

Bills Committee on Financial Reporting Council Bill

Summary of submissions and Administration's responses

(Position as at 27 October 2005)

LC Paper No.

The Association of International Accountants – Hong Kong Branch (AIA(HK))	CB(1)2288/04-05(01) (revised)
British Chamber of Commerce in Hong Kong (BCCHK)	CB(1)2288/04-05(02)
Deloitte Touche Tohmatsu (Deloitte)	CB(1)2288/04-05(03)
The Chamber of Hong Kong Listed Companies (CHKLC)	CB(1)2288/04-05(04)
Hong Kong Institute of Certified Public Accountants (HKICPA)	CB(1)2288/04-05(05)
CPA Australia – Hong Kong China Division (CPAA(HKC))	CB(1)2288/04-05(06)
The Chartered Institute of Management Accountants – Hong Kong Division (CIMA(HK))	CB(1)2288/04-05(07)
Mr CHAN Sai-hoi (S H CHAN)	CB(1)2288/04-05(08)

LC Paper No.

The Chinese General Chamber of Commerce (CGCC)	CB(1)2288/04-05(09)
Mandatory Provident Fund Schemes Authority (MPFA)	CB(1)2288/04-05(10)
Office of the Privacy Commissioner for Personal Data, Hong Kong (OPCPD)	CB(1)2288/04-05(11)
The Office of The Ombudsman (Ombudsman)	CB(1)2288/04-05(12)
KPMG	CB(1)2288/04-05(13)
Standing Committee on Company Law Reform (SCCLR)	CB(1)2288/04-05(14)
Hong Kong General Chamber of Commerce (HKGCC)	CB(1)2288/04-05(15)
Hong Kong Trustees Association Ltd (HKTA)	CB(1)2288/04-05(16)
The Association of Chartered Certified Accountants (Hong Kong) (ACCA(HK))	CB(1)2288/04-05(17)
The Law Society of Hong Kong (LSHK)	CB(1)2288/04-05(18)
— Companies and Financial Law Committee	
— Securities Law Committee	
The Hong Kong Chinese Enterprises Association (HKCEA)	CB(1)2288/04-05(19)
Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies (DTCA)	CB(1)2288/04-05(20)

LC Paper No.

Securities and Futures Commission (SFC)	CB(1)2288/04-05(21)(a) and (b)
— Investor Education Advisory Committee (IEAC)	
— Public Shareholders Group (PSG)	
— Staff	
 The Hong Kong Institute of Chartered Secretaries (HKICS)	 CB(1)2288/04-05(22)
 National Institute of Accountants of Australia – China Branch (NIAA(C))	 CB(1)2288/04-05(23)
 Ernst and Young (E & Y)	 CB(1)2288/04-05(24)
 Hong Kong Bar Association (HKBA)	 CB(1)2288/04-05(25)
 Mr Oscar WONG Sai-hung (Oscar WONG)	 CB(1)2288/04-05(27)
 Mr Simon YOUNG (Simon YOUNG)	 CB(1)2288/04-05(28)
 Mr David GUNSON (David GUNSON)	 CB(1)2288/04-05(29)
 Dr Peter P F CHAN (Peter CHAN)	 CB(1)2288/04-05(30)
 Mr Peter H Y WONG (Peter WONG)	 CB(1)2288/04-05(31)
 Hong Kong Stockbrokers Association (HKSA)	 CB(1)2331/04-05(01)

CONTENTS

1. General comments
2. Funding of the Financial Reporting Council (FRC)
3. The FRC
(Parts 1, 2 and Schedules 1, 2, 3 to the Bill)
 - 3.1 – 3.12 Composition of the FRC
 - 3.13 – 3.43 Functions and powers of the FRC
 - 3.44 – 3.53 Miscellaneous
4. The Audit Investigation Board (AIB)
(Part 3 and Schedule 4 to the Bill)
5. The Financial Reporting Review Panel (FRRP) and a Financial Reporting Review Committee (FRRC)
(Part 4 and Schedules 5, 6 to the Bill)
6. Publication of investigation/enquiry report by the FRC
(Clauses 35 and 47 of the Bill)
7. Miscellaneous
(Part 5 of the Bill)

8. Consequential and related amendments
(Part 6 of the Bill)
9. Other comments

Appendix I Extracts from the Professional Accountants Ordinance

Appendix II Extracts from the Personal Data (Privacy) Ordinance

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
1	<i>General comments</i>		
1.1	KPMG NIAA(C) HKICPA Oscar WONG S H CHAN	Supports the Bill.	Noted.
1.2	HKICS NIAA(C) CIMA(HK)	Supports the establishment of the Financial Reporting Council (FRC) as an independent statutory body.	Noted.
1.3	KPMG SCCLR ACCA(HK) LSHK CHKLC BCCHK HKSA Simon YOUNG	Supports the establishment of the FRC.	Noted.

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1.4	DTCA	<ul style="list-style-type: none"> ● Broadly supportive of the Administration's proposals. ● It is vital to keep costs under control and consider carefully the FRC's scope of work. 	Noted.
1.5	MPFA HKTA	No comment on the Bill.	Noted.
1.6	CGCC	<ul style="list-style-type: none"> ● It is not the right time to establish the FRC. The Administration should first tackle other more pressing issues in the financial market of Hong Kong, such as enhancing the regulatory regime over listing. ● Establishment of the FRC is not the only option to improve financial reporting of companies. The Administration should consider strengthening the existing regulatory regime of the accounting profession and avoid setting up an additional statutory body. 	<p>The notable corporate failures (for example, Enron and Worldcom) in other parts of the world over the past few years have highlighted the importance of enhancing the effectiveness, transparency and independence of the regulatory regime for the accountancy profession in Hong Kong.</p> <p>Notwithstanding the reforms of the investigation regime implemented by the Professional Accountants (Amendment) Ordinance 2004, the HKICPA pointed out in its <i>Proposals to Strengthen the Regulatory Framework of the Accountancy Profession</i> in January 2003 that it was necessary to deal with the outstanding issues of –</p> <p>(a) the perception that <i>greater</i> independence is</p>

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			<p>needed for investigation of auditing irregularities in relation to listed entities; and</p> <p>(b) the lack of effective powers under the PAO to compel non-HKICPA members to provide information.</p> <p>Furthermore, there is an international trend towards greater independence from the accounting profession in the oversight of auditors. During the two public consultation exercises conducted in September 2003 and February 2005, there was overwhelming support from respondents to establish an independent investigation board to investigate complaints against the public interest activities of auditors. In this light, we consider the current proposal, i.e. to establish the FRC as a new statutory body, justified.</p> <p>The establishment of the FRC will further help enhance the regulation of auditors and the quality of financial reporting of listed entities. Thus, it will have a significant bearing on enhancing Hong Kong's corporate governance regime and investor confidence.</p>

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1.7	HKCEA	<ul style="list-style-type: none"> ● The objective of establishing the FRC, and the nature and role of the FRC are unclear. There are four points of concern: <ul style="list-style-type: none"> (a) The FRC may change the existing self-regulatory regime of the accounting profession resulting in regulation of professionals by non-professionals. The engagement of external expertise for conducting investigations may involve high costs and may not be efficient; 	<ul style="list-style-type: none"> ● The major objective of the Bill, as set out in the long title, is to establish the FRC, which is, in essence, tasked to (a) investigate irregularities of auditors of listed entities; and (b) make enquiries into financial reports of such entities to ensure that they comply with the relevant legal, accounting and regulatory requirements. The FRC is to be a statutory body, as established by virtue of clause 6 of the Bill. The functions of the FRC are set out in clause 9. ● The Professional Accountants (Amendment) Ordinance 2004, which commenced operation in November 2004, had already reformed the membership of the Investigation Committees of the HKICPA, each of which now comprises a majority of lay members. However, the HKICPA proposed to the Administration that, notwithstanding this reform, it was necessary to address the outstanding issues of the perception that greater independence should be required for investigations of auditing irregularities in relation to listed entities. We consider that the establishment of the FRC will enhance the independence of the investigatory function from

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		<p>(b) There will be overlap of investigatory functions between the FRC, Hong Kong Institute of Certified Public Accountants (HKICPA) and SFC resulting in wastage of resources;</p>	<p>the profession, whereas the retention of the HKICPA's functions in disciplinary proceedings preserves the "self-regulatory" regime of the profession. Moreover, we propose that the FRC should be vested with greater investigatory powers so that investigations could be carried out more effectively, insofar as cases or complaints relating to listed entities are concerned. This will significantly enhance Hong Kong's corporate governance regime.</p> <ul style="list-style-type: none">● Upon its establishment, the FRC will investigate auditors' irregularities involving listed entities, whereas the HKICPA will continue to deal with other complaints about its registered members and practice units including those in relation to the non-listed sectors. This should not affect the current responsibilities of other regulators including the SFC and HKEx. We envisage the present division of responsibilities between SFC/HKEx and HKICPA will, by and large, apply to that between the SFC/HKEx and the FRC. The SFC also confirmed in its submission that there is no undue overlap as regards the jurisdictions of the FRC and the SFC.

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		<p>(c) The establishment of the FRC will increase the compliance cost of listed entities. The obligations of the auditors will be increased and they may charge listed entities more for auditing work. Given that the running costs of the FRC will be shared by the Companies Registry Trading Fund (CRTF), Hong Kong Exchanges and Clearing Limited (HKEx), SFC and HKICPA, it may result in a situation where the costs will be recovered from levies imposed on listed entities; and</p> <p>(d) The need for establishing the FRC merits further consideration.</p> <ul style="list-style-type: none"> ● Suggests that the Administration should consider other options for enhancing the existing regulatory regime of the accounting profession, as follows: <p>(a) To set up a "Listed Entities Financial Reporting Committee" under the HKICPA, with one third of its members being non-accountants, to undertake investigation</p>	<ul style="list-style-type: none"> ● Please refer to part 2 below regarding the funding arrangement for the FRC. ● Please refer to the Administration's responses in item 1.6 above regarding the justification for and the importance of the proposed establishment of the FRC.

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		<p>against accounting irregularities. The Committee would not be vested with prosecution or disciplinary powers and would be oversight by a Board of Review; or</p> <p>(b) To entrust HKEx or SFC with the proposed functions of the FRC to avoid overlap of functions and wastage of resources.</p>	<ul style="list-style-type: none"> We do not consider it appropriate to put the proposed FRC under the SFC or HKEx, as a certified public accountant in Hong Kong does not need to be registered with a securities regulator before becoming a company auditor.
1.8	HKGCC	Fully agrees that it is of paramount importance for Hong Kong to maintain an effective regulatory regime for the accounting profession, but fails to see how the establishment of the FRC will improve the regulatory regime of the accounting profession.	See 1.6 above.
2 Funding of the FRC			
2.1	SCCLR	It is important to provide adequate funding for the FRC.	Noted.
2.2	NIAA(C)	The proposal for the Government, HKEx, HKICPA and SFC to contribute to the funding of the FRC is appropriate.	Noted.

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2.3	CPAA(HKC)	Funding for the FRC should come from the Government, the professional body and the business community in particular from listed companies in Hong Kong by enforcing a levy on them.	<p>We note that some Members of the Bills Committee and deputations have expressed views about the adequacy of the funding for the FRC, which will be set out in a memorandum of understanding signed among the four funding parties (viz. the SFC, HKICPA, HKEx and Companies Registry Trading Fund). We have been guided by the principles that it is necessary to maintain a lean structure for the FRC and that, at the same time, the funding arrangement should be adequate for the FRC to discharge its functions effectively. The Administration has written to the HKICPA, SFC and HKEx to explore whether additional resources should be injected to the FRC.</p> <p>The sharing of the costs of the FRC among the four parties is considered appropriate, as the establishment of the FRC will further enhance the regulation of auditors and the quality of financial reporting of listed entities, hence contributing to the improvement of the overall market quality.</p>
2.4	ACCA(HK)	<ul style="list-style-type: none"> ● The full funding arrangements are not set out in the Bill. It is important that the funding arrangements demonstrate the independence of the FRC, and that funding is adequate to allow 	See 2.3 above.

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		<p>the FRC to perform its functions fully.</p> <ul style="list-style-type: none"> ● The proposed annual contribution of \$2.5 million by each of the four parties concerned (i.e. the Government, HKEx, HKICPA and SFC) appears to be inadequate for the running of the FRC. 	
2.5	HKICS	<ul style="list-style-type: none"> ● Supports the proposal to review the funding arrangement in three years' time. ● It is very probable that the annual funding of \$10 million and the reserve of \$10 million will be insufficient for the running of the FRC, especially in times of large scale investigations or when the FRC faces judicial review against its decisions. It is necessary to set out the long term funding plan for the FRC at this stage. 	See 2.3 above.
2.6	A member of SFC's IEAC	The small budget of the FRC may prevent it from carrying out its functions effectively and efficiently.	See 2.3 above.
2.7	BCCHK	<ul style="list-style-type: none"> ● The initial contribution of \$2.5 million each and then three years contributions of \$2.5 million each is steep for the four bodies to bear, especially for the HKICPA and CRTF. 	See 2.3 above.

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		<ul style="list-style-type: none"> ● Given that the FRC is a statutory body, the Government should fund the operations initially and the FRC should move towards creating a levy which would eventually fund all its operations. 	
2.8	A member of SFC's PSG	<ul style="list-style-type: none"> ● The proposed budget of the FRC is small as compared to those of similar bodies overseas. In order for the FRC to achieve its objectives, it should be better funded. ● Funding of the United States (US) Public Company Accounting Oversight Board (PCAOB) and the United Kingdom (UK) FRC comes from levies on companies based on their market capitalization. It is suggested that a similar funding model be adopted for the FRC. ● Seeks clarification on whether the FRC's proposed budget represents an increase over the resources currently made available by the HKICPA to conduct inspections of auditors. 	See 2.3 above.

