

For Discussion

**Bills Committee on
Financial Reporting Council Bill**

**Follow-up actions arising
from the meeting held on 31 October 2005**

PURPOSE

At the meeting held on 31 October 2005, the Bills Committee deliberated, among other things, the Administration's paper entitled "(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council" (LC Paper No. CB(1)166/05-06(02)). This paper sets out the outcome of the follow-up action as requested by the Bills Committee.

COMPOSITION OF THE FINANCIAL REPORTING COUNCIL

2. We note that some Members agreed with the Administration's proposal regarding the composition of the FRC as set out in **clause 7(1)** of the Bill and shared our view that flexibility should be retained so as to enable the Administration to ensure that the FRC will comprise a good mix of appointees with the suitable expertise and experience.

3. Notwithstanding this, some other Members invited the Administration to consider the following proposals -

- (a) To state clearly in the Bill the Administration's intention to establish a FRC with a wide and balanced composition; and/or

- (b) To provide for the appointment of more FRC members by the Chief Executive (CE) at the nomination of relevant bodies and stakeholders.

4. Regarding paragraph 3(a), the Administration remains of the view that setting out *mandatory* qualification requirements of individual appointees rigidly in statute is unnecessary and undesirable and that to do so may only undermine the ability of the CE to appoint the best available candidates in the light of circumstances. Nonetheless, in view of the concerns of certain Members, the Administration agrees, to the extent that such ability will not be unduly hampered, that further guidance as to how the CE will exercise the appointment power may be provided in the Bill more explicitly. Taking reference from section 4(1) of the Deposit Protection Scheme Ordinance (Cap. 581)¹, the Administration may consider proposing a Committee Stage Amendment (CSA) to **clause 7(1)(c)(iv)** as shown below -

"7. Composition of Council

- (1) The Council is to consist of -
 - (a) the Registrar of Companies, or a person appointed by the Registrar, in writing, as his representative, as an ex officio member;
 - (b) the Chief Executive Officer of the Council, as an ex officio member; and
 - (c) subject to subsection (2), the following members -
 - (i) one member appointed by the Chief Executive on the nomination of the Securities and Futures Commission;
 - (ii) one member appointed by the Chief Executive on the nomination of the HKEC;
 - (iii) one member appointed by the Chief Executive on the nomination of the HKICPA; and

¹ The relevant provisions of other Ordinances cited in this paper are at **Annex A**.

(iv) not fewer than 4, and not more than 6, other members appointed by the Chief Executive *from among persons who, either because of their experience in accounting, auditing, finance, banking, law, administration, management, or because of their professional or occupational experience, appear to the Chief Executive to be suitable for the appointment* (*italics and bold are the added words to be effected through a proposed CSA²*).

5. Regarding paragraph 3(b), **clause 7(1)(c)(i), (ii) and (iii)** of the Bill provides that the CE shall appoint three members, each nominated by the Securities and Futures Commission (SFC), the Hong Kong Exchanges and Clearing Limited and Hong Kong Institute of Certified Public Accountants (HKICPA) respectively. We consider that this proposed nomination arrangement is already sufficient to help ensure that the FRC comprises appointees nominated by the relevant parties and with backgrounds in securities regulation, listing and professional accountancy. Given that there is no apparent justification for the FRC to follow a “sectoral approach” to balance conflicts and forge consensus of various closely-related stakeholder groups³, we do not consider it necessary and desirable to build in additional nomination channels for the

² The wording of the CSA is subject to any refinement by the Law Draftsman.

³ We do not consider it appropriate to follow the example of the proposed Committee Stage Amendments to the Construction Industry Council (No. 2) Bill which prescribes in detail the composition of proposed Construction Industry Council and the related nomination arrangement. The context of the proposed Construction Industry Council is entirely different, as the use of a “sectoral approach” in the appointment process may enable stakeholder groups (including employers; trade unions representing workers employed in the construction industry; professionals and consultants connected with construction industry; contractors, subcontractors, material suppliers, equipment suppliers in the construction industry) to be represented at the proposed Council with a view to forging consensus on strategic issues connected with the construction industry. However, there is no apparent need to follow such an approach regarding the appointments to the FRC, as a wide and balanced composition for the FRC is fundamental in bringing in expertise and experience to the operation of the Council rather than balancing the influence of different stakeholder groups.

appointment⁴. The Administration also shares the view of some other Members of the Bills Committee that, given the number of relevant associations that may, or may claim to, represent certain stakeholder groups, it will be inherently difficult in this context to set out a comprehensive list of such relevant associations and reconcile nominations by different bodies in the appointment process.

