They are probably not so unyielding and they accept everything that the Government says and they go along with the Government. They probably have strong trust in the Government. However, in dealing with the Government, we do not merely rely on trust. This is different from what the former Secretary for Security Regina IP used to say in asking people to trust her. What we trust is a system, not individuals.

Besides, he said that we liked to smear other people. Then, there was mention of fighter planes, and only policemen knew how to fly fighter planes while we could not and so on. He probably implied that James TO was folding paper planes and throwing them around, and that he should stop talking nonsense if he did not have the knowledge and he should not get into the way of policemen enforcing the law. Surely, James TO is not a policeman. I have known him

for quite a long time. He became a Member of the Legislative Council at the age of 26, working since his youth onto middle age, and now becoming a "worn-out man" — LEE Cheuk-yan calls him a "worn-out man". He is very unyielding in one thing, namely, police power. He wants to strike a balance on behalf of the people. I cannot but admire him on this even though I sometimes also find him very "long-winded". That is, however, his personal style. Precisely because he is "long-winded" and unyielding, it is hoped that other Members can respect his unyielding nature. In this Council, we are really just armchair strategists. It is like that in every national congress or parliamentary body. As I said last time, we are not experts in all matters. Regarding security, those most likely to be called experts are James TO, Margaret NG and other members of the Security Panel. Of course, they are no match for Police Chief Superintendents or the Commissioner of Police. Is this the reason for us not to say anything or not to point out areas that we find problematic while examining the laws? It is not so. We are not just armchair strategists.

Then, he went on to say that five or six hands were raised, and so he said to himself that he should not speak as that would waste time and delay the progress. Mr LAU Kong-wah — excuse me, Chairman, I want to ask Mr LAU Kong-wah this — why do we have to rush to pass the Bill by 8 August? Who set the deadline of 8 August? Had the Government been so eager in this, how come for some 10 years it has not addressed the issue on wiretapping and yet seeks to force us — as Mr Alan LEONG has stated clearly earlier on — to pass the Bill within six months or six days? We raised a lot of questions. Five or six Members raised their hands in a bid to respond to him. Yet he said time should not be wasted. How can the Council make any progress in this way? The responsibility rests with the Government, not with the Council. We are different on this. As they belong to the ruling coalition, they side with the Government, and put the blame on the democratic camp. Our views are utterly different.

Then he went on to say that we pretended to be the oppressed and disguised as the oppressed. I do not look like one being oppressed. We are not being oppressed. We only think that we have to make use of our meagre strength. Just now I heard Fernando CHEUNG say that the "sunset clause" amendment of ours was most humble to the extreme.

Again, according to him, we do not build but only destroy. I really hope that there is justice in people's hearts. Members from the DAB, Democratic

Party, the Liberal Party, the Frontier, the Confederation of Trade Unions, The Alliance and so on — Sorry, Fred LI reminded me that there is also the Civic Party, all have made a lot of suggestions in respect of the policy address. Sorry, Mr Albert CHAN, there is also the League of Social Democrats. We have also been very constructive. However, under the current mechanism of voting by divisions and article 74 of the Basic Law, there are many barriers set up, which make it impossible for the Council or the legislators to do what they ought to do.

Therefore, it is the system which renders the Council, not us, under oppression. Chairman, when I look at the voting results of these few hundred amendments, I have never expected them to be passed by both divisions. It would be a miracle for these to be approved. It would be very gratifying to me if the amendments can be passed by Members returned by geographical constituencies through direct elections. How very sad because sometimes there is no approval even from that division. Why must there be voting by divisions? How come functional constituencies, though representing so few voters, are able to suppress the amendments proposed by Members returned by geographical constituencies through direct elections by the people? Mr LAU Kong-wah, the point is that the entire system is oppressing us. Chairman, we as Members of the democratic camp are not pretending to be the oppressed.

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

He went on to say that we deviated from people's interests, and that law and order should not be tampered with. In no way have we tampered with law and order. He appears to say that we utterly disregard law and order. If it is so, why for about 10 years did he not, as a member of the ruling coalition, remind the Government of the problem with law and order and the need to enact legislation? Is it right? When the Government did not enact legislation they just let the Government go its way. Now when the Government is to enact legislation and we point out the problems, yet he says we are tampering with law and order. In other words, it is up to him to say anything. My hope is for him not to hold us responsible.

Deputy Chairman, I still have more than four minutes of speaking time. In fact my original plan was to speak on the "sunset clause". I do not want to

have any more delay. So, even though I have jotted down some points on the amendments discussed earlier on with a view to speaking about them, ultimately I decided to speak only at this juncture. Unexpectedly, I have used 10 minutes to respond to LAU Kong-wah's speech.

However, I will speak as quickly as possible ……

**DEPUTY CHAIRMAN** (in Cantonese): About the "sunset clause".

**MR ANDREW CHENG** (in Cantonese): Yes, yes, it is about the "sunset clause". Deputy Chairman, but as the Chairman is prepared to let all Members speak out their mind, so I cannot help but …… *(laughter)*

**DEPUTY CHAIRMAN** (in Cantonese): We are tolerant.

**MR ANDREW CHENG** (in Cantonese): However, time …… I know that too.

**DEPUTY CHAIRMAN** (in Cantonese): The Chairman is tolerant.

**MR ANDREW CHENG** (in Cantonese): Yes. With regard to the "sunset clause", in fact I have touched on that just now. For 10 years, the Government has not drawn up any legislation. Very frankly, my feeling is why it is necessary to complete the scrutiny work within such a short span of six months. Mr Alan LEONG just now put forward some figures, such as a two-year committee or review. Sorry, I was not fast enough to note them down.

Deputy Chairman, Ms Miriam LAU, you used to say that the Bills Committee on anti-smoking chaired by me often took up your time-slots, making it impossible for your Bills Committee to hold meetings. We even had to compete with each other in booking a conference room for meetings. I said the blame was not with me. But what is the reason for such a rush? My feeling is that the Government appears to be unwilling to repeat the fiasco of the enactment of legislation for Article 23 of the Basic Law. The Government wants to force

the Bill through the legislature so as not to let the people understand the problems behind it. It does not want to let the people resist, not to let the people take to the streets, not to let your "party of the rich," Deputy Chairman, have the chance to change course, and not to let the ruling coalition run into any problems. Therefore, we are forced to pass the Bill hurriedly.

I often think that this Bill is one that "seeks to reap benefit from the dense fog". As it "seeks to reap benefit from the dense fog", "sunset" would be a most ideal time. The wish is for the sun to blow the fog away. However, the Government still disagrees. As Honourable colleagues have said, this "sunset clause" is a humble provision.

Deputy Chairman, when I was young, my father often told me not to go into two professions if it could be helped. One is that of a legislator. The other is that of a lawyer. Yet I have become both. *(Laughter)* He told me that legislators "earned their daily bread by cheating". The reason is that in his days, every legislator got the seat by appointment. They were always calculating interests and gains. In the case of lawyers, they also cheated people. They cheated people of money. So it was not a good profession.

Earlier on I listened to the discussions on professional privilege. According to Martin LEE and some other Members, a lawyer is an angel and a devil rolled into one. I would like to share with you this thought. I am a legislator as well as a lawyer. I do provide free legal counselling service. When a member of the public phones me, he will definitely indicate a wish to keep things private and will ask me if the phone conversation is taped or not. I have to tell him that I cannot make any guarantee. If there is the possibility for a legislator to be taped or a lawyer to be bugged, then, to be very honest, how can we lawyers, as some Honourable colleagues have pointed out, give our clients any guarantee that in putting justice into practice, there is still some final tool and means? I hope Members can see this point.

A Catholic priest often tells me this: if an angel becomes the devil's advocate, it would be more terrible than the devil himself. With regard to today's Bill, our debate so far has made us worry that if the ones responsible for law enforcement will enforce the law like an angel and yet possess some improper power of the devil, than it is likely for them to become more terrible than the devil. Hence, I do not wish to see the "sunset clause" not getting passed.

**DEPUTY CHAIRMAN** (in Cantonese): Mr Andrew CHENG, your time to speak is up.

**MR ANDREW CHENG** (in Cantonese): Deputy Chairman, I so submit.

**MR MARTIN LEE** (in Cantonese): Deputy Chairman, after a wait of four days, ultimately there come some sparks from the debate. First of all, I thank Mr James TO and Ms Margaret NG. "All the love to you from the old man of democracy!" Besides, thanks also go to staff members of the Secretariat for they have been working so hard. Thanks to Mr LAU Kong-wah for giving me a chance to respond. Thanks to members of the public for bringing soup and fruit to legislators of the democratic camp.

I have no wish to blame the media. To be honest, what else can they report on apart from giving an account of us eating egg tarts? The clauses are so difficult to understand. Though I am the second most senior barrister in Hong Kong, whenever I speak here, I dare not be the first speaker, the reason being that I do not know what to say. *(Laughter)* I would wait for Mr James TO and Ms Margaret NG to speak first. If I still do not get it after their speeches, then I would remain silent. After they have spoken, I would speak if I find it not so hard to understand. So how can we blame the media? It is not even possible to prepare the mark-up copy as it is too difficult. So, we should not blame the media.

How come the Government just takes over our ideas once it agrees with our amendments? Members will definitely let the Government do that as amendments proposed by the Government are more likely to get passed, actually they are bound to be passed. It is because the royalist camp is sitting at the back and there is no need to claim divisions. According to what a man of wisdom recently told me, there is one reason, namely, that the Government will not let the amendments proposed by Members, not even a single one, be passed. Mr LAU Kong-wah made a similar statement but he did not cite the same reason. He gave another reason instead. According to their understanding, under Article 74 of the Basic Law, there are three categories of laws on government policy and structure, and the use of public funds for which we are not allowed to make proposals. For the category relating to policies, it is necessary to have the Chief Executive's endorsement. However, an explanation has actually been

given to us by the Government on that day. It was then shown to us by Daniel FUNG, who said that for such laws Members were not allowed to introduce bills, or have the right to move amendments. This man of wisdom told me that that was the Government's real reason. So, if the Government accepts anything, it will introduce them. Otherwise, it cannot and will not support any proposal from us, not even a single one. That is the reason, not the one stated by Mr LAU Kong-wah. However, he has it well covered up. I must thank that man of wisdom for his enlightenment.

According to Mr LAU Kong-wah, we are playing delaying tactics. If we were to do this, would we have done it this way? Would we have done it so badly? We would have walked out to play the quorum game with you so as to leave you with insufficient quorum. On this occasion, I raised the point of insufficient quorum twice, once when "Long Hair" was speaking. "Long Hair" has done very well this time. You must listen to him. The second time is about the Member whose speech you must listen to and that is me. *(Laughter)* I have only raised the point of insufficient quorum twice.

You people are often outside the Chamber. I know you are eating, drinking, reading newspapers, and watching the television, enjoying some other television programmes, not the live telecast of the Legislative Council meeting. Do you think I am not aware of these? I did that too in the past. *(Laughter)* If we want to play tricks, how easy it would be?

**DEPUTY CHAIRMAN** (in Cantonese): Mr Martin LEE, please speak on the "sunset clause".

**MR MARTIN LEE** (in Cantonese): Deputy Chairman, there is something that you do not know. Before you took over the meeting from the Chairman as her deputy, Mr LEE Wing-tat once raised a point of order in protest. The Chairman said, "All of you are talking like that. Why can Mr LAU Kong-wah not do so?" *(Laughter)* So, I think it is okay to speak on all sorts of things.

**DEPUTY CHAIRMAN** (in Cantonese): I will let you speak. Just like the Chairman, I will let you speak.

**MR MARTIN LEE** (in Cantonese): Thank you. If LAU Kong-wah may speak, so may Martin LEE.

**DEPUTY CHAIRMAN** (in Cantonese): To a certain extent, I allow Members to speak on other matters, but Members cannot just speak on other matters.

**MR MARTIN LEE** (in Cantonese): The crucial point is that had this point not been rejected by the Chairman when it was raised by LEE Wing-tat, it would not be necessary for me to speak on that now. As the Chairman did not reject it earlier on, I am now saying whatever LAU Kong-wah has said.

**DEPUTY CHAIRMAN** (in Cantonese): Still, would you go back to this amendment. Do not talk about what Members have said in the Chamber.

**MR MARTIN LEE** (in Cantonese): I will just speak on what Mr LAU Kong-wah has said. I will not go beyond that. He has said that he is being oppressed. Indeed, I believe he has some feeling of oppression. Why? He has a lot to say, but he does not dare to speak out and he is not allowed to speak. It is not that they have agreed among themselves not to speak. It is that there are some men of wisdom who instruct them not to speak. Do you think I am dead and know nothing? The fact is like this. A Member of the royalist party spoke to me in private today, saying, "You ask me to be a rubber stamp supporting the Government, fine. However, the Government should have its men making better speeches. Otherwise, I am only to look stupid, for all I have to do is to press the button to vote every time I enter the Chamber." According to LAU Kong-wah, our law and order cannot be tampered with. When have we tampered with Hong Kong's law and order? Can people's liberty be trampled? Article 23 of the Basic Law is the foremost provision protecting human rights.

Deputy Chairman, in fact there is no need for us to be angry. Now I have to "change gear", switching over to the "happy gear". There is a person in Hong Kong whom I admire very much. Everybody knows him. He is Cardinal Joseph ZEN Ze-kiun. He made a very terse description of himself, "I am unrepentantly optimistic." Mr Alan LEONG likes that too. *(Laughter)* What makes one so happy? It is because soon the final victory will be on our side.

As a matter of fact, this piece of wicked legislation will come to nothing even without the "sunset clause". I am not a prophet. But I just learn that today "Long Hair" has done another good deed. He went to the Court to apply for a judicial review again. The subject for judicial review is our Speaker, our President. It is because she has made some rulings rejecting amendments introduced by Mr James TO and Ms Margaret NG on the ground that they have violated our rules, one of which is that amendments with financial implications require the Chief Executive's approval.

In fact, it is we who set the rules. According to Article 74 of the Basic Law, there are three types of bills that we are not allowed to introduce, that is, those relating to public expenditure, political structure, or government operation. I have read the Government's explanation. The explanation was given by Daniel FUNG. According to him, for these types of bills, even if we are to introduce amendments, there has to be written consent from the Chief Executive. We do not accept this at all. However, at that time, there was mention of financial problems. So, the Legislative Council exercised self-restraint, indicating that those with financial implications should be approved by the Chief Executive.

Now "Long Hair" considers this to be wrong, he raises the query as to why they cannot be introduced, and holds that our own restraint is wrong and is against the Basic Law. This morning, the Court has approved the application for judicial review. In my opinion, the lawsuit will turn out to be victorious. I therefore think that the final victory is going to be on our side, those in the opposition camp. It is not because we have managed to convince the royalists. Regarding this point, even though I am so optimistic, I have never dreamed of it. However, in some old Cantonese movies, the wicked character played by SHEK Kin is bound to go down in misery. This wicked law is like SHEK Kin, it will end in misery too. Therefore, I am very certain that this battle is not yet over. This is just the beginning.

My worry, however, is that today is just the first day witnessing the emergence of a major political crisis. Try to see this. If the Court of Final Appeal is to rule the Ordinance passed today to be unconstitutional, then what should be done? Is there going to be an interpretation of the law by the National People's Congress (NPC)? Will the result of the interpretation of the law lead to a requirement for the Chief Executive's written consent in the future whenever Members propose to amend such types of bills introduced by the Government? If the Standing Committee of the NPC indeed interprets the law in this way, the power of the Legislative Council will be very much weakened.

Just imagine, in the event that in future there are bills about the political system, for example, about the implementation of direct election or a bill on the Chief Executive Election Ordinance, we may not be able to introduce even one single amendment. Or as things are done now, only amendments accepted by the Government can be introduced. But these are to be introduced by the Government, not us. If it really turns out to be like that, the entire world will see that "one country, two systems" is just a lie.

I think such a situation may not crop up after all. The reason is that by the time the Court of Final Appeal rules on this case of judicial review, it is, I believe, getting very close to the time of the Olympic Games in Beijing. I believe with so many people coming to our country, visiting Beijing then — surely, some of us cannot go — I believe that leaders of our nation probably do not want to see such a time bomb show up. Hence, I am still optimistic. In my opinion, what ought to be done should be done.

"Long Hair", I have never seen you so dejected. You have said "sorry" again and again. Why do you have to say "sorry"? Your have done the right thing. We in the democratic camp are sometimes too gentle. Though the rules of the game are so unfair, for years we have been playing the game with the Government and we are still observing the rules of the game. Since you, Brother "Long Hair", hold that these rules are in fact unconstitutional, what else should you worry about? Why feel sorry about it? "Long Hair", this old man of democracy loves you too.

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

(Mr LEUNG Kwok-hung pressed the button)

**DEPUTY CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung has pressed the button. But he has already spoken once. I would like to let those Members who have not yet spoken speak first. If there is no one who has not yet spoken wants to speak, I will surely invite Mr LEUNG Kwok-hung to speak again.

(Mr LEE Cheuk-yan raised his hand to indicate a wish to speak)

**MR LEE CHEUK-YAN** (in Cantonese): Deputy Chairman, when reading newspapers these few days, I sometimes felt very disappointed, for all the reports were about us yawning in the debate or eating egg tarts. However, there is one piece of news which I find very interesting. It was reported that Mr James TIEN confessed to the media that he had done one thing wrong. This so-called wrong thing was that when the "paparazzi" people asked him where he was going, he said angrily, "That is none of your business! You guys are worse than my wife!" The words used by the *South China Morning Post* are "noisier than my wife". On reading it, I have the feeling that the Government often wastes resources. Next time, the Government should ask some policemen, instead of AOs, to be the "paparazzi". The reason is that policemen are used to doing covert surveillance. It is better to ask them to do that.

However, in my opinion, the most saddening thing is that Mr James TIEN indeed has the reason to be angry. What do his whereabouts have to do with them? Try and see what we are talking about today and what the theme of this Bill is. The theme of this Bill is precisely what made Mr James TIEN angry, namely, being stalked. However, what he suffered was much less than what common people are to suffer under this Bill. It is because he knew well that he was being followed. Someone politely asked him where he was going. No harm done. To me, it is okay for someone to ask me where I am going. However, this Bill is precisely on the matter that when the people are being stalked, being placed under covert surveillance or being wiretapped, they are totally unaware. They do not even have the chance to get angry. If we are really so disturbed, and if Mr James TIEN, finding his privacy infringed upon, indeed gets so angry, then I wonder how we can afford to let the common people's privacy be infringed upon.

Whenever there are discussions about these issues, there are always people lashing out at us with the accusations that we are messing up law and order, pampering and protecting the bad guys. Mr LAU Kong-wah is very good at making exaggerations, even inflating things to the extreme. So, all those not in favour of the Bill, or all those who criticize the Bill for its loopholes or insufficient safeguards are said to be the ones pampering the bad guys. We definitely are not. When the police are trailing a person and when the person has not yet committed any offence, you do not know whether he is good or bad. The Government follows the logic of "killing an innocent person by mistake is better than letting a bad guy get away". Is that right? Is it absolutely not necessary to keep a balance or give some protection with regard to the people's

freedom of communication, privacy or their basic freedom of movement? Will it be alright just to trust the Government?

On this occasion we can see that the ultimate goal of every amendment is to find a point of balance. With regard to the point of balance, when the Government's is different from ours, then let us discuss it. While we are discussing and arguing over things, members of the Hong Kong community, unfortunately, have not got the chance or the time to take part in the whole process of discussion. It is because the Government has not consulted them.

As a matter of fact, the contents of these four days' discussions, or actually, each one of the amendments, should require a consultation. In addition to the main body of the Bill, all the several hundred amendments in fact also require consultation. For instance, there are some very simple questions. Should the annual report show the breakdown of cases under public security, cases under other criminal investigations, those of three years and those of seven years? There should be discussions on these. But the Government does not think such information should be made public. However, the reason given is ludicrous, the argument being that if these are made known, people can make a guess at the strength of the police. I really do not understand what sort of logic it is. Such issues should be brought up for discussion to see if the people can understand the logic involved. For the entire matter, because of the need to legislate hurriedly within half a year, there is no room for earnest discussion or consultation among the people. This is the greatest problem.

Therefore, the "sunset clause" is precisely to address this issue. The wish is that there can be an opportunity to conduct a review after the ordinance has been in operation for some time. As Fernando CHEUNG has said correctly, this is a very humble request. Even if the "sunset clause" is passed, this piece of wicked legislation is still to be in force for some time. In fact, the people will have to be exposed to a scorching sun for a long time before it gets down. They will have to wait two years for the sunset. So, in itself, this is a very humble request. However, later on this humble request will be rejected. This humble request is made out of a wish for the people to have the right to be consulted. That is all.

With regard to the debate of these few days, I believe those of us who claim to understand the provisions discussed are really terrific. I was not present at every meeting of the Bills Committee. Sometimes I do not fully

understand certain provisions. Excuse me for criticizing the Secretary's performance. I do not think the Secretary fully understands everything. It is because we can notice that from his replies. He also does not know. When asked what policy he had, he was unable to say it. When asked whether he knew or not, he said he had nothing to add. When coming to the end, he would invariably call upon all Members to oppose amendments moved by Mr TO and Ms NG and support the Government. I cannot blame him as he has not been following every topic discussed by the Bills Committee. Therefore, he ought to be the first person to be given consultation. Such a ridiculous situation can be noticed throughout the entire process. If the Secretary is also not clear — please excuse me for saying this, I think Stanley YING should be clearer than the Secretary. If the Secretary is not too clear, then the "sunset clause" is all the more necessary. It will make him see better. This is the purpose of the "sunset clause", as simple as that.

We can foretell the outcome of this voting. The amendment is bound to be rejected. Even though it is to be rejected, I would think the whole incident, as described by Henry TANG, very good public education. If we get such good public education, in my opinion, it is enough. The reason is that we are aware that we are bound to fail when voting in this Council. As Mr Andrew CHENG has said just now, there can be no real debate in a distorted system. We are not able to vote on the basis of a sensible discussion. There is definitely none.

There is, however, one merit, and that is to allow the people to see and know whether or not their freedom is in danger, and they can then draw their conclusions. My feeling is that if the people are alert, this debate of ours is able to wake them up. In my opinion, this point alone is sufficient to make me consider this to be our victory.

Finally, I must pay my tribute to Mr James TO and Ms Margaret NG. Many people have asked me whether or not I have had a hard time. To be honest, how can it be said that I have a hard time? To them it is hard, given the need to stand up from morning to night. Sometimes when people asked me whether I had a hard time, I was too embarrassed to speak. *(Laughter)* How possibly can I claim to be so? It is hard for them. It is hard for the Secretary. It is also hard for the Secretariat. We are rubber-stamps for the two sides. I am a rubber-stamp of the democratic camp. You are the rubber-stamps of the Government. Both sides are rubber-stamps. So, it is not too hard for us. It is most hard for the two Members. So I must salute them.

Finally, I would like to dedicate a song to them. However, I am not going to sing it. Do not worry. *(Laughter)* This song is the favourite of Andrew WONG, a former Council Member. As we all know, it is "My Way". To be in line with gender mainstreaming, I have the last verse changed:

"For what is a woman,
what has she got?
If not herself,
then she has naught
To say the things she truly feels
and not the words of one who kneels.
The record shows
I took the blows
and did it my way!"

The most important line reads: "To say the things she truly feels and not the words of one who kneels." It is hoped that our spirit can go on. Thank you, Deputy Chairman.

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

**MR JASPER TSANG** (in Cantonese): Deputy Chairman, originally I have no idea what a "sunset clause" is. It turns out all sorts of things can be said after sunset and what is said is all about sunset.

Deputy Chairman, I think I am more qualified to talk about covert surveillance than Mr LEUNG Kwok-hung. The reason is that he came to the suspicion that he was being bugged on finding a few holes in his home. In 2003, the year when there was the SARS outbreak, we went to help cleaning up housing estates. That was a *bona fide* cleaning exercise meant to wash the floors, not making home visits. I came to a housing estate in Kowloon. A big guy came up to me and said, "Mr TSANG, you do not know me, but I have known you for a long time. I have been on your trail for more than 10 years. I trailed you more than 10 years ago." I felt very flattered. I gave it some thought. It was in 1992 that I started the work of setting up the DAB. There is just a lapse of 11 years between now and then. Even members of the DAB have only been following me for 11 years. I wonder why he had been following me

for 10-odd years. *(Laughter)* He then said that he was previously with the Special Branch. *(Laughter)* Had he not said so, I would not have been aware of covert surveillance. My guess is that in this Chamber, probably some of us know these matters and activities prior to the reunification only too well and they seem to have suspicion and fear of the law-enforcement agencies and disciplined services. So they have an urge "to keep an eye" on them to such an extent that they are less concerned about the need to keep thieves and criminals under surveillance.

Hence, Mr LAU Kong-wah said that some Honourable colleagues in the opposition camp care for and are more concerned about bad guys to such an extent that they tend to be less concerned about the safety of the common people. Is he wrong in saying so? When the amendments were being examined at the Bills Committee, quite a few Honourable colleagues repeatedly made mention of an idea: rather show leniency than wrong the innocent. Then Mr Albert HO, the most honest person among all the pro-democracy legislators, pointed out the true essence of "rather show leniency than wrong the innocent". I always hold that "rather show leniency than wrong the innocent" should not be applied in this way. "Rather show leniency than wrong the innocent" is to be used at the time of a trial." With my limited legal knowledge — according to those Members who are themselves barristers, even one with a little legal knowledge should know this and that — I understand that at the trial of a criminal case, we start with a presumption of innocence. The burden of proof is on the prosecution and it must be proved beyond reasonable doubt. This is where "rather show leniency than wrong the innocent" comes in. Even if it is obvious that a person has breached the law and yet there is insufficient evidence, it is still not possible to convict the person. However, should law-enforcement agencies and law-enforcement officers "rather show leniency than wrong the innocent"? Should policemen "rather show leniency than wrong the innocent" when arresting thieves? Does it mean that I am not to make the arrest when I can do it or not do it? Should the Customs "rather show leniency than wrong the innocent"? Does it mean that they are not to take action when they can do it or not do it? Should the ICAC "rather show leniency than wrong the innocent" when combating corruption? Suppose you make a report to the ICAC, but they say, "Sorry, it is better to have one less case than more. We would rather show leniency than wrong the innocent, and be lenient whenever possible." Should it be like that? The only scenario in which I look forward to having someone "rather show leniency than wrong the innocent" is when I am caught by a speed camera. This will come to my mind when a policeman approaches me

afterwards. Why can he not "rather show leniency than wrong the innocent"? So in fact it is not to be used in this way. Mr Albert HO has pointed out that this is not the yardstick with which we draw up the ordinance. He is very honest. The situation is like this. Now our concern is that you have to put someone under surveillance when the offences involved are punishable by three years' imprisonment. Can even investigation not be allowed? He is not yet convicted now. It is just necessary to investigate into the case now. It is just that. As such, has Mr LAU Kong-wah said anything wrong?

Mr Martin LEE is another honest person. He made a fair statement. Please do not say that Members in favour of this Bill often go outside the Chamber. We often watch the other side too. How many party members behind Mr Martin LEE, with the exception of Mr James TO, are always present? They are having tea while we are having coffee. We are watching football while they are watching snooker. Mr Martin LEE admitted that he himself did not understand the provisions. While still in a state of uncertain comprehension, he would stand up and speak. So, he should be known as "LEE Chi-ming" in Chinese as it means he seems to understand. That is to say, he is one who often does not understand though it seems that he does. For instance, what he has just said puzzles me again. He asked if there would be no investigations without covert surveillance or interception of communications. No, of course not. That would merely underestimate our police officers. Can they not conduct any investigation and must they rely on covert surveillance and interception of communications? He went on to ask, before the invention of listening devices, could the police not conduct any investigation and all criminals were able to remain at large? This reminded me of policemen who complained to me and asked me to reflect their problem to their supervisors. They hoped that there could be improvement as they were too heavily loaded with equipment. The service revolver of a policeman also comes to my mind. How large is the chance of using it? Following Mr Martin LEE's logic, I wonder if it means that a policeman is unable to catch criminals when not armed with a revolver. You might then press on, seeking to know if all law-enforcement officers were unable to catch criminals and had to let them go rampant before the invention of the revolver. That being the case, a policeman ought not carry any gun since it does not matter even a gun is not carried. How possibly can such logic stand?