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2.9	CIMA(HK)	<ul style="list-style-type: none"> Expresses concern about the small annual budget for the FRC. An annual budget of \$10 million is likely to be inadequate to provide the necessary under-pinning suggested by the Bill. A formula for cost-apportionment which relies more substantially on the shoulders of the auditors than on the general membership of the HKICPA might be more equitable. 	<ul style="list-style-type: none"> See 2.3 above. The HKICPA has indicated that its contribution to the FRC's funding would be proposed to come from a special levy on auditors of listed entities, instead of general membership.
2.10	CGCC	If the FRC needs to contract out its investigation work due to heavy caseload, it will involve high cost which may not be affordable by the FRC in view of its limited financial resources.	See 2.3 above.
3	<i>The FRC</i> <i>(Parts 1, 2 and Schedules 1, 2, 3 to the Bill)</i>		
	<u><i>Composition of the FRC</i></u>		
3.1	HKICS	<ul style="list-style-type: none"> Supports the proposal that the majority of the members of the FRC should be lay persons (clause 7) which is in line with the international trend towards making the oversight of auditors and financial reporting of listed entities more 	The Administration's intention is to establish an independent FRC with a wide and balanced composition. The Chief Executive (CE) would consider appointment of candidates from different backgrounds and disciplines (such as those with

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		<p>independent from the accounting profession.</p> <ul style="list-style-type: none"> ● Expresses concern about the criteria for selecting the lay members of the FRC. Suggests that: <ul style="list-style-type: none"> (a) lay members shall possess relevant, personal, specific experience and expertise which are essential for conducting effective investigations and making sound and fair judgement in relation to financial reporting of listed entities; and (b) the FRC should be both cautious and demanding in its choice of lay members whom can be drawn from other professional bodies. 	<p>experience in accounting, auditing, finance, banking, law, business administration, etc.), so that the FRC could discharge its functions effectively. That said, we do not propose to set out the detailed qualification requirements in the Bill, so as to facilitate the CE in appointing the best available candidates in the light of actual circumstances.</p>
3.2	NIAA(C)	<ul style="list-style-type: none"> ● The proposed composition of the FRC is appropriate (clause 7). ● It is important that members of the FRC have a broad set of experience and skills. The lay members should have at least a working knowledge of financial and accounting issues. At least one member should come from the wider 	<p>Noted. See 3.1 above.</p>

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		community who is not a representative of the business community.	
3.3	CIMA(HK)	Welcomes the proposed composition of overwhelmingly lay members.	Noted.
3.4	Oscar WONG	Membership of the FRC should include a balanced representation of the interested parties.	Noted.
3.5	CPAA(HKC)	<ul style="list-style-type: none"> ● It is important for FRC staff and members to have the relevant experience and expertise in listed companies to enable them to have a good understanding of the case issues. ● Members of the FRC can be appointed from a pool of experts which consists of a balanced number of accountants and lay persons. The pool of experts may include retired audit partners who can take up volunteer advisory roles. 	See 3.1 above.
3.6	HKGCC	It is inappropriate for the FRC to include a majority of lay persons as its members. Audits are highly technical, and investigations of auditing irregularities even more so. The investigation of auditing irregularities should be conducted by professionals.	See 3.1 above. The appointment of lay members to the FRC helps ensure the independence of the investigatory regime. It may be highlighted that, with the commencement of the Professional Accountants (Amendment) Ordinance 2004, the majority of an

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			Investigation Committee of the HKICPA are also lay persons.
3.7	BCCHK	<ul style="list-style-type: none"> Any person nominated as a member of the FRC by the HKICPA should be from their Secretariat, and not from an audit firm. Suggests that a representative from a Chamber of Commerce is one of the nominated members and also a lawyer who is an expert in the listing rules area. There should be a Chairman who would lead the Board. He/she should not be anyone from the HKICPA, the HKEx, or the SFC. 	See 3.1 above. We intend to leave it to the HKICPA which is the statutory regulatory body of the accountancy profession to make the nomination to the CE. It is our intention to establish an independent FRC with a wide and balanced composition. To help uphold the independence of the FRC, the CE shall appoint, under clause 7(4) of the Bill, the Chairman of the FRC from amongst the appointed members of the FRC who are lay persons.
3.8	ACCA(HK)	<ul style="list-style-type: none"> Suggests to stipulate in clause 7 that the four to six "other appointed members" of the FRC should represent the stakeholder groups that the FRC is intended to protect, e.g. listed companies and investors. Clause 2 of Schedule 2 to the Bill states that appointments to the FRC should be for a term not exceeding three years, although members can be 	<ul style="list-style-type: none"> See 3.1 above. There is already a <i>general</i> guideline within the Administration that a non-official member of a statutory body should not serve more than six

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		reappointed. As a good corporate governance practice, there should be a maximum term for any member reappointed. The Bill is silent in this respect.	years in any one capacity. We do not consider it necessary to prescribe this in the Bill, in order for the Administration to take into account the exigency of circumstances.
3.9	AIA(HK)	<ul style="list-style-type: none"> ● A “public officer” is referred to in clause 7(3) and in other parts of the Bill. It may be sensible for certainty to insert a definition of this term. ● Although there are provisions in Schedule 2 to the Bill relating to the removal of members of the FRC in certain circumstances, there are no similar considerations in the schedule relating to initial appointment. It may be sensible for certainty to include similar circumstances relating to appointment, perhaps to be determined by the 	<ul style="list-style-type: none"> ● According to section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), a “<i>public officer</i>” means any person holding an office of emolument under the Government, whether such office be permanent or temporary. For the purposes of the Bill, we intend that a public officer does not include (a) a judicial officer; or (b) a public officer by virtue only of his being the chairman of a board or tribunal established under an Ordinance. We will propose a Committee Stage Amendment (CSA) to put our intent beyond doubt. ● See 3.1 above.

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		appointer or nominator.	
3.10	CHKLC	<ul style="list-style-type: none"> ● Clause 1 of Schedule 3 to the Bill provides that the term of office of the Chief Executive Officer (CEO) is three years and he is eligible for re-appointment. There is a loophole that a particular person may take up this position for an exceedingly long period of time if he is eligible for re-appointment every time his tenure of office is due for renewal. There is a need to impose a maximum time limit, say, not more than two terms, to avoid this from happening. 	<ul style="list-style-type: none"> ● Clause 8(4) provides that the CEO of the FRC is the administrative head of the FRC. As his post is an executive post, we consider that re-appointments should be allowed. Therefore, we do not propose any limits on the number of terms a person could be appointed as the CEO of the FRC. ● As for other members of the FRC, there is already a <i>general</i> guideline within the Administration that a non-official member of a statutory body should not serve more than six years in any one capacity. We do not consider it necessary to prescribe this in the Bill, in order for the Administration to take into account the exigency of circumstances.

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		<ul style="list-style-type: none"> ● The remuneration of the CEO is not mentioned in the Bill. Consideration should be given to specify that the remuneration of the CEO be referable to a certain pay level of a civil servant of a comparable rank. ● As the CEO is a key figure of the FRC, there should be mandatory provisions on the notice period in respect of his resignation (e.g. at least three to six months) to ensure a smooth transition. To avoid actual or possible conflict of interests and to safeguard impartiality in discharging his duties, the CEO should not be permitted to take up any position in conflict with his position as CEO within a period of 12 months after 	<ul style="list-style-type: none"> ● Section 3 of Schedule 3 provides that all matters relating to the terms and conditions of the appointment of the CEO of the FRC are to be determined by the CE. In order to exercise flexibility in deciding the remuneration packages of individuals after taking into account their background, capability and performance, together with the pay trends and levels in comparable bodies, we do not consider it appropriate to prescribe rigidly the pay level in the legislation. That said, we envisage that proper disclosure of the remuneration package of key personnel of the FRC will be made in the FRC's annual report, which is required to be laid before Legislative Council under clause 20. ● We consider that matters relating to the notice period in connection with a resignation and the post-appointment sanitization period of an ex-CEO of the FRC should be determined by the CE in accordance with section 3 of Schedule 3. The detailed terms and conditions should be set out in the appointment contract, instead of in the Bill. It is our policy objective to ensure that the terms and conditions of the appointment of

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		termination.	the CEO would contribute to the public confidence in the credibility of the FRC.
3.11	HKICPA	Consideration should be given to whether the provisions in clause 4(1)(d) of Schedule 3 to the Bill (about removal of the CEO) are sufficiently stringent.	Section 4(1)(d) of Schedule 3 provides that if the CE is satisfied that the CEO of the FRC is convicted in Hong Kong of an offence that is <i>punishable</i> by imprisonment for 12 months or more or is convicted elsewhere than in Hong Kong of an offence that, if committed in Hong Kong, would be an offence so punishable, the CE may remove the CEO of the FRC. We consider that this is an appropriate arrangement. A similar provision is found in section 4(1)(e) of Schedule 1A to Mandatory Provident Fund Schemes Ordinance (Cap. 485) which concerns the removal of directors of the Mandatory Provident Fund Schemes Authority.
3.12	CGCC	Given the lean structure of the FRC, it may not be able to carry out investigations efficiently. This may result in backlog of cases.	The members of the FRC assume the overseeing roles over the investigations carried out by the AIB and enquiries by the FRRC. The FRC may employ persons or appoints persons as consultants, agents or advisers to assist the FRC to perform its functions (c.f. clauses 10(2)(a) and (b)).

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<u>Functions and powers of the FRC</u>			
3.13	CGCC	<ul style="list-style-type: none"> Expresses concern about the circumstances under which the FRC may initiate investigation against auditing/reporting irregularities through the Audit Investigation Board (AIB), or may initiate an enquiry into cases of non-compliance with financial requirements through a Financial Reporting Review Committee (FRRC). 	<ul style="list-style-type: none"> The purpose of prescribing statutory thresholds in clauses 23 and 40 is to provide for checks and balances for the exercise of the investigatory/enquiry powers. Without passing such thresholds, the FRC/AIB/FRRC may not exercise its powers. The thresholds “<i>circumstances suggesting an irregularity</i>” or “<i>reasonable cause to believe</i>” in clause 23, in relation to an investigation of a relevant irregularity, are modelled on sections 179 and 182 of the SFO. The threshold “<i>there is or may be a question whether or not there is a relevant non-compliance</i>” is modelled on section 245F(1) of the UK’s Companies Act 1985. Further, given that the initiation of the investigation and enquiry powers by the FRC/AIB/FRRC may be subject to a judicial review by the court, we consider that the prescribed thresholds are appropriate, in terms of both law drafting and policy.

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		<ul style="list-style-type: none"> ● Suggests that objective criteria be stipulated to ensure that the FRC will exercise its judgement in a reasonable manner. 	<ul style="list-style-type: none"> ● We appreciate that the market may need further guidance in relation to the manner in which the FRC may perform its functions. Clause 13 provides that the FRC may issue non-statutory guidelines not inconsistent with the provisions of the Bill, indicating the manner in which the FRC may perform its function or providing guidance on the operation of any provision of the Bill.
3.14	ACCA(HK)	<ul style="list-style-type: none"> ● The meaning of “relevant irregularity”, which sets out the scope of investigation by the AIB is set out in clause 4 and in particular, the “specified events” are described in subclause (3). These extend beyond the public interests (such as doing or omitting to do something that is likely to bring discredit upon the auditor). The scope of investigation should be limited to cases where public interests are jeopardized. ● The AIB must be seen to be investigating irregularities and possible irregularities where there is public interest. “Public interest entities” and “listed entities” have a high degree of overlap, but are not identical: the former also includes unlisted public companies, large 	<p>Auditors’ irregularities or non-compliances of financial reports relating to listed entities should be of sufficient public interest <i>per se</i>, as such irregularities and non-compliances will have a bearing on the quality of listed entities’ financial reporting which underpins investor confidence in the financial markets. There is no need to require those cases involving listed entities to satisfy a “public interest/materiality” test as there is already a demonstrably far greater degree of “<i>public interest</i>” in “<i>listed entities</i>” than “<i>unlisted entities</i>”, while the term “<i>listed entity</i>” is capable of more precise and objective definition under clause 3.</p> <p>As a reference, sections 179 and 182 of the SFO empowers the SFC to initiate an investigation when,</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		charities, insurance companies and pension funds. The AIB should address cases which raise issues affecting the public interest, whenever they arise. There is currently no provision in the Bill to extend the scope of investigation of the AIB to other public interest entities.	among other situations, it appears to the SFC that there are circumstances suggesting that, or the SFC has reasonable cause to believe that, there is suspected intermediary's misconduct or market misconduct. Once this threshold is passed, the SFC does not need to demonstrate that the suspected misconduct/market misconduct "raises or appears to raise important issues affecting the public interests in Hong Kong" before exercising its investigation powers under the relevant sections.
3.15	Deloitte	<ul style="list-style-type: none"> ● The FRC should be restricted to launching investigations only in respect of material irregularities in the accounts of listed companies and the matter raises or appears to raise important issues affecting the public interest (clause 4). This latter requirement is part of the scheme adopted by the Accountancy Investigation and Disciplinary Board (AIDB) in the UK (part of the FRC in the UK). ● Clause 4(3)(c) provides that a specified event has occurred in relation to an auditor or reporting accountant of a listed entity if the auditor or reporting accountant has been negligent in the 	<ul style="list-style-type: none"> ● See 3.14 above. ● Clauses 4(3)(c) and 4(3)(d) of the Bill make clear that "<i>being negligent in the conduct of an auditor's profession</i>" and "<i>being guilty of professional misconduct</i>" are two separate defined "specified

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		conduct of his profession. This provision is inappropriate because clause 4(3)(d) (guilty of professional misconduct) is sufficient to encompass any negligence which would legally constitute professional misconduct. Clause 4(3)(c) should be deleted.	events". These mirror equivalent provisions in sections 34(1)(a)(iv) and (viii) of the PAO which are two types of irregularities subject to investigatory and disciplinary action by the HKICPA's Investigation and Disciplinary Committees. Furthermore, the irregularity of <i>"being negligent in the conduct of an auditor's profession"</i> relates directly to the discharge of the auditor's duty. Having considered the interest of the profession and the public, we do not see why these two quite separate irregularities should be merged. We maintain that <i>"negligent conduct"</i> should retain its status as a separate <i>"relevant irregularity"</i> as defined in clause 4 of the Bill.
3.16	E&Y	<ul style="list-style-type: none"> ● FRC enquiries and investigations should be launched only when a significant public interest exists. Some degree of proportion, materiality and context should be brought to bear in a decision to launch an enquiry or investigation. ● Consideration of proportion, materiality, context and public interest should particularly be reflected in clauses 4 and 5 which explain the meaning of "relevant irregularity" and "relevant 	<ul style="list-style-type: none"> ● See 3.14 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>non-compliance”.</p> <ul style="list-style-type: none"> ● The scope of clause 4(4)(a)(vi) and (6)(b) are too wide as they refer to refusal/negligence of an auditor or reporting accountant to comply with the provisions of “any bylaw or rule made or any direction lawfully given by the HKICPA Council”. ● Clause 4(3)(c) should not be included in the Bill on the grounds that: <ul style="list-style-type: none"> (a) it does not state a proviso that negligence should have had a material or public interest effect in order to warrant consideration by the FRC; (b) a material negligent act, or one with a public interest effect or a course of negligent behaviour is already addressed by clause 4(3)(d) which deals with professional misconduct. 	<ul style="list-style-type: none"> ● The irregularities set out in clauses 4(4)(a)(vi) (that an auditor refused or neglected to comply with the provisions of any bylaw or rule made or any direction lawfully given by the HKICPA Council) and 4(3)(c) (that the auditor has been negligent in the conduct of his profession) are modelled on section 34(1)(a)(ix) and (iv) of the PAO respectively. An Investigation Committee of the HKICPA may currently investigate such irregularities pursuant to section 42C(2)(a) of the PAO. Upon its establishment, the FRC will take over cases concerning auditors of listed entities. Since the types of irregularities concerned are currently subject to the investigation by HKICPA's Investigation Committees, we fail to see why these should not fall within the jurisdiction of the FRC in relation to cases concerning listed entities which generally carry a sufficient public interest dimension. ● See 3.14 and 3.15 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.17	Peter WONG	<ul style="list-style-type: none"> ● Sees no merit in that clause 4(3) is reinventing the potential misdeeds and negligence of accountants when what is really important is the Disciplinary Rules of the Professional Accountants Ordinance (PAO). ● Suggests that reference to the relevant parts of the PAO be made in clause 4(3). 	<ul style="list-style-type: none"> ● Clause 4 sets out the irregularities of auditors and reporting accountants in connection with which the FRC may initiate an investigation. Since clause 4 is modelled on sections 34 and 41A of the PAO which set out the types of irregularities currently subject to investigations by an Investigation Committee constituted by the HKICPA, there would be no risk of an irregularity stipulated in the Bill not fallen within the jurisdiction of the disciplinary proceedings under the PAO. Specifically, clauses 4(3)(a), (c) and (d) of the Bill are modelled on sections 34(1)(a)(iii)(A), (1)(a)(iv) and (1)(a)(viii) of the PAO. Clause 4(3)(b) of the Bill is modelled on section 34(1)(a)(iii)(B) of the PAO, with minor alteration. We used the past tense in clause 4(3)(b) as the materiality of the statement and the maker's knowledge or belief should be contemporary with the making of the statement. Clause 4(3)(e) of the Bill is modelled on section 34(1)(a)(x) of the PAO taking into account, with minor necessary adjustment, the definition of "dishonourable conduct" in section 34(2) of the PAO. Section 34(1)(a)(vi) of the PAO finds its way into clauses 4(4)(a)(v), (5)(a) and (6)(a) of the Bill. Section