TRANSPARENCY OF THE FRC WORK

6. The Administration appreciates that there is a need to ensure that the work of the FRC will be as transparent as practicable so as to enable the public to scrutinize the performance of the Council's functions. However, given the very nature of the FRC's investigation work, we are equally mindful that the effectiveness of the investigation in progress should not be undesirably hampered and that relevant persons may be adversely affected due to any premature or inappropriate disclosure of case details. In view of this, we should strike a reasonable balance between these considerations.

7. In this regard, it is useful to recapitulate the measures which are already enshrined in the Bill and other Ordinances and are conducive to enhance the transparency of the FRC's work -

- (a) **Publication of Annual Report:** **Clause 20** provides that the FRC shall submit to the Secretary for Financial Services and the Treasury (SFST), on an annual basis, a report on the activities of the FRC. The reports shall be laid before the Legislative Council and hence published;

⁴ In addition, a Member has suggested that reference be made to the case of the United Kingdom where a Commissioner for Public Appointments is appointed to monitor, report and advise on appointments made by Ministers to certain public bodies. This is a subject matter which goes beyond the scope of this Bill and, if necessary, may only be dealt with separately in the Administration's on-going review of the issues involved in the existing advisory and statutory bodies.

- (b) **Publication of Annual Accounts:** **Clause 18** provides that the FRC shall prepare a statement of accounts of the Council that gives a true and fair view of the state of affairs of the Council as at the end of a financial year. The statement of accounts shall be laid before the Legislative Council pursuant to **clause 20(1)(b)** and hence published;
- (c) **Publication of Auditors' Report:** **Clause 19** provides that the annual accounts of the FRC shall be audited by the Director of Audit. Likewise, the auditors' report shall be laid before the Legislative Council pursuant to **clause 20(1)(c)** and hence published;
- (d) **Publication of investigation or enquiry reports:** **Clauses 35 and 47** empower the FRC to publish investigation or enquiry reports, or parts of the reports, subject to the Council having taken into account the relevant considerations as set out in **clauses 35(4) and 47(4)**⁵ concerning the public interest in, as well as the timing and any prejudicial effect of, the publication; and
- (e) **Publication of The Ombudsman's Investigation Report:** One of the proposed "checks and balances" measures of the FRC is oversight by The Ombudsman. **Clause 76** of the Bill includes an amendment to Part I of the Schedule 1 to The Ombudsman Ordinance (Cap. 397) to the effect that complaints against the actions of the FRC may be lodged with the Office of The Ombudsman. Section 16A(1) of The Ombudsman Ordinance provides that "[a]fter making an investigation into any action The Ombudsman may, if he is of the opinion that it is in the public interest so to do, publish a

⁵ Pursuant to **clauses 35(4) and 47(4)**, in deciding whether or not to cause an investigation or enquiry report, or part of a report, to be published, the FRC shall take into account –

- (a) whether or not the publication may adversely affect –
- (i) any criminal proceedings before a court or magistrate;
 - (ii) any proceedings before the Market Misconduct Tribunal; or
 - (iii) any disciplinary proceedings under the Professional Accountants Ordinance (Cap.50),
- that has been or is likely to be instituted;
- (b) whether or not the publication may adversely affect any person named in the report;
- (c) whether or not the report, or part of the report, should be published in the interest of the investing public or the public interest.

report on the investigation in such manner as he thinks fit”.

8. In addition, the Administration has undertaken to establish a Process Review Panel (PRP) for the FRC⁶ to conduct reviews of the FRC’s operational procedures. Under our proposal, we propose that the PRP shall make regular reports to the SFST on its findings. Through the publication of such reports, to the extent permitted within the statutory constraints of secrecy and confidentiality, the public will be better able to know about the FRC’s activities. Furthermore, we envisage that, in line with the experience of its overseas counterparts, the proposed FRC may consider maintaining a website, or publishing press releases or enforcement newsletters, to keep the public informed of its work⁷.