Human right fighters? I think they are more than that. They are simply the embodiment of justice. Deputy Chairman, according to my Honourable colleagues, for the sake of everybody's health, especially that of the Chairman, I

had better refrain from speaking. The reason is that Ms Emily LAU once said that one statement from me would lead to two hours' debate. All along I, therefore, just put up with that and did not speak. On hearing so many things said, it is sometimes hard to bear. It seems that the independence and dignity of justice in Hong Kong would all count on them. But for the few of them, the rule of law in Hong Kong would have vanished or collapsed. The dignity of this Council and its credibility in the mind of the people all rest on the few of them. Is it in fact like that?

They said to people, "What is legal vacuum? There has always been a legal vacuum." Members of the opposition criticize the Government for the long delay in introducing this Bill. To be honest, I find it hard to defend the Government. However, the matter has already reached such a stage. Who is misleading the people? According to some, "Given the fact that the legal vacuum has been around for so long, it does not matter even if the Bill is not passed." That being the case, what is the significance of the date of 8 August? Why did Courts of the two levels both mention the date of 8 August? The Court of Final Appeal ruled that for covert surveillance to be carried out without having a piece of legislation as its basis is wrong and not in line with Article 30 of the Basic Law. However, how come there is still the mention of the date of 8 August? It is because there is an issue. It is to let the Government draw up legislation in time to plug up the loophole. We indeed have been toiling over the matter, working overtime, spending extra hours, and staying behind. We should have been on vacation. Such arrangement is bad. It is open to criticism. However, in my opinion, they should not tell the people that as there has been a legal vacuum all along, it is not going to matter and life can still go on as usual if the Bill is not passed. There is already a legal vacuum. If it is to be delayed for a few days longer, someone will, as noted by Mr LAU Kong-wah, go out and say to the people that it is still okay not to have this piece of legislation, and that they need not think that things will not work. Is it really so?

Therefore, judging from all these, we can see that the distrust in and suspicion of government law-enforcement officers and law-enforcement agencies held by some of the Honourable colleagues in this Chamber indeed far outweigh their concern for law and order or the security of people's lives and property, and these even overshadow their consideration for the apprehension of criminals and more effective crime combat by the law-enforcement agencies. The situation is like this.

So, Deputy Chairman, it is correct to say that we are talking about the "sunset clause". However, in my opinion, what we have just said is all pertinent to the "sunset clause". The reason is that, as Mr LAU Kong-wah has said at the start of the meeting, the justification advanced by Members who claim that the "sunset clause" is indispensable, and who even advocate that the entire Bill should be rejected unless it comes with the "sunset clause" is that this is a piece of wicked legislation, and that at most it should only be tolerated for the time being. To ensure that it will lapse at the time designated, the "sunset clause" must be inserted. Had we accepted such a premise, we would have agreed to setting a date for its "sunset". However, I agree completely with what my party member LAU Kong-wah has said. Though my attendance in the Bills Committee is much less than that of Mr LAU Kong-wah, and I have not been as hard-working as Mr James TO and Ms Margaret NG, it is certain that I attended far more meetings of the Bills Committee than Mr Martin LEE. I also understand the Bill a bit better than Mr Martin LEE. In my opinion, the Government did show the greatest sincerity and seriousness in dealing with all the suggestions made by Members in the Bills Committee. Deputy Chairman, you know this very well.

Therefore, I think the Bill is worth supporting. It should be passed. It is not just because law-enforcement agencies have a need for it. It is not just because it is needed for people's safety. More so it is the fruit of many months' painstaking labour from the departments concerned and our Honourable colleagues. Thank you, Deputy Chairman.

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

**MR KWONG CHI-KIN** (in Cantonese): Deputy Chairman, having listened to several days' debate, I had some pressure when I went out just now. The pressure came from some members of the media who asked me, "It seems that you have not yet spoken." Indeed, I have yet to speak. So I am responding to the request of friends of the media. *(Laughter)* As in the words of Mr Jasper TSANG, being one with some background in law — I can be considered to be one with some background in law — so I am going to say a few words.

(THE CHAIRMAN resumed the Chair)

That the Bill is examined in this way in fact really goes beyond my imagination. In my opinion, those with only some background in law do not have the ability to take part in the discussions. However, our debate has been in progress for several days. The whole Bill is quite technical and complicated. The right to speak only goes to those who have legal background and who have seriously taken part in the examination work. I admit that I did not take part in the examination work. Some friends asked me why I did not take part in the examination work. It was probably because I anticipated a time-consuming examination, so I did not sign up for it. *(Laughter)* For one not having taken part to speak is quite dangerous, the reason is that what we are talking about now are, unlike what some Honourable colleagues say, some black and white issues.

In my opinion, it is bound to be impossible to please all members of the community with what we are doing now because what we are trying to achieve is to strike a balance. On the one hand, it is necessary to crack-down on crimes. On the other hand, it is necessary to protect the people's freedom of communications as well as their right to communicate in privacy. How to choose between the two so as to strike a good balance? My first degree was in sociology. On the basis of my rudimentary understanding, there is no reason for there to be two views only, given the fact that Hong Kong is so diversified and we have 60 Members all coming from different background and representing different trades and professions as well as members of the public. However, because of political reasons, we are divided into two major camps. In my opinion, the many amendments introduced by Mr James TO and Ms Margaret NG after a lot of laborious efforts are something that we can either take or let go. In other words, the Government's approach is workable. The way adopted by Mr James TO is also acceptable even though I do not quite like it. The way adopted by Ms Margaret NG also has its own merits. If, however, we have to either accept them all or reject them all, then this point deserves to be given some thought by our Council, our Government and our entire community. Unfortunately, we are in a very awful political situation, where two major political camps are confronting each other.

According to my original plan, upon my return from vacation — as I can be regarded as one with a little legal knowledge — I was to take a serious look at those CSAs to sort out those acceptable and those not acceptable. I read the news upon my return, and realized that the pan-democratic camp had adopted a "bundling up" strategy. Then I felt that it was useless. Once they bundled

things up, so two major camps are formed, leading to this outcome. I find this most undesirable, but this is the political reality in Hong Kong. As a matter of fact, I did listen to the speeches by quite a few Members coming from the pan-democratic camp, though I left the Chamber occasionally to take a nap. Mr Jasper TSANG criticized them. However, it was I who watched snooker games. *(Laughter)* I found that nobody in the Council likes to watch snooker games. Occasionally seeing that no one was watching Cable TV, I watched snooker games. I think it is me, not Mr Martin LEE, who likes watching snooker games the most. My guess is that Mr Martin LEE simply does not understand snooker. He knows only football.

As the discussion was too technical, I was unable to participate. As a matter of fact, on the whole I understand the arguments of both parties. Now the two sides are pitted against each other, though a lot has been heard, it is useless. I have spoken to Members of different affiliations in private. We all have our own views on various amendments. In fact, the results we get should be very complicated. They ought to be like a seesaw, and the deliberations would be on and off as in the case of some bills prior to 1997. For instance, what is it going to look like now if the amendments moved by Mr James TO and Ms Margaret NG are added to the Government's amendments? What is it going to look like if their amendments are combined? However, existing political reality simply does not allow us to do so.

My hope is that after the meeting, these Members from the pan-democratic camp with legal background will not say scary things just to raise an alarm. As a matter of fact, over the past few days, I have heard some remarks that are, in my opinion, gone overboard. That is harmful to our "one country, two systems" and the system of judicial independence. I have no wish to name anyone for discussion so as not to provoke a dispute. I would like to point out in particular that on one occasion, when the discussion was on selecting Judges to be responsible for authorizing operations of covert surveillance and interception of communications, some senior counsels whom I respect very much opined that such a move would ruin judicial independence. I felt very much disturbed on hearing such words. The reason is that one trained in common law ought to understand that when a Judge is chosen to be responsible for some other matters, he is no longer a Judge. He is one responsible for some other matters. This will not impact our judicial independence, nor will it affect the prestige of Judges in the system. We avail ourselves of the service of well-respected Judges to take up certain tasks. For example, Mr Justice BOKHARY headed the inquiry into the Garley Building fire while Mr Justice WOO looked after election affairs

and the demarcation of constituency boundaries. Each was not doing the work of a Judge, but doing quasi-administrative duties or carrying out investigation for the Government instead. When a Judge is discharging those duties, he is no longer a Judge. This is no problem about it. We trust these Judges for their independence and integrity, and we have confidence in them because they are impartial and trustworthy. No matter you like it or not, under this Bill, there is also such an arrangement. Please do not attack the arrangement to such a degree as to say that it will affect judicial independence. I myself have some legal background, and I definitely do not want to see the slightest encroachment upon the tradition of our judicial independence. All of us, including Members of the democratic camp, should protect the tradition of judicial independence as well as the prestige of Judges. Do not ruin that by giving it one more kick ourselves.

Just now, Mr Jasper TSANG gave a good speech. I would like to respond to it. In fact, the Government is really to blame. For years it failed to draw up legislation for wiretapping. However, it is of no help for us to talk about these now. There is really a deadline right in front of us. During the past few days, I listened to some comments that were thought-provoking. However, I did not have even the slightest wish to respond. Why? It is because to me 8 August is indeed a deadline. Although some Members who holding a dissenting view query the Chairman's statement that 8 August is a deadline, this is actually an issue of political stands. I respect them even if they hold a different view. However, objectively, 8 August is indeed a deadline. The reason is that the whole issue was created by Mr LEUNG Kwok-hung. Earlier on, Mr LEUNG Kwok-hung also claimed to be the person who started the trouble. We in fact should not use the term "trouble-maker", the reason being that the term "trouble-maker" carries a negative connotation. Mr LEUNG Kwok-hung in fact brought up a question, namely, that the Chief Executive, Mr TSANG, used Executive Order as a stop-gap solution in the aftermath of some cases that called into question the Government's law-enforcement operations. At that time quite a few people expressed reservation and doubt. At that time, I did not make any comment as I did not understand. I refused to do that even when approached by some mass media for comments as I wanted to do some research first.

Let us refer to Article 30 of the Basic Law. The bottomline is that the freedom and privacy of communication of Hong Kong residents shall be protected by law. This right is inviolable except that the relevant authorities may inspect communication in accordance with legal procedures to meet the

needs of public security or of investigation into criminal offences. The crucial term is "legal procedures". The Court of Final Appeal ruled that an Executive Order is not legal procedure. So, here comes today's Bill. The grace period granted by the Court is up to 8 August. So, as a responsible Council, we are duty-bound to make an effort to settle the matter by 8 August. Surely, it is another matter if the Bill is rejected. At least we have got to make a reasonable attempt so as to try to put the Bill to the vote before 8 August and see if it can be passed. Otherwise, there is indeed going to be a legal vacuum. What if there is a legal vacuum? The problem is going to be very serious. Here is the problem. The purpose of Article 30 of the Basic Law is the vesting of power. To comply with that Article's requirement, we now need a legal procedure. It is now well understood that Executive Order is not legal procedure. There has got to be enactment of legislation if there is to be any legal procedure. Therefore, we have to enact legislation. The Ordinance to be enacted today is to confer power through legislation. Only then can law-enforcement departments resort to covert surveillance and interception of communications. Law-enforcement agencies cannot intercept communications without this piece of legislation.

I think each Member who has spoken is very clear about these. These should have been discussed at the resumption of the Second Reading debate. However, at that time I was a little drowsy, having just come back from a trip. I did not hear it too clearly. However, my guess is that all Members should understand. So I think 8 August is a date that we should respect. Otherwise, this will be an irresponsible parliamentary body. We are Council Members. If we fail to respond to the deadline set for the Government by the Court and if we are unable to act in accord with the entire Government, then there is also problem with us.

Regarding the views expressed by the two Members who introduced the amendments and those of other Members in the democratic camp, they are quite persistent with human rights. Personally I respect that very much. "One country, two systems" is also precious in that many members of the public hold such a view and are persistent with human rights and freedoms.

Chairman, thank you very much for your forbearance. I am about to speak on the "sunset clause". Our protection of human rights does not rest with the "sunset clause". A responsible government has got to review the operation of the law from time to time and it does not matter whether or not there is any "sunset clause". It should not wait until 2009 before working on that. If a

case turns up next week showing serious problems with the Ordinance, I believe the Secretary will still conduct a review or make amendments quickly. So, must we be so rigid on the "sunset clause"? I do not think so.

Chairman, in the final analysis, the protection of human rights and freedoms rests with Article 30 of the Basic Law. I believe even if the Bill is passed today, the discussion will not end. It is probably just the beginning. If the Bill is passed, there may be cases coming up constantly in the future challenging the Bill we have passed. I hope those Members of the democratic camp will not blow up the matter so much as to speak of the imminent erosion of human rights and the rule of the law following the passage of the Bill. Even if you think that the Bill does leave much to be desired, under our constitutional set-up, the ultimate safeguard of human rights and freedoms rests with Article 30 of the Basic Law. If members of the public think any ordinance has erosive effect on human rights, they may still seek redress through our independent judicial system, or even cause the eventual invalidation of certain ordinances by the Courts. Our protection is therefore still there.

Chairman, it does not matter whether or not we like the provisions of the legislation. As I have said at the start, we have to strike a balance that cannot be easily achieved. It is because each person has a different yardstick. Hong Kong is a diversified community. My hope is for those in the democratic camp to respect the political views we hold, Members supporting the Government. In this world, to strike a balance, it is impossible to be simply right or wrong. While I do not want to say that you are pampering outlaws, I also hope that you will not say that we are trampling on human rights. Let us refrain from criticizing each other this way. It is because striking such a balance is something subtle and cannot be achieved so easily. Whether the balance is good or bad depends on how the Government is to practise law-enforcement and the correction role played by the Courts. When these are coupled with discussions in the community, we can strike a good balance in due course.

Chairman, I must thank all Honourable colleagues who have spoken, for I have learned a lot of legal and political views from them. Thank you, Chairman.

**MS AUDREY EU** (in Cantonese): Chairman, when delivering his speech yesterday, LEE Wing-tat asked me, "Ms Audrey EU, it is only normal for your heart to be heavy when you are talking about such solemn issues. How comet

you are always wearing a smile? Why are you able to smile?" At that time I wanted to make a reply. However, as you all know, I cannot tell the Chairman in that way. For one to survive in this Council, and not to go nuts or get a nervous breakdown, the only way out is to learn to wear a smile.

To be honest, just now I really was unable to squeeze a smile. But I heard many people laughing. He said that it was not hard for him, and that he was just drinking coffee and tea, playing electronic games, watching snooker games and enjoying television at the back, adding that things were all too technical, and that he did not know what we were talking about even though he had some legal knowledge. On the other hand, he said these were just different views, not strictly either black or white, and so it was also correct for him to think that way. Did he not tell others that he did not understand what he heard? He called himself a rubber stamp. Chairman, as a Member of this Council, I cannot bring myself to smile.

This is solemn Bill and what is involved are fundamental human rights and the Basic Law. For 10 years the Government did not legislate. Yet this Council of ours is now forced to legislate within a few days. Then some Member of this Council told us that he had gone to have tea or coffee, that he himself did not understand and had not prepared to speak, and that he came in to speak only because some reporters asked him why he did not speak. He then went on, wondering whether it was necessary for us to be so serious about it. Now Judges are just being deployed to discharge some other duties. It is just like the case in which Mr Justice BOKHARY heard the Lan Kwai Fong incident and the Garley Building fire. It is something very common. May I ask if he has ever read the Bill? I wonder if he has read it carefully at all. For the amendment to clause 6, the Secretary for Security specifies the need to insert subclause (3A), which reads "In performing any of his functions under this Ordinance, a panel judge is not regarded as a court or a member of a court". These are Judges' authorizations, not judicial authorizations. The authorities cheat by saying that this is judicial authorization. However, there is none of the safeguards pertinent to judicial procedures. This application is made *ex parte*. The Judges are to be appointed by the Chief Executive. Yet he said that Judges are normally appointed by the Chief Executive. However, these are different. The present arrangement is to have a special deployment of some Judges to some other posts which the Chief Executive appoints them for three years, this is different from ordinary Judges, who are to be Judges permanently after being

appointed by the Chief Executive. The protection of judicial independence comes right from there. Now such panel Judges are not like that, their office is both renewable and revocable. They are deployed in this way, KWONG Chi-kin. They are not deployed to preside over the inquiry into the Garley Building fire. It is because they hear cases in open proceedings by virtue of their judicial and legal experience. I ask him to make a clear distinction. If he just came back from his vacation and has yet to read the Bill carefully, I ask him not to say that those are merely different views.

Jasper TSANG's words are correct. He said he ran into a guy who told him that he had been on his trail for some 10 years. However, that was, as Jasper TSANG said, before the reunification. Jasper TSANG, you are too naive. Did such things only happen before the reunification? All governments, not excepting democratic governments, have such things. Why are we so concerned about wiretapping? Why are we so concerned about one of the issues, that is, public security? It is because that can be used for political surveillance and control. Every government has such an intention. This is also the reason for the need to be very careful when such laws are to be enacted. There can be things like political screening. I wonder how we can be aware of such covert surveillance and wiretapping. Can we afford not to be alert? The fact is that the more we look upon this as an issue, the more we show concern and value it, the more keenly we will feel the pain and the stronger will be our urge to do something more. So, in this connection, I pay my highest respect to Mr James TO and Ms Margaret NG. I believe today even many of those who disagree with their amendments will not call into question their efforts in this respect. Here, I would also offer my thanks to members of the Secretariat. It is because they have also burned the midnight oil for several days in order to prepare for this meeting. I certainly know that the Secretary and his team have done a lot of work too. However, to be honest, the attitude of the whole government is, in my opinion, really not acceptable.

Chairman, this Bill of ours has broken a number of records. This morning I made an inquiry with the Secretariat. According to them, there are about 450 amendments. Chairman, you have turned down some 60 of them, leaving behind 380 amendments. Today, as we come to debate the "sunset clause", most if not all of the major amendments in fact have already been debated. The remaining schedules are of little importance. However, not a single amendment introduced by Members managed to be passed.

Today, we are talking about the "sunset clause". I am sure those opposing the "sunset clause" will point out that this is not a very big problem and that the Government has promised to conduct a review. Emily LAU said something right earlier on. She remembers and so do I, and I think Members present here, including those supporting the Government, are all able to quote many instances showing the Government's failure to honour its promises. There have been many such cases. Even the Secretary has admitted with a smile and in embarrassment that the Government sometimes fails to honour promises.

This is the reason why as Members elected by the people, we are bound by duty to ask the Government to state clearly in black and white in the Ordinance, and, contrary to what the authorities ask us that we should trust them and that amendments will be introduced in two, three or four years for review. Why do we insist on having this "sunset clause"? It is to ensure that the Government must carry out the review in two years, otherwise, on 8 August 2008, that part of the Ordinance on the continuation of wiretapping will cease to be effective. This is the key reason for having the "sunset clause". The Government asks us to trust it. However, on seeing the performance of the entire Government regarding interception of communications and covert surveillance, even those supporting the Government say that they find it difficult to lend their support.

I wonder during the past 10 years how many times legislators from the democratic camp had told the Government that there was no legislation in this respect, and that, given the existence of a legal vacuum, the Government should not do those things. Now the Government accuses us in the democratic camp are using a delay tactic, and that we do not want the authorities introduce this law because we oppose the authorities. During the past 10 years, who told the authorities that it was absolutely necessary to have such a law, and that what they did was illegal? Who said that? It was not the royalist camp, not the ruling faction. It was not they who urged the authorities to legislate. It was we who urged the authorities to legislate. But have the authorities done so?

It dragged on till last year when the authorities lost two lawsuits. What action did the authorities take then? Though staffed with many lawyers, the Department of Justice still said that it was okay to handle it with an executive order. Many of our lawyers advised the authorities against that, calling into

question the authorities' move to legislate by way of executive order. However, the authorities said that it could do that, and that according to Article 30 of the Basic Law, it could proceed by virtue of legal procedures and executive orders were legal procedures. With regard to such an answer, even those in the first year — to say it in the words of Mr KWONG Chi-kin, those even with just a little legal knowledge — will know that it is wrong. However, the entire Department of Justice told the authorities that it was right. How possibly can the authorities persuade us to have confidence in them? How can we trust that it will conduct a review? The history of the whole matter shows us that not until the third defeat in Court, which was in the Court of Final Appeal, not the Court of First Instance, that the authorities admitted their mistake. What is more, it was not an "admission of mistake" made by admitting the mistake. It was an admission of mistake made by introducing the Bill. There has not been one single word spoken to admit the mistake.

So, there is the allegation that the Democratic Party is trying to use delay tactics so as to embarrass the Government by going beyond 8 August. What a big joke! Will such a government feel embarrassed? For 10 years the Government remained shameless. Will it ever feel embarrassed? The Government has been brazen enough to replace legislation with an Executive Order, claiming that it was not necessary to legislate since there was an Executive Order. I wonder if the Government will ever feel embarrassed. Therefore, when someone says that 8 August is the deadline for passing this Bill, I want to know what sort of a deadline it is. For 10 years there has been no enactment. Let us suppose that it is really to be delayed. If not on 8 August, it is still going to be passed on 9 August, or 10 August. According to the Chairman, the meeting will have to be in session throughout the night. We say this is quite inhumane. At most, it is just a day or two late. After all, those supporting the Government are just rubber stamps. In the end, the Bill will still be passed. I wonder if it is necessary to have all the rush in order to hold the meeting throughout the night for several days. What we have been discussing is this matter. The point is that even if it goes beyond 8 August, it would just be 9 August. It would be late by one day only. I wonder how it can be compared with the Government's delay of 10 years.

LAU Kong-wah, did you allege that we were "tampering with law and order"? How are we "tampering with law and order"? Does he know that over the past 10 years, the Government has been carrying out these operations?

The Government has so admitted. Even though the ruling of the Court of Final Appeal has suspended the declaration till 8 August, what the Government has been doing over the past 10 years is based on no law. To our surprise, the Secretary for Security ventured to say that they would continue doing it. What if there is no passage on 8 August? This will go on. Who is "tampering with law and order"? Who is "tampering with the rule of law"?

Chairman, some people heard Ms Margaret NG being praised for both the thoroughness of her amendments and the elegance of her English. It is possible for this to give rise to some charming misunderstanding resulting in the belief that it is nothing serious not to pass the amendments of the democratic camp as things are just going to be not that perfect. Or, as in the words of Mr KWONG Chi-kin, they are just different views and there is no need to sound so distressing. We think many of these are fundamental issues, but I do not have sufficient time to speak about them. There is not even enough time to briefly explain these issues, for there are just too many issues. Time is really not enough.

All these are very fundamental issues. This is also the reason why we insist on having a "sunset clause" as a most minimum and humble request. This is a shameless government. To make sure that it will carry out its promise, it is necessary to have something stated in black and white. This is the reason why we insist on having the "sunset clause".

Chairman, when giving his speech, LAU Kong-wah alleged that the democratic camp "pretended" to have just three tricks. Other Members, such as Mr Andrew CHENG and Mr Martin LEE, have all responded to that. So, there is no need for me to reply in detail. However, I would like to reply to his first point. According to him, we are pretending to be fighters for democracy.

To be honest, I do not know how to pretend to be anything. Also, I dare not claim to be a fighter for democracy. However, there is one thing that I can state here with full confidence and perfect assurance, and that is, it is absolutely necessary for us to support democracy, human rights, the rule of law and judicial independence. If he thinks that he does not want to do that, I can only say that he knows himself well enough.

Why do we have to work so hard for this Bill? Is it that we like to play? Is it that we want to punish ourselves? Are we masochistic? Do we like

filibustering? Do we enjoy toiling non-stop these few days? Not just these few days, how about the examination of the Bill before? There are Margaret NG, James TO and those helping them in the background. Are they masochistic? It is for some very important principles that they do these things. However, the Government and certain rubber stamp-like Council Members in front of us say this is not important and it is not that serious. This is not simply a matter of political environment. This is about how each one of us Members elected by the people will discharge his or her duties.

Given the fact that he also said that for 10 years this Government had not done anything in this respect, and it evaded its responsibilities for 10 years, in order for him to discharge the least of his responsibility, he should support the "sunset clause". Thank you, Chairman.

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

(Miss TAM Heung-man raised her hand to indicate a wish to speak)

**MISS TAM HEUNG-MAN** (in Cantonese): Madam Chairman, I want to say that I am glad the leader of our party stated that we have not been using any delay tactics. Indeed, we have not been filibustering. Now I am speaking for the first time. I would have made a speech of 15 minutes for every amendment had the ploy of filibustering been in use. How can people say that? It is the first time that I speak, and so is Dr Fernando CHEUNG. It is likely this is the only time for the two of us to speak. Had we been filibustering, I would have spoken several times, Mr LAU Kong-wah. So, it is sheer nonsense to say that we have been filibustering.

We know each other well, Mr KWONG Chi-kin. We have a lot of discussion topics between us. However, it is just impossible for me to take what you have just said. You said all of us were bundled up, and we are bundled up here and there. Both sides are bundled up. Though you claim to be neutral, you are also bundled up to support the Government's motion. Why do you not abstain? Another Member did abstain from voting, and he gave an explanation. If you are so neutral, why do you not abstain?

Earlier on Ms Emily LAU expressed her disappointment with our Secretary of Departments, especially our Secretary for Justice. I share her point of view. I recall that at that time the Government said the Secretary for Justice appointed was very good, and that he would uphold the rule of law. Even Mr Martin LEE told me that he was very good. However, I wonder what this good man has done today to uphold the rule of law. I noted from the newspaper a few days earlier that the Secretary for Justice was "chasing the dragon". What is meant by "chasing the dragon"? I understood when I went into the details. "Chasing the dragon" in fact means to doze off. When the motion was under discussion, even the Secretary for Justice was "chasing the dragon" and not staying in his seat. Other Members were also absent. In fact I could have been absent too. However, I hope that even by sitting here without saying a word, I can still give some support to fellows from our democratic camp, especially Ms Margaret NG and Mr James TO.

Last night, many members of the public sent us some goodies, including some bottles of chicken essence. I passed all these bottles of chicken essence onto friends in the democratic camp, especially Mr James TO and Ms Margaret NG. A bottle of chicken essence cannot replenish the energy they spent over the past months or days, especially during the last few days. All along I have been sitting here, and I am not going to leave until the meeting is over. This is to give them spiritual support, uphold human rights and the rule of law. So, now I also call upon all Members to support the amendment in connection with the "sunset clause" moved by Ms Margaret NG. Thank you.

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

(Ms Miriam LAU raised her hand to indicate a wish to speak)

**MS MIRIAM LAU** (in Cantonese): Madam Chairman, I consider myself lucky that the heated debate throughout the discussion of this "sunset clause" did not appear in the meetings of the Bills Committee. Otherwise, it may not be possible for us to finish the discussion on this piece of legislation in 55 meetings and 130 hours. The reason is that I would have been quickly dislodged from my position as the chairman.

Here, I also want to thank the Clerk to the Bills Committee and other colleagues at the back for working so hard to make it possible for us to get in time for the resumption of the Second Reading debate on 2 August. As a matter of fact, we have really put in a lot of time and efforts at the back to refine this Bill.

Of course, I also want to take this opportunity to thank the Legislative Council Secretariat and you, Madam Chairman, for the great efforts spent on the Bill. I think this is unprecedented. At least never have I encountered such a complicated and thorny Bill in my 10-odd years as a Council Member. That the Bill can come up for debate today is in fact due to the great efforts by all parties.

There have been great efforts by all parties. This is especially true of the Bills Committee. It is mainly due to the fact that I am the Chairman of the Bills Committee, so I would like to say a few words on the work of the Bills Committee. All together we held 52 meetings. So many meetings were held within just four and a half months.