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>34(1)(a)(ix) of the PAO finds its way into clauses 4(4)(a)(vi), (5)(b) and (6)(b) of the Bill. Sections 34(1)(a)(xi) and (xii) of the PAO find their way in clause 4(4)(b) of the Bill.</p> <ul style="list-style-type: none"> ● Section 51(1)(f) of the PAO provides that the Council of the HKICPA may make rules regulating the conduct of inquiries by the Disciplinary Committee and for other matters relating to such inquiries.
3.18	CIMA(HK)	<ul style="list-style-type: none"> ● The FRC seems to delegate much of its power to the proposed AIB and the FRRCs. It is questionable whether the proposed structure is unnecessarily complex. ● The AIB is not responsible for discipline. This differs from the role of the AIDB in the UK, which takes up cases identified as relating to the 	<ul style="list-style-type: none"> ● Clause 9(e) provides that one of the functions of the FRC is to approve and oversee the policies and activities of the AIB, a FRRC and any committee established by the FRC. Under clauses 35 and 47, an investigation report of the AIB and an enquiry report of a FRRC shall be submitted to the FRC for consideration. This reporting mechanism introduces checks and balances in the overall structure of the FRC, which should not be viewed as unnecessarily complex. ● Please refer to the Administration's paper entitled "Functions of the FRC" which sets out the Administration's justification for the FRC's role

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>public interest, and may not only investigate, but also deliver disciplinary sanctions in such cases. The division of responsibility between the AIB and the HKICPA seems strange.</p> <ul style="list-style-type: none"> Any possible overlap or duplication of investigation duties between the AIB and the HKICPA should be removed by the identification by the AIB of "public interest", which would automatically allow the AIB to take up the case. 	<p>being investigatory. As we also mentioned in paragraph 12 of the Administration's paper entitled "International Experience", while both investigation and disciplinary functions are technically performed by one party (i.e. the AIDB) in the UK, in practice, the functions are separated as the "investigation" and "prosecution" are undertaken by the Executive Counsel of the AIDB, and the "disciplinary" function performed by a "separate" Disciplinary Tribunal of the AIDB.</p> <ul style="list-style-type: none"> It should also be stressed that the HKICPA fully supports the legislative proposals of the Bill and reiterates the Council's determination that the Institute should continue to act as the profession's regulatory body and to be responsible for the disciplinary role of which the prosecution role is an integral part. See 3.14 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.19	HKICPA	<ul style="list-style-type: none"> ● The HKICPA should continue to act as the profession's regulatory body and to be responsible for the disciplinary role of which the prosecution role is an integral part. ● The FRC's investigation role and the HKICPA's prosecution and disciplinary roles should be properly defined in order for the process to be co-ordinated. ● The FRC is expected to work closely with the HKICPA to develop the non-statutory protocols, guidelines and/or Memorandum of Understanding ("MOU") in order to enable the HKICPA to discharge the prosecution role effectively. 	<p>We note that the HKICPA agrees with the proposal that the FRC should only be an investigatory body. The HKICPA is also in agreement with the proposed arrangement whereby the Registrar of the HKICPA would continue to be the "prosecutor" against the auditor in the disciplinary proceedings under the PAO, upon receipt of the referral of investigation findings from the FRC. We envisage that the FRC may enter into memoranda of understanding in relation to matters about provision of assistance and referral of cases at various stages of the FRC's investigations.</p>
3.20	CPAA(HKC)	<ul style="list-style-type: none"> ● To enhance the interaction and communication between the investigatory function and subsequent prosecution, it is important for the FRC and the relevant enforcement agency or professional body to have a good understanding and consensus of the terms of reference as well as the scope of investigation. This could be facilitated by a MOU between the FRC and the 	<ul style="list-style-type: none"> ● We agree that the FRC may enter into memoranda of understanding, under clause 10(2)(d) of the Bill, with the HKICPA and other regulators to set out the detailed arrangements such as matters relating to the referral of cases and cooperation among themselves.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>relevant bodies to outline the details of cooperation including the criteria to be adopted by the FRC in determining the basis for prosecution.</p> <ul style="list-style-type: none"> ● FRC's decision to refer the case to further action should be based on three key functions: materiality, public interest and the likelihood of successful case to facilitate the prosecution process. It is essential for the FRC and the relevant parties to agree to a comprehensive set of criteria covering the assistance required for the FRC. ● The terms of reference for the three organizations (HKICPA, SFC & FRC) need to be clearly defined to avoid overlapping of functions. The FRC through the AIB would be responsible for the investigation of the suspected irregularities of auditors of listed corporations and the preparation of auditors' reports. The FRC through the FRRC would enquire into suspected non-compliance of the accounts and financial statements of corporations and collective investment schemes listed in Hong Kong. The 	<ul style="list-style-type: none"> ● See 3.21 and 3.22 below.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>HKICPA would continue to be responsible for the investigation of the non-listed sector and misconduct of the accounting profession, and the SFC would investigate auditors and other persons involved in market misconducts.</p> <ul style="list-style-type: none"> ● Suggests that an appeal process should be in place, and the FRC funding be modified to reflect the additional costs. 	<ul style="list-style-type: none"> ● We have given considerable thought to the need to set up an independent tribunal to hear appeals from any parties aggrieved by the actions of the FRC. Our view is that it is not necessary to establish such an appeal tribunal, as the FRC's role is confined to investigatory and enquiry work and the FRC is not vested with any disciplinary powers to sanction anyone or impose a penalty on its own. In this regard, we have been advised that the investigation/enquiry and the referral of cases to a specified body by the FRC are too remote from the determination of a civil right or obligation of the person to which the case or complaint relates¹. As a benchmark comparison, there is also no appeal mechanism against an

¹ Article 14(1) of the International Covenant on Civil and Political Rights (replicated in Article 10 of the Hong Kong Bill of Rights) guarantees that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law *in the determination of any criminal charge against him, or of his rights and obligations in a suit at law.*

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>investigation by the Investigation Committee of the HKICPA and the HKICPA Council's decision to refer a case to a Disciplinary Committee.</p> <ul style="list-style-type: none"> ● Having said so, any party aggrieved by the action of the FRC may apply to the court for a judicial review of the action concerned. Moreover, both the disciplinary decisions under the PAO and Court's decisions regarding the revision of accounts are appealable.
3.21	Staff of SFC	<ul style="list-style-type: none"> ● Undue overlap between investigations undertaken by the FRC and SFC is not anticipated. The FRC's investigation will focus on evidence of auditor malpractice, particularly whether the audit work was sufficient and whether appropriate judgments were made, whereas SFC will be looking for evidence of corporate fraud or misconduct, breach of Listing Rules or market misconduct. ● There will be good reasons for the FRC and SFC to co-ordinate their investigations. This is provided for in the Bill. 	<p>Noted. We agree that there will not be undue overlap as regards the jurisdictions of the FRC and the SFC.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.22	Members of SFC's PSG	<ul style="list-style-type: none"> ● As the proposed function of the AIB is actually a part of the current functions of the HKICPA, there is no change from the current situation in terms of overlapping of functions with SFC. ● The Bill will promote two-way sharing of information between the FRC and SFC which is an improvement from the current one-way flow of information from the SFC to the HKICPA only. ● SFC and the FRC would need to co-ordinate their work in respect of the same case where both have interest in different aspects. 	<p>Noted. We agree that the current division of work between the SFC and the HKICPA could apply, by and large, to the division of work between the SFC and the FRC in future. Furthermore, the notification concerning the initiation of investigation/enquiry under clauses 24 and 42, the consultation under clauses 29 and 43, the referral of cases and provision of assistance under clauses 9(f) and (g), and the gateway for disclosure of information to the SFC under clause 51(3)(b)(xi) will all facilitate the co-operation between the SFC and the FRC in combating irregularities and non-compliances in the financial markets.</p>
3.23	KPMG	<ul style="list-style-type: none"> ● Expresses support for the proposed functions of the FRC (clause 9). ● On the proposal that the FRC may refer cases to specified bodies, clauses 9 and 12 should be clarified as to whether the FRC will act in the capacity of complainant or whether it will be purely referring the case to the HKICPA for its further action. It would facilitate the disciplinary process if the FRC was to act as the 	<ul style="list-style-type: none"> ● Noted. ● The Administration is of the view that the FRC should only be an investigatory body. After an investigation, the FRC is empowered to refer cases or complaints to the professional bodies concerned (including the HKICPA) or other enforcement agencies for disciplinary or other follow-up action. In the disciplinary proceedings under PAO, the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>complainant.</p> <ul style="list-style-type: none"> Given that the Disciplinary Committee of the HKICPA must consist of a majority of lay persons, the Committee is sufficiently independent of the members of the HKICPA, thus avoiding the need for the FRC to set up its own disciplinary body in respect of auditors. 	<p>FRC will <i>assist</i> the Registrar of the HKICPA to present the case against the auditor concerned <i>but will not act as a "complainant"</i>. The justifications for this arrangement are set out in detail in the Administration's paper entitled "Functions of the Financial Reporting Council".</p> <ul style="list-style-type: none"> It should also be noted that the HKICPA has confirmed in its submission that the Institute should continue to act as the profession's regulatory body and to be responsible for the disciplinary role of which the prosecution role is an integral part.
3.24	KPMG and a member of SCCLR	<p>The functions of the FRC include conducting investigations and enquiries "in response to a complaint or otherwise" (clause 9(b) and (c)). There are three points of concern:</p> <p>(a) The FRC's scope should remain primarily reactive upon receipt of referrals from other regulators and complainants;</p> <p>(b) In the case of proactive investigations, there should be checks and balances to ensure that,</p>	<p>The Administration considers that it is best for the FRC, as an independent investigation body, to decide its enforcement approach having regard to the caseload, resources, and other relevant considerations. Clauses 23 and 40 set out the statutory thresholds which the FRC shall cross before it <i>may</i> initiate an investigation or enquiry. In essence, the FRC may initiate (i) an investigation if "there are <i>circumstances suggesting</i> an irregularity" (c.f. clauses 23(1) and (2)), or "the FRC has <i>reasonable causes to believe</i> that there is or may be a relevant irregularity" (c.f. clause 23(3)); or (ii) an</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>before the investigation is allowed to proceed beyond a very preliminary stage, due consideration is given to whether the benefits of the investigation and its outcome are likely to outweigh the significant cost and resources the investigation may entail. The costs and resources that would likely be required from all relevant parties, i.e. from both the FRC and those individuals and entities to be investigated, should be taken into account; and</p> <p>(c) It is also important to take account of other developments that should help enhance corporate governance and financial reporting in Hong Kong, particularly when considering whether the benefits of proactively undertaking investigation into past practices or information already reported would outweigh the costs.</p>	<p>enquiry if “it appears to the FRC that <i>there is or may be a question</i> whether or not there is a relevant non-compliance” (c.f. clause 40(1)). The FRC shall certify in writing that the thresholds have been passed before initiating the investigation/enquiry powers.</p>
3.25	CHKLC	<ul style="list-style-type: none"> There may be a certain degree of overlapping between the work of the law enforcement agencies, regulators and professional bodies. Therefore it is likely that for a particular case involving party under investigation, there are two or more of such agencies carrying on 	<p>See 3.21 and 3.22 above. We appreciate there is a need for the planned investigation of the FRC to be coordinated with the enforcement actions of other bodies or regulators where the situation warrants. In this regard, clauses 24 and 42 require the FRC to notify the relevant financial services regulators when the FRC</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>investigations and the normal day-to-day operations of listed entities will be adversely affected.</p> <ul style="list-style-type: none"> ● Suggests that the FRC should be placed under a legal responsibility that, whenever it intends to start an investigation on a party (which may be a listed company or an accounting firm), it should enquire and/or consult, on a strictly confidential basis, with other related law enforcement agencies to avoid duplication in investigations. 	<p>initiates an investigation or enquiry in relation to a listed entity which is a regulatee of such other regulators. Clauses 29 and 43 require the investigator/enquirer to consult the relevant financial services regulators when a requirement in connection with the production of records or documents or giving of information is imposed on a person who is a regulatee of the other regulators.</p>
3.26	E&Y	<ul style="list-style-type: none"> ● There should be some mechanism inserted in the Bill for confidential communication and agreement between the FRC and, for example, the HKICPA and the SFC when an enquiry or investigation is planned by the FRC, to ensure that those entities do not implement parallel enquiries, in order to avoid the inconvenience, oppression and costs to affected parties of duplicate investigations. 	See 3.25 above.
3.27	Deloitte	Suggests incorporating in the Bill provisions to prevent duplicate investigations by the FRC, HKICPA and SFC against the same auditor or accountant	<ul style="list-style-type: none"> ● At present, the HKICPA possesses investigatory powers under the PAO to investigate suspected irregularities involving its registered members and

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		relating to the same irregularity. This would prevent wastage of resources, and harassment and oppression faced by the auditor.	<p>practice units. The FRC will, upon its establishment, investigate auditors' irregularities involving listed entities, whereas the HKICPA will continue to deal with other cases involving its own members and practice units (including those cases in the non-listed sectors). In essence, the FRC will simply take over the responsibility for investigating auditors' irregularities concerning listed entities. As a transitional arrangement, the FRC will not deal with cases which have, before its establishment, been received by the HKICPA.</p> <ul style="list-style-type: none">● The above arrangement between the interface of the HKICPA and the FRC are expected to be set out in a memorandum of understanding between the two bodies, pursuant to clause 10(2)(d) of the Bill, with a view to facilitating cooperation and avoiding any unnecessary duplication of work.● We also consider that the current division of responsibilities between the SFC and the HKICPA will, by and large, apply to that between the SFC and the FRC. Both the SFC and the Administration do not anticipate that there will be

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>undue overlap between the FRC's and the SFC's investigations.</p> <ul style="list-style-type: none"> ● See 3.21 and 3.22 above.
3.28	HKICS	<ul style="list-style-type: none"> ● It is necessary to ensure there is no duplication of or confusion about the respective roles of the FRC and other authorities, such as SFC and HKEx, which shall be responsible for the follow-up actions after the investigation is over. ● There should be communication between the FRC and the Police or the relevant authorities throughout the investigations so that the FRC is advised on the kind of information or evidence which it should collect for an offence or disciplinary action to be established. It will be a great waste of efforts if an investigation report is subsequently found to be lacking in some crucial evidence rendering any legal or disciplinary action impossible to proceed. 	<ul style="list-style-type: none"> ● In devising the functions and powers of the FRC, we are mindful of the need to avoid any undue duplication of work among the FRC, the HKICPA, and other financial services regulators. ● Upon its establishment, the FRC will investigate auditors' irregularities involving listed entities, whereas the HKICPA will continue to deal with other complaints about its registered members and practice units including those in relation to the non-listed sectors. This should not affect the current responsibilities of other regulators including the SFC and HKEx. We envisage the present division of responsibilities between SFC/HKEx and HKICPA will, by and large, apply to that between the SFC/HKEx and the FRC. ● The Bill contains a number of provisions to ensure a smooth interface between (i) the investigations of