9. When the transparency framework set out in paragraphs 7 to 8 above are **seen as a package**, the Administration considers that in overall terms this framework has already been prudently prescribed and thus sufficient to serve the need to help ensure the transparency of the FRC. Consequently, we do not consider it appropriate to follow up a Member’s suggestion that the Bill should mandate the holding of the FRC meetings in public, given that **in most circumstances** the meetings of the FRC will focus on the progress, findings and follow-up actions of an investigation or enquiry⁸. Although **clause 9(e)** provides that one of the functions of the FRC is to approve and oversee the policies and activities of the Audit Investigation Board, a Financial Reporting Review Committee or any Committee established by the Council, such policies and activities may likely concern either individual cases under investigation or overall investigation techniques, tactics and strategies.

⁶ Please refer to paragraphs 16 to 19 of the Administration’s paper entitled “(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council”, and paragraphs 15 to 19 of this paper.

⁷ **Clause 51(3)(e)** permits the FRC to disclose information in summary form that is so framed as to prevent particulars relating to any person from being ascertained from it.

⁸ We do not consider it appropriate to follow the example of the proposed Committee Stage Amendment to the Construction Industry Council (No. 2) Bill which proposes that the meetings of the proposed Construction Industry Council shall be open to the public save in certain prescribed circumstances. We should view the matter in a proper context and avoid using a “one-size-fits-all” approach. One of the key functions of the proposed Construction Industry Council is to advise and make recommendations to Government on strategic matters, major policies and legislative proposals, that may affect or are connected with the construction industry, whereas **the FRC is primarily an investigatory body and hence most of its meeting discussion will be on case-specific matters.**

Hence, the holding of meetings in public may run the risk of undermining the effectiveness of the FRC's investigations and enquiries and providing further room for relevant persons engaging in irregularities to disguise the true nature of their activities. We note that some other Members of the Bills Committee have also pointed out the possible jeopardy as mentioned above. In any case, there is no provision in the Bill prohibiting the FRC from holding its meetings in public if the FRC sees fit in the light of the actual circumstances and subject to the secrecy provisions in **clause 51**.

10. Nor do we think it necessary and desirable to provide in the Bill a requirement for the FRC make public the major discussions and decisions made at its closed meetings, including the FRC's decisions on whether to initiate an investigation and the relevant reasons. As some Members pointed out, we should be particularly mindful of any suggestion **mandating** the disclosure of information concerning "non-pursuable" cases, as this may affect adversely relevant persons in connection with such cases. In particular, in respect with those cases carrying suspected criminal elements, it is highly undesirable for the FRC to disclose any details after the Council has ceased investigation but referred the case to the Police or other relevant agencies, as such disclosure may probably affect the subsequent investigation. Nonetheless, we appreciate that some members of the public may wish to know whether or not the FRC is taking or has taken appropriate actions in response to a complaint. We consider that the proposal of convening a PRP, which will be tasked to verify whether those decisions concerning cases (including "non-pursuable" cases) have been made in accordance to the proper procedures, is already sufficient as an additional "checks and balances" measure.

DIRECTIONS OF THE CHIEF EXECUTIVE

11. **Clause 14** of the Bill enables the CE to give the FRC a written direction with respect to the performance of any of the Council's functions. Having considered the Administration's intention as set out in paragraphs 11 to 14 of the Administration's paper entitled "(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council", a Member invited the Administration to consider the

following matters -

- (a) To provide in **clause 14** that the FRC is required to comply with the CE's written directions only if the directions are not inconsistent with the FRC's functions, and to make reference to section 6E(3) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) in this regard;
- (b) To provide that the CE's written directions should be made public and specify the circumstances under which non-disclosure may be allowed; and
- (c) To clarify whether the CE's written directions are subject to judicial review.