It is really a little heart-breaking for me today. It is because I heard some Honourable colleagues of the democratic camp criticizing the Bill and the amendments, including those introduced by the Government, as full of mistakes and utterly worthless. What is more, as in the words of Mr LEE Cheuk-yan, the "sunset clause" that they are after would require two years' waiting, and in the meantime the people and the Ordinance would have to suffer under the scorching sun.

In fact, have we really done nothing in the past 130 hours in the 52 meetings? As I said on the resumption of the Second Reading debate, the 52 meetings have gone through all the procedures required of a Bills Committee, including policy discussion, solicitation of documents from the Government, clause-by-clause deliberation, word-by-word and sentence-by-sentence deliberation, and debate on individual words. I remember that on one occasion, because of one single word, there were repeated requests made to the Government for the provision of documents. Discussions were conducted over and over. At least two or three hours or even longer time was used for the discussion of just one single word or one single definition. Is such work rough and careless? Which Bills Committee would do such work? I also wonder, why is there such criticism from Honourable colleagues even though so much has been done?

At the time of the resumption of the Second Reading debate, I mentioned that quite a few Honourable colleagues took part in the examination of the Interception of Communications and Surveillance Bill which is a piece of highly sensitive legislation introduced by the Government. Their aim is to strive to safeguard people's privacy, also to protect public security by ensuring that law-enforcement agencies can enforce the law effectively and collect intelligence by means of wiretapping so as to protect people's personal safety and property, and yet strike a balance between the two. Surely, the Bill introduced by the Government leaves room for improvement. The Bills Committee has the responsibility to make it perfect. So Members provided the Government with a lot of ideas. In addition to providing ideas, Members also asked the Government to justify the practices applied in certain areas. We held discussions over and over in a bid to find the point of balance. As we were in such a state of mind, the Government eventually had to introduce more than 100 Committee stage amendments (CSAs).

Earlier on Mr Andrew CHENG mentioned and Mr James TO also acknowledged that among the CSAs introduced by the Government, half of them either came from Mr James TO or from Ms Margaret NG. All these are contributions made to this Bill by the Bills Committee for the purpose of making the Bill better and more concrete. How can it be full of mistakes? How can it be utterly worthless? I hope when lashing at the Bill, Honourable colleagues can also consider that many people have done a lot of work at the back. Perhaps let me pause for a while here.

Though I disagree with the CSAs introduced by Mr James TO and Ms Margaret NG, here I still would like to express my appreciation of the two of them. I admire their persistence. I also admire their steadfastness. However, I am sorry to say that I do not agree with their views. Given the great amount of work we have already done, why is the Bill still being lashed at today? Why is it that none of the many amendments moved by Ms Margaret NG and Mr James TO is passed? Is it really that simple that this is because there are two major camps? No, it is not so.

As a matter of fact, the CSAs introduced by Mr James TO and Ms Margaret NG were also proposed in the meetings of the Bills Committee. Both of them had time to explain to the Government and the Members in detail respectively. Now the Government proposes a system on interception of communications and surveillance. Because of the complexity of the system,

many Honourable colleagues are not able to understand. I am indeed very surprised. They claim that they do not understand. It is probably because they have not done the reading. Also, it is probably because they have not been to the meetings of the Bills Committee. So, they have never heard anything. Yet, today they lashed at the Bill freely, describing it as utterly worthless and full of mistakes. In fact, this is one whole set of system.

Ms Margaret NG has her own set of system. Mr James TO has his own set of views. I also respect those views. Given the disparities among the three sets, we considered them in the Bills Committee carefully and also in the course of this debate. At the time of the resumption of the Second Reading debate, I also had some careful consideration. On the one hand, we do not wish to let criminals and law-breakers have any room to manoeuvre and take any advantage. At the same time, it is necessary to safeguard human rights. So, it is necessary to strike a balance. We do not want to give too much room for people to have the chance to do bad things. We do not want to see such a situation.

Therefore, it is very hard to extract from another set of system a certain portion for transfer to a system which we have already considered and found to be intact. The reason is that it will give rise to great concern. There will be problems when individual clauses are presented on their own. When it is to be put into a system already considered, there is the question of whether or not the proportion should be greater here. The impact of adding one clause is probably not huge. The impact will be greater if two clauses are to be added. The loophole will be bigger too. Or, another loophole will be created. Will there be such a situation in the future? At that time we were probably very concerned. Every item was carefully considered. Why were there so many clauses? Is it really a matter of being *en bloc* that anything proposed by Mr James TO or Ms Margaret NG would be rejected? It is not like that. The reason is that we cannot tear apart a system and then mix it up with other things. It will not work. It will simply not work to consider things in this way as we cannot be sure of the outcome of the consideration.

So a lot of efforts have in fact been put in on this Bill. Also, with contributions from Mr James TO and Ms Margaret NG, and those from other members of the Bills Committee, it has been made better, and the balance has become more satisfactory. Therefore, we think that proposals in the Bill are basically acceptable. Of course, no Bill is perfect. Hence we also ask the Government to conduct reviews. Then, should the reviews be conducted as

quickly as possible, in next month or next year? However, how reviews can be conducted without acquiring experience?

There will be reviews by government departments every three months. We were informed of the arrangement long ago. So when a problem comes to light upon review, there is to be immediate correction. However, a major review should be conducted only after some length of time and with the acquisition of some experience. This is something which the Government must do, and which is scheduled to take place in 2009.

Here I must also thank Ms Margaret NG for introducing the "sunset clause", of which I knew nothing before. Many thanks to Ms Margaret NG. In addition to indicating a wish to introduce the "sunset clause", she also provided me with information, which in fact was made available to all members of the Bills Committee.

Where does it come from? There are mainly two sources, namely, from the United States and Australia. In 2001, the United States passed the so-called USA PATRIOT Act. She passed to me the entire piece of legislation, one densely packed with words. I went through it carefully. After reading it, I pondered over the question as to whether or not I should make the decision to add the "sunset clause". I was at a loss, not quite understanding the need for having a "sunset clause". So I made some further study.

I found out that the USA PATRIOT Act was passed in 2001 in the aftermath of the September 11 incident — September 11 took place in September — and the Act was passed in the end of October. It was passed in a rush. According to some documents, when members of the two Houses of Congress passed the Act, the text of the Bill was in fact not yet ready. However, it was passed in that way. The time frame was very tight. Never had it been examined, nor was it debated. If compared with our Interception of Communications and Surveillance Bill of today, the Bills Committee alone spent some 130 hours on the work of examination. Today this Council is holding its debate for the fourth day already. I have also counted the number of hours spent. As a matter of fact, the Bill has gone through a lot of debates and discussions. It is totally different from the USA PATRIOT Act.

Let us take a closer look. What is the Act about? The USA PATRIOT Act contains some very totalitarian things and they give me a shock indeed.

Under the USA PATRIOT Act, police may make home searches without having to inform the persons concerned whatsoever. No notification is required to be given in advance or afterwards. No notification is required when it is in progress and no notification is required when it is done. After that, there can be unrestrained interceptions of people's e-mails by means of the FBI's carnivore surveillance system. There is no need to get a Judge's authorization, nor is it necessary to get authorization from anyone.

Besides, what will the authorities do when someone is suspected of being a terrorist? That has got to be a foreigner. They are particularly harsh to foreigners. The authorities may place him under arrest for "periods of up to" six months. There is no need for any authorization. Approval from the Attorney-General is sufficient. The authorities need not give reasons so long as there is suspicion. There are many totalitarian things, including the power to ask computer companies to provide them with all their clients' information. Contained in many such documents are a lot of totalitarian matters. Then I understood. There were so many totalitarian issues, yet none of them had been examined. How could the Act be passed? It was by proposing a "sunset clause" of 2005. I went further and found that President BUSH said at that time that he himself was well aware of the severity and authoritarian nature of the Act, so he put forward the "sunset clause" to pacify the Congress and to lure the Congressmen to pass it first and review the law later on.

Another example is Australia. The information was also given to me by Ms Margaret NG. As a matter of fact, Australia has a similar situation. The piece of legislation passed is the Australian Anti-Terrorism Act (No. 2) 2005. The background leading to its passage was very unusual. The Prime Minister of Australia John HOWARD described the Act as unusual law for unusual times. On 7 July 2005, bombs planted by terrorists were found in the subways in England, the incident was a great shock to the Australian community. At the anti-terrorism summit meeting two months later, the Australian Government hurriedly decided to enhance their anti-terrorism laws. It is stipulated that the relevant piece of legislation is to be reviewed within five years after its implementation, and that it is due to have its "sunset" in 10 years.

Are we drawing up such laws? I forgot to talk about the severity of that piece of Australian legislation. Among the provisions are the ones allowing the police to detain those suspected of being terrorists for as long as 14 days. The police also have extensive power to stop and search, to interrogate, and to serve injunction orders on individuals. All these are very totalitarian measures.

Are we discussing measures of this type? The reason why I have spent so much time speaking on that just now is to make it clear that the process of our discussion has in fact been very meticulous. Fortunately, up to now I have never heard Honourable colleagues criticize me for handling things improperly. Every work procedure was observed. All the discussions were done in full. The law that we shall make is one on surveillance and interception of communications. It is subject to the various standards of tests contained in clause 3, which I consider to be the soul of the Bill. Everybody is often required to make assessment to strive for a balance in order that there is no wanton or arbitrary infringement upon people's privacy. In fact, this piece of legislation is basically acceptable even though it is still not perfect. No one can say anything done is perfect. So, there is a need for reviews. But I think this is a piece of legislation that we should support. Thank you.

**CHAIRMAN** (in Cantonese): Does any Member who has not yet spoken wish to speak? Here is your opportunity.

(No Member who had not yet spoken indicated a wish to speak)

**CHAIRMAN** (in Cantonese): If there is none, we now proceed to the second round of speeches. The reason is that at the Committee of the whole Council, Members may speak for a second time. However, let me make it clear in advance. The approach which I adopted earlier on was very lax. It is because I knew that many Members had a lot in their mind and they were eager to say it out. They had a strong urge to speak out even though what they said was not particularly pertinent to the "sunset clause". So I let all of you speak to your heart's content. However, we now come to the second round of speeches. It is going to be different. I now make it clear. What you are going to say must be pertinent to the "sunset clause". Otherwise, I will have to interrupt your speech and remind you. I hope I do not have to remind you and I can sit here in greater comfort.

**MR LEUNG KWOK-HUNG** (in Cantonese): What in fact is happening now? Why is it necessary to have the "sunset clause" here? It is because the

Government has failed to discharge its duties. As a result, there is not enough time to draw up this piece of legislation, no matter who is doing the whitewash for the Government here. This is not something fabricated by me. Nobody understands it. Even the lawmakers say they do not understand. Those reading the text also do not understand. How possibly can the people know? The people do not know. The Government does not consult the people. How can they know what the Government is doing? Had the opposition camp so labelled by him not made queries, would the Government have made it known? Had Members of the democratic camp not spoken out today, Ms Miriam LAU would have remained silent. This well proves that some fellows do imagine that the democratic camp is employing delay tactics. He said he would not speak. That is depriving himself of the chance to speak and it has nothing to do with others. If it is necessary to filibuster, I myself can speak for one hour. They need not worry about it. They have got the wrong intelligence. On this occasion, the wiretapping operation is poorly done. Indeed, the operation to intercept communications is poorly done. So, it is really necessary to tighten it up a little. The operations they have carried out to intercept our communications and put us under surveillance are poorly done, thus leading to the belief that we are here to filibuster. I wonder what kind of filibustering it is. They just do not want to speak. What does that have to do with others?

Hence, when looking from this angle, they are just making confession of their own accord now ……

**CHAIRMAN** (in Cantonese): The "sunset clause".

**MR LEUNG KWOK-HUNG** (in Cantonese): Correct, they are now making confession of their own accord. The fact is that they said they did not understand and had no knowledge, yet it was to be put to the vote. Some Members put forward the "sunset clause" and suggested that further discussions should be scheduled at another time. There is another point that is most important. The people must be consulted. The Government has not done so on this occasion.

**CHAIRMAN** (in Cantonese): You have spoken a lot on this point. Do not repeat what you have said before. Go back to the "sunset clause".

**MR LEUNG KWOK-HUNG** (in Cantonese): The "sunset clause" has no …… Chairman, originally I had no plan to speak today. You said they were to be allowed to speak their mind freely. What did LAU Kong-wah say? What stuff LAU Kong-wah said is pertinent to the "sunset clause"? He just attacked us ……

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, you ……

**MR LEUNG KWOK-HUNG** (in Cantonese): Let me tell you. Be fair. He was attacking the democratic camp. He was totally ……

**CHAIRMAN** (in Cantonese): You people also attacked them. Both sides were attacking each other. We are all aware of this. However, you are now speaking for the second time. When you spoke for the first time, I let you speak to your heart's content.

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, sorry. I was quiet when someone made a personal attack on me. Have I made any personal attacks on others here? I never mention anyone by name. They are allowed to make personal attacks here. I am now speaking, but you keep on interrupting me. Is there any freedom of speech here?

**CHAIRMAN** (in Cantonese): There is freedom of speech. There are also Rules of Procedure.

**MR LEUNG KWOK-HUNG** (in Cantonese): Now with every sentence I speak, I will say "setting-sun clause" once. "Setting-sun clause". These fellows are giving up the chance themselves. That is their own business. "Setting-sun clause". Jasper TSANG's buddy — "Setting-sun clause" — CHING Cheong was arrested as a result of wiretapping and interception of communications by others. Under the law of the Mainland, there are 200 000 public security policemen. "Setting-sun clause" ……

**CHAIRMAN** (in Cantonese): It is "sunset clause". *(Laughter)*

**MR LEUNG KWOK-HUNG** (in Cantonese): "Sunset clause". However, the law and order on the Mainland is so bad that even their own people live in fear. They love to conduct surveillance on people. Is the law and order on the Mainland very good? Countries which are most authoritarian will invariably use the most manpower — "setting-sun clause" — "sunset clause" — *(Laughter)* to carry out surveillance. All people are placed under surveillance. There is surveillance on all, it does not matter whether or not they are political prisoners. Is their law and order very good? All authoritarian countries have poor law and order. "Sunset clause" ……

**CHAIRMAN** (in Cantonese): All right, could you lower your voice a little? It is because this Chamber is quite resonant. Speaking in such a loud voice, you are just like yelling in the street. Our ears are suffering. Please speak properly what you want to say. This is parliamentary culture.

**MR LEUNG KWOK-HUNG** (in Cantonese): Just now you have not mentioned "sunset clause". *(Laughter)*

**CHAIRMAN** (in Cantonese): I was talking about Rules of Procedure.

**MR LEUNG KWOK-HUNG** (in Cantonese): OK, OK, "sunset clause", "sunset clause". LAU Kong-wah said that we — "sunset clause". He said that we in the democratic camp — "sunset clause"— set criminals free. Does he mean — "sunset clause" — the Mainland Government set the criminals free? With regard to the law and order on the Mainland — "sunset clause" — even its flatterer the *Oriental Daily News* — "sunset clause" — also finds it frightening. — "sunset clause" That being the case — "sunset clause" — , I wonder if the law on national security of the Mainland is having the tightest grip on the people. "Sunset clause". Does it mean the government of the Republic of China? "Sunset clause". It is a "sunset clause", it is sunset, it is "sunset clause"……

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, do you know you are a Member of the Legislative Council? What you say has got to be logical. Do not be like that! Please take a look at other Members. My goodness.....

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, it does not matter even if you do not let me speak.

**CHAIRMAN** (in Cantonese): It is not that I want to stop your speech. My wish is for you to speak in a way in line with the practice of speaking in this Council, all right?

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, I am a reasonable person. Originally I had no plan to speak. I am already in a low spirit. The point is that LAU Kong-wah made a personal attack. You let him attack me. What should I do? Madam Chairman, do you understand that it is necessary to be balanced and proportionate? They are able to do that. But I have not done that sort of thing. I target issues, not individuals. And for that I have also been criticized. Please do not forget that this Council has its Hansard. He does not care about reputation, but I do. Right?

Now I am to say less "sunset clause" meaninglessly. There is no need to make a personal attack when you talk about "sunset clause". Is it right? Speak when speaking. Whether or not there should be such a clause is the question. When discussing about the "sunset clause", he alleged that we wanted to set the crooks free in total disregard of law and order. He should not think that words spoken here are not liable to the charge of libel, and that one may therefore talk nonsense. I would like to ask him this. During the debate on the "sunset clause", when have we talked about setting the crooks free? We have just said that a good person, or one not yet convicted, ought to enjoy the rights under Article 30 of the Basic Law. In brief, it was wrong for the Hong Kong British Government to trail political prisoners or political dissenters. But after the reunification, there are the Basic Law and the constitutional laws. Lawsuits can now be filed. I wonder if we should still go in the old way. Given the Government's present approach, it is possible for it to be like that. Therefore, we put forward the "sunset clause". Right? Why put labels on other people?

Mr Jasper TSANG jeered at us, saying that we tried to embarrass the Government on purpose. This is indeed flattering. I embarrassed the Government deliberately. But did it feel embarrassed? Donald TSANG does not allow the "sunset clause". I asked Donald TSANG five times to apologize. However, he did not apologize. Precisely because of such an attitude to ruling, one that is firm in refusing to admit mistake, so not a single amendment proposed by the opposition has been passed. This is known as "whateverism". What is "whateverism"? That is to say, it is necessary to insist on whatever Chairman MAO said. However, this is long gone since the fall of the Gang of the Four.

Today, Donald TSANG's rule is likewise characterized by "whateverism". There is no approval for whatever is proposed by the opposition. Ladies and Gentlemen, I once heard of this political story: When KHRUSHCHEV came to power, someone below the stage wrote him a note, saying that he was not that great as he did not take part when people were cursing Stalin, but only climbed up to curse Stalin after he was gone. Do you know what KHRUSHCHEV wrote on the note? He wrote that it was precisely because he had not said anything then, he was able to sit there. A society of lies is like that. Every person does not dare to tell the truth.

May I put a question to those Members who label us as the opposition camp. On which occasion was decision not made by the butt but by the brain? I have known them for a long time. Whenever the Communists change course, they also change course. Every time it is like that. How possibly can they apply this to Hong Kong? According to LAU Kong-wah, we are likely to protest. So he is taking advantage of others' risky position and made a scene here. He barked like a crazy dog. Now they have all left the Chamber. How can they bring false charges against others? If the Government is to be supported, then find a justification for doing so. However, he did not state that, but at the end suddenly spoke a heap of ……

Chairman, to go along conscience, earlier on he did not even mention the term "sunset clause". I find it very simple. The problem of today is a political one. Surely, we are dealing with legislation. Only a government can legislate. Only public authority can legislate and enforce the law. We are facing a royalist camp that is always in the majority. It is not by general election that the royalist camp holds power. This is the problem. What Ms Miriam LAU said is correct. Every person has been working hard. The problem is that when it is put to the vote, they are not equal ……

**MR LAU KONG-WAH** (in Cantonese): Chairman, point of order.

**CHAIRMAN** (in Cantonese): Yes, Mr LAU Kong-wah.

**MR LAU KONG-WAH** (in Cantonese): Chairman, earlier on I heard you say that in this round we should concentrate our discussion on the "sunset clause". Just now I have listened to him for a long time but there is no mention of "sunset clause". Chairman, would you still let him go on like that?

**CHAIRMAN** (in Cantonese): Mr LAU Kong-wah, thank you for reminding me. Mr LEUNG Kwok-hung, do you hear that?

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, I am not going to speak further. When LAU Kong-wah spoke earlier on, I did not know whether I had heard him talk about the "sunset clause" as well. Do you need to suspend the meeting to listen to that?

**CHAIRMAN** (in Cantonese): No.

**MR LEUNG KWOK-HUNG** (in Cantonese): It only takes 15 minutes.

**CHAIRMAN** (in Cantonese): In fact earlier on, a few Members were just like you and they made brief mention of the "sunset clause", then proceeded to say something totally irrelevant.

**MR LEUNG KWOK-HUNG** (in Cantonese): That is it. LAU Kong-wah himself also did not mention "sunset clause"……

**CHAIRMAN** (in Cantonese): If you are not going to speak any further, you may sit down. But if you want to speak, then go on and turn to me when you speak.

**MR LEUNG KWOK-HUNG** (in Cantonese): But he is raising a point of order to criticize me.

**CHAIRMAN** (in Cantonese): So I am reminding you.

**MR LEUNG KWOK-HUNG** (in Cantonese): Ladies and Gentlemen, on this issue, Jasper TSANG and LAU Kong-wah have smeared against us. Their logic is very simple. As Donald TSANG is appointed by the communists, he must be supported no matter what and it does not matter whether it is right or wrong. This is by inheritance, not by nature. It is political inheritance. This is a problem ……

**MR TAM YIU-CHUNG** (in Cantonese): Chairman, point of order.

**CHAIRMAN** (in Cantonese): Yes, Mr TAM Yiu-chung.

**MR TAM YIU-CHUNG** (in Cantonese): Chairman, just now I have listened to his speech again and I noticed that it has nothing to do with "sunset clause".

**MR LEUNG KWOK-HUNG** (in Cantonese): I dare not mention "sunset clause", but I have said it twice now. I am telling you all, the Chairman in fact disturbed my flow of thought right from the start, making it impossible for me to speak. There is a "sunset clause" in this world……

**CHAIRMAN** (in Cantonese): Now are you saying that I am wrong?

**MR LEUNG KWOK-HUNG** (in Cantonese): ……There is a "sunset clause" in this world. This world has a red sun that never sets — a red sun that never sets, do you hear that? That is the Communist Party. This communist clause……

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, Mr LEUNG Kwok-hung……

**MR LEUNG KWOK-HUNG** (in Cantonese): This "sunset clause" envelops Hong Kong……

**CHAIRMAN** (in Cantonese): The meeting is now suspended.

12.10 am

Meeting suspended.

12.18 am

Committee then resumed.

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, go on with your speech.

**MR LEUNG KWOK-HUNG** (in Cantonese): About the "sunset clause," apart from the red sun clause which never sets and which exercises control over all the Chinese people, there are indeed such clauses on the Mainland. They are known as provisional laws. Let me quote an example. The law on correction by labour is provisional. It has been provisional for decades, and yet there is no need for review. The Mainland Government often says that there will be a review. However, it has remained provisional for two years after two years and on and on. Under the law on correction by labour, a person can be detained for up to three years without court trial. This law on correction by labour is provisional. The meaning of provisional is a setting sun, said to be subject to further review by the National People's Congress (NPC). However, this Bill here does not have that. The NPC, so to speak and in a grand style, must have consultation with the Chinese People's Political Consultative Conference (CPPCC). Chairman, you probably have been a member of the CPPCC. Among our Members there are also those who have been CPPCC members. Consultation is required. Are those provisional laws not still in force? They

do not call them "setting-sun laws". So it is futile for you all to condemn "setting-sun laws".

The Mainland is most skilled in "setting-sun laws". Do you all know that the Yellow River empties into the sea? The setting sun disappears once it sets beneath the horizon. Nothing is to be seen. It remains in force. Of course I am in fear. In particular, why are there "setting-sun laws"? The Government is always like that, utterly shameless. Had I not filed a lawsuit against the Government, the Government would not have realized the mistake. However, on realizing the mistake, it set a deadline of six months for us to legislate. It is claimed that even a delay of one day will lead to lawless chaos. Has the Government conducted a survey at Portland Street? Have the criminals been asked? Do they say that they will do bad things if this piece of legislation is not there? That is just bullshit.

**CHAIRMAN** (in Cantonese): Mr LEUNG Kwok-hung, turn to me when you speak.

**MR LEUNG KWOK-HUNG** (in Cantonese): Yes, Chairman. *(Laughter)* I am asking them. Have the criminals informed the Government and has the Government conducted wiretapping on the criminals and intercepted their message that they would come out for their field day once there is a legal vacuum? No, of course not. Does the Government want to cheat all the people in Hong Kong? You want to catch criminals? If Hong Kong is to catch criminals, many criminals can be caught. Also, I want to lodge a complaint against CHOY So-yuk. For her, she would rather wrong the innocent than show leniency. It is simple, her case is considered as one in which she has no case to answer. But the problem is that if you believe …… *(the buzzer sounded)* I have finished speaking. Thank you, Chairman.

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

(Mr Albert CHAN raised his hand to indicate a wish to speak)

**MR ALBERT CHAN** (in Cantonese): Chairman, before I speak, I wish the Chairman can reconsider the ruling you have made with regard to the restrictions on Members speaking for a second time.

About the Rules of Procedure, I understand that in many cases it can be "neither be too slack nor too strict". Sometimes this is true about meeting procedures as well. Chairman, you gave a relatively lenient ruling at first, but during a debate, when a Member who speaks first is verbally attacked by another Member who speaks later, and if he is not given the opportunity to respond to it the second time he speaks, it is rather inappropriate. Certainly I respect the ruling your Honour has made, but for the sake of the fairness of the debate, I hope the Chairman can give it a second thought. I wish to speak again after the Chairman has made her ruling on that.

**CHAIRMAN** (in Cantonese): Mr Albert CHAN, maybe you have already spoken at that time, but subsequently a number of Members have given their comments and criticisms too. Having said that, I wish all of us who are present in this Chamber will restrict our speeches to clause 66.

Frankly speaking, when ferocious exchanges of arguments in the meeting of the Legislative Council are made with regard to certain provisions, the public would understand that deliberations are in progress. But often if these ferocious exchanges of arguments are nothing more than criticisms directed personally against Members who hold different views, the public would be aware of this fact too. I hope Members will bear this in mind. Although you are speaking to the Chairman, it is in fact the people of Hong Kong who are listening to what you are saying. If Members will just bear this in mind, I believe there would be no need for me to make too many interventions. Therefore, I shall leave it to Mr Albert CHAN to decide how you would handle it, shall I?

**MR ALBERT CHAN** (in Cantonese): Yes, thank you, Chairman. Chairman, I certainly appreciate your good intention. However, there are passions involved in the debates conducted in this Council. There is no reason why we should not fight back if we are punched twice in the back, particularly when we acted like gentlemen in treating our counterparts. I will do my best to show my respect to the Chairman by employing my wisdom — limited as it may be — and confine my speech to the scope of the "sunset clause". I will see how the requirements of the Chairman can be met.

Chairman, I would like to give a brief response on one point. Mr LAU Kong-wah was smearing the democratic camp by accusing us of having no apparent intention on combating crimes, as if we were giving in to the criminals and let them do what they want. Chairman, I hope Members will take a look at the "sunset clause" again. Ms Margaret NG has devoted a lot of efforts in the hope that with the enactment of the legislation, the provisions can compel the security departments to carry out interception and related operations in a more careful manner, particularly so with regard to work that will cease to have effect after 8 August 2008 as specified in the Bill and which government departments are compelled to proceed with extra care. If the provision is to compel the government departments to act with greater care, then certainly this is not giving a free hand to the criminals, nor do we have no regard to public order at all. If Members from the democratic camp — especially Mr James TO and Ms Margaret NG who have proposed a great number of amendments — are not concerned about the public order of Hong Kong, they would never have proposed those amendments in the first place, much less the proposal of a "sunset clause".

These amendments will allow the governing bodies especially the security departments, to exercise their duty with greater care and diligence. Thus these amendments will only contribute to a better public order in Hong Kong. To those Members who are opposed to all these amendments, particularly those who are opposed to the "sunset clause", and especially Mr LAU Kong-wah who has accused us of having no regard to public order, I will pay back their accusations twice as many.

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

**MR JAMES TO** (in Cantonese): Chairman, I would just like to give a very brief response. According to Mr LAU Kong-wah, the democratic camp aims at jeopardizing public order and is only concerned about the rights of the criminals.