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>the FRC and (ii) the disciplinary proceedings of the HKICPA or proceedings of other law enforcement agencies. Clause 4 is modelled on sections 34 and 41 of the PAO so as to ensure that the relevant irregularities investigated by the FRC can fall within the jurisdictions of the disciplinary proceedings under the PAO. Clauses 9(f) and (g) provide that it is the FRC's functions to refer a case to a specified body, and provide assistance to that body on the body's investigation or enquiry into or dealing with the case. Clause 10(2)(d) empowers the FRC to enter into any memorandum of understanding with other parties, with a view to facilitating cooperation between the FRC and other regulators. Clauses 35(5) and 47(5) provide that a copy of the Investigation Report by the AIB and the Enquiry Report by a FRRC is admissible as evidence of the facts stated in the report in certain proceedings.</p> <ul style="list-style-type: none"> ● Moreover, where the FRC has unveiled evidence of criminal conduct, it may suspend the investigation pursuant to clause 36(1)(b) and refer the matter to the police or other relevant law enforcement agencies pursuant to clause 9(f) of the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			Bill.
3.29	Peter WONG	The rules and procedures, particularly as to the adducing of evidence by the FRC during the investigation phase and HKICPA both during the formulation and preparation of the prosecution phase as well as the disciplinary hearing phase, have to be efficient, relevant and matching, because what evidence/conclusion is reached during investigation must be replicable by the prosecution during the disciplinary process. Those rules and procedure are very urgently needed.	We consider that the Bill has provided sufficient powers for the FRC to conduct investigations effectively with a view to referring a case to the HKICPA or other specified bodies for disciplinary or other follow-up action. However, as the FRC is purely investigatory, the rules of disciplinary proceedings of the HKICPA should be considered in a separate context as appropriate. Section 51(f) of the PAO empowers the Council of the HKICPA to make rules regulating the conduct of inquiries by a Disciplinary Committee.
3.30	Members of SFC's PSG	<ul style="list-style-type: none"> ● Members of PSG feel more comfortable if the FRC has a disciplinary function. There are three points of concern: <ul style="list-style-type: none"> (a) There are concerns about the transparency and efficiency of disciplinary cases handled by the HKICPA, and inadequate sanctions on cases; (b) The HKICPA is not obliged by the Bill to take disciplinary action for cases referred by 	<ul style="list-style-type: none"> ● Please refer to the Administration paper's entitled "Functions of the Financial Reporting Council" which sets out our justifications for the role of the FRC being purely investigatory. In essence, it must be stressed that the accountancy profession in Hong Kong is subject to, a large extent, a "self-regulatory" regime. The HKICPA is established under the PAO with a clear purpose of controlling and regulating the accountancy profession. The registration and disciplinary powers of the HKICPA should thus be viewed as

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>the FRC; and</p> <p>(c) If the investigation and disciplinary functions are housed in different bodies, there is a danger that disciplinary cases will not proceed after referral.</p> <ul style="list-style-type: none"> ● Suggest that FRC's disciplinary actions be funded by the HKICPA as that part of its current function would be transferred to the FRC. 	<p>the two sides of the same coin. If the disciplinary function was taken away from the HKICPA, at least in respect of listed entities, this could have adverse implications for the continued viability of the whole self-regulatory regime.</p> <ul style="list-style-type: none"> ● It is also relevant to point out that, with the commencement of the Professional Accountants (Amendment) Ordinance 2004 in November 2004, the independence and transparency of the disciplinary proceedings of the HKICPA have been substantially enhanced. The majority of the members of a Disciplinary Committee under the HKICPA must now be lay persons, and in general the proceedings of the Committee are open to the public. ● Furthermore, the HKICPA has confirmed in its submission that the Institute should continue to act as the profession's regulatory body and to be responsible for the disciplinary role of which the prosecution role is an integral part.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.31	ACCA(HK)	<ul style="list-style-type: none"> ● The proposal that the FRC's function should remain purely investigatory (clause 9) is inappropriate for two main reasons: <ul style="list-style-type: none"> (a) The Bill is inconsistent with the International Organization of Securities Commissions (IOSCO) Principles for Auditor Oversight. To be consistent with these Principles, there should be a mechanism to make auditors subject to discipline by an oversight body that is independent of the profession. If cases are referred to HKICPA or other professional bodies for disciplinary proceedings, the FRC should act in a monitoring role to ensure that proper follow up actions are taken; and 	<ul style="list-style-type: none"> ● See 3.30 above. ● Please refer to the Administration paper's entitled "Functions of the Financial Reporting Council" which sets out our justifications for the role of the FRC being purely investigatory. In essence, it must be stressed that the accountancy profession in Hong Kong is subject to, a large extent, a "self-regulatory" regime. The HKICPA is established under the PAO with a clear purpose of controlling and regulating the accountancy profession. The registration and disciplinary powers of the HKICPA should thus be viewed as the two sides of the same coin. ● The IOSCO Principles suggest that "[a] mechanism should exist to require auditors to be subject to the discipline of an auditor oversight body that is independent of the audit profession, <i>or if a professional body acts as the oversight body, is overseen by an independent body</i>". In this regard, it is relevant to point out that, with the commencement of the Professional Accountants

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>(b) The Bill is inadequate to meet the objectives of enhancing the transparency and accountability of the regulatory regime for the auditing profession. The regulatory process is undermined if public interest disciplinary action remains in the hands of a professional accountancy body, giving rise to a lack of independence at the end of the regulatory process.</p>	<p>(Amendment) Ordinance 2004 in November 2004, the independence and transparency of the disciplinary proceedings of the HKICPA have been substantially enhanced. The majority of the members of a Disciplinary Committee under the HKICPA must now be lay persons, and in general the proceedings of the Committee are open to the public. The proceedings and the decisions of the Disciplinary Committee of the HKICPA are independent of the Council of the HKICPA. With the FRC being the investigatory body in future, we consider there are sufficient checks and balances in the overall oversight of the auditing profession.</p> <ul style="list-style-type: none"> ● Clauses 35 and 47 provides that the FRC may publish investigation and enquiry reports, after having considered the matters referred to in clauses 35(4) and 47(4). To the extent that the publication may not adversely affect the institution of subsequent proceedings, the published reports may enable the public to scrutinize the progress in which such cases are pursued by relevant professional and regulatory bodies insofar as the necessary disciplinary or follow-up action is

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> ● Suggestions on the functions of the FRC, as follows: <ul style="list-style-type: none"> (a) There should be provision for the accountancy bodies regulating their members to report on their activities to the FRC for cases referred for disciplinary proceedings, and for the FRC to inspect/investigate such activities of these bodies; and (b) If the FRC is finally vested with the necessary disciplinary powers, the need for a separate appeal tribunal becomes stronger. Where the FRC does not possess any disciplinary power, it should at least have the power to refer cases that are warranted of disciplinary action directly to the Disciplinary Committee of the local statutory professional accountancy body, and act as the complainant to present the case in front of the Disciplinary Committee. This will avoid duplication of resources of the 	<p>concerned.</p> <ul style="list-style-type: none"> ● We wish to stress that the FRC is not intended to be a regulatory body with a disciplinary function. In view of the self-regulatory regime of the profession, we consider that the professional accountancy bodies should continue to discharge their disciplinary functions. As the establishment of the FRC is to provide for a much independent investigation of auditors' irregularities in relation to listed entities, the FRC should be an impartial and effective "fact-finder" to assist, instead of becoming a party to, subsequent disciplinary proceedings. It is thus not necessary and appropriate to put in place additional provisions to subject the accountancy bodies to any reporting requirement to the FRC, once a case is referred to an accountancy body and enters into the disciplinary proceedings.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		FRC and the local statutory accountancy body.	
3.32	Staff of SFC	<ul style="list-style-type: none"> ● No view on whether the FRC should have purely an investigative role or whether it should take on some of the prosecution work of the HKICPA. The issue is a policy question. ● The following experience of regulatory bodies are relevant: <ul style="list-style-type: none"> (a) It is not uncommon, nor prohibited by law, for regulatory bodies to perform both investigatory and disciplinary roles, while it is less common for them to take up both investigatory and criminal prosecutorial role; (b) Most overseas securities regulators have the power to both investigate and bring civil proceedings, and also conduct disciplinary proceedings. The Financial Services Authority (FSA) in the UK, Australian Securities and Investments Commission (ASIC) and SFC itself can also bring criminal proceedings (for summary 	<ul style="list-style-type: none"> ● Noted. ● These examples demonstrate that, even though the investigation and prosecution may be undertaken by the same body, it remains essential to introduce separation of the responsible persons undertaking these functions for proper checks and balances. In the case of the FRC, we consider that the fact that the “investigator” and “prosecutor” roles are undertaken by two separate and independent parties (i.e. the FRC and HKICPA respectively) introduces such checks and balances.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>offences); and</p> <p>(c) It is essential to avoid prejudgement of proceedings by ensuring that those who establish the evidence of a breach through investigation do not play a part in making a decision on the breach. For instance, with regard to SFC's disciplinary proceedings, at the end of investigation, evidence of an alleged breach is passed to a separate group of staff who decide whether there is enough evidence to start disciplinary cases and conduct the proceedings together with an ultimate decision maker. The same situation prevails in the Securities and Exchange Commission in the US, the SFA and the ASIC, though their specific arrangements differ.</p> <ul style="list-style-type: none"> ● Given the small budget of the FRC, there is concern about whether sufficient separation of roles of FRC's staff would be achieved to provide safeguards of the rights of those involved in disciplinary proceedings. 	

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.33	HKBA	<ul style="list-style-type: none"> ● The Bar Council investigates complaints about the conduct of barristers through the Special Committee on Discipline. The Special Committee reports to the Bar Council. The Bar Council may refer a substantiated complaint to a Barristers Disciplinary Tribunal. ● While the primary work of investigation is done by the Special Committee on Discipline, the Barristers Disciplinary Tribunal has the power to investigate the matter further. Although there is some scope for overlap in the investigatory process, the investigatory and sanctioning components of the disciplinary process are quite separate. No problems have been created in the context of disciplinary proceedings against barristers by reason of the separation of the investigatory and sanctioning components of the disciplinary process. ● No comment on the proposed structure of the disciplinary process for auditors contemplated in the Bill. 	<ul style="list-style-type: none"> ● Noted. ● We note that no problems have been created in the context of disciplinary proceedings against barristers by reason of the separation of the investigatory and sanctioning components of the disciplinary process. In the case of the FRC, we consider the fact that the “investigator” and “prosecutor” roles are undertaken by two separate and independent parties (i.e. the FRC and HKICPA respectively) introduces proper checks and balances.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.34	NIAA(C)	<ul style="list-style-type: none"> ● The public trust in the audit profession is best served by having independent investigation and disciplinary regimes for company auditors. Such a “dual” system is applied in other jurisdictions, e.g. Australia. ● The role of the AIB should be to conduct investigation and gather evidence on cases. It is suggested that the AIB will refer cases involving less serious matters to the HKICPA for taking action. As for serious cases, rather than simply handing over the findings and documents to the HKICPA for taking action, the AIB should present its evidence and findings to an Audit Discipline Board (ADB) and act in more of a prosecutorial manner. It is suggested that: <ul style="list-style-type: none"> (a) the ADB should be made up of a mixture of people with audit and accounting backgrounds and lay persons; (b) a panel of audit/accountancy experts and a panel of lay person be set up. The ADB will draw members from these panels to form an Audit Disciplinary Tribunal (ADT) 	Noted. See 3.30 and 3.31 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>for hearing disciplinary cases referred by the AIB;</p> <p>(c) the ADB will also act as an appeal board to hear appeals against the decisions of an ADT;</p> <p>(d) the decisions of the ADT/ADB will be made public; and</p> <p>(e) the HKICPA could have regard to the decision of the ADB and the information presented by the AIB to determine if there is a need for further action at the professional level.</p>	
3.35	HKSA	<ul style="list-style-type: none"> At present, there appears to be overlapping in the oversight of auditing of publicly listed companies among the Registrar of Companies, the HKICPA, the HKEx, and the SFC. The Bill carves out this overlapping area to be overseen by the FRC which will have statutory powers to carry out investigations into irregularities and non-compliance with accounting standards. The arrangement will go a long way towards 	Noted. See 3.30 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>enhancing investor confidence in the financial reports of listed companies.</p> <ul style="list-style-type: none"> ● The proposals in the Bill appear to be a sensible mix of statutory powers of investigation, coupled with self-regulation by the HKICPA where disciplinary action is required. The concept is fully supported. The FRC should avoid being police, prosecutor, judge, jury and executioner. 	
3.36	ACCA(HK)	<p>Clause 9 states that the FRC may refer a case or complaint to a “specified body”, being a “specified authority” or “specified enforcement agency”. The interpretation of a “specified authority” (clause 2) includes an accountancy body that is a member of the International Federation of Accountants (IFAC). In view of the different categories of IFAC membership possible (including affiliate membership), this requirement should refer to current full membership of IFAC.</p>	<p>The definition of “<i>lay person</i>” under section 2(1) of the PAO also makes reference to “<i>a member of the International Federation of Accountants</i>”. We do not think it necessary to further narrow down the scope concerning the membership of the IFAC, insofar as the definitions of “<i>specified authority</i>” and “<i>lay persons</i>” in clause 2(1) of the Bill are concerned. According to the IFAC’s website, there are only 4 affiliate member bodies of the IFAC, which are located in the United States (two of them), France and Bahrain respectively.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.37	HKCEA	<p>Clause 9(f) provides that the FRC may refer to a “specified body” any case or complaint concerning a relevant irregularity or non-compliance in relation to a listed entity. There are two points of concern:</p> <ul style="list-style-type: none"> ● Listed companies, such as banks and insurance companies, already have their respective regulators. Referral of cases to a “specified body” may give rise to problem of “dual regulation”; and ● At present, auditors of listed companies are not subject to registration or qualification assessment. It is unreasonable to subject auditors of listed companies to the FRC's regulation. 	<ul style="list-style-type: none"> ● Upon its establishment, the FRC will investigate auditors' irregularities involving listed entities, whereas the HKICPA will continue to deal with other complaints about its registered members and practice units including those in relation to the non-listed sectors. This should not affect the current responsibilities of other regulators including the SFC and HKEx. We envisage the present division of responsibilities between SFC/HKEx and HKICPA will, by and large, apply to that between the SFC/HKEx and the FRC. The SFC also confirmed in its submission that there is no undue overlap as regards the jurisdictions of the FRC and the SFC. ● The PAO and CO, together with the relevant code published by the SFC and the Listing Rules, contain provisions governing the appointment of auditors for companies. In essence, an auditor of a listed company is either a holder of a practising