12. Regarding paragraph 11(a) above, **clause 14(1)** has already provided that the power of giving directions can only be exercised by the CE subject to the following restrictions –

- (a) the direction must be in the public interest;
- (b) the CE must first consult the Chairman of the FRC; and
- (c) the directions must be with respect to the performance of the FRC's function as stipulated in **clause 9**.

In this light, we consider that the clause as it is drafted have already prescribed the necessary checks and balances on the CE's reserve power, which is not intended to be used lightly. Similar provisions are found in section 11 of the Securities and Futures Ordinance (SFO, Cap. 571) and section 10 of Clearing and Settlement Systems Ordinance (CSSO, Cap. 584). To avoid any inconsistency with **clause 14(3)**⁹, the

⁹ **Clause 14(3)** provides that if a direction is given by the CE under **clause 14(1)**, a requirement under an Ordinance that the FRC shall, for the purpose of performing any of the functions to which the direction relates –

- (a) form any opinion;
- (b) be satisfied as to any matter (including the existence of particular circumstances); or
- (c) consult any person,

does not apply for any purpose connected with the performance of functions pursuant to, or consequent upon, the direction.

Clause 14(3) is modelled on section 11(3) of the SFO and section 10(3) of CSSO.

Administration considers that the present drafting of **clause 14** is appropriate and does not require further amendment.

13. Regarding paragraph 11(b) above, there is no provision in the Bill prohibiting the disclosure of the written directions given by the CE to the FRC. The CE will decide whether to make public such written directions, and if so, in what manner, in light of actual circumstances. There are also no similar requirements in other Ordinances (for example, section 11 of the SFO and section 10 of CSSO) to *mandate* the CE to make such disclosure.

14. Regarding paragraph 11(c) above, the Department of Justice advises that the CE's power in question, being a statutory power, would be regarded by the Court as being of a public nature and amenable to judicial review.

PROPOSED PROCESS REVIEW PANEL

15. We note that Members in general welcome the Administration's proposal (as set out in paragraphs 16 to 19 of the Administration's paper entitled "(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council") of setting up a non-statutory **PRP**, which is independent of the FRC, to review the operations of the FRC.

16. Some Members of the Bills Committee invited the Administration to consider the following further suggestions -

- (a) To provide the proposed terms of reference and composition of the PRP for the Bills Committee's reference;
- (b) To expand the proposed ambit of the PRP to cover the review of the FRC's decision on not initiating investigations or enquiries into "non-pursuable" cases; and

- (c) To prepare corresponding amendments to other relevant clauses of the Bill, such as the secrecy provision in **clause 51**, arising from this PRP proposal.

17. Regarding paragraph 16(a) above, we have prepared at **Annex B** terms of reference of the PRP for the FRC (in draft form) for the purpose of illustration. At this stage, they are closely modelled on the terms of reference (at **Annex C**) of a similar non-statutory Panel for the SFC. Separately, with respect to composition of the proposed PRP for the FRC, our preliminary view is that the Panel may comprise members from, for example, the accounting, auditing, academic, legal, other financial services sectors, as well as some ex-officio members representing the FRC and the Administration. The present membership of the PRP for the SFC is at **Annex D**.

18. Regarding paragraph 16(b) above, we propose that the PRP should essentially aim to conduct reviews of the FRC's operational procedures to ensure that they are fair and reasonable, and to determine whether, in handling cases or taking actions or decisions, the FRC has followed its due process procedures (including procedures for ensuring consistency). As indicated in the proposed terms of reference at **Annex B**, the PRP is to receive and consider periodic reports from the FRC on all completed and "non-pursuable" cases. The proposed PRP may call for and review the FRC's files to verify whether the decisions made and the actions taken in relation to certain cases or complaints (including any "non-pursuable" ones) have adhered to and are consistent with the relevant procedures and guidelines, and advise the FRC accordingly. Although the proposed PRP for the FRC will focus on process rather than reviewing the merits of any cases, the experience of the PRP for the SFC which adopts a similar approach has, as pointed out by a Member of the Bills Committee, proved to be effective in helping ensure that the SFC exercises its powers in a fair and consistent manner. In this regard, we will adhere to the same model in devising the terms of reference for the proposed PRP for the FRC.