I believe it is acceptable for us to have different beliefs and I can give him my due respect. However, when he made this accusation, it hurt me real bad, especially when this sentence made me feel that I am one of the people he

accused. We have known each other for a very long time. In the Panel on Security, we take turn to act as the Chairman and Deputy Chairman of the Panel, and I have discussed a great number of issues with him. I have been a member of the Central Fight Crime Committee for 12 years and a member of Action Committee Against Narcotics for six years. I have worked with three different Chief Secretaries for Administration or Chief Secretaries, two Hong Kong Governors and Chief Executives and four different Secretaries for Security ……

**CHAIRMAN** (in Cantonese): Mr James TO, please speak on clause 66.

**MR JAMES TO** (in Cantonese): Chairman, I will speak on that briefly. Chairman, since I spoke before Mr LAU Kong-wah, I would like to give a brief response.

I have many friends and know many journalists. To me, a friend means someone to whom we can talk about just anything. If I am jeopardizing public order at all, they will always let me know, or my journalist friends will tell me what their police friends would have told them. However, I have never been told that James TO is unfamiliar with police affairs, or that he aims at jeopardizing public order. Therefore, when I heard a remark like this, I was badly hurt.

Even when I argued ferociously with the former Secretary for Security Mrs Regina IP with regard to Article 23 of the Basic Law, she still wrote to Mr TUNG and recommended me to be appointed member of the Central Fight Crime Committee. This is because we had worked together in closed-door meetings and I had given my advice. And Ms Miriam LAU was there too, is that right? Together we have worked to fight ……

**CHAIRMAN** (in Cantonese): Mr James TO, you are making it difficult for me. I know you would like to tell us……

**MR JAMES TO** (in Cantonese): OK, I am done with my speech.

**CHAIRMAN** (in Cantonese): Mr LAU Kong-wah, do not make it difficult for me.

**MR LAU KONG-WAH** (in Cantonese): Chairman, it is difficult for me as well. I know there are rules, but I must speak up. I shall be very brief, but please let me give them my response briefly. One of them is Mr Albert CHAN. Maybe he has some misunderstanding. When I talked about letting go the criminals ……

**CHAIRMAN** (in Cantonese): Are you trying to clarify what you have said just now?

**MR LAU KONG-WAH** (in Cantonese): Yes, I would like to clarify that. The content of my speech was specifically about the amendments, that is to say, to one of the amendments …… is that not okay to talk about it? Chairman, you may make a ruling. If you rule that I must not continue speaking on this, that would be fine, but I would……

**CHAIRMAN** (in Cantonese): Members will have a chance to speak for a second time during the Committee stage, but I hope you will stop giving what other Members such as Mr Albert CHAN has described as arguments given in ferocious exchanges, otherwise, this Council will continue to do heated arguments even when it is three o'clock in the morning. Therefore, if you would like to clarify what you have said just now, or if you would like to cite an example, just give your example directly, all right?

**MR LAU KONG-WAH** (in Cantonese): Chairman, I do not think I was that radical. In fact I have remained calm all the way. What I wanted to say is that, if there are any amendments which will prohibit the police from conducting covert surveillance targeting on criminals such as those running vice establishments or those involved in crimes like having sexual intercourse with underage girls, these criminals will be set free. This was what I meant.

Furthermore, Mr James TO and I are good friends. Since we are good friends, we should be frank with each other. The amendments moved earlier

are unacceptable and they will have the effect of jeopardizing our public order. Given the fact that we are the Chairman and Vice Chairman of the Panel on Security respectively, let us work together to perfect the public order of Hong Kong. I believe this is not to be taken casually; this is what I wanted to say. Thank you, Chairman.

**MR MARTIN LEE** (in Cantonese): Madam Chairman, it has been six hours since sunset. I have nothing more to say.

**MR KWONG CHI-KIN** (in Cantonese): Chairman, I would just like to give a simple clarification. Just now Ms Audrey EU appeared to have some misunderstanding about what I said and I would like to clarify.

I understand that some Members think that it is very important that all these applications must be made with the Court. Of course, another way which is the simplest and the most convenient administratively is for approvals to be given by the law-enforcement agencies themselves. In between the two is like what we now have in the Bill, that is to say, where approval is given not by the Court, but by a panel whose members have the background of having been served as Judges, and who have the qualifications of being a Judge. I said just now that I found it rather sad that we were divided into two major camps, otherwise maybe there could be more diversified views. I hope Members will respect divergent views. As I have said just now, it is about striking a balance between public order and human rights. I think it is very hard to strike a right balance which everybody will find satisfactory, because it is subject to different views and judgements.

I would like to clarify that I have never said, "It is not that serious, is it?" This is a misunderstanding on the part of Ms Audrey EU. I agree that divergent views are important as well, and that may bring about serious consequences. I was not saying — I was just trying to express myself in a light and relaxed manner — but I was not saying that was not a serious consequence. I do not understand what made Ms Audrey EU so mad, but that was not what I meant. Thank you, Chairman.

**MR JAMES TO** (in Cantonese): Chairman, Mr LAU Kong-wah and I are not good friends, what we have is a working relationship. Nevertheless, our working relationship will be affected by what he has said just now. Second, with regard to his remark that we aim at jeopardizing public order, to me his remark implies that I have proposed my amendments with this objective in mind, and I believe this is a very serious allegation under whatever context. If I am a person who does not care about anything, I would not be saying what I am saying now.

**CHAIRMAN** (in Cantonese): Mr TAM Yiu-chung, this is your first speech.

**MR TAM YIU-CHUNG** (in Cantonese): Yes, Chairman. Chairman , just now, I heard Ms Audrey EU and Members of the Civic Party argued that they insisted on having the "sunset clause" because the Government did not live up to its word and did not keep its promise. However, judging from my own experience, it does not occur to me to be the case. On the contrary, there is a recent example that Mr Martin LEE has promised to treat us late night snacks but he failed to keep his word. *(Laughter)* He has a deal with me in private, that he and I would share the bill, but then they said they would walk away in protest, so I do not think it would work out.

**MS EMILY LAU** (in Cantonese): Chairman, a point of order. Chairman, what has this got to do with the "sunset clause"?

**MR LEE WING-TAT** (in Cantonese): Chairman, I wish to make use of the one and a half minutes' time as allowed by the Rules of Procedure to make a clarification, because this is a very serious accusation. In the remark Mr LAU Kong-wah made just now, he said the democratic camp aimed at jeopardizing public order. This is what he said. He said the amendments we made as aiming at jeopardizing public order. But I believe he should take his words back. Please do not forget that even the Government has accepted half of the amendments Mr James TO and Ms Margaret NG have proposed. As a matter of fact, he has insulted not just the Democratic Party, the democratic camp and the Civic Party, he has insulted the Government as well, since the Government has accepted half of the amendments, it is also within the scope of aiming at

jeopardizing public order as well. And this is the Government he supports. To all intents and purposes, does Mr LAU Kong-wah think what he has said is out of line? In our opinion, just as he has said, there can be divergent views, but when he makes such a serious accusation as this one which accuses the democratic camp of coming up with amendments that aim at jeopardizing public order, the fact is that both the Government and the democratic camp are doing the same. Will he say that the Government under the leadership of Mr Donald TSANG, Secretary for Justice WONG Yan-lung and Secretary Ambrose LEE must all be so accused, that they are jeopardizing public order as well? Thank you, Chairman.

**MR LAU KONG-WAH** (in Cantonese): Chairman, I tell Mr LEE Wing-tat solemnly that I will not take my words back. This is because I am sincere, and that I care. As Mr Andrew CHENG can tell, I care about it, and I care a lot about the public order of Hong Kong. As to the examples I have cited just now, if these are not jeopardizing public order, what exactly are they?

**MS MARGARET NG** (in Cantonese): Chairman, a point of order. Just now Mr LEE Wing-tat has reminded me that in the remark of Mr LAU Kong-wah, he said the amendments proposed by the democratic camp — in fact, basically it is Mr James TO and I who have proposed those amendments tonight — aimed at jeopardizing public order ……

**CHAIRMAN** (in Cantonese): Ms NG, what is the point you are raising?

**MS MARGARET NG** (in Cantonese): Chairman, I am talking about this matter. It has come to my attention that according to Rule 41 of the Rules of Procedure, which deals with the contents of speeches, subrule (5) stipulates that "A Member shall not impute improper motives to another Member". Chairman, I wonder if accusing another Member of proposing amendments that aim at jeopardizing public order means improper motives at all?

**CHAIRMAN** (in Cantonese): I see. Ms Margaret NG is asking me to rule as to whether or not the remark of Mr LAU Kong-wah was offensive to other

Members. Since the usual practice is to review the videotape to check with what the Member has said on that occasion before I make a ruling, so I have to suspend the meeting now and review the videotape.

12.36 am

Meeting suspended.

1.06 am

Committee then resumed.

**CHAIRMAN** (in Cantonese): Dear Members, sorry for having kept you waiting, as I had to search for the relevant footage in the videotape. Ms Margaret NG asked me to come up with a ruling in accordance with section (5) of Rule 41 of the Rules of Procedure, which provides that "a Member shall not impute improper motives to another Member ".

I have listened to the speech of Mr LAU Kong-wah several times. He said, "the opposition camp must not be allowed to succeed in jeopardizing public order". "Opposition camp" cannot be interpreted to mean as another Member; therefore, I rule that Mr LAU Kong-wah was not in breach of this section of the Rules of Procedure.

**MR JAMES TO** (in Cantonese): Chairman, that is correct if it is strictly about the part on the "opposition camp". However, in the speech I gave subsequently, in which I said I felt offended, to which Mr LAU Kong-wah replied later on, saying that we were good friends, and that would not have been the case and so on and so forth. Subsequently, he said he would not take his words back, because he cared a lot about public order. Therefore, he has said it very clearly. The last point he made was about me, even though what he had said previously was about the opposition camp in general — you may say I am fitting myself into his words because I feel I have been hurt — but when I was saying that, he still insisted he would not take his words back, at that point he was talking about me, and he even said he and Mr James TO were good friends. Therefore, Chairman,

with regard to the final part, I found that it was clearly me who was being referred to.

**CHAIRMAN** (in Cantonese): Would you like me to spend another 15 minutes to half an hour reviewing the videotape? I remember that very clearly. You asked him to take his words back, but he said he was not taking them back. Would you like me to review the videotape again?

**MR JAMES TO** (in Cantonese): Yes please, Chairman. I found the last part very important, because that was about me. Of course, other Members from the opposition camp or democratic camp may not have found themselves hurt, but I do care a lot about that, because this will ……

**CHAIRMAN** (in Cantonese): You think that he was talking about you? All right, let me see if that was what he said.

(A Member indicated a wish to speak to the Chairman)

**CHAIRMAN** (in Cantonese): If you have anything to say to me, come with me and tell me inside.

1.09 am

Meeting suspended.

1.37 am

Committee then resumed.

**CHAIRMAN** (in Cantonese): Members, both Mr James TO and Mr LAU Kong-wah went into my office and reviewed the relevant footage and a section of the footage that followed. Both of them agreed there was some

misunderstanding, and they both accepted my ruling. Therefore, we shall now continue with the meeting.

(Mr LEUNG Kwok-hung raised his hand to indicate his wish to speak)

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

**MR LEUNG KWOK-HUNG** (in Cantonese): Chairman, I hope the Secretary for Justice — the Secretary for Justice is not present now — but I hope both the Secretary for Justice and the Secretary for Security can listen to good advice and accept this "sunset clause". This is because this is the final chance to give Hong Kong society an opportunity to conduct a review under a statutory procedure within a short period of time and to consult the public for revising the current legislation. As a matter of fact, judging from whatever perspectives, both parties for and against the Bill have agreed that the Bill is very hard to understand. This being the case, how can the citizens understand it? In fact, both Article 23 and Article 30 of the Basic Law are constitutional provisions, but when legislation is being enacted, the two are handled differently, one with extensive consultation and the Government conducted by means of issuing consultation papers. As Legislative Council Members, we must represent the public, so we must consult their views as well. Since everybody is saying this is beyond them, this is proof that it is imperative to have this "sunset clause" in place.

There is one more point I would like to raise. Personally, I definitely hope that we can do a good job with regard to this piece of legislation. Since Hong Kong is now part of the Chinese territory, the laws we enact can have an exemplary effect to the Mainland from which they can draw reference. I am saying this from the perspective of the people of Hong Kong, I also hope we can contribute our part to the legal system of China. Maybe I have been a little bit too agitated just now, so I may not have made myself clear. In fact, the Mainland is probably the first in the world in terms of resources devoted for conducting surveillance and interception of communications. But the result of our country in this respect is not good, and the problems in public order have not been addressed either. I hope Members, and especially those patriotic Members, will consider this point. Thank you, Chairman.

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

(No Member indicated a wish to speak)

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

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, this is the first time I speak on this issue. Please allow me to give a few remarks to begin with. I am most grateful to all Members, particularly Members of the Bills Committee. Having devoted approximately 130 hours of work, Members, and Ms Miriam LAU in particular, have all been working very hard. Over the past four days, I have been here in this Council with Members and together we worked to examine the Bill. I am very grateful to Members too for their consistent hard work and for working together with the Government for the examination of the Bill. I have noticed that there are divergent views in the Legislative Council, in the same way as we do in society of Hong Kong, which is a very open, very liberal and very diversified society. I have heard many views in this Council. Naturally some of the views differ from mine, but I have much respect for the views of Members. I know they stem from your heart, for which I have much respect.

With regard to this Bill, I remember three years ago, when I first took up the post of Secretary for Security, this was one of the first tasks for me. I remember when I talked with Mr James TO and Mr LAU Kong-wah from the Panel on Security about my tasks, I told them I would finish this particular task within my term of office. Today, this particular task is about to complete. In this connection, my heartfelt thanks go to colleagues of the Security Bureau for having undertaken a massive amount of work over the past three years. It is not that we have not done our job. We have conducted many researches, and our colleagues have visited other common law jurisdictions to study their systems and to identify areas where references can be drawn. As such, the Bill that we tabled to the Legislative Council is a result of efforts put in throughout a prolonged period of time, particularly during the past 10 months or so. Therefore, I must thank my colleagues, colleagues of the Security Bureau and colleagues of the Department of Justice. Of course I must thank the colleagues of the Legislative Council Secretariat who have been working days and nights

too over the past few days. I must thank you too, Madam Chairman, for leading us all the way through the examination of the Bill.

Let me comment on the clause about "expiry". Madam Chairman, just as I pointed out clearly in the speech I made during the resumption of the Second Reading debate, examples of the "sunset clause" in other common law jurisdictions are generally applicable to measures that are only needed for a certain period of time, or to laws and provisions that are very exceptional, such as measures made in response to terrorist activities which will affect basic human freedoms, whereas the relevant laws are to be approved by the legislature within a very short period of time. Even when this is the case, provisions with respect to expiry in overseas countries are applicable only to certain specific provisions of a particular piece of legislation, instead of invalidating the entire mechanism.

None of these characteristics, namely the temporary and exceptional nature of the measures and the limited time for examination, are applicable to the Bill we have today. Judging from our case, first, interception of communications and covert surveillance are indispensable means of investigation for all law-enforcement agencies. The Bill is not provisional, and there is no doubt whatsoever as to its continual need; as such, it is not advisable to have a clause that provides for its expiry. There is no such thing as a "sunset clause" which provides for the expiry of the legislation in the laws of other common law jurisdictions on interception of communications and covert surveillance.

As regards the provisions of the Bill, the Bill proper coupled with the various amendments proposed by the authorities should have provided sufficient protection during various stages of the operations, including the provisions for Judges' authorizations and a monitoring system by an independent Commissioner, and so on. The relevant protections are in many ways more comprehensive than those provided by the existing laws of other countries in this respect. To me, this is simply not comparable to other overseas legislation where special powers are given to a piece of temporary legislation with a "sunset clause". Ms Miriam LAU cited the example of Australia just now, so I would not spend time to repeat it.

With regard to the time for discussion, as I pointed out earlier on, subsequent to the Law Reform Commission report on interception of Communications released in 1996, different sectors of society conducted extensive and comprehensive discussion on the subject on different occasions.

The Bill has been drafted on the basis of a massive amount of discussions, consultations and studies, and on the basis of the views and opinions collected last year from Members of the Legislative Council, as well as deputations and individuals who have taken an interest in the matter.

Furthermore, in a period of over five months, the Bills Committee convened meetings totalling more than 100 hours for the examination of the Bill. Having listened to the views and opinions of Members, deputations and individuals during these meetings, the Government has proposed nearly 190 amendments to the Bill. These 190 amendments have been made to accommodate the views and opinions expressed by Members of the Bills Committee, including, of course, the views of Mr LAU Kong-wah, Ms Miriam LAU, Mr James TO and Ms Margaret NG with a view to perfecting the Bill. Therefore, there has been massive and thorough discussion with regard to both the Bill proper itself and the preparations and researches conducted prior to the drafting of the Bill. During the whole process, different views and opinions have been accommodated generously with a view to perfecting the Bill.

If the Government should disagree with certain views and opinions, this is due to thorough policy consideration instead of insufficient discussion. We should not describe the law which has a permanent need as being provisional, otherwise it will not only deny the massive efforts of the Bills Committee, it will also be irresponsible to society. Therefore, we are opposed to the "sunset clause" as proposed by Ms Margaret NG, which will invalidate this piece of legislation that governs the operations of law enforcement officers necessary for the maintenance of the safety and the law and order of society. If for any reason we are not able to enact a new piece of legislation before the expiry of the time limit, a legal vacuum will ensue and I believe this is an irresponsible thing to do.

As I pointed out during the resumption of the Second Reading debate, I agree to conduct a review in due course subsequent to the enactment of the Bill. It is our plan that the review will include the items included in the annual report prepared by the Commissioner, with a report of the results submitted to the Panel on Security. Moreover, we will conduct a comprehensive review of the implementation of the law after the Commissioner has submitted the annual report for the second full year. The review will not be restricted to the observations made by the Commissioner on the compliance of the law, the Code of Practice and the conditions of authorization. Instead, it will also include reviews of other aspects of the operation of the law.

We will listen to the views and opinions from different parties. However, as with other review measures, we believe we should not specify the model of the future review in the legislation, including the scope of the review, the format of the consultation and the format of the report, and so on. Nor should we specify a specific date for the review in the legislation. We should provide some leeway to allow for greater flexibility in the scale and the scope of the review, so that it will be able to respond to the actual circumstances and needs of society at the time when the review is conducted.

Madam Chairman, I so submit.

**CHAIRMAN** (in Cantonese): Ms Margaret NG, you may now speak again.

**MS MARGARET NG** (in Cantonese): Chairman, first of all, I must thank all the Honourable colleagues for having patiently taken part in the debate on the many amendments Mr James TO and I moved over the past few days. I am also grateful to Honourable colleagues for the generous remarks addressed to me during the debate on the "sunset clause" held just now. As a matter of fact, Chairman, undertaking business of this nature is not particularly hard to me, they are, after all, part of the business of this Council. In fact, being a Member of this Council gives me a rare opportunity to work on something meaningful, and I am very grateful for having this opportunity to explain to the public on what we believe to be the problems of this Bill.

Chairman, although it was not plain sailing with regard to the many discussions held during the earlier part of the debate, generally speaking, those were discussions made with a calmness of mind, irrespective of the fact that we might have insisted on a number of areas. The professional legal training that I received instilled inside me a sense of rationality that allows me to conduct analysis and carry out my business in a rational manner. This is something I have got used to. However, the debates held over the past few days have pushed this sense of rationality to the extreme. Naturally I have feelings of my own too. I have my set of principles and standards, and when they are not met, I will feel enraged as well. I know that many Honourable colleagues feel aggrieved in the course of all these, because they have been devoted wholeheartedly to working for the citizens, but they have been accused of having ulterior motives and have been subject to smear of different sorts.

I fully understand that many Honourable colleagues feel truly aggrieved. I would like to respond to Dr Fernando CHEUNG in particular. He found that the "sunset clause" we proposed was a humble request — Chairman, we have got to the "sunset clause" finally — but I do not find it a humble request at all. Instead, although as far as we are concerned, we have been pushed to the extreme, we find it worthwhile to put it up a little for the sake of the public.

I would also like to take this opportunity to thank the Chairman for presiding over the meetings over the past few days in a manner that preserved the dignity in the procedures of the Legislative Council. This dignity is mainly about allowing all parties to give their views and enabling us to conduct our business in accordance with the procedures.

With regard to the Government, this is nothing personal about the Secretary himself, but I really find the way the Government has acted very disappointing. In particular, what the Government asked for from Members who supported it is truly out of line, as these Members were asked not to take part in the debates held in this Council, not to attend the meetings, and to stay away from the arguments as much as possible. As a matter of fact, in the Legislative Council, our main job is to debate on every single amendment proposed, and to come up with a solution if we should, in the end, find the amendment concerned truly unsatisfactory. Now we have got to a stage where we would stop discussing all other details, but why is it impossible to give some consideration to something as simple as a "sunset clause"? This is the major reason why I find it disappointing.

We are talking about if the relevant provision will undermine the authority of the law-enforcement agencies just as some Members are worried, and if it will undermine the authority of the law-enforcement agencies if the Bill is not enacted with permanent effect all in one go, and if it will undermine the authority of the law-enforcement agencies if the amendment we proposed will be passed. As a matter of fact, as far as a free society is concerned, there are always a number of areas where balances have to be struck. Are the police having excessive power in relation to civic rights? Are law-enforcement actions of the police, particularly those that are done covertly, abusive? These are areas where balances have to be struck in any free society. Whenever the law-enforcement agencies have excessive powers, the citizens will invariably suffer. As we can see in the autocratic societies and the totalitarian countries, the power of the law-enforcement agencies is far from small. In fact it is enormous. Therefore,

we are worried that the way we handle this Bill today may not be striking a balance at a safe level. This is why I have proposed the "sunset clause" so that it will give us an opportunity to think it all over again and that the Bill we pass today will not be taken as a normal part of our daily lives on a permanent, long term basis.

Just now Ms Miriam LAU spent a lot of time in making the point that the "sunset clause" was little more than a gimmick to her, that she did not know what a "sunset clause" was, and that it took her quite a while before she realized what it meant. As a matter of fact, I was not the one who coined the term "sunset clause"; it was coined by some commentators in the media while the Bill was being examined. What did it refer to? In fact, subsequent to the USA PATRIOT Act, everybody knows what a "sunset clause" is. What sunset clauses and sunrise clauses are have been much talked about in the United States and in Canada. The discussion took place a few years ago when the anti-terrorist movement first began. During the course, a view was formed in the commentaries of the newspapers, and what was the basis of this view? According to this view, it was known that the people who were criticizing the Bill had pointed out a number of loopholes in the Bill, and the commentators themselves agreed that the Bill was flawed. So they gave a piece of advice to those of us who were uneasy with the contents of the Bill. They told us that the public would find a legal vacuum very worrying as well, so their advice was that we might as well propose a "sunset clause" to give a provisional nature to the Bill, so that even if there were inadequacies, these inadequacies would become more tolerable. The advice was actually directed to us, but it does not mean that we should adopt a "sunset clause" just because the matter will be given a provisional basis. Instead, it was advising us that we might accept the Bill provisionally even though we believed there were loopholes in the Bill. Just now the Secretary for Security explained how the "sunset clause" would be incompatible with the common law, and how these expiry provisions were applicable only to measures that were necessary within a specific period of time. Second, he said it was applicable to laws that had to be passed within a short period of time. As a matter of fact, provisions that render some legal provisions ineffective are tools that provide for the expiry of those clauses after a specific time. These tools are applicable in a number of different scenarios, and these are tools that can be deployed as suitable occasions arise.

This Council has come across a situation like this before and I also mentioned that on another occasion. That is our Copyright (Amendment) Bill.

Chairman, Members will remember that it was an occasion near the end of the Legislative Session, when certain provisions were passed rather hastily. At the time of the examination we thought everything was in order, and nobody envisaged any problems, not even after the Bill was passed. It was not until the law had become effective and was being implemented that major problems began to surface. At that time, after having discussed with Members, the Government devised a Bill to provide for a temporary suspension. At that time the authorities pledged that the Bill would cease to have effect, and that those provisions were there only to provide a temporary framework. Before the legislation would cease to have effect, the Government would re-engage in new rounds of discussion with different parties to sort out a more long-lasting solution. We accepted the arrangement.

Chairman, it was in fact a "sunset clause". The "sunset clause" is a legal provision that specifies the time when the provision would cease to have effect. Of course, there was another provision which provided that the Legislative Council could extend the expiry period by means of a resolution prior to the expiry period, but that was by no means an extension for an indefinite period. Therefore, after the temporary provisions had come into effect, the Government carried out consultation and legislated accordingly in a proactive manner. As a result, we have finished some of the jobs and the legislation has been enacted. The second phase is currently underway. Therefore, Chairman, this is actually feasible and it is by no means a gimmick. What we are proposing is something that we have experienced before and something we have done before, though it is called differently. So why should it be a big problem at all?

The Secretary said just now that the Security Bureau had done a huge amount of work, whereas Ms Miriam LAU said the Bills Committee had devoted 130 hours in the examination of the Bill, but those are work we did on our part. Does it mean that as long as we finish our job and we are happy with what we have done and that would be the end of it? That way, we would still be one step away from finishing it all, and that is to say, even if we are very happy with what we have done, we should go and ask the people who will be affected if they will find it satisfactory too, or if they think everything is in order, and if they will be affected, and so on. We cannot just tell them that we have already arranged for their marriage in accordance with the instructions of their parents and match-makers, and that everything has been pre-arranged. We cannot tell them, "Dear son (or daughter), this is the marriage that is guaranteed to bring

happiness to you". This is a civilized world where those who will be affected should be consulted, not to mention the fact that these arrangements are in our views ridden with loopholes.

Therefore, Chairman, with regard to this "sunset clause", first of all, it is not a gimmick, it is something that we have done before; second, it is necessary, because in the end, the Secretary has never consulted the people who will be affected.

Chairman, this "sunset clause" has the support of The Law Society of Hong Kong as well. In the remarks Ms Miriam LAU made earlier on, she mentioned a cartoon from the *South China Morning Post* and what the cartoon was about. However, in the same issue of the *South China Morning Post*, the editorial was of the opinion that Members should oppose this Bill, particularly if the "sunset clause" was not included. Therefore, this provision is not without its supporters, irrespective of what was said in the cartoon mentioned. The Hong Kong Bar Association is of the view that instead of taking the trouble to include the "sunset clause", we may take just the matter to the Court directly in future. Since there are so many loopholes with this Bill, we may institute a series of litigations to the Court in future. Judging from the perspective of legal principles alone, the Hong Kong Bar Association is right. However, judging from the perspective of the public, the citizens may not want to see so many litigations on that.

Given these reasons, plus the fact that many citizens appear to believe that this is an acceptable solution, we have proposed this amendment. Yet, the authorities oppose the amendment without even giving any grounds. The remarks the Secretary made just now were merely reading from a draft. Chairman, he was simply telling us these things from what was written on a piece of paper. Chairman, I am truly very disappointed. I am not going to raise my voice to make my case or anything, but to me, the way he behaved — he was saying nothing more than just going round in circles. He failed to answer why the public was consulted, why the public did not have a chance to study the Bill put forth by the authorities and why they were deprived of any opportunity to express their views and opinions on the provisions of the Bill for the consideration of the authorities. These are questions that the Secretary has never given any answer. He has failed to respond to the questions we have raised right down to the closing remarks he made.

Chairman, the only thing I can say is that I know this "sunset clause" will be voted down today. The only thing I can do here is to express my grave disappointment.

**CHAIRMAN** (in Cantonese): If no public officers or Members wish to speak, I now put the question to you and that is: That new clause 66 be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

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

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

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

Functional Constituencies:

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

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Timothy FOK, Mr

Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the motion.

Geographical Constituencies:

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

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

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, five were in favour of the motion and 22 against it; while among the Members returned by geographical constituencies through direct elections, 24 were present, 13 were in favour of the motion and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the motion was negatived.