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			certificate issued by the HKICPA or a corporate practice registered with the HKICPA.
3.38	SCCLR	<p>There should be clear provisions in the Bill:</p> <p>(a) to enable the FRC to engage full time staff to assist in the work of the AIB and a FRRC; and</p> <p>(b) to enable the FRC to refer those matters beyond its remit to other relevant authorities for appropriate follow-up action.</p>	<ul style="list-style-type: none"> ● Clause 10(2)(a) provides that the FRC may employ persons to assist the FRC, the AIB, a FRRC, or any or all of them, in the performance of its or their functions. ● Clauses 9(f) and (g) provide that the functions of the FRC are to refer to a specified body, or provide assistance to a specified body on the body's investigation or enquiry into or dealing with, any case concerning a "relevant irregularity" or a "relevant non-compliance" in relation to a listed entity.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.39	OPCPD	<ul style="list-style-type: none"> ● Under clause 12(1)(b) and (2)(b), the FRC may provide assistance to a specified authority on the authority's investigation or enquiry into irregularities or non-compliance in relation to a listed entity if "it is not contrary to the interest of the investing public or to the public interest" to do so. However, as the term "public interest" is not defined in the Bill, it is a fluid concept subject to the regulator's own interpretation. ● Prefers a higher standard of requirement, e.g. "it is in the public interest" which shows the existence of public interest directly. 	<p>Apparently, the Commissioner is of the view that, to the extent that clause 12 conflicts with the Personal Data (Privacy) Ordinance (PDPO, Cap. 486), the FRC may consider itself not bound by the latter, hence the need to revise the "<i>not contrary to the public interest</i>" threshold. In this regard, we wish to emphasize that the PDPO shall bind the proposed FRC, subject to the exemption pursuant to a proposed consequential amendment to section 2(1) of the PDPO under clause 79 of the Bill. Accordingly, unless the Bill expressly excludes the application of the PDPO, the FRC shall operate in such a manner that is consistent with the requirements enshrined in the PDPO (including the data protection principles (DPP) in Schedule 1 thereto).</p> <p>Given the FRC will already be bound by the PDPO, we do not see it necessary to examine the fine difference between the "<i>not contrary to the public interest</i>" and "<i>in the public interest</i>" tests. There are also a number of precedents regarding the "<i>not contrary to the public interest</i>" test in existing legislation, for instance, section 50(4) of the Clearing and Settlement Systems Ordinance (Cap. 584), section 120(5)(f)(ii) of the Banking Ordinance (Cap. 155), and section 186(3)(b) of the SFO.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.40	NIAA(C)	<ul style="list-style-type: none"> ● The role of the FRC should include oversight of the adoption of accounting and auditing standards. It should perform a similar function of the FRC in Australia and provide a mechanism for public oversight in this aspect. ● The adoption of International Accounting Standards should make the process easier to achieve. 	The HKICPA is established under the PAO to provide for a self-regulatory regime for accountants and their practice in Hong Kong. Section 18A of the PAO provides that the Council of the HKICPA may, in relation to the practice of accountancy, issue or specify any statement of professional ethics, or standards of accounting, auditing and assurance practices, required to be observed, maintained or otherwise applied by any certified public accountants. The issue of the oversight of accounting standards is in essence outside the scope of the Bill.
3.41	Simon YOUNG	It is important to subject the prescribed powers of the FRC to close scrutiny against the human rights standards provided for in the Basic Law and Hong Kong Bill of Rights as challenges against the FRC could undermine its credibility and potentially compromise its investigations.	The proposals in the Bill are in conformity with the Basic Law, including any provisions concerning human rights enshrined in the Hong Kong Bill of Rights.
3.42	Oscar WONG	The procedures for hiring external expertise to assist in the investigation of large corporate scandal case have not been set out in the Bill. It would be useful if certain guidelines are available in this regard.	Clause 10(2)(b) empowers the FRC to appoint persons as consultants, agents or advisers to assist the FRC in the performance of its functions. This being an administrative matter of the FRC, the Council may, where necessary, issue guidelines pursuant to clause 13 to indicate the manner in which it propose to exercise

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			its powers to appoint consultants, agents or advisers under clause 10(2)(b).
3.43	Peter CHAN	Suggests that any accountant who is subject to the hearing of the HKICPA Disciplinary Committee may choose to be heard by the AIB at his choice.	See 3.30 above. Please refer to the Administration's paper entitled "Functions of the FRC" which set out the Administration's justifications that the FRC should be purely an investigatory body.
<i>Miscellaneous</i>			
3.44	A member of SFC's IEAC	The FRC may refer the relevant investigation/enquiry report to a "specified body", such as the HKICPA, for disciplinary action, further investigation or any other actions. The maximum sanctions that the HKICPA could impose are a fine of \$500,000 and/or order that the name of the professional accountant be removed from the register permanently. Such level of fine would not be sufficient to deter serious wrongdoings, and would render the FRC a toothless tiger.	<p>Integrity is the core value that underpins the auditing profession. The risk of losing clients' confidence has often been a very effective, albeit intangible, deterrent against professional misconduct.</p> <p>In any case, it has to be pointed out that the purpose of the Bill is to establish the FRC which is an investigatory body. Matters concerning the severity of disciplinary orders made by a Disciplinary Committee of the HKICPA under section 35 of the PAO are not consequential to the proposals of the Bill and may be re-visited in a separate context as appropriate.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.45	A member of SFC's IEAC	Suggests that the investigation results and disciplinary actions taken, and also actions not taken, by the specified body be made transparent and known to the public to help achieving deterrent effects on wrongdoers and strengthening regulatory accountability.	<ul style="list-style-type: none"> ● We appreciate that there is a public interest dimension in the publication of investigation/enquiry reports which will enhance the transparency of the work of the FRC. In this regard, clauses 35 and 47 provide that the FRC may publish its investigation/enquiry reports after taking into account the relevant considerations as set out in clauses 35(4) and 47(4). Furthermore, the FRC shall prepare an annual report on the activities of the Council, and the report will be laid on the table of the Legislative Council pursuant to clause 20. Such reports enable the public to scrutinize the performance of the FRC in exercising its functions. ● It is also relevant to point out that, with the commencement of the Professional Accountants (Amendment) Ordinance 2004 in November 2004, the independence and transparency of the disciplinary proceedings of the HKICPA have been substantially enhanced. The majority of the members of a Disciplinary Committee under the HKICPA must now be lay persons, and in general the proceedings of the Committee are open to the public.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.46	CHKLC	<ul style="list-style-type: none"> ● Guidelines (clause 13), especially on the manner in which the FRC proposes to perform its functions, should be issued simultaneously at the time the FRC Ordinance is in force. ● The guidelines should clarify the following issues: <ul style="list-style-type: none"> (a) whether the FRC would only act upon receiving complaints and/or reports made to it, or would pro-actively and spontaneously carry out investigations; (b) whether the FRC would systematically review all annual and interim reports issued by listed companies and make enquiries with the companies and/or their respective auditors; and (c) whether the listed company under investigation is expected to make an announcement once an investigation started against it. 	<p>Clause 13(1) provides that the FRC may issue guidelines not inconsistent with the Ordinance (a) indicating the manner in which it proposes to perform its functions; or (b) providing guidance on the operation of any provision of the Ordinance. Since the authority for issuing such guidelines is the FRC, the guidelines could only be issued upon the establishment of the FRC after the commencement of the legislation.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.47	ACCA(HK)	The proposed provision (clause 14) allowing the Chief Executive (CE) to give the FRC written directions as he thinks fit with respect to the performance of any of its functions may be perceived as a lack of independence.	The proposed reserve power in clause 14 is a tool of last resort for the Government, through the CE, to implement necessary remedial measures in the most pressing and extreme circumstances. The CE would not give directions to the FRC, unless necessary in the public interest and after consulting the FRC Chairman . We consider the provision necessary to enable the Administration to continue to account to the Legislative Council and the public for effective regulation of the profession. Similar power also exists in the ordinances providing for the establishment of, for example, the SFC, Mandatory Provident Fund Schemes Authority, and Hong Kong Deposit Protection Board.
3.48	NIAA(C)	The proposed provision for the CE to give written directions to the FRC (clause 14) may subject it to political interference.	See 3.47 above.
3.49	NIAA(C)	The FRC should keep and maintain its accounts and the Director of Audit should be responsible for the audit (Clauses 18 and 19).	Noted.
3.50	BCCHK	The Director of Audit may be in the best position to have a general oversight of the number and type of cases investigated by the FRC and their outcomes, as	<ul style="list-style-type: none"> Under the Audit Ordinance (Cap. 122), the Director of Audit is responsible for the auditing and reporting on the public accounts and the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		well as whether details are reported.	<p>accounts of specified persons, bodies corporate and other bodies. Clause 19 provides that the Director of Audit shall be the auditor of the FRC. Given the statutory role of the Director of Audit, it may not be appropriate for him to have a general oversight of the FRC's investigations.</p> <ul style="list-style-type: none"> ● For the checks and balances on the FRC, please refer to the Administration's paper entitled "(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council".
3.51	SCCLR	Consideration should be given as to whether liquidators should be included as a relevant body to whom the FRC would disclose the relevant information obtained.	One of the important duties of a liquidator is to look into the affairs of the company in liquidation and ascertain whether any misfeasance, fraudulent preference, or breach of trust has been committed by any of its officers and, if necessary, he must take proceedings in respect of these. Given this, there is sufficient justification that the FRC be allowed to disclose information regarding the auditor of a listed entity (which may include information on suspected fraud or breach of trust committed by its officers) to the liquidator. The disclosure gateway is set out in clause 51(3)(c).

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
3.52	HKICPA	<ul style="list-style-type: none"> ● Whether it should be “or” instead of “and” at the end of clause 4(2)(a). ● Clause 4(3) is similar to but not the same as section 34(1)(a) of the Professional Accountants Ordinance (PAO). <i>(Remarks: Section 34 of the PAO is attached in Appendix I.)</i> ● Clause 6(2)(c) provides that the FRC is “capable of being sued...”. However, clause 53 provides the FRC with immunity. There may be contradiction in the two clauses. ● Clause 7(1) has not specified whether the FRC members should be paid. 	<ul style="list-style-type: none"> ● The word “and” is just to join two separate definitions of “auditing irregularity” and “reporting irregularity”. The use of the word “and” does not necessarily mean the two definitions could not function without the other. ● See 3.17 above. ● The FRC is capable of being sued, as provided under clause 6(2)(c). Clause 53 only affords the FRC with immunity in relation to anything done, or omitted to be done, in good faith in the performance, or purported performance, of the functions of the Council. Clause 53 does not give an unqualified immunity to the FRC. ● We envisage, save for the CEO who would assume an executive post, the other members of the FRC (including the Registrar of Companies as an ex officio member) would serve on a <i>pro bono</i> basis

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> ● There may be contradiction between subclauses (2)(a) and 2(b) of clause 10. The word “employ” is used in subclause (2)(a), whereas “appoint” is used in subclause (2)(b). ● Whether the word “perform” instead of “performs” should be used in clause 13(1)(a). 	<p>for this public service. According to section 4 of Schedule 2 and section 3 of Schedule 3, all matters relating to the terms and conditions of the appointment of the appointed members and CEO of the FRC are to be determined by the CE.</p> <ul style="list-style-type: none"> ● We consider that the above drafting is in order. A person “<i>employed</i>” under clause 10(2)(a) is an employee, while a person “<i>appointed</i>” under clause 10(2)(b) is not necessarily so. Similar wording is adopted in sections 7(f), (g) and (h) of the Deposit Protection Scheme Ordinance (Cap. 581). ● Agreed.
3.53	AIA(HK)	<ul style="list-style-type: none"> ● Resolutions at FRC’s meeting are passed by a majority vote of the members present (clauses 6(8) and (9) of Schedule 2 to the Bill). However, written resolutions must be passed unanimously by all the members present in Hong Kong (clause 7 of Schedule 2 to the Bill). ● It is not clear why a written resolution should not 	<p>Section 7 of Schedule 2 to the Bill provides that that the FRC may transact any business by circulation of papers. Usually the matters to be transacted by circulation of papers are routine or administrative in nature, and may not require discussion among members during a Council meeting. In this regard, we prescribe that a written resolution should be approved by all the members of the FRC present in Hong Kong (being not</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		be passed by a majority of the members present in Hong Kong at the time, with the same proviso as clause 6(9) of Schedule 2 to the Bill (i.e. the number of the votes that constitutes the majority, apart from the casting vote (if any), is to be 4 or more.)	<p>less than the number required to constitute two thirds of the members of the FRC). If the proposed resolution cannot be unanimously passed, the matter should be discussed at the Council meeting during which the matter is to be determined, pursuant to section 6(8) of Schedule 2, by a majority of the votes of the members of the Council present at the meeting. The key difference is whether there is an opportunity for discussion. We consider that, without such an opportunity, it will be more appropriate to require a unanimous vote.</p> <p>Section 7 of Schedule 2 to the Bill is modelled on section 7 of Schedule 2 to the Deposit Protection Scheme Ordinance (Cap. 581).</p>
4	<i>The Audit Investigation Board (AIB)</i> <i>(Part 3 and Schedule 4 to the Bill)</i>		
4.1	A member of SFC's IEAC	<ul style="list-style-type: none"> ● It is necessary to clarify the role of the FRC in relation to the AIB, in particular the extent to which the FRC conducts its investigations and how much evidence it would gather. ● Considers that the FRC (i.e. AIB) should have a 	The functions of the FRC are set out in clause 9. Fundamentally, under clauses 9(b) and (c), the key functions of the FRC are to investigate “ <i>relevant irregularities</i> ” (as defined in clause 4) and enquire into “ <i>relevant non-compliances</i> ” (as defined in clause 5). The Bill has provided for sufficient powers for the FRC

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>role to obtain sufficient evidence through conducting investigations to support a successful disciplinary case.</p>	<p>to conduct investigations effectively with a view to referring a case to the HKICPA or other specified bodies for disciplinary or other follow-up action. Upon completion of an investigation or enquiry, the FRC may decide on and carry out the appropriate action in accordance with the Ordinance (c.f. clause 9(d)). The FRC is also empowered under clauses 9(f) and (g) to refer to a specified body any case or complaint and to provide assistance to a specified body on the body's investigation or enquiry into or dealing with any case or complaint.</p> <p>The intention, as expressed in the long title of the Bill, makes clear that the FRC is an investigatory body.</p>
4.2	BCCHK	<ul style="list-style-type: none"> ● Agrees that the AIB should pursue investigations and not handle disciplinary matters. The AIB should be staffed by employees of the FRC; although they may subcontract investigative work to suitable parties if required, but at all times controlling the matter and the secrecy aspects. ● Agrees that investigations can cover the audit firm, its principals and staff, i.e. individuals, and may be instituted where there is reasonable cause 	Noted.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		to believe there has been an irregularity.	
4.3	NIAA(C)	<ul style="list-style-type: none"> ● It is important for the public perception that auditors be and be seen to be independent. ● Suggests that “auditor independence” be included in the scope of “irregularity” to be investigated by the AIB. 	The issue of “auditors’ independence” is addressed in the professional standards issued by the HKICPA. Having failed or neglected to observe, maintain or otherwise apply a professional standard is within the scope of “relevant irregularities” under clause 4 of the Bill.
4.4	HKICS	<ul style="list-style-type: none"> ● Expresses concern that a suspected case of auditing irregularity may fall under the scope of both the AIB and the FRRC. For instance, the FRRC may enquire into a listed entity which has failed to comply with the Listing Rules in preparing its financial statements. Such non-compliance may be due to negligence of the auditor which can trigger an investigation by the AIB. It is not clear whether the powers of the AIB and FRRC are to be exercised on a mutually exclusive basis. ● It is necessary to clarify the duties of the AIB and the FRRC in respect of the situation mentioned above taking into account that the powers of the former are much more extensive than those of the 	As provided in clauses 9(e), 23 and 40, the FRC may direct the AIB or a FRRC to investigate a “relevant irregularity” or enquire into a “relevant non-compliance”. The FRC may trigger its investigation and/or enquiry powers as and when the statutory thresholds in clauses 23 and/or 40 are passed. It should be noted that the focus of the AIB’s investigation is <i>auditors’</i> irregularity, whereas that of a FRRC’s enquiry is a non-compliance with an accounting requirement as to the matters to be included in a <i>financial report</i> . That said, where necessary, a case may be looked into by both the AIB and a FRRC if the FRC sees fit to direct so and certifies that the respective thresholds under clauses 23 and 40 have both been passed.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		latter.	
4.5	SCCLR A member of SCCLR	<ul style="list-style-type: none"> ● Considers that the remit of the AIB and the FRRC should be expanded to cover all situations where financial reports would be required to be prepared and widely circulated. ● Under the proposed definitions of “specified report” and “listing document” (clause 2), many financial reports required to be prepared and widely circulated in accordance with both the Main Board and the GEM Listing Rules (the “Listing Rules”) will fall outside the coverage of the Bill. For example: <ul style="list-style-type: none"> (a) the definition of “listing document” does not cover the introduction documents which count as listing documents for the purpose of the Listing Rules. Under the Listing Rules, introduction documents are expressly included in the definition of “listing documents”; and (b) the definition of “financial reports” does not cover financial reports included in circulars 	<p>We consider that the present definition is adequate to enable the FRC, as a new body, to focus on investigations of and enquiries into the audit and reporting of key financial information that is published under the relevant statutory or regulatory requirements and involves a greater degree of public interest. After the establishment of the FRC, we may review the scope of the FRC's investigations/enquiries in the light of market development.</p> <p>It may be useful to refer to the experience of Financial Reporting Review Panel which was established in the United Kingdom (UK) in 1990. Previously it was only tasked to review the annual accounts prepared under the UK's Companies Act 1985. It was only in 2004 that legislative amendments were introduced to empower the Secretary of State to appoint the Panel to keep under review <i>periodic</i> accounts and reports that are produced by issuers of listed securities and are required to comply with any accounting requirements imposed by listing rules. In the light of the UK's experience, we consider it prudent to adopt a pragmatic and focused approach in prescribing the scope of the</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
	A member of SCCLR	<p>required to be prepared and circulated by listed companies in connection with major transactions, very substantial acquisitions and very substantial disposals. These reports are of no less significance to the investing public.</p> <ul style="list-style-type: none"> ● Consideration should be given to appropriately expand the definitions of “specified report” and “listing document”. 	FRC's work.
4.6	HKSA	The Bill appears to be applicable only to annual accounts and interim financial statements. It is suggested that “published accounts and financial statements” should be extended to cover all financial reports prepared by auditors of listed companies published and used by the investing public such as those included in disclosure on major transactions, etc.	See 4.5 above.
4.7	CHKLC	Given the small size of the AIB (clause 22), it may not be able to cope with its duties and workload.	Clause 22(2)(a) provides that the Chief Executive Officer (CEO) of the FRC is an ex officio member and chairman of the AIB. Under our proposal, the AIB is to be overseen by the CEO of the FRC who will be supported by the full-time employees of the FRC and