19. Regarding paragraph 16(c) above, we will, in consultation with the Department of Justice, consider the need to make corresponding amendments to **clause 51**¹⁰ and any other amendments as appropriate.

Financial Services and the Treasury Bureau
November 2005

¹⁰ The relevant amendment may be discussed when the Bills Committee proceeds to deliberate Component Four of the Bill which concerns the miscellaneous provisions.



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Chapter:	581	Title:	DEPOSIT PROTECTION SCHEME ORDINANCE	Gazette Number:	L.N. 101 of 2004
Section:	4	Heading:	Composition of Board	Version Date:	22/05/2004

(1) The Board is to consist of—

- (a) the Secretary for Financial Services and the Treasury, or a person appointed by the Secretary, in writing, as his representative, as an ex officio member;
- (b) the Monetary Authority, or a person appointed by the Authority, in writing, as his representative, as an ex officio member; and
- (c) not fewer than 4 and not more than 7 other members appointed by the Chief Executive from among persons who, either because of their experience in finance, accounting, banking, law, administration, information technology or consumer affairs, or because of their professional or occupational experience, appear to the Chief Executive to be suitable for the appointment.

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Chapter:	397	Title:	THE OMBUDSMAN ORDINANCE	Gazette Number:	L.N. 273 of 2001
Section:	16A	Heading:	Publication of reports	Version Date:	19/12/2001

(1) After making an investigation into any action the Ombudsman may, if he is of the opinion that it is in the public interest so to do, publish a report on the investigation in such manner as he thinks fit.

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Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	11	Heading:	Directions to Commission	Version Date:	01/04/2003

(1) After consultation with the chairman of the Commission, the Chief Executive may, upon being satisfied that it is in the public interest to do so, give the Commission written directions as to the furtherance of any of its regulatory objectives or the performance of any of its functions.

(2) The Commission shall comply with any written direction given under subsection (1).

(3) Where any written direction is given under subsection (1), any requirement under any other provision of this or any other Ordinance that the Commission shall, for the purpose of performing any of the functions to which the written direction relates-

- (a) form any opinion;
- (b) be satisfied as to any matter (including existence of particular circumstances);
- or
- (c) consult any person,

shall not apply for all purposes connected with the performance of functions pursuant to, or consequent upon, the written direction.

(4) Written directions given under subsection (1) are not subsidiary legislation.

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Chapter:	584	Title:	CLEARING AND SETTLEMENT SYSTEMS ORDINANCE	Gazette Number:	L.N. 145 of 2004
Section:	10	Heading:	Power of Chief Executive to give directions	Version Date:	04/11/2004

(1) After consulting the Monetary Authority, the Chief Executive may, on being satisfied that it is in the public interest to do so, give the Monetary Authority such written directions as he thinks fit as to the performance of any function of the Monetary Authority under this Ordinance.

(2) The Monetary Authority shall comply with any direction given under subsection (1).

(3) If a direction is given under subsection (1), a requirement in an Ordinance that the Monetary Authority shall—

- (a) form any opinion;
- (b) be satisfied as to any matter (including the existence of particular circumstances); or
- (c) consult any person,

for the purpose of performing any function to which the direction relates, does not apply for any purpose connected with the performance of that function pursuant to or consequent upon the direction.

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Chapter:	485	Title:	MANDATORY PROVIDENT FUND SCHEMES ORDINANCE	Gazette Number:	2 of 2002
Section:	6E	Heading:	Functions of Authority	Version Date:	15/02/2002

(3) The Chief Executive may give directions, either generally or in a particular case, with respect to the exercise by the Authority of its functions. The Authority must comply with any such directions unless they are inconsistent with this Ordinance.

(Added 4 of 1998 s. 2)

**Terms of Reference of the Proposed Process Review Panel
for the Financial Reporting Council**

(Note: The proposed terms of reference are indicative draft only and drawn up, with reference to the similar terms of reference in relation to the Process Review Panel for the Securities and Futures Commission, for the purpose of illustration.)