**CLERK** (in Cantonese): New clause 66 Mandatory review.

**MR JAMES TO** (in Cantonese): Chairman, Members from the pan-democratic camp and I will stop proposing any further amendments. We are extremely disappointed and we now walk out *en masse*.

(A number of Members from the pan-democratic camp left the Chamber *en masse*)

**CHAIRMAN** (in Cantonese): Members, just now when the votes were cast, I received two written notices that Ms Margaret NG, Mr LEE Wing-tat and Mr James TO will stop moving the remaining amendments under their names. The meeting will continue now. The Secretary for Security has given notice that he will move an amendment to amend Schedule 2 proposed in the Bill.

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendment to Schedule 2.

*Section 1*

The authorities propose to amend section 1 of Schedule 2 in response to the views of the Bills Committee and especially to those of Ms Audrey EU by specifying that a panel Judge must not consider any application in the premises of any department. Furthermore, we have accepted the suggestion made by the Bills Committee by specifying that the panel Judge may consider the application in such manner as he considers appropriate.

*Section 3*

The amendment proposed by the authorities to section 3 of Schedule 2 is a consequential amendment made in response to the amendment made to clause 51 of the Bill. It provides that a panel Judge may provide documents or records at the request of the Commissioner.

*Section 4*

The authorities propose to delete section 4 of Schedule 2. In response to the suggestion of the Bills Committee, we have already moved the relevant provision to clause 6 of the principal Bill.

Madam Chairman, I call upon Members to support the amendments proposed by the authorities.

*Proposed amendment*

**Schedule 2 (see Annex)**

**CHAIRMAN** (in Cantonese): The Clerk reminded me of the intention expressed by several Members earlier of withdrawing the amendment to new clause 66 in respect of mandatory review. Does any Member object to the withdrawal? If yes, please raise your hands.

(No hands raised)

**CHAIRMAN** (in Cantonese): We will now deal with Schedule 2. The Secretary for Security has moved his amendment. Does any Member wish to speak?

(No Member indicated a wish to speak)

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Schedule 2 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That Schedule 2 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CHAIRMAN** (in Cantonese): Members, I am aware that you have some difficulty in following the script on hand to transact our business for a number of amendments are supposed to be deleted. For this reason, I hope you will follow my instructions in the conduct of business.

**CLERK** (in Cantonese): Schedule 3.

**CHAIRMAN** (in Cantonese): The Secretary for Security has given notice to move amendments to Schedule 3 and add the definition of "journalistic material" to clause 2(1).

**SECRETARY FOR SECURITY** (in Cantonese): Madam Chairman, I move the amendment to Schedule 3 and to add the definition for "journalistic material" in clause 2(1).

The amendments to Part 1 of Schedule 3 proposed by the authorities have been made in response to the suggestions of the Bills Committee by prescribing that more information should be provided when a Judge's authorization is sought, such as reasons indicating that the application satisfies the conditions of constituting a reasonable doubt as set out in clause 3, a more detailed description in the assessment on the threat to public security, the likelihood that the materials obtained may be the contents of any journalistic material, and previous applications made with respect to the subject in the preceding two years, and so on. In conjunction with the requirements already in place, such as the form of the operation, the information sought to be obtained, the assessment of the impact to any person affected, the likelihood that the information may be subject to legal professional privilege, and that the objective cannot reasonably be

furthered by other less intrusive means, and so on, the relevant information should allow the authorizing authority to consider the application in a complete and thorough manner.

The amendments proposed by the authorities to Part 2 and Part 3 of Schedule 3 are similar to the amendments proposed to Part 1.

The amendments proposed by the authorities to Part 4 of Schedule 3 are mainly consequential to the amendments made to clause 12 and clause 18 of the principal Bill. They provide that when renewal of an authorization is being considered, the authorizing authority may be provided with information with regard to the overall time for which operations have been targeted at the relevant subject since the authorization was first granted. The rest of the amendments are consequential amendments made in response to the amendments made to Schedule 3 and other parts of the Bill.

Given the fact that a proposal has been made to include the contents of journalistic material that may be obtained as information that shall be provided in an affidavit or statement accompanying an application, the authorities propose that the definition for "journalistic material" be added in clause 2(1).

Madam Chairman, I call upon Members to endorse the amendments proposed by the authorities. Thank you, Madam Chairman.

*Proposed amendments*

**Schedule 3 (see Annex)**

**Clause 2 (see Annex)**

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

**MR LAU KONG-WAH** (in Cantonese): Chairman, in examining the Bill, particular attention has been given to several types of person. First, of course, are the citizens and this means their privacy, and how to protect their privacy from excessive intrusion. Second are the lawyers with regard to their legal privileges, which have been provided for clearly in the Bill. Third are the

journalists with regard to adequate protection on the information or materials they obtain. Therefore, these have to be spelt out clearly in Schedule 3 in the hope that they will be taken into account in the consideration. I believe this is very important, and we agree that they should be spelt out clearly here. We support the amendments.

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

(No Member indicated a wish to speak)

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

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

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

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Clause 2 and Schedule 3 as amended.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 2 and Schedule 3 as amended stand part of the Bill.

**CHAIRMAN** (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CLERK** (in Cantonese): Schedule 1 and Schedule 5.

**CHAIRMAN** (in Cantonese): I now put the question to you and that is: That Schedule 1 and Schedule 5 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

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

**CHAIRMAN** (in Cantonese): Council now resumes.

Council then resumed.

**Third Reading of Bills**

**PRESIDENT** (in Cantonese): Bill: Third Reading.

**INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL**

**SECRETARY FOR SECURITY** (in Cantonese): Madam President, the

Interception of Communications and Surveillance Bill

has passed through Committee with amendments. I move that this Bill be read the Third time and do pass.

**PRESIDENT** (in Cantonese): I now propose the question to you and that is: That the Interception of Communications and Surveillance Bill be read the Third time and do pass.

**PRESIDENT** (in Cantonese): I now put the question to you as stated. Will those in favour please raise their hands?

(Members raised their hands)

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

(No hands raised)

Mr James TIEN rose to claim a division.

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

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

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

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mrs Selina CHOW, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the motion.

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

THE PRESIDENT announced that there were 33 Members present and 32 were in favour of the motion. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

**CLERK** (in Cantonese): Interception of Communications and Surveillance Bill.

**END OF SESSION**

**PRESIDENT** (in Cantonese): Honourable Members, I believe Members will find this meeting an unforgettable one. I would like to thank Members and public officers who have stayed with us in this Chamber until the last moment, as well as the staff of the Secretariat who have been with us all along in the Legislative Council Building. I would also like to thank members of the media who have been with us painstakingly in this Chamber over the past few days. I guess they may have to go on diet now because they have eaten too much. *(Laughter)*

At any rate, I wish all Members, all public officers, all our colleagues and friends of the media will lighten up and relax from tomorrow onwards. Let us

get on with our work again when the next Legislative Session resumes. I now adjourn the Council.

(Members tapped on the bench to mark the occasion)

*Adjourned accordingly at twenty-five minutes past Two o'clock in the Morning*.

**Annex**

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Security

| Clause | Amendment Proposed |
|---|---|
| 2(1) | (a) In the definition of "copy" – |
| | (i) in paragraph (*a*)(i), by deleting "which identifies itself as such copy, extract or summary of such contents"; |
| | (ii) in paragraph (*a*)(ii), by deleting "record of" and substituting "record showing, directly or indirectly,"; |
| | (iii) in paragraph (*b*)(i), by deleting "which identifies itself as such copy, extract or summary of the material"; |
| | (iv) in paragraph (*b*)(ii), by deleting "which identifies itself as such transcript or record made of the material". |
| | (b) In the definition of "court", by deleting "section 53 and section 4 of Schedule 2" and substituting "sections 6(3A) and 53". |
| | (c) In the definition of "covert surveillance" – |
| | (i) in paragraph (*a*), by deleting "systematic"; |
| | (ii) by deleting paragraph (*b*) and substituting – |
| | "(*b*) does not include – |
| | (i) any spontaneous reaction to unforeseen events or circumstances; |

and

(ii) any such surveillance that constitutes interception under this Ordinance;".

(d) In the definition of "data surveillance device", in paragraph (*a*), by adding "by electronic means" before "; but".

(e) In the definition of "head", in the English text, by deleting "deputy of the" and substituting "deputy".

(f) In the definition of "interception" –

(i) in paragraph (*a*), by deleting "the communication" and substituting "that communication";

(ii) in paragraph (*b*), by deleting "communications;" and substituting "any communication;".

(g) By deleting the definition of "judicial authorization" and substituting –

""judge's authorization" (法官授權) means a judge's authorization issued or renewed under Division 2 of Part 3 (and, where the context requires, includes a judge's authorization to be issued or renewed under that Division);".

(h) In the definition of "maintain", in paragraph (*a*), by deleting "relocate" and substituting "reposition".

(i) In the definition of "postal service", by deleting everything after "means" and substituting "postal service to which the Post Office Ordinance (Cap. 98) applies;".

(j) In the definition of "public place", in paragraph (*b*), by deleting "to the extent that they" and substituting "that".

(k) By deleting the definition of "transmitted".

(l) In the definition of "Type 2 surveillance" –

(i) by deleting "subsection (3), means any covert surveillance to the extent" and substituting "subsections (3) and (3A), means any covert surveillance";

(ii) by deleting paragraph (*a*) and substituting –

"(*a*) is carried out with the use of a listening device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording words spoken or activity carried out by any other person, if the person using the device –

(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or

(ii) listens to, monitors or records the words or activity with the consent, express or implied, of a person described in subparagraph (i); or";

(iii) in paragraph (*b*), by deleting "it";

(iv) in paragraph (*b*), by deleting "and" and substituting ", if";

(v) in paragraph (*b*)(ii), by adding ", or electronic interference with the device," after "object".

(m) In the definitions of "行政授權", "緊急授權", "審查" and "器材取出手令", in the Chinese text, by deleting "有此要求" and substituting "所需".

(n) In the definition of "監聽器材", in the Chinese text, by

deleting paragraph (*a*) and substituting –

"(*a*) 指用以作出以下行爲的任何器材：竊聽、監聽、監測或記錄任何談話或在談話中向任何人或由任何人所說的說話；但".

(o) In the definition of "藉郵政服務傳送的通訊", in the Chinese text, by deleting "郵件" and substituting "郵遞品".

(p) By adding –

""journalistic material" (新聞材料) has the meaning assigned to it by section 82 of the Interpretation and General Clauses Ordinance (Cap. 1);

"postal article" (郵遞品) has the meaning assigned to it by section 2(1) of the Post Office Ordinance (Cap. 98);

"public security" (公共安全) means the public security of Hong Kong;".

2(2) By adding ", but nothing in this subsection affects any such entitlement of the person in relation to words spoken, written or read by him in a public place" before the full stop.

2 By adding –

"(3A) An officer of a department may apply for the issue or renewal of a prescribed authorization for any Type 2 surveillance as if the Type 2 surveillance were Type 1 surveillance, and the provisions of this Ordinance relating to the application and the prescribed authorization apply to the Type 2 surveillance as if it were Type 1 surveillance.".

2 By adding –

"(5A) For the purposes of this Ordinance, advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security.".

2(6)

(a) In paragraph (*a*), by deleting "also regarded as being made orally if it is" and substituting "regarded as being made orally if it is made orally in person or".

(b) In paragraph (*a*), in the Chinese text, by deleting "亦".

(c) In paragraph (*b*), by deleting "also regarded as being provided orally if it is" and substituting "regarded as being provided orally if it is provided orally in person or".

(d) In paragraph (*b*), in the Chinese text, by deleting "亦".

(e) In paragraph (*c*), by deleting "also regarded as being delivered orally if it is" and substituting "regarded as being delivered orally if it is delivered orally in person or".

(f) In paragraph (*c*), in the Chinese text, by deleting "亦".

2 By deleting subclause (7).

3(1)

(a) In paragraph (*a*)(ii), by deleting "and".

(b) By adding –

"(*aa*) there is reasonable suspicion that any person has been, is, or is likely to be, involved in –

(i) where the purpose sought to be furthered

by carrying out the interception or covert surveillance is that specified in paragraph (*a*)(i), the particular serious crime to be prevented or detected; or

(ii) where the purpose sought to be furthered by carrying out the interception or covert surveillance is that specified in paragraph (*a*)(ii), any activity which constitutes or would constitute the particular threat to public security; and".

(c) In paragraph (*b*), by deleting "proportionate to" and substituting "necessary for, and proportionate to,".

(d) In paragraph (*b*)(i), by deleting ", in operational terms,".

(e) In paragraph (*b*)(i), by deleting "and".

(f) In paragraph (*b*)(ii), by deleting the full stop and substituting "; and".

(g) In paragraph (*b*), by adding –

"(iii) considering such other matters that are relevant in the circumstances.".

3(2) In paragraph (*a*)(i), by adding "particular" before "serious".

4(1) By deleting "through any other person" and substituting "indirectly (whether through any other person or otherwise)".

5(1) By deleting "through any other person" and substituting "indirectly (whether through any other person or otherwise)".

6(2) By deleting ", and may from time to time be reappointed".

6 By adding –

"(3A) In performing any of his functions under this Ordinance, a panel judge –

(*a*) is not regarded as a court or a member of a court; but

(*b*) has the same powers, protection and immunities as a judge of the Court of First Instance has in relation to proceedings in that Court.".

6 By adding –

"(4A) A person previously appointed as a panel judge may from time to time be further appointed as such in accordance with the provisions of this Ordinance that apply to the appointment of a panel judge.".

8(2) In paragraph (*b*), by deleting everything after "specified in" and substituting "Part 1 or 2 of Schedule 3 (as may be applicable).".

11(2) In paragraph (*b*)(ii), by deleting "a copy of any affidavit" and substituting "copies of all affidavits".

12(2) By deleting everything after "unless" and substituting –

"–

(*a*) he is satisfied that the conditions for the renewal under section 3 have been met; and

(*b*) without limiting the generality of paragraph (*a*), he has taken into consideration the period for which the judge's authorization has had effect since its first issue.".

17(2) In paragraph (*b*)(ii), by deleting "a copy of any statement" and substituting "copies of all statements".

18(2) By deleting everything after "unless" and substituting –

"–

(*a*) he is satisfied that the conditions for the renewal under section 3 have been met; and

(*b*) without limiting the generality of paragraph (*a*), he has taken into consideration the period for which the executive authorization has had effect since its first issue.".

20(1) (a) In the Chinese text, by deleting "權 —" and substituting "權：該人員認爲 —".

(b) In paragraph (*a*), in the Chinese text, by deleting "該人員認爲".

(c) In paragraph (*b*), in the Chinese text, by deleting "該人員".

(d) In paragraph (*b*), in the Chinese text, by deleting "後，認爲" and substituting "下，".

20(2) In paragraph (*b*)(ii), by deleting everything after "comply with" and substituting "the requirements specified in Part 1 or 2 of Schedule 3 (as may be applicable) which are to apply to the statement as they apply to an affidavit referred to in section 8(2)(*b*).".

22(1) In paragraph (*b*), by deleting "takes effect" and substituting "is issued".

23(1) By deleting "takes effect" and substituting "is issued".

23(3)
(a) In the English text, by deleting "If no application for confirmation of the emergency authorization is made" and substituting "In default of any application being made for confirmation of the emergency authorization".
(b) In paragraph (*a*), by deleting everything after "concerned" and substituting "; and".

24(3)
(a) In paragraph (*b*), by deleting "any information obtained by carrying out the interception or Type 1 surveillance concerned, to the extent".
(b) In paragraph (*b*)(i), by deleting everything after the comma and substituting "any information obtained by carrying out the interception or Type 1 surveillance concerned; or".
(c) In paragraph (*b*)(ii), by adding "any information obtained by carrying out the interception or Type 1 surveillance concerned" after the comma.

26(1) By deleting "takes effect" and substituting "is issued or granted".

26(3)
(a) In the English text, by deleting "If no application for confirmation of the prescribed authorization or renewal is made" and substituting "In default of any application being made for confirmation of the prescribed authorization or renewal".

(b) In paragraph (*b*)(i), by deleting everything after "concerned" and substituting "; and".

26 By adding –

"(4A) If, at the time of an application for confirmation of the prescribed authorization or renewal as provided for in subsection (1), the relevant authority is no longer holding his office or performing the relevant functions of his office –

(*a*) without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a panel judge or authorizing officer (as the case may be) and lawfully performing the relevant functions of the office of that relevant authority; and

(*b*) the provisions of this section and section 27 are to apply accordingly.".

27(3) (a) In paragraph (*b*), by deleting "any information obtained by carrying out the interception or covert surveillance concerned, to the extent".

(b) In paragraph (*b*)(i), by deleting everything after the comma and substituting "any information obtained by carrying out the interception or covert surveillance concerned; or".

(c) In paragraph (*b*)(ii), by adding "any information obtained by carrying out the interception or covert surveillance concerned" after the comma.

29(1) In paragraph (*b*)(ii), by deleting "likely" and substituting "reasonably expected".

29(4) By adding "reasonably" before "necessary".

29(5) By adding "reasonable" before "assistance".

29(6) (a) In paragraph (*b*), by adding "the use of reasonable" before "force".

(b) By deleting paragraph (*c*) and substituting –

"(*c*) the incidental interception of any communication which necessarily arises from the interception of communications authorized to be carried out under the prescribed authorization; and".

(c) In paragraph (*d*)(ii), by deleting "likely" and substituting "reasonably expected".

29(7) (a) In paragraphs (*a*)(ii) and (*b*)(ii), by deleting "the entry, by" and substituting "in the case of Type 1 surveillance, the entry, by the use of reasonable".

(b) In paragraph (*c*)(i), in the English text, by deleting "authorization," and substituting "authorization".

(c) In paragraph (*c*)(ii), by deleting "the entry, by" and substituting "in the case of Type 1 surveillance, the entry, by the use of reasonable".

30 (a) In the heading, by deleting "**further**" and substituting

"**also**".

(b) By deleting everything before the dash and substituting –

"A prescribed authorization also authorizes the undertaking of conduct, including the following conduct, that is necessary for and incidental to the carrying out of what is authorized or required to be carried out under the prescribed authorization".

New By adding –

"**30A. What a prescribed authorization may not authorize**

(1) Notwithstanding anything in this Ordinance, unless exceptional circumstances exist –

(*a*) no prescribed authorization may contain terms that authorize the interception of communications by reference to –

(i) in the case of a postal interception, an office or other relevant premises, or a residence, of a lawyer; or

(ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service known or reasonably expected to be known by the

applicant to be ordinarily used by a lawyer for the purpose of providing legal advice to clients; and

(*b*) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place at an office or other relevant premises, or a residence, of a lawyer.

(2) For the purposes of subsection (1), exceptional circumstances exist if the relevant authority is satisfied that there are reasonable grounds to believe –

(*a*) that –

(i) the lawyer concerned;

(ii) in the case of an office or other relevant premises of the lawyer, any other lawyer practising with him or any other person working in the office; or

(iii) in the case of a residence of the lawyer, any other person residing in the residence,

is a party to any activity which constitutes or would constitute a serious crime or a threat to public security; or

(*b*) that any of the communications concerned is for the furtherance of a

criminal purpose.

(3) For the avoidance of doubt, a prescribed authorization does not authorize any device to be implanted in, or administered to, a person without the consent of the person.

(4) In this section –

"lawyer" (律師) means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap. 159) who practises as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);

"other relevant premises" (其他有關處所), in relation to a lawyer, means any premises, other than an office of the lawyer, that are known or reasonably expected to be known by the applicant to be ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients (including any premises ordinarily used by lawyers for the purpose of providing legal advice to clients when in court or visiting a prison, police station or other place where any person is detained).".

35(3) By adding "reasonably" before "necessary".

36 In the heading, by deleting "**further**" and substituting "**also**".

36(1) (a) By deleting everything before the dash and substituting –

"(1) A device retrieval warrant also authorizes

the undertaking of conduct, including the following conduct, that is necessary for and incidental to the carrying out of what is authorized to be carried out under the warrant".

(b) In paragraph (*b*), by adding "the use of reasonable" before "force".

38(3) By deleting ", and may from time to time be reappointed".

38 By adding –

"(5A) A person previously appointed as the Commissioner may from time to time be further appointed as such in accordance with the provisions of this Ordinance that apply to the appointment of the Commissioner.".

39 In paragraph (*b*), by adding –

"(ii*a*) give notifications to relevant persons under Division 3A;".

40 By adding –

"(1A) Without limiting the generality of subsection (1), the Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(*b*), 26(3)(*b*)(ii) or 52.".

40(2) By adding "or (1A)" after "subsection (1)".

41(2) By adding "(including any disciplinary action taken in respect of any officer)" before "to address".

41(3) By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any panel judge or any or all of them.".

42(1) (a) By deleting "believes" and substituting "suspects".

(b) In paragraphs (*a*) and (*b*), by adding "an officer of" before "a department".

43(1) In paragraph (*b*), by deleting everything after "whether or not" and substituting "the interception or covert surveillance alleged has been carried out by an officer of a department without the authority of a prescribed authorization.".

43 By deleting subclause (2) and substituting –

"(2) If, on an examination, the Commissioner, having regard to section 45(1), determines that the interception or covert surveillance alleged has been carried out by an officer of a department without the authority of a prescribed authorization, he shall as soon as reasonably practicable give notice to the applicant –

(*a*) stating that he has found the case in the applicant's favour and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance; and

(*b*) inviting the applicant to confirm whether the applicant wishes to seek an order for the payment of compensation under the application, and if so, to make written

submissions to him for that purpose.".

43 By adding –

"(2A) Upon receiving confirmation from the applicant that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for that purpose, may make any order for the payment of compensation by the Government to the applicant.

(2B) The compensation ordered to be paid under subsection (2A) may include compensation for injury of feelings.".

43(3) By adding "as soon as reasonably practicable" after "shall".

43 By deleting subclause (4).

43 By deleting subclause (5) and substituting –

"(5) Notwithstanding subsections (2), (2A) and (3), the Commissioner shall only give a notice or make an order under those subsections when he considers that the giving of the notice or the making of the order (as the case may be) would not be prejudicial to the prevention or detection of crime or the protection of public security.".

43 By adding –

"(6) The Commissioner shall not make a determination referred to in subsection (2) in respect of an interception if the interception is within the

description of section 4(2)(*b*) or (*c*).".

44(1) In paragraph (*c*), by adding ", after the use of reasonable efforts," after "cannot".

45 By deleting subclause (1) and substituting –

"(1) For the purposes of an examination –

(*a*) in determining whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization, the Commissioner shall apply the principles applicable by a court on an application for judicial review; and

(*b*) without limiting the generality of paragraph (*a*), the Commissioner may by applying those principles determine that any interception or covert surveillance has been carried out without the authority of a prescribed authorization notwithstanding the purported issue or renewal of any prescribed authorization.".

45 By adding –

"(1A) Subject to section 51(1), the Commissioner shall carry out an examination on the basis of written submissions made to him.".

45(3) (a) By deleting "under section 43(2)(*a*)" and substituting "or making any order under section 43(2), (2A)".

(b) In paragraph (*b*), by deleting "; and" and substituting "further to those mentioned in section 43(2)(*a*); or".

46(1) (a) By deleting "under" and substituting "referred to in".

(b) By adding ", including any order or findings he has made in the examination" before the full stop.

46(2) (a) By deleting "notified of the determination" and substituting "given the notification".

(b) By adding "(including any disciplinary action taken in respect of any officer)" before "to address".

46(3) By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any panel judge or any or all of them.".

New By adding –

"**Division 3A – Notifications by Commissioner**

**46A. Notifications to relevant persons**

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner, having regard to subsection (5), considers that there is any case in which any interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization, subject to subsection (6), the Commissioner shall as soon as reasonably practicable give notice to the relevant

person –

(*a*) stating that there has been such a case and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance; and

(*b*) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.

(2) Where the relevant person makes an application for an examination in respect of the interception or covert surveillance within 6 months after receipt of the notice or within such further period as the Commissioner may allow, the Commissioner shall, notwithstanding anything in section 44(1)(*a*) but subject to the other provisions of section 44, make a determination referred to in section 43(2), and the provisions of this Ordinance are to apply accordingly.

(3) Notwithstanding subsection (1), the Commissioner shall only give a notice under that subsection when he considers that the giving of the notice would not be prejudicial to the prevention or detection of crime or the protection of public security.

(4) Without prejudice to subsection (3), in giving notice to a relevant person under subsection (1), the Commissioner shall not –

(*a*) give reasons for his findings; or

(*b*) give details of any interception or covert surveillance concerned

further to those mentioned in subsection (1)(*a*).

(5) For the purposes of this section –

(*a*) in considering whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization, the Commissioner shall apply the principles applicable by a court on an application for judicial review; and

(*b*) without limiting the generality of paragraph (*a*), the Commissioner may by applying those principles determine that any interception or covert surveillance has been carried out without the authority of a prescribed authorization notwithstanding the purported issue or renewal of any prescribed authorization.

(6) This section does not require the Commissioner to give any notice to a relevant person if –

(*a*) the relevant person cannot, after the use of reasonable efforts, be identified or traced;

(*b*) the Commissioner considers that the intrusiveness of the interception or covert surveillance concerned on the relevant person is negligible; or

(*c*) in the case of interception, the

interception is within the description of section 4(2)(*b*) or (*c*).

(7) In this section, "relevant person" (有關人士) means any person who is the subject of the interception or covert surveillance concerned.".

47(2) (a) By deleting paragraph (*a*) and substituting –

"(*a*) a list showing –

(i) the respective numbers of judge's authorizations, executive authorizations and emergency authorizations issued under this Ordinance during the report period, and the average duration of the respective prescribed authorizations;

(ii) the respective numbers of judge's authorizations and executive authorizations renewed under this Ordinance during the report period, and the average duration of the respective renewals;

(iii) the respective numbers of judge's authorizations, executive authorizations and emergency authorizations issued as a result of an oral application under this Ordinance during the report period, and the average duration of the respective prescribed authorizations;

(iv) the respective numbers of judge's authorizations and executive authorizations renewed as a result of an oral application under this Ordinance during the report

period, and the average duration of the respective renewals;

(v) the respective numbers of judge's authorizations and executive authorizations that have been renewed under this Ordinance during the report period further to 5 or more previous renewals;

(vi) the respective numbers of applications for the issue of judge's authorizations, executive authorizations and emergency authorizations made under this Ordinance that have been refused during the report period;

(vii) the respective numbers of applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;

(viii) the respective numbers of oral applications for the issue of judge's authorizations, executive authorizations and emergency authorizations made under this Ordinance that have been refused during the report period; and

(ix) the respective numbers of oral applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;".

(b) In paragraph (*d*)(ii), by adding "or errors" after "irregularities".

(c) By deleting paragraph (*d*)(iv) and substituting –

"(iv) the respective numbers of notices given by the Commissioner under section 43(2) and section 43(3) during the report period further to examinations;".

(d) In paragraph (*d*), by adding –

"(iv*a*) the number of cases in which a notice has been given by the Commissioner under section 46A during the report period;".

(e) In paragraph (*d*)(v), by adding "48," before "49".

(f) In paragraph (*d*)(v), by deleting "and" at the end.

(g) In paragraph (*d*), by adding –

"(vi) the number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization during the report period; and

(vii) the number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 41, 46, 50 or 52 during the report period, and the broad nature of such action; and".

47 By deleting subclause (4) and substituting –

"(4) The Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report, together with a statement as to whether any matter has been excluded from that copy under subsection (5) without the agreement of the Commissioner.".

50(2) By adding "(including any disciplinary action taken in respect of any officer)" before "to implement".

50(3) By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any panel judge or any or all of them.".

51 By adding –

"(1A) For the purpose of performing any of his functions under this Ordinance, the Commissioner may request a panel judge to provide him with access to any of the documents or records kept under section 3 of Schedule 2.".

52 By adding "(including any disciplinary action taken in respect of any officer)" before the full stop.

55(1) By deleting everything before "ground" and substituting –

"(1) If the officer by whom any regular review is or has been conducted under section 54(1) or (2) is of the opinion that the".