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			any other consultants, agents or advisers appointed by the FRC. Therefore, in essence, the AIB is the executive arm of the FRC and carries out one of the main functions of the FRC, namely the investigation of relevant irregularities as directed by the FRC pursuant to clause 23. Although the AIB is to consist of two members at a minimum, there is no upper limit of the number of members so that the FRC would have the flexibility to decide on the size of the AIB in the light of caseload and resources available.
4.8	HKICS	<ul style="list-style-type: none"> ● Clause 23 specifies when the FRC may exercise its powers to initiate investigations. It is not clear what constitutes “circumstances suggesting” and “reasonable cause to believe” that there is auditing and reporting irregularity. Suggests that the FRC should issue guidelines under clause 13 in this regard. ● Suggests that the FRC should provide guidance to assure that the use by auditors of a top-down, risk-based approach employing reasonable judgement in the auditing of accounts under the generally accepted accounting principles will be recognized and respected by the FRC. Similar 	See 3.13 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		guidance has been issued by the Securities and Exchange Commission and the PCAOB in the US recently when they evaluate the implementation experience of section 404 of the Sarbanes-Oxley Act.	
4.9	AIA(HK)	<p>Clauses 25 and 26 provide that the investigator may require the auditor of the listed entity, or of a “relevant undertaking” of the listed entity, to produce records and documents. There are two suggestions:</p> <ul style="list-style-type: none"> ● The meanings of “relevant undertaking” and “associated undertaking” are similar. It is clearer to include “associated undertaking” in clauses 25 and 26; and 	<ul style="list-style-type: none"> ● The definition of the term “<i>associated undertaking</i>”, which appears in clause 54, extends the definition of “<i>relevant undertaking</i>” (which basically covers the subsidiary of the listed entity) to cover (a) an undertaking in which the corporation has an interest (whether held by that corporation directly or indirectly through any other corporation or corporations) that is accounted for by that corporation in its accounts using equity accounting; or (b) a corporation a substantial shareholder of which is also a substantial shareholder of the corporation. This enables the immunity in relation to the “whistle-blowing” under clause 54 to be afforded to a wider class of

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>persons (i.e. auditors of the associated undertakings of a listed entity). The definition of “<i>associated undertaking</i>” is modelled on section 381(5) of the SFO which is also an immunity clause in relation to the “whistle-blowing” by auditors.</p> <ul style="list-style-type: none">● For the investigation powers under clauses 25(2)(c) and 26(2)(c), we consider it sufficient and prudent to provide that the investigator may require the “<i>relevant undertaking</i>” of the listed entity to produce documents or records. This should be considered alongside clauses 25(5) and 26(5), which provide that the investigator may require production of documents or records from any person, who (a) has directly or indirectly dealt with or has had dealing directly or indirectly with the listed entity or a relevant undertaking of the entity, or (b) is otherwise in possession of records or documents that relate to the audit of the accounts of the entity or undertaking or to the preparation of a specified report required for a listing document.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> It is necessary to specifically extend the statutory obligation to produce records and documents to officers of the listed entity, a relevant undertaking, or an associated undertaking. 	<ul style="list-style-type: none"> Clause 27 contains provisions supplementary to clauses 25 and 26. Clause 27(2) provides that if a person produces a record or document pursuant to a requirement imposed on him under clause 25 or 26, the investigator may in writing require the person, <i>or where the person is a corporation, an existing, or past, officer or employee of that person</i>, to give an explanation, or make a statement, or matters relating to the document.
4.10	LSHK	<ul style="list-style-type: none"> Clauses 25 and 26 empower the investigator to require the auditors and reporting accountants of listed entities to produce records and documents relating to auditing or reporting irregularities. Clause 28 further empowers the investigator to require the auditors and the reporting accountants, or a person whom the investigator has reasonable cause to believe to be in possession of records or documents that contain, or are likely to contain, information relevant to the relevant irregularity or to the question whether or not there is such an irregularity, to produce the records or documents. There are three points of concern: 	<ul style="list-style-type: none"> It is necessary to sufficiently empower the FRC (or AIB, if so directed by the FRC) in order for it to carry out investigations effectively. The Bill proposes that the FRC's powers of investigation should be modelled on those currently possessed by the SFC in relation to an investigation of a listed corporation under sections 179 and 183 of the SFO, so that the FRC may require (a) auditors/reporting accountants of the listed entity and of its relevant undertaking; (b) the listed corporation; (c) a responsible person of the listed collective investment scheme; (d) a relevant undertaking of the listed entity; (e) authorized institutions; and (f) any other persons in possession of records, documents or information relevant to

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>(a) Such powers are over extensive and wider than the equivalent power of the investigation provisions in the FRC in the UK, and the PCAOB in the US;</p> <p>(b) Given that the role of the FRC is investigatory/enquiry only, the powers of the FRC/AIB should enable it to compel the provision of information and documents by auditors and listed companies, but not further. In particular, the powers should not extend to legal advisers whose legal professional privilege may not always be successfully claimed;</p> <p>(c) The FRC/AIB should not have all the investigation powers of SFC which would be overly intrusive and not justified by its objective and jurisdiction.</p>	<p>the irregularity to produce the records or documents, or provide information, in connection with the investigation. The Bill contains a set of “checks and balances” measures (for example, the thresholds in clause 23, and the conditions required to be met for the exercise of powers under clauses 25, 26 and 28) to ensure that the powers would not be abused.</p> <ul style="list-style-type: none"> ● Please refer to the Administration's paper entitled “International Experience” which compares the investigatory regime of the FRC with that of the similar bodies in overseas jurisdictions. It should be pointed out that the powers of the UK's FRC (which derived its powers from the Companies Act 1985 and the Companies (Audit, Investigations and Community Enterprise Act) 2004) to require production of document and information from the company and any officer, employee or auditor of the company are exercisable in relation to the enquiry of the Financial Reporting Review Panel, not Audit Investigation and Disciplinary Board (AIDB). In relation to investigations of auditors' irregularities, the relevant powers of the UK's AIDB under the FRC are not backed by

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>legislation, but administrative arrangements agreed with the professional bodies to which the accountant belongs. Therefore, it may not be appropriate to make a direct comparison in this regard. In the US, although the investigatory powers of Public Company Accounting Oversight Board apply only to an accountant or associated persons (including employees or independent contractors of a public accounting firm), the Board may seek the issue by the Securities and Exchange Commission of a subpoena to require the testimony of, and production of any document in the possession of, any person under the Sarbanes-Oxley Act.</p> <ul style="list-style-type: none"> ● Clause 55(1) expressly provides that any claims, rights or entitlements that arise on the ground of legal professional privilege would not be affected. This is modelled on section 380(4) of the SFO. We have no intention to disrupt or alter the common law rules on legal professional privilege. Where such privilege cannot be claimed by reason of such rules (for instance, when the communications are made for a fraudulent or illegal purpose or when the client has waived the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> ● In contrast, the investigatory powers of the FRC/FRRC as provided under clause 42 are not so extensive. The power to require production of records and documents and provision of information and explanation is restricted to the listed corporation, the auditor and officers or employees of the corporation. The scope of such power is appropriate. 	<p>privilege and permitted disclosure), we fail to see the justification for a statutory carve-out for legal advisers.</p> <ul style="list-style-type: none"> ● Noted.
4.11	HKCEA	<p>Clause 25, 26 and 27 provide the FRC with the power to require auditors and reporting accountants of listed entities to produce records and documents relating to auditing or reporting irregularities and to give explanation on the information therein. There are two points of concern in respect of a listed entity which is a bank, as follows:</p> <ul style="list-style-type: none"> ● The records and documents may contain information relating to customers. As banks are subject to statutory obligation to protect customers' personal data, they may not be able to 	<p>Clause 25(4) expressly provides that the investigator may require an authorized institution to produce any record or document specified in the requirement if the investigator has reasonable cause to believe, and certifies in writing that it has reasonable cause to believe, that (a) the institution is in possession of records or documents that relate to the audit of the accounts of the listed entity or its relevant undertaking; and (b) the record or document specified in the requirement relates to the audit of the accounts of the entity or undertaking and is relevant to the <i>auditing irregularity</i> or to the question whether or not there is</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>produce the records and documents and give explanation on the information therein; and</p> <ul style="list-style-type: none"> ● There should be provisions stipulating that the required records and documents do not cover information relating to customers' personal data. Alternatively, the Bill may need to confer privilege on the FRC by deeming the FRC as a part of Government. 	<p>such an irregularity. A similar provision is contained in clause 26(4) in relation to investigation of a <i>reporting irregularity</i>. Clauses 25(4) and 26(4) are modelled on section 179(6) of the SFO.</p> <p>Furthermore, clause 28(5) provides that the investigator shall not require an authorized institution to disclose any information, or produce any record or document, relating to the affairs of a customer of the institution under that clause unless (a) the customer is a person whom the investigator has reasonable cause to believe may be able to give information relevant to the investigation; and (b) the investigator is satisfied, and certifies in writing that it is satisfied, that the disclosure or production is necessary for the purpose of the investigation. Clause 28(5) is modelled on section 183(4) of the SFO.</p> <p>The aforesaid provisions allow banks to disclose information in relation to the affairs of its customer where the situation warrants. We believe the proposed powers are justified in view of the need to enhance the investigatory function of the accountancy profession.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.12	HKSA	While appreciating the need to give the AIB powers to carry out investigations, there is concern that the proposed powers are very wide-ranging and would extend to “any other person” who has had dealings with or in possession of documents “relating to the affairs of the corporation”. This is particularly disturbing in that failure to comply may result in severe legal liability.	According to the HKICPA's <i>Proposals to Strengthen the Regulatory Framework of the Accountancy Profession</i> in January 2003, one of the difficulties regarding the investigation regime under the PAO is the lack of effective powers under the PAO to compel non-HKICPA members to provide information . To address this, clauses 25(5) and 26(5) of the Bill propose to enable an investigator to require a person, who (a) has directly or indirectly dealt with, or has had dealings directly or indirectly with, the listed entity or a relevant undertaking of the entity; or (b) is otherwise in possession of records or documents that relate to the audit of the accounts of the entity or undertaking or to the preparation of a specified report required for a listing document, to produce records or documents. Clauses 25(5) and 26(5) are modelled on section 179(8) of the SFO.
4.13	Deloitte	The requirement under clause 25 may pose problems to auditors of listed entities or relevant undertakings of the entities if such listed entities/undertakings have operations in the Mainland. There are different laws in the Mainland relating to commercial secrets, States secrets, etc. which may inhibit Hong Kong based auditors from producing documents which are held by	Noted. Where appropriate, the FRC, pursuant to clause 12, may refer cases to a specified authority (which may be outside Hong Kong), or provide assistance to a specified authority on the authority's investigation or enquiry into or dealing with, any case or complaint concerning a relevant irregularity or relevant non-compliance.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		their associated practices in the Mainland.	
4.14	E&Y	<ul style="list-style-type: none"> ● Clause 25 may pose problem to auditors or reporting accountants if the required documents are physically located in countries/jurisdictions outside Hong Kong. Regulations of that other country or jurisdiction may pose legal impediments with respect to providing the documents to the investigator. ● The auditors or reporting accountants should be relieved from the obligation to produce the required documents if such is prohibited by legal impediments arising under the laws of the relevant jurisdiction. 	See 4.13 above.
4.15	HKICPA	<p>There are differences between clause 25(1) and (2) and section 42D of the PAO which sets out the powers of an HKICPA Investigation Committee.</p> <p><i>(Remarks: Section 42D of the PAO is attached in Appendix I.)</i></p>	The proposed investigation powers are not modelled on the PAO, as the FRC should be given stronger investigatory teeth to undertake investigations more effectively. Therefore, clause 25 of the Bill does not necessarily follow section 42D of the PAO. Instead, the clause is modelled on section 179 of the SFO.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.16	Deloitte	Clause 28(1)(d) is too vague and too wide. It provides the requirement for the auditor or reporting accountant of the listed entity or the relevant person to “give the investigator all other assistance in connection with the investigation that he is reasonably able to give”. Other sub-paragraphs of clause 28(1) have clearly set out all the requirements which an investigator could reasonably make of a person.	The requirement of giving the investigator all assistance in connection with the investigation that a person is <i>reasonably</i> able to give is also found in section 42D(1)(a)(iii) of the PAO (which provides for the investigation powers of the HKICPA's Investigation Committees) and section 183(1)(d) of the SFO (which provides for the investigation powers of the SFC). This is a sweep-up clause which enables the investigator to conduct an investigation effectively.
4.17	AIA(HK)	A reference to an authorized officer assisting the investigator appears in clause 28(1)(b) and 28(6). It is clearly set out in clause 28(6) that the appointment of such a person for the purposes of clause 28(1)(b). It is not clear from clauses 25, 26 and 27 whether an authorized officer can assist the investigator for the purposes of those clauses, although clause 30 seems to suggest this can be the case in relation to clause 27. For clarity, and if this is the Administration's intention, clauses 25, 26 and 27 should contain similar references to an authorized officer as are found in clause 28.	Clause 28(1)(b) makes a specific reference to an “ <i>authorized officer</i> ”, so that a person concerned shall only attend before an authorized officer (i.e. a member of the investigator, or who is employed by the FRC to assist the investigator, as defined in clause 28(6)), instead of all members of the FRC/AIB, during the interview. For the other requirements to be imposed by the investigator (e.g. the requirement for production of records and documents), the requirements would be made in the name of the investigator. Hence, there is no need to make a specific reference to “ <i>an authorized officer</i> ” other than in clause 28(1)(b). Separately, clause 10(2)(a) provides that the FRC may employ persons to assist the FRC and AIB in the performance of their functions.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.18	Simon YOUNG	<ul style="list-style-type: none"> ● The investigator is required under clause 29 to consult the relevant regulatory bodies before invoking the powers under clauses 25, 26 and 28. The purpose of this requirement and the consequences for failure to do so are unclear. ● The consequences for the FRC failing to consult should be made clear. 	In our view, the statutory condition to consult is a directory, rather than mandatory, procedure. Failure to comply with the condition will not invalidate the investigation. This is a question of statutory construction – in the light of the purpose of the legislation and the importance of the condition. We accept that if the condition is a procedural safeguard imposed for the benefit of persons affected by the exercise of powers, the condition will normally be regarded as mandatory. In this case, however, the consultation is to help ensure that the planned investigation of the FRC will be coordinated with the enforcement action of other relevant regulators where the situation warrants. The consequence caused by a failure to consult the relevant regulators is not so serious as to justify a prohibition on using the evidence or information obtained during the investigation.
4.19	HKICS	The consultation requirements under clauses 29 and 43 may result in a dilemma or deadlock if the consulted body is not agreeable to the proposed exercise of the power. The Bill should provide how the matter will proceed in such kind of situation.	The consultation requirements in clauses 29 and 43 are measures to ensure that the planned investigation of the FRC will be coordinated with the enforcement actions of other financial services regulators where the situation warrants. It is rightly pointed out that the word <i>consultation</i> does not require the FRC, as an independent investigatory body, to obtain the <i>consent</i>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			of the party being consulted before exercising the relevant investigation/enquiry powers. We envisage that, in practice, through communication, accumulation of experience, and building of understanding among regulators, the likelihood of a deadlock (if any) among regulators will be minimal.
4.20	Oscar WONG	Person being investigated should be properly informed of their rights, for example, their right to legal representation.	The Bill does not contain any provision that restricts the right to legal representation. Clauses 30(1) and 44(1) require the investigator/enquirer to inform or remind the person concerned of the limitations on the admissibility in evidence imposed by clauses 30(2) and 44(2).
4.21	Simon YOUNG	<ul style="list-style-type: none"> ● Concern about abrogation of the privilege against self-incrimination (clause 30), as follows: <ul style="list-style-type: none"> (a) At common law, an individual's privilege against self-incrimination entitles him to refuse to answer any questions or participate in any conduct which could result in his direct incrimination. Clause 30 expressly abrogates this privilege and requires the individual to comply even if compliance would result in the materialization of 	Clauses 31(9) and 43(3) abrogate the common law privilege against self-incrimination and replace it with a statutory prohibition on how an answer given in an investigation/enquiry can be used. If a person makes a claim under clauses 30(2) and 44(2) before answering the investigator/enquirer's question, the self-incriminating answer is not admissible against him in criminal proceedings. Clauses 30(1) and 44(1) require the investigator/enquirer to inform or remind the person concerned of the limitations on the admissibility in evidence imposed by clauses 30(2) and