1. To review and advise the Council upon the adequacy of the Council's internal procedures and operational guidelines governing the action taken and operational decisions made by the Council and its staff in the performance of the Council's functions in relation to the following areas –
 - (a) receipt and handling of complaints;
 - (b) exercise of statutory powers of investigations and enquiries;
 - (c) publication of investigation and enquiry reports;
 - (d) referring cases and providing assistance to specified bodies.
2. To receive and consider periodic reports from the Council on all completed or non-pursuable cases in the above-mentioned areas.
3. To receive and consider periodic reports from the Council in respect of the manner in which complaints against the Council or its staff have been considered and dealt with.
4. To call for and review the Council's files and records relating to any case or complaint referred to in the periodic reports mentioned in paragraphs 2 and 3 above for the purpose of verifying that the actions taken and decisions made in relation to that case or complaint adhered to and are consistent with the relevant internal procedures and operational guidelines, and to advise the Council accordingly.
5. To receive and consider periodic reports from the Council on all investigations and enquiries lasting more than one year.

6. To advise the Council on such other matters as the Council may refer to the Panel or on which the Panel may wish to advise.
7. To submit to the Secretary for Financial Services and the Treasury annual reports and, if appropriate, special reports (including reports on problems encountered by the Panel) which, subject to applicable statutory secrecy provisions and other confidentiality requirements, should be published.

**Process Review Panel for the
Securities and Futures Commission**

Terms of Reference

1. To review and advise the Commission upon the adequacy of the Commission's internal procedures and operational guidelines governing the action taken and operational decisions made by the Commission and its staff in the performance of the Commission's regulatory functions in relation to the following areas-
 - (a) receipt and handling of complaints;
 - (b) licensing of intermediaries and associated matters;
 - (c) inspection of licensed intermediaries;
 - (d) taking of disciplinary action;
 - (e) authorisation of unit trusts and mutual funds and advertisements relating to investment arrangements and agreements;
 - (f) exercise of statutory powers of investigation, inquiry and prosecution;
 - (g) suspension of dealings in listed securities;
 - (h) administration of the Hong Kong Codes on Takeovers and Mergers and Share Repurchases;
 - (i) administration of non-statutory listing rules;
 - (j) authorisation of prospectuses for registration and associated matters; and
 - (k) granting of exemption from statutory disclosure requirements in respect of interests in listed securities.

2. To receive and consider periodic reports from the Commission on all completed or discontinued cases in the above-mentioned areas, including reports on the results of prosecutions of offences within the Commission's jurisdiction and of any subsequent appeals.
3. To receive and consider periodic reports from the Commission in respect of the manner in which complaints against the Commission or its staff have been considered and dealt with.
4. To call for and review the Commission's files relating to any case or complaint referred to in the periodic reports mentioned in paragraphs 2 and 3 above for the purpose of verifying that the action taken and decisions made in relation to that case or complaint adhered to and are consistent with the relevant internal procedures and operational guidelines and to advise the Commission accordingly.
5. To receive and consider periodic reports from the Commission on all investigations and inquiries lasting more than one year.
6. To advise the Commission on such other matters as the Commission may refer to the Panel or on which the Panel may wish to advise.
7. To submit annual reports and, if appropriate, special reports (including reports on problems encountered by the Panel) to the Financial Secretary which, subject to applicable statutory secrecy provisions and other confidentiality requirements, should be published.
8. The above terms of reference do not apply to committees, panels or other bodies set up under the Commission the majority of which members are independent of the Commission.

**Process Review Panel for the
Securities and Futures Commission**

Membership List

- Chairman: Mr CHENG Hoi Chuen, Vincent, GBS, JP
- Members: Professor CHAN Yuk Shee, BBS, JP
- Mr CHEONG Ying Chew, Henry
- Mr CHOW Wing Kin, Anthony, SBS, JP
- The Honourable EU Yuet Mee, Audrey, SC, JP
- Mr FONG Hup, MH
- Mr KAM Pok Man
- Mr KWAN Pak Chung, Edward
- Mr PANG Yuk Wing, Joseph, JP
- Ex-officio members: Chairman, Securities and Futures Commission
(Mr Martin WHEATLEY)
- Non-Executive Director, Securities and Futures
Commission (Dr York LIAO, SBS, JP)
- Representative of Secretary for Justice
(Mr Ian G M WINGFIELD, GBS, JP)