55(2)

(a) In paragraph (*a*), in the English text, by deleting "any ground" and substituting "the ground".

(b) In the Chinese text, by adding "有關部門" before "在當其時".

(c) In the Chinese text, by deleting "有關部門的人員" and substituting "人員".

55 By adding –

"(5A) If, at the time of the provision of a report to the relevant authority under subsection (3), the relevant authority is no longer holding his office or performing the relevant functions of his office –

(*a*) without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a panel judge or authorizing officer (as the case may be) and lawfully performing the relevant functions of the office of that relevant authority; and

(*b*) the provisions of this section are to apply accordingly.".

55 By deleting subclause (6) and substituting –

"(6) For the purposes of this section, the ground for discontinuance of a prescribed authorization exists if the conditions for the continuance of the prescribed authorization under section 3 are not met.".

New By adding –

"**55A. Reports to relevant authorities following arrests**

(1) Where, further to the issue or renewal of a prescribed authorization under this Ordinance, the officer of the department concerned who is for the time

being in charge of the interception or covert surveillance concerned becomes aware that the subject of the interception or covert surveillance has been arrested, the officer shall, as soon as reasonably practicable after he becomes aware of the matter, cause to be provided to the relevant authority by whom the prescribed authorization has been issued or renewed a report assessing the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the interception or covert surveillance.

(2) Where the relevant authority receives a report under subsection (1), he shall revoke the prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under section 3 are not met.

(3) Where the prescribed authorization is revoked under subsection (2), the prescribed authorization is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.

(4) If, at the time of the provision of a report to the relevant authority under subsection (1), the relevant authority is no longer holding his office or performing the relevant functions of his office –

(*a*) without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a

panel judge or authorizing officer (as the case may be) and lawfully performing the relevant functions of the office of that relevant authority; and

(*b*) the provisions of this section are to apply accordingly.

(5) In this section, "relevant duration provision" (有關時限條文) means section 10(*b*), 13(*b*), 16(*b*), 19(*b*) or 22(1)(*b*) (as may be applicable).".

56 By adding –

"(1A) Where any protected product described in subsection (1) contains any information that is subject to legal professional privilege, subsection (1)(*c*) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that any part of the protected product that contains the information –

(*a*) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed not later than 1 year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or

(*b*) in the case of a prescribed authorization for a telecommunications interception, is

as soon as reasonably practicable destroyed.".

56 By deleting subclause (2) and substituting –

"(2) For the purposes of this section, something is necessary for the relevant purpose of a prescribed authorization –

(*a*) in the case of subsection (1)(*a*), if –

(i) it continues to be, or is likely to become, necessary for the relevant purpose; or

(ii) except in the case of a prescribed authorization for a telecommunications interception, it is necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or

(*b*) in the case of subsection (1)(*c*) –

(i) when it continues to be, or is likely to become, necessary for the relevant purpose; or

(ii) except in the case of a prescribed authorization for a telecommunications interception, at any time before the expiration of 1 year after it ceases to be necessary for the purposes of

any civil or criminal proceedings before any court that are pending or are likely to be instituted.".

57(2) (a) In paragraph (*a*)(ii)(A), by deleting everything after "application," and substituting "for a period of at least 1 year after the pending proceedings, review or application has been finally determined or finally disposed of; or".

(b) In paragraph (*a*)(ii)(B), by deleting "at least until" and substituting "for a period of at least 1 year after".

(c) In paragraph (*a*)(ii)(B), by deleting ", until" and substituting ", for a period of at least 1 year after".

58 By deleting subclause (4) and substituting –

"(4) Notwithstanding subsection (2) or any other provision of this Ordinance, where, for the purposes of any criminal proceedings (whether being criminal proceedings instituted for an offence or any related proceedings), any information obtained pursuant to a relevant prescribed authorization and continuing to be available to the department concerned might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence –

(*a*) the department shall disclose the information to the prosecution; and

(*b*) the prosecution shall then disclose the information to the judge in an ex parte hearing that is held in private.".

58 By deleting subclause (5).

58 By deleting subclause (6) and substituting –

"(6) The judge may, further to the disclosure to him of the information under subsection (4)(*b*), make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.".

58 By adding –

"(6A) Where any order is made under subsection (6) in any criminal proceedings, the prosecution shall disclose to the judge for any related proceedings the terms of the order and the information concerned in an ex parte hearing that is held in private.".

58(7) By deleting "direction" and substituting "order".

58(8) By adding –

""judge" (法官), in relation to any proceedings, means the judge or magistrate before whom those proceedings are or are to be heard, or any other judge or magistrate having jurisdiction to deal with the matter concerned;

"related proceedings" (有關法律程序), in relation to any criminal proceedings, means any further proceedings (including appeal proceedings) arising from, or any proceedings preliminary or incidental to, those proceedings;".

New — By adding –

"**58A. Information subject to legal professional privilege to remain privileged**

Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.".

59(4) — By deleting "have regard to" and substituting "comply with".

60(1) — By deleting "in" and substituting "relating to".

60(2) — (a) By deleting "prejudice to" and substituting "limiting".

(b) By deleting "defect in" and substituting "defect relating to".

62 — By deleting "make regulation" and substituting ", subject to the approval of the Legislative Council, make regulations".

63 — By deleting everything after "may," and substituting "subject to the approval of the Legislative Council, amend Schedules 1, 2, 3 and 4 by notice published in the Gazette.".

65(1) — (a) By deleting "the provision then in force as".

(b) By deleting "sections 56 and 58 apply" and substituting "section 56 applies".

(c) By deleting "and to the relevant matters".

(d) By deleting paragraph (*a*)(i) and substituting –

"(i) the materials were protected product; and".

65 By adding –

"(2A) Nothing in this section operates to validate or authorize any telecommunications interception carried out pursuant to an order referred to in subsection (1).".

65 By deleting subclause (3) and substituting –

"(3) In this section, "copy" (文本), in relation to any contents of a communication referred to in subsection (1), means any of the following (whether or not in documentary form) –

(*a*) any copy, extract or summary of such contents;

(*b*) any record referring to the telecommunications interception referred to in subsection (1) which is a record showing, directly or indirectly, the identity of any person who is the sender or intended recipient of the communication.".

Schedule 2 Within the square brackets, by deleting "2, 6" and substituting "6, 51".

Schedule 2, section 1(2) By deleting everything after "considered" and substituting "outside the court precincts at any place other than the premises of a department.".

Schedule 2, section 1 By deleting subsection (3) and substituting –

"(3) The panel judge may consider the application in such manner as he considers appropriate.".

Schedule 2, section 3(3)

In paragraph (*b*), by adding "(including those performed at the request of the Commissioner under section 51(1A) of this Ordinance)" before "; and".

Schedule 2, section 3(5)

(a) In the English text, by adding ", whether" after "department concerned".

(b) By deleting "otherwise".

Schedule 2, section 4

By deleting the section.

Schedule 3, Part 1

(a) In paragraph (*b*), by adding –

"(iv*a*) the grounds for the reasonable suspicion specified in section 3(1)(*aa*) of this Ordinance;".

(b) In paragraph (*b*)(v), by deleting "nature of, and an assessment of the immediacy and gravity of" and substituting "following information".

(c) In paragraph (*b*)(v)(A), by deleting everything after "Ordinance," and substituting "the particular serious crime to be prevented or detected and an assessment of its immediacy and gravity; or".

(d) In paragraph (*b*)(v)(B), by adding ", an assessment of its immediacy and gravity, and an assessment of its impact, both direct and indirect, on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong" before the semicolon.

(e) In paragraph (*b*)(viii), by adding ", or may be the contents of any journalistic material," after "privilege".

(f) In paragraph (*b*)(viii), by deleting "and".

(g) In paragraph (*b*), by adding –

"(x) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which –

(A) any person set out in the affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned; or

(B) where the particulars of any telecommunications service have been set out in the affidavit under subparagraph (iii), the interception of any communication to or from that telecommunications service has also been sought,

and if so, particulars of such application; and".

(h) In paragraph (*c*), by deleting everything after "name" and substituting ", rank and post the applicant and any officer of the department concerned approving the making of the application.".

Schedule 3, Part 2

(a) In paragraph (*b*), by adding –

"(v*a*) the grounds for the reasonable suspicion specified in section 3(1)(*aa*) of this Ordinance;".

(b) In paragraph (*b*)(vi), by deleting "nature of, and an assessment of the immediacy and gravity of" and substituting "following information".

(c) In paragraph (*b*)(vi)(A), by deleting everything after "Ordinance," and substituting "the particular serious crime to be prevented or detected and an assessment of its immediacy and gravity; or".

(d) In paragraph (*b*)(vi)(B), by adding ", an assessment of its

immediacy and gravity, and an assessment of its impact, both direct and indirect, on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong" before the semicolon.

(e) In paragraph (*b*)(ix), by adding ", or may be the contents of any journalistic material," after "privilege".

(f) In paragraph (*b*)(ix), by deleting "and".

(g) In paragraph (*b*), by adding –

"(xi) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; and".

(h) In paragraph (*c*), by deleting everything after "name" and substituting ", rank and post the applicant and any officer of the department concerned approving the making of the application.".

Schedule 3, Part 3

(a) In paragraph (*b*), by adding –

"(v*a*) the grounds for the reasonable suspicion specified in section 3(1)(*aa*) of this Ordinance;".

(b) In paragraph (*b*)(vi), by deleting "nature of, and an assessment of the immediacy and gravity of" and substituting "following information".

(c) In paragraph (*b*)(vi)(A), by deleting everything after "Ordinance," and substituting "the particular serious crime to be prevented or detected and an assessment of its immediacy and gravity; or".

(d) In paragraph (*b*)(vi)(B), by adding ", an assessment of its immediacy and gravity, and an assessment of its impact, both direct and indirect, on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong" before the semicolon.

(e) In paragraph (*b*)(ix), by adding ", or may be the contents of any journalistic material," after "privilege".

(f) In paragraph (*b*)(ix), by deleting "and".

(g) In paragraph (*b*), by adding –

"(xi) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the statement under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; and".

(h) In paragraph (*c*), by deleting "and rank" and substituting ", rank and post".

Schedule 3, Part 4

(a) In paragraph (*a*)(i), by adding "and the duration of each renewal" before the semicolon.

(b) In paragraph (*a*)(iii), by adding "an assessment of" before "the value".

(c) In paragraph (*b*), by deleting everything after "name" and substituting ", rank and post the applicant and any officer of the department concerned approving the making of the application.".

Schedule 4

In paragraph (*b*), by deleting "and rank" and substituting ", rank and post".

| | |
|---|---|
| 2(1) (definition of "prescribed authorization" and paragraph (*a*) of the definition of "relevant authority"), 8(1), 9(1), (2) and (3)(*a*), 10, 11(1) and (2)(*b*)(i) and (ii), 12(1), (3)(*a*) and (4), 13, 20(1)(*b*) and 22(2) and Schedule 3 (Parts 1, 2 and 4) | By deleting "judicial authorization" wherever it appears and substituting "judge's authorization". |
| Part 3 | In the heading of Division 2, by deleting "**Judicial Authorizations**" and substituting "**Judge's Authorizations**". |
| 8 and 11 | In the cross-headings immediately before the clauses, by deleting "***judicial authorizations***" and substituting "***judge's authorizations***". |
| 8, 9, 10, 11, 12 and 13 | In the headings, by deleting "**judicial authorization**" and substituting "**judge's authorization**". |
| Schedule 3 (Parts 1, 2 and 4) | In the headings, by deleting "JUDICIAL AUTHORIZATION" and substituting "JUDGE'S AUTHORIZATION". |

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable Margaret NG

| Clause | | Amendment Proposed |
|---|---|---|
| 2 | [NEGATIVED] | By deleting subclause (2). |

[Hon Margaret NG's other proposed amendments to the above Bill, which have been ruled in by the President, are in Appendix A to LC Paper No. CB(3)782/05-06]

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable Margaret NG

| Clause | | | Amendment Proposed |
|---|---|---|---|
| 2(1) | [NEGATIVED] | (a) | In the definition of "interception product", by deleting "a prescribed authorization for" and substituting "an". |
| | [NEGATIVED] | (b) | By deleting the definition of "oral application". |
| | [NEGATIVED] | (c) | In the definition of "protected product", by adding "and includes any information derived from such product and any document or record containing such information" after "surveillance product". |
| | [NEGATIVED] | (d) | In the definition of "serious crime", by deleting everything after "offence punishable" and substituting "by maximum penalty that is or includes a term of imprisonment of not less than 7 years;". |
| | [NEGATIVED] | (e) | In the definition of "surveillance product" – (i) by deleting "a prescribed authorization for"; (ii) by adding ", any information derived from the material, and any document or record containing such information" before the semicolon. |
| | [NEGATIVED] | (f) | In the definition of "Type 1 surveillance", by deleting "other than Type 2 surveillance" and substituting – "which (a) is carried out with the use of any surveillance device; (b) involves entry onto any premises without permission; (c) interferes with the interior of any conveyance or |

object without permission".

NEGATIVED (g) In the definition of "Type 2 surveillance", by deleting everything after "covert surveillance" and substituting "other than Type 1 surveillance.".

(h) By adding –

NEGATIVED ""public security" (公共安全) means the public security of Hong Kong from terrorist acts and similar acts endangering public safety; "

NOT PROCEEDED WITH "subject of interception or surveillance(截取或監察的目標人物)" means any person whose activity is being monitored by interception of his communication or surveillance.".

2 NEGATIVED By adding –

"(5A) For the purposes of this Ordinance, the exercise of any right enjoyed by any person under the Basic Law or under international treaties, conventions or instruments applying to the Hong Kong Special Administrative Region or under common law shall not be regarded as a threat to public security.".

2 NEGATIVED By deleting subclause (6).

2 NOT PROCEEDED WITH By deleting subclause (7).

3(1) NEGATIVED (a) In paragraph (*a*), by deleting "sought to be furthered by" and substituting "of".

(b) In paragraph (a)(i), by deleting "serious crime" and substituting "a serious crime which the applicant reasonably believes is about to take place or has taken place as the case may be".

(c) In paragraph (a)(ii), by deleting "; and" and substituting "against a threat which the applicant reasonably believes to be imminent;".

(d) By adding –

"(aa) there is credible evidence to show a reasonable suspicion that the subject of the interception or covert surveillance has been, is, or is likely to be, involved in –

1. committing the serious crime; or

2. undertaking the activity which constitutes or would constitute the threat to public security;

"(ab) the serious crime to be prevented or detected or the particular threat to public security referred to in paragraph (a)(i) or (ii) as the case may be is identified; and".

(e) In paragraph (*b*), by deleting "proportionate to the purpose sought to be furthered by carrying it out".

(f) In paragraph (*b*)(i), by deleting ", in operational terms,".

3(2) [NEGATIVED] (a) By adding before paragraph (a) –

"(aa) the right to freedom and privacy protected by Article 30 of the Basic Law;

(ab) other rights and freedoms protected under other provisions of the Basic Law including Articles 29 and 39;";

(b) In paragraph (b), by deleting "sought to be furthered by" and substituting "of".

4(1) [NEGATIVED] By adding "Any person who carries out any interception recklessly in contravention of this section commits an offence punishable by 2 years imprisonment." after "interception.".

4(2) [NEGATIVED] (a) In paragraph (a), by adding "and" at the end.

(b) By deleting paragraph (b).

(c) In paragraph (c), by deleting everything in parenthesis.

4 [NEGATIVED] By deleting subclause (3).

5(1) [NEGATIVED] By adding"Any person who carries out covert surveillance in contravention of this section commits an offence punishable by 3 years imprisonment." after "surveillance.".

6(1) [NEGATIVED] By deleting "Chief Executive shall, on the recommendation of the Chief Justice," and substituting "Chief Justice shall".

6 [NEGATIVED] By deleting subclause (3).

6 By adding –

NOT PROCEEDED WITH "(3A) In performing any of his functions under this Ordinance, a panel judge has the same powers, protection and immunities as a judge of the Court of First Instance, but is not regarded as a court or member of a court.

NEGATIVED (3B) For the purpose of performing any of his functions under this Ordinance, a panel judge may administer oaths and take affidavits.

8(1) NOT PROCEEDED WITH By deleting "a judicial" and substituting "an".

8 NEGATIVED By adding –

" (1A) An application under subsection (1) shall be made ex parte in writing and supported by an affidavit of the applicant.

(1B) The panel judge may order a hearing to be held and any informant to appear before him for examination, or determine the application without a hearing. Any hearing of the application shall be held in private.

(1C) Regardless of whether a hearing is held the panel judge shall give his determination in writing.

(1D) Documents and records compiled by or made available to the panel judge shall be maintained as provided in Schedule 2.".

8(2) NEGATIVED By deleting everything after "The" and substituting "affidavit in support of an application under subsection (1) shall comply with the requirements specified in Part 1 or 2 of Schedule 3 as the case may be.".

9(3) NEGATIVED By deleting everything after "under subsection (1)" and substituting "in writing with reasons for his determination.".

11(2) NEGATIVED (a) By deleting everything before "(i)" and substituting –
"(2) An application under subsection (1) shall be made ex parte in writing and supported by –".

(b) In subparagraph (ii) –

NOT PROCEEDED WITH (i) by deleting "any affidavit" and substituting "every affidavit";

NEGATIVED (ii) by deleting "oral";

NEGATIVED (iii) by deleting everything after "confirmation of" and

NEGATIVED (iv) substituting "an emergency authorization or its renewal; and".

NOT PROCEEDED WITH (c) By renumbering subparagraphs (i), (ii) and (iii) as paragraphs (a), (b) and (c) respectively.

11 NEGATIVED By adding –

"(2A) The panel judge may order a hearing to be held and any informant to be questioned or determine the application without a hearing. Any hearing of the application shall be held in private.".

12(2) NEGATIVED By deleting "shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met." and substituting –

"(a) shall not grant the renewal unless he is satisfied that the conditions under section 3 are met; and

(b) shall take into account the total duration of the interception or covert surveillance as the case may be under authorization.".

12(3) NEGATIVED In paragraph (a), by adding "and giving reasons for the renewal" before "in writing".

12(4) NEGATIVED By adding "but in any event not more than a total of 2 years in duration" before "under".

14(1) NEGATIVED By adding "in charge of the investigation of the subject of interception or surveillance" before "may".

15(3) NEGATIVED In paragraph (a), by adding "and giving reasons for the authorization" before "in writing".

17(2) WITHDRAWN In paragraph (b)(ii), delete ", or for the purposes of any application made further to an oral application for confirmation of the executive

authorization or its previous renewal".

18(2) [NEGATIVED] By deleting "shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met." and substituting –

"(a) shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met; and

(b) shall take into account the total duration of the surveillance under the authorization.".

18(3) [NEGATIVED] In paragraph (a), by adding "and giving his reasons for the renewal" before "in writing".

18(4) [NEGATIVED] By adding "but in any event not more than a total of 2 years in duration" before "under".

20(1) [NEGATIVED] (a) By adding "(not below a rank equivalent to that of superintendent of police)" after "An officer".

(b) By deleting, "if he considers that" and substituting "where".

20 [NEGATIVED] By deleting subclause (2) and substituting –

"(2) Subject to subsection(3) an application for emergency authorization shall be—

(a) made in writing; and

(b) supported by a statement in writing made by the applicant which is to—

(i) set out the reason for making the application; and

(ii) comply with the requirements specified in Part 1 or 2 of Schedule 3 as the case may be which are to apply to the statement as they apply to an affidavit referred to in section 8(2).".

20 [NEGATIVED] By adding –

"(3) An application for emergency authorization under subsection (1) may be made orally in person if, having regard to all circumstances of the case, it is not reasonably practicable to make an application in writing.

(4) Where an oral application is made, the applicant shall make an oral statement providing the required information specified in Part 2 or 3 of Schedule 3 as the case may be.".

21(2) WITHDRAWN

(a) In paragraph (a), by deleting "and" at the end.

(b) By adding —

"(aa) that, where an oral application is made, section 20(3) applies; and".

21(3) WITHDRAWN

In paragraph (a), by adding "and giving his reasons for the authorization" after "authorization".

22(1) NOT PROCEEDED WITH

In paragraph (b), by deleting "when it takes effect" and substituting "of the issuance of the authorization".

23 NEGATIVED

By deleting the clause and substituting –

" **23. Application for confirmation of emergency authorization**

(1) Where an authorization for interception or Type 1 surveillance is issued as a result of an emergency application, the head of the department concerned shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization, as soon as reasonably practicable, and in any event within 48 hours of the issuance of the emergency authorization.

(2) The application for confirmation shall be –

(a) made in writing; and

(b) supported by—

(i) a copy of the emergency authorization; and

(ii) an affidavit of the applicant which verifies the contents of the statement provided under section 20(2)(b) or (4) as applicable for the purposes of the application for emergency authorization.

(3) Failing an application for confirmation of the emergency authorization being made within the period of 48 hours referred to in subsection (1) —

(a) the emergency authorization shall be void and of no effect from the time issued;

(b) any interception or Type 1 surveillance carried out under the emergency authorization shall be regarded as unauthorized;

(c) without prejudice to section 52, the head of the department concerned shall submit a report to the Commissioner with the details of the case; and

(d) any material or information obtained by carrying out the interception or Type 1 surveillance concerned shall be preserved for the sole purpose of the Commissioner's review or examination under Part 4.".

24(2) [NEGATIVED] By deleting "21(2)(b) has been complied with" and substituting "21(2)(a), (aa) and (b) has been complied with".

24 [NEGATIVED] By deleting subclause (3) and substituting –

"(3) Where the panel judge refuses to confirm the emergency authorization under subsection (1)(b), he may make one or more of the following orders—

(a) an order revoking the emergency authorization;

(b) an order that the emergency authorization have effect subject to the variation specified by the panel judge;

(c) an order that the emergency authorization is to be given no effect from the time of its issuance;

(d) an order that the revocation takes effect upon the panel judge's determination;

(e) an order that the head of the department preserves any material or information obtained under the emergency authorization for the sole purpose of a report to and investigation by the Commissioner.".

| | | |
|---|---|---|
| 24 | [NEGATIVED] | By deleting subclause (4). |
| 24(5) | [NEGATIVED] | In paragraph (a), by adding "and giving his reasons for the confirmation" after "authorization". |
| Part 3, Division 5 | [NEGATIVED] | By deleting the Division heading and the cross-heading before clause 25. |
| 25 | [NEGATIVED] | By deleting the clause. |
| 26 | [NEGATIVED] | (a) By deleting the cross-heading before the clause.<br>(b) By deleting the clause. |
| 27 | [NEGATIVED] | By deleting the clause. |
| 28 | [NEGATIVED] | By deleting the clause. |
| 29 | [NEGATIVED] | By adding before subclause (1) —<br>"(1A) A prescribed authorization for interception must specify the person or persons whose communications are to be the subject of interception and no authorization for interception shall be construed as authorizing the interception of any communication to or from any person other than the person or persons so specified.<br>(1B) A prescribed authorization for covert surveillance must specify the person or persons who are to be the subject of covert surveillance and no authorization for covert surveillance shall be construed as authorizing the surveillance of any person other than the person or persons so specified." |
| 29(1) | [NEGATIVED] | (a) By deleting "A" and substituting "Subject to subsection (1A), a".<br>(b) In paragraph (b), by deleting –<br>"one or both of the following—<br>(i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;<br>(ii)". |

29(2) [NEGATIVED] (a) By deleting "A" and substituting "Subject to subsection (1A), a".

(b) In paragraph (a), by adding "as the place for installation of the surveillance device" after "authorization".

29(3) [NEGATIVED] By adding "lawful and" after "anything".

29(4) [NEGATIVED] By adding "provided that the nature of the interference so authorized must be specified in the authorization" after "surveillance concerned)".

29(6) [NEGATIVED] (a) In paragraph (a), by adding "provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization" after "authorization".

(b) In paragraph (b), by adding "subject to paragraph (a)," before "the entry,".

29(7) [NEGATIVED] (a) In paragraph (a)(i), by adding "provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization" after "in the prescribed authorization".

(b) In paragraph (a)(ii), by adding "subject to subparagraph (i)," before "the entry,".

(c) In paragraph (b)(i), by adding "provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization" after "in the prescribed authorization".

(d) In paragraph (b)(ii), by adding "subject to subparagraph (i)," before "the entry,".

(e) In paragraph (c)(i), by adding "provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization" after "likely to be".

(f) In paragraph (c)(ii), by adding "subject to subparagraph (i)," before "the entry,".

30
NOT PROCEEDED WITH

(a) By deleting "A" and substituting "Subject to section 29,".

(b) by adding "lawful" after "undertaking of any".

New
NOT PROCEEDED WITH

By adding –

**"30A. What a prescribed authorization may not authorize**

(1) Notwithstanding anything in this Ordinance, subject to subsection (2) —

(a) no prescribed authorization may contain terms that authorize the interception of communications by reference to —

(i) in the case of a postal interception, an office or other relevant premises, or a residence, of a lawyer; or

(ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service known or reasonably expected to be known by the applicant to be ordinarily used by a lawyer for the purpose of providing legal advice to clients;

(b) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place at an office or other relevant premises, or a residence, of a lawyer; and

(c) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place in any place provided for legal visits by lawyers visiting prisons or other places of detention or in any place where a

lawyer is visiting any other person in detention.

(2) A prescribed authorization may contain terms that authorize –

(a) the interception of a communication service used by a lawyer other than a service referred to in subsection (1)(a)(ii); or

(b) covert surveillance to be carried out in respect of oral or written communications taking place at the residence of a lawyer,

if the relevant authority is satisfied that there is credible evidence to justify a reasonable belief that the lawyer concerned is a party to any activity which constitutes or would constitute a serious crime or threat to public security and the communications concerned is for the furtherance of that criminal purpose, or that threat to public security.

(3) For the avoidance of doubt, a prescribed authorization does not authorize any device to be implanted in, or administered to, a person without the consent of the person.

(4) In this section —

"lawyer (律師)" means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap. 159) who practises as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);

"other relevant premises (其他有關處所)", in relation to a lawyer, means any premises, other than an office of the lawyer, that are known or reasonably expected to be known by the applicant to be ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients.".

32(1) [NEGATIVED] By adding",ex parte," after "concerned may apply".

33(3) [NEGATIVED] In paragraph (a), by adding "and giving reasons for the issuance of

the warrant" after "retrieval warrant".

33 [NEGATIVED] By adding —

"(2A) The panel judge may order a hearing to be held and any informant to appear before him for examination, or determine the application without a hearing. Any hearing of the application shall be held in private.".

38(2) [NEGATIVED] By deleting "judge" and substituting "person".

38(5) [NEGATIVED] (a) By deleting ", on the recommendation of the Chief Justice,";

(b) By adding "provided that the reason for such revocation must be given in writing and shall be reviewable by a court of law" after "good cause".

38 [NEGATIVED] By deleting subclause (6) and substituting –

"(6) In this section, "eligible person" (合資格人士) means—

(a) a former permanent judge of the Court of Final Appeal;

(b) a former Justice of Appeal of the Court of Appeal; or

(c) a former judge of the Court of First Instance." .

39 [WITHDRAWN] In paragraph (*b*), by deleting everything after "paragraph (a), to—" and substituting –

"(i) conduct reviews under Division 2;

(ii) carry out examinations under Division 3;

(iii) give notifications to relevant persons under Division 3A;

(iv) submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments under Division 4;

(v) perform any further functions prescribed by regulation made under section 62 for the purposes of this subparagraph; and

(vi) perform such other functions as are imposed or conferred on him under this Ordinance or any other enactment.".

40 [NOT PROCEEDED WITH] (a)By adding –

"(1A) Without limiting the generality of subsection (1), the

Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(*b*), 24(3)(e) or 52.".

(b) By adding –

"(3) The Commissioner shall have a general power to require any department to investigate any person within that department where a panel judge or he determines that there is reasonable grounds to believe that the person concerned has contravened provisions of this Ordinance or has presented false information in obtaining an authorization and to require a report from such department on the outcome of any investigation and any disciplinary action taken.