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>self-incriminating evidence; and</p> <p>(b) In other words, only a claim-based use immunity is given to the individual. Where the individual makes an express claim of the privilege, the ensuring answers cannot be used against the individual as evidence in any subsequent prosecution. Those answers which are not prefaced or qualified by a claim of privilege can be used as incriminating evidence at trial. The claim-based use immunity is to be contrasted with a blanket use immunity which by statute automatically confers immunity over all of the incriminating answers given by the individual.</p> <ul style="list-style-type: none"> ● Suggests conferring blanket use immunity for all answers given by persons under compulsion: <p>(a) Use immunity should be given to individuals as a matter of right and should not be something that must be claimed on an ad hoc basis; and</p> 	<p>44(2).</p> <p>If a person has not made a claim under clauses 30(2) and 44(2), the statutory prohibition does not apply. However, a court has the general residual discretion to exclude evidence where this is necessary to ensure a fair trial for the accused. The requirement of a fair trial involves the observance of the principle, among others, that no man is to be compelled to incriminate himself. Therefore, clauses 30(2) and 44(2) are capable of being given effect to in a manner which is consistent with Article 11(2)(g) of the Hong Kong Bill of Rights, which guarantees that a person is not to be compelled to testify against himself or to confess guilt in the determination of any criminal charge against him.</p> <p>It should be noted that clauses 30 and 44 are modelled on section 187 of the SFO. A similar provision can be found in section 145(3A) of the CO. We consider it justified to introduce the claim-based statutory prohibition. There would be a wide range of information obtained under an investigation or enquiry. The claim-based requirement is useful for parties to the proceedings to quickly identify possibly</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>(b) Blanket use immunity obviates the need to warn the individual of the right to claim the use immunity, thus avoiding potential legal wrangle in cases where the investigators have failed to give the required warning.</p> <p><i>(Remarks: Mr YOUNG raises the same concern and suggestion on clause 44.)</i></p>	self-incriminating evidence with a view to ensuring that such evidence will not be admitted against the person who has given the information in the first place.
4.22	Simon YOUNG	<ul style="list-style-type: none"> ● There is no apparent reason why the offence in clause 31(1) should be one of strict liability. ● It is recommended that the <i>mens rea</i> requirement of “knowledge or recklessly” be expressly added to the provision. 	Clause 31(1) is modelled on section 179(13) of the SFO and provides that a person commits an offence if he, without reasonable excuse, fails to comply with a requirement imposed on him under clauses 25, 26, 27 or 28. This proposes a strict liability offence, as contrasted with other offence provision under clause 31 which requires proof of either “intent to defraud” or “knowledge /recklessness”. It should be stressed that the offence referred to in clause 31(1) allows the defence of “reasonable excuse”, such that a person who innocently fails to comply with a requirement may be able to establish the defence of “reasonable excuse”.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.23	AIA(HK)	<ul style="list-style-type: none"> ● The proposed fine under clause 31(12) is the same as that under clause 31(13) (i.e. \$1,000,000), even though the offences under subclause (13) are of a more serious nature, being “with intent to defraud”. ● Suggests that the proposed fine under clause 31(13) be raised to give more deterring effect. 	<p>Clause 31 sets out the offences for failures to comply with requirements imposed under Division 2 of Part 3 of the Bill, which concerns non-compliance with a requirement in relation to production of records or documents or provision of assistance during investigation. The offences are not intended to be a punishment in relation to auditors' irregularities or other types of market misconduct itself. The level of fines in clause 31 are modelled on sections 184(2) and (3) of the SFO. Although the level of fines for an offence under sub-clause (2), (3), (4), (5), (6) and (7) is the same, an offender may be subject to a longer period of imprisonment in relation to an offence under sub-clause (2), (3), (6) and (7) which encompasses the element of “intent to defraud”. The Department of Justice has been consulted on the appropriateness of the proposed penalty levels.</p>
4.24	Simon YOUNG	<p>Clause 32 provides that a person who fails to comply with the requirements under clauses 25, 26, 27 or 28 may either be charged with a criminal offence or punished in the same manner as if he had been guilty of contempt of court. There are three points of concerns:</p>	<ul style="list-style-type: none"> ● Clauses 31 and 32 offer two alternative ways to deal with a failure to comply with a requirement imposed by the investigator. Under clause 31, the person who fails to comply is prosecuted for the appropriate offence. Clause 32 empowers the investigator to apply, by originating summons, to the Court for an inquiry into the failure, in which

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> ● Whether the contempt power is necessary given the availability of a host of criminal offences in clause 31 for which the person may be prosecuted; ● Even the Independent Commission Against Corruption has not been given recourse to a contempt power where there is non-compliance with authorizations issued pursuant to section 13 of the Prevention of Bribery Ordinance; and ● The problem of the proposed contempt mechanism is that imprisonment for contempt can occur without the usual safeguards of the criminal process. The rules of evidence in criminal proceedings would not apply to this proceeding and thus hearsay evidence would be generally admissible. <p><i>(Remarks: Mr YOUNG raises the same concern on clause 45.)</i></p>	<p>case the Court may order the person to comply with the requirement and, if there was no reasonable excuse for the failure, punish the person for the failure. In this light, clause 32, which mirrors section 185 of the SFO, mainly concerns the Court's assistance in compelling compliance with the investigator's requirements for the purpose of the investigation. Clauses 31(10) and 32(4) provide that there will be no double jeopardy in relation to the conviction or punishment by the Court under clause 31 or 32.</p> <ul style="list-style-type: none"> ● Although hearsay evidence is admissible in civil contempts, the burden is on the investigator to prove beyond reasonable doubt that the failure was without reasonable excuse. These rules are applicable to all other proceedings for civil contempts.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.25	Deloitte	<ul style="list-style-type: none"> ● Clause 34 provides for magistrate's warrants to be issued to search for, seize and remove certain records and documents. The clause potentially applies to the premises of anybody, regardless of whether they have anything to do with the listed company or the auditor. ● Suggests that domestic premises be excluded from the scope of clause 34. If domestic premises are to be included, the warrant should be approved by a High Court judge rather than by a magistrate. 	Clause 34 of the Bill is modelled on section 191 of the SFO. This power is important as it enables the investigator to seize important evidence which may otherwise be destroyed in the conduct of an irregularity. Circumscribing the class of the premises will run the risks of creating a loophole that the person under investigation may be tempted to transfer documents relevant to investigation from premises subject to a search warrant to those not. The fact that the warrant is to be issued by a magistrate has provided for an appropriate check and balance.
4.26	Simon YOUNG	<ul style="list-style-type: none"> ● Clause 35(5) provides that the AIB's investigation report be admissible in criminal proceedings as evidence of the facts stated in the report. The proposal is controversial and lacks justifications. There are two points of concern: <ul style="list-style-type: none"> (a) As all criminal trials, the investigator should be required to attend the proceedings as a witness and be subjected to full cross-examination as to his or her findings. Written reports, which will most likely contain hearsay upon hearsay, would not 	Having considered the comments of some deputations, we have reviewed with the Department of Justice on clauses 35(5) and 47(5) concerning the admissibility of evidence in relevant proceedings. We accept that we should be slow to create statutory exceptions to the rule against hearsay in criminal proceedings. We would consider proposing a CSA to carve out the admissibility of the investigation/enquiry reports in criminal proceedings as evidence of the facts stated therein.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>normally be admissible in a criminal trial; and</p> <p>(b) Police officers are not allowed to submit their investigation file as admissible evidence at trial, and there is no reason why FRC's investigation reports should be treated differently.</p> <ul style="list-style-type: none"> ● The Hong Kong Law Reform Commission is currently studying the reform of hearsay rule in criminal proceedings. It is highly recommended that the possible enactment of any hearsay exception in the Bill be deferred and made consistent with the reforms which may flow from the Commission's study. <p><i>(Remarks: Mr YOUNG raises the same concern on FRRC's enquiry report (clause 47(5)).)</i></p>	

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.27	E&Y	<ul style="list-style-type: none"> While an FRC investigation report could be used as the basis for initiating court or disciplinary proceedings, it should not have the status of being “admissible as evidence of the facts stated in the report” in such proceedings (clauses 35(5) and 47(5)). The court or disciplinary body should use the FRC investigation report as it deems appropriate in implementing its normal procedures, and such procedures should be conducted in accordance with their usual rules, requiring (if necessary) the calling of witnesses as to fact and expert witnesses as to expressions of opinion. 	<ul style="list-style-type: none"> See 4.26 above. As for the admissibility of investigation/enquiry reports in other proceedings, it should be stressed that such reports are not admissible as evidence of the <i>opinions (but facts)</i> stated therein, and that the reports are not automatically considered as conclusive evidence of such facts. The persons concerned may still produce evidence before the court to prove that what was stated in the report is not true. The Court, Market Misconduct Tribunal or a Disciplinary Committee of the HKICPA would then decide on the issue after considering all evidence.
4.28	Deloitte	<ul style="list-style-type: none"> It is inappropriate to make the AIB's investigation report admissible as evidence in any court or disciplinary proceedings (clause 35(5)) for the following reasons: 	<ul style="list-style-type: none"> See 4.26 and 4.27 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>(a) Such reports may contain large amount of hearsay and expressions of opinion put forward as matters of fact. It is fundamentally inappropriate for that material to be submitted in any criminal proceedings. It is equally inappropriate to make such reports admissible as evidence in any civil proceedings;</p> <p>(b) Admission of the reports in civil proceedings may result in misuse of reports by civil litigants and their lawyers to promote the prospect of success in the litigation; and</p> <p>(c) Admission of the reports in any court proceedings may prolong and bog down the procedures of investigation as accountants, directors and other related persons would be forced to defend the investigation as if it was a rehearsal for subsequent court proceedings.</p> <ul style="list-style-type: none"> ● Suggests that clause 35(5) be limited to enabling facts stated in the investigation report to be only prima facie evidence in the Market Misconduct Tribunal or in disciplinary proceedings under the 	