(4) The Commissioner shall have a general power to conduct any investigation as he considers necessary into the conduct of any person apart from a panel judge and to refer any matter to the Director of Public Prosecutions upon conclusion of such investigation.".

43(1) NOT PROCEEDED WITH

In paragraph (b), by deleting "a prescribed authorization should have been, but has not been, issued or renewed under this Ordinance in relation to the interception or covert surveillance alleged" and substituting "the alleged interception or covert surveillance was carried out under the authority of a prescribed authorization issued or renewed in accordance with this Ordinance".

43(2) NOT PROCEEDED WITH

By deleting everything after "authorization" and substituting—

"was issued or renewed in contravention of this Ordinance or should not have been issued or renewed or the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, he shall give notice as soon as practicable to the applicant –

(a) stating that he has found the case in the subject of interception or surveillance's or the applicant's favour with particulars of his findings; including but not limited to –

(i) the broad nature of the interception or

covert surveillance; and

(ii) the time when the interception or covert surveillance commenced and the time when the interception or covert surveillance ended; and

(b) inviting the applicant to confirm whether the latter wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose.".

43(3) NOT PROCEEDED WITH — By adding "as soon as practicable" after "notice".

43 NOT PROCEEDED WITH — By deleting subclause (4).

44(1) NEGATIVED — In paragraph (a), by deleting "1 year" and substituting "5 years".

44 NEGATIVED — By deleting subclause (2).

44 NEGATIVED — By deleting subclause (3).

45(1) NOT PROCEEDED WITH —

(a) In paragraph (a), by adding "except that the burden of proving the interception or covert surveillance alleged to have been lawfully carried out shall lie with the government" after "judicial review".

(b) In paragraph (b), by adding "subject to section 51(1)," before "carry out".

45 NOT PROCEEDED WITH — By deleting subclasue (3) and substituting –

"(3) Without prejudice to section 43(5), in giving notice to an applicant under section 43(2)(a) or (3), the Commissioner shall —

(a) give reasons for his determination;

(b) give details of any interception or covert surveillance concerned; and

(c) in the case of section 43(3), indicate whether or not the interception or covert surveillance alleged has taken place,

to the extent that it will not prejudice the prevention or detection of crime or the protection of public security.".

~~47(2)~~ WITHDRAWN ~~(a) By deleting everything after "covert surveillance" and~~ substituting –

" (a) a list showing –

(i) the respective numbers of judge's authorizations, executive authorizations and emergency authorizations issued under this Ordinance during the report period, and the maximum and average duration respectively of the respective prescribed authorizations;

(ii) the respective numbers of judge's authorizations and executive authorizations renewed under this Ordinance during the report period, and the maximum and average duration respectively of the respective renewals;

(iii) the respective numbers of judge's authorizations, executive authorizations and emergency authorizations issued as a result of an oral application under this Ordinance during the report period, and the average duration of the respective prescribed authorizations;

(iv) the respective numbers of judge's authorizations and executive authorizations that have been renewed under this Ordinance during the report period further to 5 or more previous renewals;

(v) the respective numbers of applications for the issue of judge's authorizations, executive authorizations and emergency authorizations made under this Ordinance that have been refused during the report period;

(vi) the respective numbers of applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;

~~(vii) the respective numbers of oral applications for the~~

~~issue of judge's authorizations, executive~~ authorizations and emergency authorizations made under this Ordinance that have been refused during the report period; and;

(viii) the respective numbers of oral applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;

(b) a list showing –

(i) the major categories of offences for the investigation of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; and

(ii) the number of persons arrested during the report period as a result of or further to any interception or covert surveillance carried out pursuant to a prescribed authorization;

(*c*) a list showing –

(i) the number of device retrieval warrants issued under this Ordinance during the report period, and the average duration of the warrants; and

(ii) the number of applications for the issue of device retrieval warrants made under this Ordinance that have been refused during the report period;

(*d*) a list showing –

(i) a summary of reviews conducted by the Commissioner under section 40 during the report period;

(ii) the number and broad nature of any cases of abuses or suspected abuses, irregularities or errors identified in the reviews during the report period;

(iii) the number of applications for examination that have been received by the Commissioner during the report period;

(iv) the respective numbers of notices given by the Commissioner under section 43(2) and (3) during the report period further to examinations;

~~(v) the number of cases in which a notice has been~~

~~given by the Commissioner under section 46A~~ during the report period;

(vi) the broad nature of recommendations made by the Commissioner under sections 49 and 50 during the report period;

(vii) the number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization during the report period; and

(viii) the number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 41, 46 or 50 during the report period, and the broad nature of such action; and

(e) an assessment on the overall compliance with the relevant ~~requirements during the report period.~~".

47 WITHDRAWN By deleting subclause (4) and substituting –

"(4) The Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report, together with a statement as to whether any matter has been excluded from that copy under subsection (5) without the agreement of the Commissioner.".

51(3) NEGATIVED By deleting "Except" and substituting "Subject to section 43 herein, except".

New NEGATIVED By adding –

"54A. Contravention of this Ordinance

In addition to any or all of the remedies herein provided, any contravention of this Ordinance shall be a civil wrong actionable in equitable relief as well as damages.".

New NOT PROCEEDED WITH By adding –

"55A. Reports to relevant authorities

following arrests

A prescribed authorization ceases to have effect automatically upon the arrest of the subject of the interception or covert surveillance. The officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned shall immediately after he becomes aware of the matter, take all necessary steps to cease any interception or covert surveillance being or would be carried out in respect of the arrested person."

55(6) [NOT PROCEEDED WITH]

By adding before paragraph (a) –

"(aa) the application for issuance or renewal of any prescribed authorization was in contravention of this Ordinance;

(ab) the interception or acts of covert surveillance carried out was in excess of the prescribed authorization;" .

56(1) [NEGATIVED]

(a) By deleting "make arrangements to".

(b) In paragraph (b), by deleting "and".

(c) By adding –

"(ba) that any information or intelligence report or record generated from the protected product are subject to the same restriction and protection as the protected product; and".

(d) In paragraph (c), by deleting "that the protected product is destroyed as soon as its retention is" and substituting "that subject to any provision regarding the preservation of the protected product for the review or examination by the Commissioner or pending the consideration of the subject of the interception or surveillance, the protected product and all information or intelligence report or record generated from it are destroyed as soon as their retention are".

56 [NEGATIVED]

By adding –

" (1A) Where any protected product described in subsection (1) contains a communication that is subject to legal professional privilege, subsection (1)(c) is to be construed as also requiring the head of department to ensure that the

person entitled to claim such legal professional privilege be notified, or the same and to preserve the protected product pending the person's consideration of what, if any, action is to be taken as regards the same.

(1B) Any person who intentionally or recklessly discloses the contents of or deals with any protected product other than with proper authorization commits an offence punishable by 2 years imprisonment.".

56 [NEGATIVED] By deleting subclause (2).

57(1) [NEGATIVED] (a) In paragraph (b)(i), by deleting "or, where section 28 applies, a copy of any record, affidavit or other document provided as described in section 28(1)(b), for the purposes of the application)";

(b) By deleting paragraph (c);

(c) In paragraph (f)(i), by adding "and" at the end;

(d) By deleting paragraph (f)(ii).

57(2) [NEGATIVED] In paragraphs (a)(i) and (b), by deleting "2 years" and substituting "10 years".

58 [NEGATIVED] By adding before subclause (1) –

"(1A) Nothing in this Ordinance shall authorize any conduct by any person which affects or may affect the right to a fair trial nor shall any judge or court or prosecutor be constrained or limited in any way in ordering or giving disclosure of any material including any protected product necessary for a fair trial.".

58(1) [NEGATIVED] By deleting "Any" and substituting "Subject to subsection (1A) and the right of any person charged with a criminal offence to apply to the court for disclosure of a telecommunications interception product, any".

58(2) [NEGATIVED] By deleting "Any" and substituting "Subject to subsection (1A) and the right of any person charged with a criminal offence to apply to the court for disclosure of a telecommunications interception product, any".

58 [NEGATIVED] By deleting subclause (3).

58(4) [NEGATIVED] By deleting everything after "available for disclosure" and substituting "and which is necessary for the purposes of a fair trial.".

58 [NEGATIVED] By deleting subclause (5).

58 [NEGATIVED] By deleting subclause (6).

58 [NEGATIVED] By deleting subclause(7).

58(8) [NEGATIVED] By deleting the definitions of "relevant device retrieval warrant" and "relevant offence".

65 [NEGATIVED] By adding before subclause (1)–

"(1A) Nothing in this Ordinance shall be construed as authorizing or permitting or validating any interception of communications or surveillance which has been carried out before the commencement of this Ordinance.".

65(1) [NEGATIVED] By deleting "Where" and substituting "Subject to subsection (1A), where".

65(3) [NEGATIVED] By deleting paragraph (b) after the cross-heading ""relevant matters"(有關事宜)".

New [NEGATIVED] By adding –

**"66. Expiry**

(1) Subject to subsection (2), sections 4(2) and (3) and section 5(2) and all provisions in Part 3 shall cease to have effect on 8 August 2008.

(2) Any prescribed authorization issued, renewed or confirmed, any device retrieval warrant issued prior to 8 August 2008 shall expire on that date.

(3) Prior to 8 August 2008, the Commissioner shall conduct a full and independent public consultation on the provisions and implementation of this Ordinance, and

their effect on the freedom of private communications provided under Article 30 of the Basic Law. The Commissioner shall state the findings of the consultation and his recommendations on the revision or replacement of this Ordinance in a report to the Chief Executive.".

Schedule 2 [WITHDRAWN] With the square brackets, by adding ", 8" after "6".

Schedule 2 [WITHDRAWN] By adding the cross-heading, "***Judge's authorization***" immediately before section 1.

Schedule 2, section 1 [WITHDRAWN] By deleting the section.

Schedule 2, section 2 [WITHDRAWN] By deleting the section.

Schedule 2, section 3 [WITHDRAWN] In paragraph (6), delete '(whether with or without reference to section 28 of this Ordinance), 27(5)".

Schedule 3, Part 1 [WITHDRAWN]

(a) In paragraph (a), by adding "and identify the serious crime sought to be prevented or detected or the threat to public security, whichever is applicable" after "interception".

(b) In paragraph (b)(ii), by deleting "if known,"

(c) In paragraph (b)(iii), by deleting "if known,".

(d) In paragraph (b)(viii), by deleting "information" and substituting "communication".

(e) In paragraph (b)(viii), by adding", or may be confidential journalistic information, or sensitive personal information" after "privilege".

(f) In paragraph (b)(viii), by deleting "and'.

(g) In paragraph (b)(ix), by deleting "and".

(h) In paragraph (b), by adding –

"(x) set out all facts and matters in support of the reasonable suspicion specified in section 3 of this Ordinance including the source of information or belief; and

(xi) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable; and".

Schedule 3, Part 2 [WITHDRAWN] (a) In paragraph (a), by adding "and identify the serious crime sought to be prevented or detected or the threat to pubic security, whichever is applicable" after "surveillance".

(b) In paragraph (b)(ii), by deleting "if known,".

(c) In paragraph (b)(iv), by deleting "if known,".

(d) In paragraph (b)(iv), by adding "or from" before "which" .

(e) In paragraph (b)(vi), by deleting "immediacy" and substituting "imminence".

(f) In paragraph (b)(ix), by adding ", any confidential journalistic information or sensitive personal information" after "privilege".

(g) In paragraph (b)(ix), by deleting "and".

(h) In paragraph (b)(x), by deleting "and'.

(i) In paragraph (b), by adding –

"(xi) set out all facts and matters in support of the reasonable suspicion specified in section 3 of this Ordinance including the source of information or belief; and

(xii) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable; and".

Schedule 3, Part 3 WITHDRAWN

(a) In paragraph (a), by adding "and identify the serious crime sought to be prevented or detected or the threat to pubic security, whichever is applicable" after "surveillance".

(b) In paragraph (b)(ix), by deleting "and".

(c) In paragraph (b)(x), by deleting "and".

(d) In paragraph (b), by adding –

"(xi) set out all facts and matters in support of the reasonable suspicion specified in section 3 of this Ordinance including the source of information or belief; and

(xii) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable; and".

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable James TO Kun-sun

| Clause | | Amendment Proposed |
|---|---|---|
| 2(1) [NOT PROCEEDED WITH] | (a) | In the definition of "court", by deleting "and section 4 of Schedule 2". |
| [NEGATIVED] | (b) | In the definition of "interception product", by deleting "a prescribed authorization for" and substituting "an". |
| [NOT PROCEEDED WITH] | (c) | By deleting the definition of "judicial authorization". |
| [NOT PROCEEDED WITH] | (d) | In the definition of "oral application", by deleting "section 25(1)" and substituting "section 20(3)". |
| [NOT PROCEEDED WITH] | (e) | By deleting the definition of "panel judge". |
| [NOT PROCEEDED WITH] | (f) | In the definition of "prescribed authorization", by deleting "judicial" and substituting "Court of First Instance". |
| [NOT PROCEEDED WITH] | (g) | In the definition of "relevant authority", by deleting paragraph (a) and substituting — "(a) in relation to an application for the issue or renewal of a Court of First Instance authorization, means the judge of the Court of First Instance to whom the application is or has been made;". |
| [NEGATIVED] | (h) | In the definition of "serious crime" — (i) in paragraph (b)(i), by deleting "3 years; or" and substituting "7 years;"; (ii) by deleting paragraph (b)(ii). |
| [NEGATIVED] | (i) | By deleting the definition of "Type 2 surveillance" and substituting — ""Type 2 surveillance" (第2類監察), subject to subsections (3) and (3A), means any covert surveillance that is carried out with the use of an optical surveillance device or a tracking device, if the use of the device does not involve – (a) entry onto any premises either physically or by electronic means without permission; or |

(b) interference with the interior of any conveyance or object without permission.".

(j) By adding —

[NOT PROCEEDED WITH] ""Court of First Instance authorization" (原訟法庭授權) means an authorization issued or renewed by a judge of the Court of First Instance under Division 2 of Part 3 (and, where the context requires, includes an authorization to be issued or renewed by a judge of the Court of First Instance under that Division);

[NOT PROCEEDED WITH] "journalistic content" (新聞內容) means any content of journalistic material;

[NEGATIVED] "Privacy Commissioner for Personal Data" (個人資料私隱專員) means the Commissioner as defined in the Personal Data (Privacy) Ordinance (Cap. 486);

[NEGATIVED] "public security" (公共安全) means the public security of Hong Kong, but does not include economic security;

[NEGATIVED] "subject of interception or covert surveillance" (截取或秘密監察的目標人物) means any person whose activity is being monitored by interception of his communication or covert surveillance;".

2 [NOT PROCEEDED WITH] By deleting subclause (2).

2 [NOT PROCEEDED WITH] By adding –

"(3A) An officer of a department may apply for the issue or renewal of a prescribed authorization for any Type 2 surveillance as if the Type 2 surveillance were Type 1 surveillance, and the provisions of this Ordinance relating to the application and the prescribed authorization apply to the Type 2 surveillance as if it were Type 1 surveillance.".

2 [NEGATIVED] By deleting subclause (4).

2 [NEGATIVED] By adding –

"(5A) For the purposes of this Ordinance, association, assembly, demonstration, confrontation, strike, advocacy, confrontation, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless intended to be carried on by

violent means (more than negligible), is not of itself regarded as a threat to public security.".

2 [NEGATIVED] By adding –

"(5B) For the purposes of this Ordinance, any act prescribed under Article 23 of the Basic Law, unless intended to be carried on by violent means (more than negligible), is not of itself regarded as a threat to public security.".

2 [NEGATIVED] By adding –

"(5C) Notwithstanding anything in this Ordinance, no officer shall use any surveillance device unless the device has been certified by the Director of Health that it will have no adverse effect to the health of any person.".

2 [NOT PROCEEDED WITH] By deleting subclause (7).

3(1) [NOT PROCEEDED WITH]

(a) In paragraph (*a*)(ii), by deleting "and".

(b) By adding –

"(*aa*) there is reasonable suspicion that any person has been, is, or is likely to be, involved in –

(i) where the purpose sought to be furthered by carrying out the interception or covert surveillance is that specified in paragraph (*a*)(i), the particular serious crime to be prevented or detected; or

(ii) where the purpose sought to be furthered by carrying out the interception or covert surveillance is that specified in paragraph (*a*)(ii), any activity which constitutes or would constitute the particular imminent threat to public security; and".

(c) In paragraph (*b*), by deleting "proportionate to" and substituting "necessary for, and proportionate to,".

(d) In paragraph (*b*)(i), by deleting ", in operational terms,".

(e) In paragraph (*b*)(i), by deleting "and".

(f) In paragraph (*b*)(ii), by deleting the full stop and substituting "; and".

(g) In paragraph (*b*), by adding –

"(iii) considering whether the issue or renewal or the continuance of a prescribed authorization can be justified in view of human rights factors, including –

(A) the right to freedom and privacy protected by Article 30 of the Basic Law; and

(B) the rights and freedoms protected in the Basic Law and the International Covenant on Civil and Political Rights.".

4 [NEGATIVED] By adding —

"(1A) Contravention of subsection (1) shall be an offence punishable with a maximum penalty of 2 years imprisonment.".

5 [NOT PROCEEDED WITH] By adding —

"(1A) Contravention of subsection (1) shall be an offence punishable with a maximum penalty of 2 years imprisonment.".

6 [NOT PROCEEDED WITH] By deleting the clause and substituting —

"**6. Judges**

(1) For the purposes of this Ordinance, a judge refers to a judge of the Court of First Instance.

(2) Schedule 2 applies to and in relation to the procedures of, and other matters relating to, a judge.".

Part 3, Division 2 [NOT PROCEEDED WITH] By deleting the Division heading and the cross-heading before clause 8 and substituting —

"**Division 2 – Court of First Instance Authorizations**

***Issue of Court of First Instance authorizations***".

8 [NOT PROCEEDED WITH] In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

8(1) [NOT PROCEEDED WITH] (a) By deleting "a panel judge" and substituting "a judge of the Court of First Instance" .

(b) By deleting "a judicial authorization" and substituting "an authorization".

8(2) [NOT PROCEEDED WITH] (a) By adding before paragraph (*a*) —

"(*aa*) to be made ex parte;".

[NOT PROCEEDED WITH] (b) In paragraph (*b*), by deleting "a judicial authorization"

where it twice appears and substituting "an authorization".

9 [NOT PROCEEDED WITH] In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

9(1) [NOT PROCEEDED WITH] (a) By deleting "a judicial authorization" and substituting "an authorization".

(b) By deleting "panel judge" and substituting "judge of the Court of First Instance".

(c) By deleting "the judicial authorization" where it twice appears and substituting "the authorization".

9 [NOT PROCEEDED WITH] By adding —

"(1A) When considering the application in subsection (1), the judge referred to in that subsection may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.".

9(2) [NOT PROCEEDED WITH] (a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

(b) By deleting "judicial authorization" and substituting "authorization".

9(3) [NOT PROCEEDED WITH] (a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

[NOT PROCEEDED WITH] (b) In paragraph (*a*), by deleting "judicial authorization" and substituting "authorization".

[NEGATIVED] (c) In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

10 [NOT PROCEEDED WITH] (a) In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

(b) By deleting "A judicial authorization" and substituting "An authorization".

(c) By deleting "panel judge" where it twice appears and substituting "judge of the Court of First Instance".

(d) By deleting "the judicial authorization" where it twice appears and substituting "the authorization".

11 [NOT PROCEEDED WITH] (a) By deleting the cross-heading before the clause and substituting —

"***Renewal of Court of First Instance authorizations***".

(b) In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

11(1) NOT PROCEEDED WITH (a) By deleting "a judicial authorization" and substituting "an authorization".

(b) By deleting "panel judge" and substituting "judge of the Court of First Instance".

(c) In the English text, by deleting "the judicial authorization" and substituting "the authorization".

11(2) NEGATIVED (a) By adding before paragraph (*a*) —

"(*aa*) to be made ex parte;".

NOT PROCEEDED WITH (b) In paragraph (*b*)(i), by deleting "judicial authorization" and substituting "authorization".

NOT PROCEEDED WITH (c) In paragraph (*b*)(ii), by deleting "a copy of any affidavit" and substituting "copies of all affidavits".

NOT PROCEEDED WITH (d) In paragraph (*b*)(ii), by deleting " judicial authorization, or for the purposes of any application made further to an oral application for confirmation of the judicial authorization or its previous renewal" and substituting "authorization".

12 NOT PROCEEDED WITH In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

12(1) NOT PROCEEDED WITH (a) By deleting "a judicial authorization" and substituting "an authorization".

(b) By deleting "panel judge" and substituting "judge of the Court of First Instance".

12 NOT PROCEEDED WITH By adding —

"(1A) When considering the application in subsection (1), the judge referred to in that subsection may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.".

12 NEGATIVED By adding —

"(1B) When considering the application in subsection (1), the judge referred to in that subsection shall take into account the total duration of authorization since the issue of the authorization sought to be renewed.".

12(2) NOT PROCEEDED WITH (a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

(b) By deleting "its grant" and substituting "the renewal".

12(3) NOT PROCEEDED WITH (a) By deleting "panel judge" and substituting "judge of the

Court of First Instance".

NOT PROCEEDED WITH (b) In paragraph (*a*), by deleting "judicial authorization" and substituting "authorization".

NEGATIVED (c) In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

12(4) NOT PROCEEDED WITH By deleting "A judicial authorization" and substituting "An authorization".

13 NOT PROCEEDED WITH (a) In the heading, by deleting "**judicial authorization**" and substituting "**Court of First Instance authorization**".

(b) By deleting "a judicial authorization" and substituting "an authorization".

(c) In paragraph (*a*), by deleting "judicial authorization" and substituting "authorization".

(d) In paragraph (*b*), by deleting "panel judge" and substituting "judge of the Court of First Instance".

15(3) NEGATIVED In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

17(2) NEGATIVED In paragraph (*b*)(ii), by deleting ", or for the purposes of any application made further to an oral application for confirmation of the executive authorization or its previous renewal".

18 NEGATIVED By adding —

"(1B) When considering the application in subsection (1), the authorizing officer shall take into account the total duration of authorization since the issue of the authorization sought to be renewed.".

18(2) NEGATIVED By deleting "its grant" and substituting "the renewal".

18(3) NEGATIVED In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

20(1) NEGATIVED (a) By adding "(not below a rank equivalent to that of superintendent of police)" after "An officer".

NOT PROCEEDED WITH (b) In paragraph (*b*), by deleting "a judicial authorization" and substituting "a Court of First Instance authorization".

20 NOT PROCEEDED WITH By adding —

"(3) An application for emergency authorization under subsection (1) may be made orally in person if, having regard to all circumstances of the case, it is not reasonably practicable to make an application in writing.

(4) Where an oral application is made, the applicant shall make an oral statement providing the required information specified in Part 2 of Schedule 3 as the case may be.".

21(2) NEGATIVED

(a) In paragraph (*a*), by deleting "and" at the end.

(b) By adding —

"(*aa*) that, where an oral application is made, section 20(3) applies; and".

21(3) NEGATIVED In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

22(2) NOT PROCEEDED WITH By deleting "judicial authorization" and substituting "Court of First Instance authorization".

23(1) NOT PROCEEDED WITH By deleting "a panel judge" and substituting "a judge of the Court of First Instance".

23(2) NOT PROCEEDED WITH By adding before paragraph (*a*) —

"(*aa*) to be made ex parte;".

23(3) NOT PROCEEDED WITH

(a) In the English text, by deleting "If no application for confirmation of the emergency authorization is made" and substituting "In default of any application being made for confirmation of the emergency authorization".

(b) In paragraph (*a*), by deleting everything after "concerned" and substituting "and any further information or intelligence or record derived from such information; and".

24(1) NOT PROCEEDED WITH By deleting "panel judge" and substituting "judge of the Court of First Instance".

24 NOT PROCEEDED WITH By adding —

"(1A) When considering the application in subsection (1), the judge referred to in that subsection may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.".

24(2) NOT PROCEEDED WITH By deleting "panel judge" and substituting "judge of the Court of First Instance".

24(3) NOT PROCEEDED WITH

(a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

NEGATIVED

(b) In paragraph (*b*), by deleting "any information obtained by carrying out the interception or Type 1 surveillance concerned, to the extent".

NEGATIVED

(c) In paragraph (*b*)(i), by deleting everything after the comma and substituting "any information obtained by

carrying out the interception or Type 1 surveillance concerned, and any further information or intelligence or record derived from such information; or".

NEGATIVED (d) In paragraph (*b*)(ii), by deleting everything after the comma and substituting "any information obtained by carrying out the interception or Type 1 surveillance concerned that is specified in the order, and any further information or intelligence or record derived from such information.".

24(5) NOT PROCEEDED WITH (a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

NEGATIVED (b) In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

Part 3, Division 5 NOT PROCEEDED WITH By deleting the Division heading and the cross-heading before clause 25.

25 NOT PROCEEDED WITH By deleting the clause.

26 NOT PROCEEDED WITH (a) By deleting the cross-heading before the clause.

(b) By deleting the clause.

27 NOT PROCEEDED WITH By deleting the clause.

28 NOT PROCEEDED WITH By deleting the clause.

29(1) NOT PROCEEDED WITH In paragraph (*b*)(ii), by deleting "likely" and substituting "reasonably expected".

29(3) NOT PROCEEDED WITH By adding before the full stop —

" :

Provided that an assessment of the risk and damage arising from the concealment has been submitted before the issue of the authorization and that the nature of concealment so authorized must be specified in the authorization".

29(4) NOT PROCEEDED WITH (a) By adding "reasonably" before "necessary".

(b) By adding before the full stop —

":

Provided that an assessment of the risk and damage arising from the interference with any property has been submitted before the issue of the authorization and that the nature of interference so authorized must be specified in the authorization".

29(5) NOT PROCEEDED WITH (a) By adding "reasonable" before "assistance".

(b) By adding before the full stop —

":

Provided that –

(*a*) an assessment of the implication of assistance has been submitted before the issue of the authorization;

(*b*) the nature of assistance so authorized must be specified in the authorization; and

(*c*) no authorization shall require the specified person to incur any expense".

29(6) NOT PROCEEDED WITH

(a) By deleting "also authorizes" and substituting "may contain terms that authorize".

(b) In paragraph (*a*), by adding before the semicolon –

":

Provided that if the devices are to be installed or used in any private property –

(i) an assessment of the risk and damage arising from the installation and use of such devices has been submitted before the issue of the authorization; and

(ii) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization".

(c) In paragraph (*a*), be adding "and" at the end.

(d) In paragraph (*b*), by adding "the use of reasonable" before "force".

(e) In paragraph (*b*), by deleting the semicolon and substituting —

":

Provided that an assessment of the risk and damage arising from the entry has been submitted before the issue of the authorization.".

(f) By deleting paragraph (c).

(g) By deleting paragraph (*d*).

(h) By adding —

"(6A) A prescribed authorization for interception also authorizes —

(a) the incidental interception of any communication which necessarily arises

from the interception of communications authorized to be carried out under the prescribed authorization; and

(*b*) where subsection (1)(*a*)(ii) or (*b*)(ii) is applicable, the provision to any person, for the execution of the prescribed authorization, of particulars of the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying –

(i) in the case of subsection (1)(*a*)(ii), the communications made to or by the person specified in the prescribed authorization; or

(ii) in the case of subsection (1)(*b*)(ii), the communications made to or from any telecommunications service that the person specified in the prescribed authorization is using, or is reasonably expected to use.

29(7) NOT PROCEEDED WITH

(a) By deleting "also authorizes" and substituting "may contain terms that authorize".

(b) In paragraphs (*a*)(i) and (*b*)(i), by adding before "; and" –

":

Provided that if the surveillance device is to be installed or used in any private property –

(A) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the issue of the authorization; and

(B) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization".

(c) In paragraphs (*a*)(ii) and (*b*)(ii) –

(i) by deleting "the entry, by" and substituting "in the case of Type 1 surveillance, the entry, by the use of reasonable";

(ii) by adding after "prescribed authorization" –

":

Provided that an assessment of the risk and damage arising from the entry has been submitted before the issue of the authorization".

(d) In paragraph (*c*)(i), in the English text, by deleting "authorization," and substituting "authorization".

(e) In paragraph (*c*)(i), by adding before "; and" –

":

provided that if the surveillance device is to be installed or used in any private property –

(A) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the issue of the authorization; and

(B) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization".

(f) In paragraph (*c*)(ii) –

(i) by deleting "the entry, by" and substituting "in the case of Type 1 surveillance, the entry, by the use of reasonable";

(ii) by adding after "prescribed authorization" –

":

Provided that an assessment of the risk and damage arising from the entry has been submitted before the issue of the authorization".

29 By adding –

[NOT PROCEEDED WITH]

"(8) A prescribed authorization may contain terms that authorize the undertaking of the following conduct, that is necessary for and incidental to the carrying out of what is authorized or required to be carried out under the prescribed authorization –

(*a*) the installation, use, maintenance and retrieval of any enhancement equipment for the devices;

(*b*) the temporary removal of any conveyance or object from any premises for the installation, maintenance or retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;

(*c*) the breaking open of anything for the installation, maintenance or retrieval of the devices or enhancement equipment;

(*d*) the connection of the devices or enhancement equipment to any source of electricity and the use of electricity from that source to operate the devices or enhancement equipment;

(*e*) the connection of the devices or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or system in connection with the operation of the devices or enhancement equipment; and

(*f*) the provision of assistance for the execution of the prescribed authorization, :

Provided that an assessment of the risk and damage arising from the above conduct has been submitted before the issue of the authorization.".

30 [NEGATIVED] By deleting the clause and substituting –

"**30. What a prescribed authorization also authorizes**

A prescribed authorization also authorizes the retrieval of any of the devices authorized to be used under the prescribed authorization that is necessary for and incidental to the carrying out of what is authorized or required to be carried out under the prescribed authorization.".

31 NEGATIVED (a) By renumbering the clause as clause 31(1).

(b) By adding —

"(2) In the case of non-compliance with the specified conditions in subsection (1), the prescribed authorization shall cease to have effect from the time of non-compliance.".

32(1) NOT PROCEEDED WITH By deleting "panel judge" and substituting "judge of the Court of First Instance".

32(2) WITHDRAWN By adding before paragraph (a) —

"(aa) to be made ex parte;".

33(1) NOT PROCEEDED WITH By deleting "panel judge" and substituting "judge of the Court of First Instance".

33 NEGATIVED By adding —

"(1A) When considering the application in subsection (1), the judge referred to in that subsection shall take into account the assessment of the risk and damage arising from the retrieval of such device to the premises or object.".

33 NEGATIVED By adding —

"(1B) If the judge referred to in subsection (1) refuses to issue the device retrieval warrant in subsection (1)(*b*), he shall make an order directing the relevant head of the department to disable the function of the device.".

33(2) NOT PROCEEDED WITH By deleting "panel judge" and substituting "judge of the Court of First Instance".

33(3) NOT PROCEEDED WITH (a) By deleting "panel judge" and substituting "judge of the Court of First Instance".

(b) In paragraph (*a*), by deleting "in writing" and substituting "in writing with reasons".

34 NOT PROCEEDED WITH By deleting "panel judge" where it twice appears and substituting "judge of the Court of First Instance".

35(2) NEGATIVED By adding before the full stop —

":

Provided that an assessment of the risk and damage arising from the concealment has been submitted before the issue of the warrant and that the nature of concealment so authorized must be specified in the warrant".

35(3) NEGATIVED (a) By adding "reasonably" before "necessary".

(b) By adding before the full stop —

":

Provided that an assessment of the risk and damage arising from the interference with any property has been submitted before the issue of the warrant and that the nature of interference so authorized must be specified in the warrant".

36 NOT PROCEEDED WITH — In the heading, by deleting "**further authorizes**" and substituting "**may authorize or require under or by virtue of its terms, etc.**".

36(1) NOT PROCEEDED WITH — (a) By deleting everything before the dash and substituting –

"(1) A device retrieval warrant may contain terms that authorize the undertaking of the following conduct, that is necessary for and incidental to the carrying out of what is authorized to be carried out under the warrant".

(b) In paragraph (*b*), by adding "the use of reasonable" before "force".

(c) By deleting "of the warrant." and substituting —

"of the warrant:

Provided that an assessment of the risk and damage arising from the above conduct has been submitted before the issue of the warrant.".

37 NEGATIVED — (a) By renumbering the clause as clause 37(1).

(b) By adding —

"(2) In the case of non-compliance with the specified conditions in subsection (1), the warrant shall cease to have effect from the time of non-compliance.".

38(2) NEGATIVED — By deleting everything after "Justice," and substituting "subject to the approval of the Legislative Council, appoint the person referred to in subsection (6) to be the Commissioner.".

38(5) NEGATIVED — By deleting everything after "may," and substituting —

"subject to the approval of the Legislative Council, revoke the appointment of the Commissioner for good cause provided that the reason for such revocation —

(a) must be given in writing to the

Commissioner being revoked; and

(b) shall be reviewable by a court of law.".

39 NOT PROCEEDED WITH

In paragraph (*a*), by adding "overall implementation of this Ordinance (except the functioning of the Court of First Instance relating to this Ordinance) and" before "compliance".

40 NOT PROCEEDED WITH

By adding —

"(1A) Without limiting the generality of subsection (1), the Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b) or 52.".

41(3) NOT PROCEEDED WITH

By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any judge of the Court of First Instance or any or all of them.".

43(1) NEGATIVED

(a) By adding "in the course of performing any of his functions under this Ordinance considers or suspects that there is any case in which any interception or covert surveillance has been carried out in contravention of this Ordinance, or" before "receives".

(b) In paragraph (a), by adding "or any interception or covert surveillance" after "alleged".

(c) In paragraph (b), by deleting everything after "whether or not" and substituting "the interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization issued or renewed under this Ordinance.".

43 NOT PROCEEDED WITH

By deleting subclause (2) and substituting —

"(2) In the case of subsection (1), if, on an examination, the Commissioner determines that the interception or covert surveillance alleged or any interception or covert surveillance has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, he shall give notice to the applicant or to the subject of interception

or covert surveillance (as the case may be) —

(*a*) stating –

(i) that he has found the case in favour of the applicant or the subject of interception or covert surveillance (as the case may be) and indicating whether the case is one of interception or covert surveillance;

(ii) the broad nature of the interception or covert surveillance;

(iii) the time when the interception or covert surveillance commences and the time when the interception or covert surveillance ends; and

(iv) the duration of the interception or covert surveillance; and

(*b*) inviting the applicant or the subject of interception or covert surveillance (as the case may be) to confirm whether the applicant or the subject of interception or covert surveillance wishes to seek an order for the payment of compensation, and if so, to make written submissions to him for that purpose.".

43 [NOT PROCEEDED WITH] By adding —

"(2B) Upon receiving confirmation from the applicant or the subject of interception or covert surveillance that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for that purpose, may make any order for the payment of compensation by the Government to the applicant or the subject of interception or covert surveillance (as the case may be).

(2C) The compensation ordered to be paid under

subsection (2B) may include compensation for injury of feelings.".

43(5) NOT PROCEEDED WITH — By adding ", (2B)" before "and (3)".

44(1) NEGATIVED —
(a) In paragraph (*a*), by deleting "1 year" and substituting "5 years".
(b) In paragraph (*c*), by adding "or the subject of interception or covert surveillance" after "applicant".

44 NEGATIVED — By deleting subclause (2).

44 NEGATIVED — By deleting subclause (3).

45(1) NEGATIVED —
(a) In paragraph (*a*), by deleting "; and" and substituting a full stop.
(b) By deleting paragraph (*b*).

45(2) NEGATIVED — By adding "or the subject of interception or covert surveillance" after "applicant".

45 NOT PROCEEDED WITH — By deleting subclause (3) and substituting —

"(3) Without prejudice to section 43(5), in giving notice to an applicant or the subject of interception or covert surveillance (as the case may be), or making any order under section 43(2), (2B) or (3), the Commissioner shall not —

(*a*) give reasons for his determination;
(*b*) give details of any interception or covert surveillance concerned further to those mentioned in section 43(2)(a); or
(*c*) in the case of section 43(3), indicate whether or not the interception or covert surveillance alleged has taken place.".

46(1) WITHDRAWN — By deleting "under section 43(2)" and substituting "referred to

in section 43(2)".

46(3) WITHDRAWN By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any judge of the Court of First Instance or any or all of them.".

47(2) NOT PROCEEDED WITH (a) By deleting paragraph (*a*) and substituting —

"(*a*) a list showing –

(i) the respective numbers of prescribed authorizations issued under Divisions 2, 3 and 4 of Part 3 during the report period, and the average duration of the respective prescribed authorizations;

(ii) the respective numbers of prescribed authorizations renewed under Divisions 2 and 3 of Part 3 during the report period, and the average duration of the respective renewals;

(iii) the numbers of emergency authorizations confirmed under Division 4 of Part 3 during the report period;

(iv) the numbers of emergency authorizations issued as a result of an oral application under Division 4 of Part 3 during the report period, and the average duration of such authorizations;

(v) the respective numbers of prescribed authorizations that have been renewed under Divisions 2 and 3 of Part 3 during the report period further to 5 or more previous renewals;

(vi) the respective numbers of applications for the issue of prescribed authorizations made under Divisions 2, 3 and 4 of Part 3 that have been refused during the report period;

(vii) the respective numbers of applications for the renewal of prescribed authorizations made under Divisions 2 and 3 of Part 3 that

NOT PROCEEDED WITH

have been refused during the report period;

(viii) the numbers of oral applications for the issue of emergency authorizations made under Division 4 of Part 3 that have been refused during the report period;

(ix) the numbers of applications for the confirmation of emergency authorizations made under Division 4 of Part 3 that have been refused during the report period;

(x) the respective numbers of prescribed authorizations issued under Divisions 2, 3 and 4 of Part 3 for the purpose of preventing and detecting of serious crimes, and prescribed authorizations issued under Divisions 2, 3 and 4 of Part 3 for the purpose of protecting public security during the report period;

(xi) the respective numbers of prescribed authorizations renewed under Divisions 2 and 3 of Part 3 for the purpose of preventing and detecting of serious crimes, and prescribed authorizations renewed under Divisions 2 and 3 of Part 3 for the purpose of protecting public security during the report period;

(xii) the total number of telephone lines intercepted during the report period;

(xiii) the total number of facsimile lines intercepted during the report period;

(xiv) total number of e-mail accounts intercepted during the report period;

(xv) the total number of Internet Protocol (IP) addresses under covert surveillance during the report period;

(xvi) the total number of persons who have been the subjects of covert surveillance during the report period; and

(xvii) the total number of premises under covert

[NOT PROCEEDED WITH] surveillance during the report period;".

(b) In paragraph (*b*)(i), by deleting "and".

(c) In paragraph (*b*), by adding—

"(ia) the major categories of threats to public security for the investigation of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; and".

(d) By deleting paragraph (*d*) (v) and substituting —

"(v) the respective broad natures of other reports submitted by the Commissioner under section 48 and recommendations made by the Commissioner under sections 49 and 50 during the report period;".

(e) In paragraph (*d*), by adding —

"(vi) the respective numbers of cases in which information subject to legal professional privilege and in which journalistic content have been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization during the report period; and

(vii) the respective numbers of cases of different departments in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 41, 46, 50 or 52 during the report period, and the broad nature of such action; and".

(f) In paragraph (e), by adding "implementation of this Ordinance and the overall" before "compliance".

47 [NEGATIVED] By adding —

"(5A) The matter excluded in subsection (5) shall be reported to the Legislative Council under confidential cover.".

48 [NEGATIVED] By deleting the clause and substituting —

**"48. Other reports to Chief Executive by**

[NEGATIVED] **Commissioner**

(1) In addition to any report required to be submitted to the Chief Executive under section 47, the Commissioner may from time to time submit any further report to the Chief Executive on any matter relating to the performance of his functions under this Ordinance as he thinks fit.

(2) The Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report, together with a statement as to whether any matter has been excluded from that copy under subsection (3) without the agreement of the Commissioner.

(3) If the Chief Executive considers that the publication of any matter in the report referred to in subsection (2) would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(4) The matter excluded in subsection (3) shall be reported to the Legislative Council under confidential cover.".

49(2) [NEGATIVED] By deleting everything before "exercise" and substituting —

"(2) Where the Commissioner makes any recommendations to the Secretary for Security under subsection (1), the Secretary shall notify the Commissioner and the Legislative Council of any".

50 [NEGATIVED] By adding —

"(2A) The Commissioner shall cause to be laid on the table of the Legislative Council a copy of the report, together with a statement as to whether any matter has been excluded from that copy under subsection (2B).

(2B) If the Commissioner considers that the publication of any matter in the report referred to in

subsection (2A) would be prejudicial to the prevention or detection of crime or the protection of public security, he may exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(2C) The matter excluded in subsection (2B) shall be reported to the Legislative Council under confidential cover.".

50(3) [NOT PROCEEDED WITH] By deleting everything after "Chief Executive" and substituting ", the Secretary for Justice or any judge of the Court of First Instance or any or all of them.".

51(1) [NEGATIVED]

(a) In paragraph (*a*), by adding ", apart from any judge" after "person".

(b) In paragraph (*a*), by deleting "and" at the end.

(c) In paragraph (*b*), by deleting the full stop and substituting "; and".

(d) By adding —

"(*c*) require any head of department to take such remedial action and make compensation as he considers reasonable and necessary.".

51 By adding —

[NEGATIVED] "(1A) Non-compliance with subsection (1)(a) shall be an offence with maximum penalty of 2 years imprisonment.

[WITHDRAWN] (1B) For the purpose of performing any of his functions under this Ordinance, the Commissioner may request a judge of the Court of First Instance or an authorizing officer to provide him with access to any of the documents or records kept under section 3 of Schedule 2.".

52 [NEGATIVED] By deleting everything before "shall" and substituting —

"Without prejudice to other provisions of this Part, where the head of any department considers that there may have been any case of —

(*a*) failure by the department or any of its officers to comply with any relevant requirement; or

(*b*) submission of misleading and false information

for the purpose of obtaining a prescribed authorization or for the purpose of implementing any provision of this Ordinance, he".

55 [NEGATIVED] By deleting subclause (6) and substituting –

"(6) For the purposes of this section, the ground for discontinuance of a prescribed authorization exists if –

(*a*) the conditions for the continuance of the prescribed authorization under section 3 are not met;

(*b*) the specified conditions in section 31 are not met;

(*c*) the application for issuance or renewal of any prescribed authorization was in contravention of this Ordinance;

(*d*) the interception or acts of covert surveillance carried out was in excess of the prescribed authorization.".

New [WITHDRAWN] By adding –

"**55A. Reports to relevant authorities following arrests**

(1) Where, further to the issue or renewal of a prescribed authorization under this Ordinance, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned becomes aware that the subject of the interception or covert surveillance has been arrested, the officer shall, as soon as reasonably practicable after he becomes aware of the matter, cause to be provided to the relevant authority by whom the prescribed authorization has been issued or renewed a report assessing the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the interception or covert surveillance.

(2) Where the relevant authority receives a report under subsection (1), he shall revoke the

WITHDRAWN

prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under section 3 or that the specified conditions under section 31 are not met.

(3) Where the prescribed authorization is revoked under subsection (2), the prescribed authorization is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.

(4) If, at the time of the provision of a report to the relevant authority under subsection (1), the relevant authority is no longer holding his office or performing the relevant functions of his office –

(*a*) without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being as a judge of the Court of First Instance or appointed authorizing officer (as the case may be) and lawfully performing the relevant functions of the office of that relevant authority; and

(*b*) the provisions of this section are to apply accordingly.

(5) In this section, "relevant duration provision" (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as may be applicable).".

57(1) NOT PROCEEDED WITH (a) In paragraph (*b*)(i), by deleting "or, where section 28 applies, a copy of any record, affidavit or other document provided as described in section 28(1)(*b*)," .

NOT PROCEEDED WITH (b) In paragraph (*b*)(ii), by deleting "panel judge" and substituting "judge of the Court of First Instance".

NOT PROCEEDED WITH (c) In paragraph (*b*)(ii), by deleting "or, where section 28 applies, a copy of any emergency authorization issued, ".

NOT PROCEEDED WITH (d) By deleting paragraph (*c*).

NOT PROCEEDED WITH (e) In paragraph (*e*)(ii), by deleting "panel judge" and substituting "judge of the Court of First Instance".

NEGATIVED (f) In paragraph (*f*)(i), by adding "and" at the end.

NOT PROCEEDED WITH (g) By deleting paragraph (*f*)(ii).

NEGATIVED (h) In paragraph (*f*)(iii), by deleting "and" at the end.

NEGATIVED (i) By adding —

"(*fa*) a record of —

(i) the total number of telephone lines intercepted during the report period;

(ii) the total number of facsimile lines intercepted during the report period;

(iii) total number of e-mail accounts intercepted during the report period;

(iv) the total number of Internet Protocol (IP) addresses under covert surveillance during the report period;

(v) the total number of persons who have been the subjects of covert surveillance during the report period; and

(vi) the total number of premises under covert surveillance during the report period; and".

57 NEGATIVED By adding —

"(1A) The head of department shall submit the record in subsection (1) to the Commissioner every year.".

57(2) NEGATIVED (a) In paragraph (*a*)(i), by deleting "2 years" and substituting "10 years".

(b) In paragraph (*b*), by deleting "2 years" and substituting "10 years".

58 [NEGATIVED] By deleting the clause.

59(2) [NEGATIVED] By deleting "panel judge" and substituting "judge of the Court of First Instance".

65(1) [NEGATIVED]

(a) By deleting "sections 56 and 58 apply" and substituting "section 56 applies".

(b) By deleting ", and to the relevant matters".

(c) In paragraph (*a*)(i) by deleting "sections 56 and 58 respectively" and substituting "section 56".

65(3) [NEGATIVED]

(a) In the definition of "copy", by deleting the semicolon at the end and substituting a full stop.

(b) By deleting the definition of "relevant matters".

New [WITHDRAWN] By adding –

"**66. Mandatory review**

(1) Within 27 months of the enactment of this Ordinance, the Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report of review of the implementation of this Ordinance.

(2) Upon considering the report, the Legislative Council may pass a resolution to cause this Ordinance to cease to take effect.".

Schedule 2 [WITHDRAWN]

(a) By deleting the heading and substituting —

"PROCEDURES OF, AND OTHER MATTERS RELATING TO JUDGE".

(b) Within the square brackets, by adding ",51" before "& 63".

Schedule 2, section 1 [WITHDRAWN] In the heading, by deleting "**panel judge**" and substituting "**judge**".

Schedule 2, section 1(1) [WITHDRAWN] By deleting "panel judge" and substituting "judge".

Schedule 2, section 1 [WITHDRAWN] By deleting subsection (2) and substituting —

"(2) Any application made to a judge under this Ordinance may, where the judge so directs, be considered outside the court precincts at any place other than the premises of a department.".

| | |
|---|---|
| Schedule 2, section 1 WITHDRAWN | By deleting subsection (3) and substituting —<br>"(3) The judge may consider the application in such manner as he considers appropriate.". |
| Schedule 2, section 2 WITHDRAWN | (a) In the heading, by deleting "**panel judge**" and substituting "**judge**".<br>(b) By deleting "panel judge" and substituting "judge". |
| Schedule 2, section 3 WITHDRAWN | In the heading, by deleting "**panel judge**" and substituting "**judge**". |
| Schedule 2, section 3(1) WITHDRAWN | By deleting "panel judge" and substituting "judge". |
| Schedule 2, section 3(2) WITHDRAWN | By deleting "panel judge" and substituting "judge". |
| Schedule 2, section 3(3) WITHDRAWN | (a) In paragraph (*a*), by deleting "panel judge" and substituting "judge".<br>(b) In paragraph (*b*), by deleting "panel judge" and substituting "judge".<br>(c) In paragraph (*b*), by adding "(including those performed at the request of the Commissioner under section 51(1A) of this Ordinance)" before "; and".<br>(d) In paragraph (*c*), by deleting "panel judge" and substituting "judge". |
| Schedule 2, section 3(4) WITHDRAWN | By deleting "panel judge" wherever it appears and substituting "judge". |
| Schedule 2, section 3(5) WITHDRAWN | (a) In the English text, by adding ", whether" after "department concerned".<br>(b) By deleting "otherwise".<br>(c) By deleting "panel judge" and substituting "judge". |
| Schedule 2, section 3(6) WITHDRAWN | By deleting "(whether with or without reference to section 28 of this Ordinance), 27(5) ". |
| Schedule 2, section 4 WITHDRAWN | By deleting the section. |

Schedule 3, Part 1 WITHDRAWN

(a) In the heading, by deleting "JUDICIAL AUTHORIZATION" and substituting "COURT OF FIRST INSTANCE AUTHORIZATION".

(b) By deleting "judicial authorization" and substituting "Court of First Instance authorization".

(c) In paragraph (*b*)(viii), by adding ", or which may be journalistic content," after "privilege".

Schedule 3 Part 2 WITHDRAWN

(a) In the heading, by deleting "JUDICIAL AUTHORIZATION" and substituting "COURT OF FIRST INSTANCE AUTHORIZATION".

(b) By deleting "judicial authorization" and substituting "Court of First Instance authorization".

(c) In paragraph (*b*)(ix), by adding ", or which may be journalistic content," after "privilege".

Schedule 3, Part 3 WITHDRAWN

In paragraph (*b*)(ix), by adding ", or which may be journalistic content," after "privilege".

Schedule 3, Part 4 WITHDRAWN

(a) In the heading, by deleting "JUDICIAL AUTHORIZATION" and substituting "COURT OF FIRST INSTANCE AUTHORIZATION".

(b) By deleting "judicial authorization" wherever it appears and substituting "Court of First Instance authorization".

(c) In paragraph (*a*)(ii), by deleting everything after "authorization" where it secondly appears and substituting a semicolon.

(d) In paragraph (*a*)(iii), by adding "an assessment of" before "the value".

(e) In paragraph (*b*), by deleting everything after "name" and substituting ", rank and post the applicant and any officer of the department concerned approving the making of the application.".

Schedule 4
NOT PROCEEDED WITH

(a) In paragraph (*a*)(iv), by deleting "and".

(b) In paragraph (*a*), by adding —

"(iva) an assessment of the risk and damage arising from the retrieval of the devices; and".

(c) In paragraph (*b*), by deleting "and rank" and substituting ", rank and post".

Schedule 5, section 5
WITHDRAWN

In the proposed section 33(1) —

(a) by deleting the dash;

(b) in paragraph (*a*) —

(i) by deleting "(*a*)";

(ii) by deleting "; or";

(c) by deleting paragraph (*b*).

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable LEE Wing-tat

| Clause | Amendment Proposed |
|---|---|
| 2(1)<br>[NOT PROCEEDED WITH] | In the definition of "Type 2 surveillance" –<br>(a) by deleting "subsection (3), means any covert surveillance to the extent" and substituting "subsections (3) and (3A), means any covert surveillance";<br>(b) by deleting paragraph (*a*) and substituting –<br>"(*a*) is carried out with the use of a listening device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording words spoken or activity carried out by any other person, if the person using the device –<br>(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or<br>(ii) listens to, monitors or records the words or activity with the |

NOT PROCEEDED WITH

prior express consent in writing, of a person described in subparagraph (i); or";

(c) in paragraph (*b*), by deleting "it";

(d) in paragraph (*b*), by deleting "and" and substituting ", if";

(e) in paragraph (*b*)(i), by adding "either by physical or electronic means" after "premises";

(f) in paragraph (*b*)(ii), by adding ", or electronic interference with the device," after "object".

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable CHEUNG Man-kwong

| Clause | Amendment Proposed |
|---|---|
| 2(1)<br>[NOT PROCEEDED WITH] | In the definition of "Type 2 surveillance" –<br>(a) by deleting "subsection (3), means any covert surveillance to the extent" and substituting "subsections (3) and (3A), means any covert surveillance";<br>(b) by deleting paragraph (*a*) and substituting –<br>"(*a*) is carried out with the use of a listening device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording words spoken or activity carried out by any other person, if the person using the device –<br>(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or<br>(ii) listens to, monitors or records the words or activity with the |

NOT PROCEEDED WITH

consent, express or implied, of a person described in subparagraph (i); or";

(c) in paragraph (*b*), by deleting "it";

(d) in paragraph (*b*), by deleting "and" and substituting ", if";

(e) in paragraph (*b*)(i), by adding "either by physical or electronic means" after "premises";

(f) in paragraph (*b*)(ii), by adding ", or electronic interference with the device," after "object".

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

**COMMITTEE STAGE**

Amendments to be moved by the Honourable Albert HO Chun-yan

| Clause | | Amendment Proposed |
|---|---|---|
| 2(1) | [NEGATIVED] | (a) In the definition of "serious crime", by deleting paragraph (*b*) and substituting –<br>"(*b*) in relation to the issue or renewal, or the continuance, of a prescribed authorization for covert surveillance, by a maximum penalty that is or includes –<br>(i) a term of imprisonment of not less than 3 years; or<br>(ii) a fine of not less than $1,000,000,<br>but does not include the offences referred to in section 17A(3) of the Public Order Ordinance (Cap. 245);". |
| | [NEGATIVED] | (b) In the definition of "surveillance device" –<br>(i) in paragraph (*a*), by adding "or" at the end;<br>(ii) in paragraph (*b*), by deleting "; or" and substituting a semicolon;<br>(iii) by deleting paragraph (*c*). |
| | [NOT PROCEEDED WITH] | (c) In the definition of "Type 2 surveillance" –<br>(i) by deleting "subsection (3), means any covert surveillance to the extent" and substituting "subsections (3) and (3A), means any covert surveillance";<br>(ii) by deleting paragraph (*a*) and substituting –<br>"(*a*) is carried out with the use of a listening |

NOT PROCEEDED WITH

device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording words spoken or activity carried out by any other person, if the person using the device –

(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or

(ii) listens to, monitors or records the words or activity with the prior express consent in writing, of a person described in subparagraph (i); or";

(iii) in paragraph (*b*), by deleting "it";

(iv) in paragraph (*b*), by deleting "and" and substituting ", if";

(v) in paragraph (*b*)(ii), by adding ", or electronic interference with the device," after "object".

6(1) NEGATIVED By deleting "3 to 6" and substituting "not less than 10".

7 NEGATIVED By deleting the clause and substituting –

"**7. Authorizing officers**

(1) The head of a department may designate any officer not below a rank equivalent to that of senior superintendent of police to be an authorizing officer for the purposes of this Ordinance.

(2) Notwithstanding subsection (1), the authorizing officer who determines the application for the issue, renewal or confirmation of any prescribed authorization (as the case may be) shall not be of the same formation in the department as the officer who makes the application concerned.".

12(4) [NOT PROCEEDED WITH] By adding " , but in any event not more than a total duration of 12 months (including the period of the previous issue and renewals (if any))" after "once".

18(4) [NEGATIVED] By adding " , but in any event not more than a total duration of 12 months (including the period of the previous issue and renewals (if any))" after "once".

39 [NEGATIVED] In paragraph (*a*), by adding "overall implementation of this Ordinance and" before "compliance".

New [WITHDRAWN] By adding –

"**66. Mandatory review**

Within 27 months of the enactment of this Ordinance, the Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report of review of the implementation of this Ordinance.".

Schedule 2, section 1 [WITHDRAWN] By adding before subsection (1) —

"(1A) The Registrar of the Court of First Instance shall select a panel judge from the panel judges referred to in section 6 of this Ordinance for the purpose of considering any application made under this Ordinance.".