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>PAO.</p> <p><i>(Remarks: Deloitte raises the same concern and suggestion on clause 47(5).)</i></p> <ul style="list-style-type: none"> ● The Bill is silent on who is to take the responsibility for disciplinary prosecution under the PAO. If a matter is of sufficient public interest for the FRC to have taken action, it appears logical, practical and expedient for the FRC to fill the role of prosecutor. It is unfair for the HKICPA to bear the cost of prosecution in respect of which it has had no role. 	<ul style="list-style-type: none"> ● Please refer to the Administration paper's entitled "Functions of the Financial Reporting Council" which sets out our justifications for the role of the FRC being purely investigatory. In essence, the FRC will only be an investigatory body. The Registrar of HKICPA should retain his function to prosecute (i.e. to present a case against) a certified public accountant in the disciplinary proceedings under the PAO. Furthermore, the HKICPA has confirmed in its submission that the Institute should continue to act as the profession's regulatory body and be responsible for the disciplinary role of which the prosecution role is an integral part. ● It is appropriate for the HKICPA to undertake the prosecution role and bear the cost of a prosecution as, under section 7 of the PAO, it is within the objects of the HKICPA, as a statutory <i>self-regulatory professional body</i>, to regulate the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>practice of the accountancy profession, discourage dishonourable conduct by certified public accountants, and to hold inquiries into the conduct of certified public accountants, firms and corporate practices. The HKICPA should therefore have a key role to play in respect of the disciplinary action against its own members. Section 35(1) of the PAO also provides that the Disciplinary Committee may in any case make such order as the Committee thinks fit with regard to the payment of costs and expenses of and incidental to the proceedings, <i>whether of the Institute (including the costs and expenses of the Disciplinary Committee)</i> or of any complainant or of the certified public accountant.</p> <ul style="list-style-type: none"> ● Furthermore, as the FRC will take over the responsibility for investigating the audits of listed entities, the HKICPA will no longer have to bear the full cost of undertaking these investigations in respect of their members.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.29	AIA(HK)	<p>There is conflict between clauses 30 and 35(5), as follows:</p> <ul style="list-style-type: none"> ● Clause 30 suggests that evidence collected from a person in an investigation by the AIB is not admissible in evidence against that person in criminal proceedings, with certain exceptions. ● Clause 35(5) provides that the AIB's investigation report is admissible as evidence of the facts stated in the report in other proceedings. <p><i>(Remarks: AIA(HK) raises the same concern on clauses 44 and 47(5).)</i></p>	<ul style="list-style-type: none"> ● Clause 30(2), which seeks to prohibit the admission of self-incriminating evidence in criminal proceedings, starts with the words "(d)espite anything in this Ordinance". This statutory prohibition on the use of self-incriminating evidence overrides any other provisions in the Ordinance concerning the admissibility of evidence in criminal proceedings. The same applies to clause 44(2). ● See 4.26 and 4.27 above.
4.30	A member of SFC's PSG and a member of IEAC	<p>Suggests that investors be allowed to use the findings of the FRC and findings of the disciplinary actions of the HKICPA in civil actions for damages. The suggestion would greatly reduce the cost of shareholders action and enhance the standards of audit</p>	<p>The main purpose of an investigation/enquiry by the FRC is to help enhance the regulation of auditors and the quality of financial reporting of listed entities. While clause 35(5) provides that the investigation/enquiry reports of the FRC are admissible</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		work.	as evidence of the facts stated in the report in certain proceedings, the admissibility of HKICPA's disciplinary decisions in legal proceedings is entirely a separate issue.
4.31	Deloitte	<p>Clause 36(2) provides that if the FRC has directed the AIB to conduct an investigation, it shall not exercise a power under clause 36(1) in respect of the case (i.e. close the case, suspend the investigation, or carry out other follow-up action) unless the AIB has submitted a report and the FRC has considered it. There is no reason why the FRC should be deprived of the power to cease or suspend any investigation.</p> <p><i>(Remarks: Deloitte raises the same concern on clause 48(2).)</i></p>	If the FRC has directed the AIB to conduct an investigation and the AIB is in the process of investigation, we consider that the FRC shall not be allowed to close a case, suspend an investigation or carrying out any follow-up actions, unless and until it receives a report from the AIB with regard to the progress and results of investigation. It should also be noted that, before the completion of investigation, the FRC is empowered, under clause 35(2), to require the AIB to submit an interim report on the investigation.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.32	CGCC	<ul style="list-style-type: none"> ● Clause 37 empowers the courts and magistrates to order persons convicted on prosecutions instituted as a result of investigations under Part 3 of the Bill to pay the costs and expenses of the investigations. ● Given that the investigation costs and expenses involved could be very high, suggests that a ceiling be set for the sum to be paid by the convicted persons. 	<ul style="list-style-type: none"> ● Clause 37 provides that if, on a prosecution instituted as a result of an investigation under Part 3 of the Bill, a person is convicted by a Court or Magistrate, the Court or Magistrate may order the person to pay to the FRC the sum the Court or Magistrate <i>considers appropriate</i> for the costs and expenses in relation or incidental to the investigation <i>reasonably incurred</i> by the FRC. Similarly, in clauses 71 and 80, we propose amendments to section 35(1)(d) of the PAO and section 257(1) of the SFO to empower a Disciplinary Committee of the HKICPA or a Market Misconduct Tribunal to order the relevant person to pay to the FRC the sum the Disciplinary Committee or Tribunal <i>considers appropriate</i> for the costs and expenses in relation or incidental to the investigation <i>reasonably incurred</i> by the FRC. In this light, the Court or Magistrate, the Market Misconduct Tribunal, or the Disciplinary Committee of the HKICPA shall consider all relevant circumstances before ordering the payment. The decision of the Court or Magistrate, Market Misconduct Tribunal or the Disciplinary Committee of the HKICPA is appealable.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<ul style="list-style-type: none"> ● The Administration should consider how the investigation costs and expenses should be recovered if the investigation has not proved any irregularities of the auditor concerned. 	<ul style="list-style-type: none"> ● If there is no case after an investigation or the person is not found to have committed an irregularity, the FRC will not recover the investigation cost from any person.
4.33	AIA(HK)	<p>Clause 37 provides that, following conviction in a prosecution as a result of an investigation by the AIB, the person convicted can be ordered to pay a sum to the FRC representing its costs and expenses in the investigation. There are two points of concern:</p> <ul style="list-style-type: none"> ● If the prosecution results in a fine, whether an award of a sum to meet the costs and expenses of the FRC will take into account the financial penalty already imposed by the court; if not, the result is effectively two financial penalties being imposed for the same offence. ● Whether there is a danger that this provision may create a conflict of interest in investigations. There are financial benefits to the FRC, which appoints the AIB to investigate, if an investigation leads to a report that initiates a successful prosecution. This is of particular 	<ul style="list-style-type: none"> ● See 4.32 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		concern given that the Bill contains no rights of appeal in relation to reports of the AIB (and the FRRC).	<ul style="list-style-type: none"> We do not believe that there will be a conflict of interest in investigations. The FRC shall discharge its investigatory functions with due diligence and due care all the time, and it is the Court or Magistrate (but not the FRC) that may convict a person. At present, section 35(1)(d) of the PAO also provides that a Disciplinary Committee of the HKICPA may make an order that the certified public accountant pay the costs and expenses of and incidental to an investigation under the PAO against him, if the Committee is satisfied that a complaint is proved.
4.34	BCCHK	Where an irregularity is proved, the costs of the investigation can in some suitable instances be recovered from the auditor, or from the guilty party (clause 37).	Noted. See 4.32 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.35	SCCLR	Suggests that a legal cost reclaim mechanism should be established to enable the HKICPA to recover costs in relation to cases referred to it by the FRC for taking disciplinary proceedings.	<p>There is already a legal cost reclaim mechanism under the PAO which enables the HKICPA to recover the costs and expenses in relation to its disciplinary proceedings. The existing section 35(1)(iii) of PAO provides that a Disciplinary Committee may make such order as the Committee thinks fit with regard to the payment of costs and expenses of and incidental to the proceedings, whether of <i>the Institute</i> (including the costs and expenses of the Disciplinary Committee) or of any complainant or of the certified public accountant.</p> <p>Separately, clause 71 of the Bill contains an amendment to the PAO to enable a Disciplinary Committee of the HKICPA to order that the certified public accountant concerned shall pay to the FRC for the costs and expenses in relation or incidental to the investigation reasonably incurred by the FRC, where the disciplinary proceedings were instituted as a result of an investigation by the FRC.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.36	KPMG and a member of SCCLR	Insofar as the FRC is performing its investigatory/enquiry role against suspected irregularities concerning auditors, which will be referred to appropriate regulatory authorities for follow-up action, there is no need to set up a separate body to hear appeals against the decisions of the FRC.	Noted.
4.37	NIAA(C)	<ul style="list-style-type: none"> ● Given that the role of the FRC is investigatory only, there is no need to set up an appeal tribunal to hear appeals against FRC's decisions. ● If the FRC takes up a disciplinary role, it is necessary to provide an appeal tribunal. 	Noted. See 3.20 above.
4.38	HKICS	<ul style="list-style-type: none"> ● Given that the role of the FRC is investigatory only, there is no need to set up an appeal tribunal to hear appeals against FRC's decisions. ● However, a further check and balance mechanism may be built in for the FRC to review its decisions to enhance fairness of the procedures/findings. 	Noted. See 3.20 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
4.39	BCCHK	The AIB will handle investigations but in terms of fines or penalties, SFC will in most cases impose penalties, if necessary. This process will need to be reviewed in the light of experience.	The FRC will be an investigatory body responsible for investigation of auditors' irregularities and enquiry into non-compliances of financial reports concerning listed entities. Upon completion of an investigation/enquiry, the FRC is empowered, under clauses 9(f) and (g), to refer to a specified body, or provide assistance to a specified body on the body's investigation or enquiry into or dealing with, any case or complaint concerning a relevant irregularity or relevant non-compliance. The SFC is one of the specified bodies as defined in clause 2(1).
5	<i>The Financial Reporting Review Panel (FRRP) and a Financial Reporting Review Committee (FRRC)</i> <i>(Part 4 and Schedules 5, 6 to the Bill)</i>		
5.1	CIMA(HK)	The proposal for the establishment of an FRRP, and the use of the panel to provide members for FRRCs for individual cases, are strongly supported.	Noted.
5.2	ACCA(HK)	Clause 39 states that the CE appoints members of the FRRP, whom he considers suitable for appointment to FRRCs. Clause 41 gives no further detail of the expertise required of members of a FRRC. In view of the technical expertise required, the FRRP and each FRRC should consist of a majority of accountants,	With reference to the membership base of the UK FRRP, we envisage that the CE will consider appointing professionals with the expertise and backgrounds in the accounting, auditing, legal, banking, financial services or commercial field to the FRRP. We do not propose to set out the detailed

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		who should be drawn from a variety of backgrounds, and bring to the Panel and the Committees experience in a variety of sectors.	qualification requirements in the Bill, so as to facilitate the CE in appointing the best available candidates, in the light of actual circumstances, from different backgrounds and disciplines to enable the FRRP and FRRC to discharge their functions effectively. It should be noted that the UK Companies Act also does not set out the detailed qualification requirements of the membership of the FRRP in the UK.
5.3	BCCHK	The FRRC should comprise not less than 20 professionals, chosen by the CE, with five being chosen to review any particular case, and chaired by a Panel Convener.	Noted. See clauses 39 and 41 of the Bill regarding the composition of the FRRP and a FRRC.
5.4	ACCA(HK)	Enquiries by a FRRC should be extended to all public interest entities, rather than just listed entities as stipulated under clause 40(1).	See 3.14 above.
5.5	ACCA(HK)	<ul style="list-style-type: none"> The objective of the FRRCs and the Financial Reporting Review Panel (FRRP) is to consider whether the provision of financial information complies with relevant legal and accounting requirements. Therefore, the review should cover the whole set of annual accounts wherever financial information is presented. Two 	The major objective of a FRRC is to enquire into non-compliance of the financial reports concerning listed entities. The FRC is not intended to extend its remit beyond the function of financial reporting. Even though directors' report, management discussions and analysis reports may form part of the annual or interim reports issued by listed entities, strictly

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>suggestions:</p> <p>(a) The definition of “relevant requirement” (Parts 1 and 2 of Schedule 1 to the Bill) is in relation to an “accounting requirement”, and therefore does not include compliance of other information issued with financial statements (e.g. directors’ reports) with relevant legal requirements. Rather, the definition should be in relation to an “accounting or reporting requirement”;</p> <p>(b) The definition of “relevant financial report” (Parts 1 and 2 of Schedule 1 to the Bill) is in relation to a balance sheet and accounts annexed to it in accordance with section 129C(1) of the Companies Ordinance. Therefore, the directors report (required to be attached by section 129D of the Companies Ordinance) is not included within the definition of “relevant financial report”. The definition should be changed to cover “directors reports”.</p>	<p>speaking these disclosures are, by their very nature, not governed by matters of accounting requirements set out in the CO, SFC Codes, Financial Reporting Standards or Listing Rules. Consequently, we propose that a FRRC should, at least at its initial operation, limit its remit to relevant financial reports (in the form of accounts of financial statements) presented in accordance with the relevant accounting requirements.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
5.6	SCCLR	<p>There should be clear provisions in the Bill:</p> <ul style="list-style-type: none"> ● to give a FRRC the discretion to decide whether to take “pro-active approach” in performing its functions; and ● to permit cross referral of cases between the AIB and a FRRC. 	<ul style="list-style-type: none"> ● Clause 9(c) provides that the functions of the FRC are to enquire, <i>in response to a complaint or otherwise</i>, into a “relevant non-compliance”. ● As provided in clauses 9(e), 23 and 40, the FRC is to direct the AIB or a FRRC to investigate a “relevant irregularity” or enquire into a “relevant non-compliance”. The FRC may trigger its investigation and/or enquiry powers as and when the statutory thresholds in clause 23 and/or 40 are passed. Therefore, where necessary, a case may be looked into by both the AIB and a FRRC if the FRC sees fit to direct so. Furthermore, as AIB and a FRRC are required to submit reports to the FRC respectively under clauses 35 and 47, the FRC may where necessary and after considering the reports, refer an AIB case to a FRRC, or <i>vice versa</i>, for further action pursuant to clauses 36 and 48.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
5.7	ACCA(HK)	Clause 49 does not refer to the speed of the FRC's action to request the removal of any non-compliance, or the period within which the operator of the entity must take the remedial action. If it is the intention that the FRC will publish more detailed operational procedures in due course, these detailed operational procedures should be referred to in the Bill.	Clause 49(1) empowers the FRC to request the operator of a listed entity to revise the accounts voluntarily or take such other remedial action concerning the financial report as necessary <i>within the period specified in the notice</i> . If necessary, the FRC may consider publishing guidelines pursuant to clause 13 to indicate how it proposes to exercise its powers referred to in clause 49.
5.8	ACCA(HK)	Clause 49(1)(b) permits the FRC to request the operator of a listed entity to cause the relevant financial report to be revised or take other remedial action. Clause 50 enables the FRC to apply to the Court for an order requiring the directors of a listed corporation to revise the relevant financial report or take other necessary remedial action. Clause 49 refers to a listed entity which means a listed corporation or a listed collective investment scheme as stipulated in clause 3. Hence, the scope of clause 50 should not be limited to a listed corporation, but should refer to a listed entity as interpreted under clause 3.	Based on our legal advice, we propose that the FRC should only be empowered to seek a Court order to mandate revision of the annual accounts of Hong Kong incorporated companies under the requirements of the CO or any specified report that are required under the CO to be included in a prospectus. This is because to empower the FRC to apply for an order to compel compliance with the financial reporting standards, Listing Rules or relevant code issued by the SFC, which are non-statutory <i>per se</i>, would arguably give statutory effect to such standards, rules or codes, and hence convert non-compliances with the non-statutory standards, rules or codes into legal wrongs that are subject to legal sanctions by way of a Court orders. Accordingly, Part 2 of Schedule 1 to the Bill is prescribed for the purpose of the provisions

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>(i.e. clauses 5(2) and 50) relating to the Court order for mandatory revision of accounts. In effect, the Court may only declare non-compliances of a financial report <i>under the CO</i> with the accounting requirements as to the matters or information to be included in the report <i>as provided in the CO</i>. The relevant arrangements in the UK are similar.</p> <p>As the Government and the SFC plan to give statutory backing to certain Listing Rules such as those regarding financial disclosures, we would review the scope of the “<i>relevant financial reports</i>” and “<i>relevant requirements</i>” for the purpose of clause 50 in due course.</p>
5.9	KPMG and a member of SCCLR	<ul style="list-style-type: none"> Where the matter under investigation is a question of non-compliance with financial reporting standards, there is concern about the lack of appeal provisions. There are two points of concern: <ul style="list-style-type: none"> (a) Clause 49 empowers the FRC to request directors of a listed entity to rectify their financial reports, and clause 50 empowers the FRC to seek a court order to compel such 	<ul style="list-style-type: none"> There may be occasions that the FRC <i>may</i> see it necessary to communicate with or consult relevant experts and the HKICPA on the interpretation of financial reporting standards. We agree that the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>a rectification under certain circumstances. However, there is no requirement for the FRC to consult the HKICPA where the directors and/or the auditors of the listed entity do not agree with the FRC's interpretation of the relevant financial reporting standards; and</p> <p>(b) The proposed provisions mentioned above are unfair to the listed entity under investigation and would undermine the authority of the HKICPA to set and interpret financial reporting standards.</p> <ul style="list-style-type: none"> ● In the UK, the FRC plays the combined role of enforcer with the role of standard setter and therefore operates successfully without a specific requirement for its FRC to consult its standard setter. In Hong Kong, however, the FRC will be independent from the standard setting body, i.e. the HKICPA. 	<p>FRC may, pursuant to clause 10(2)(d), enter into memoranda of understanding with the HKICPA regarding the communication or consultation in this regard.</p> <ul style="list-style-type: none"> ● It should be emphasized that the FRC has no power to sanction any person for failing to revise its accounts as requested by the FRC. If the directors of a listed corporation do not comply with the request for voluntary revision of accounts, the FRC may apply to the Court for a declaration of non-compliance and an order for mandatory revision of accounts. Hence, it is the Court that interprets the relevant requirements and its decision in this regard is appealable.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
5.10	KPMG, a member of SCCLR and HKICPA	Strongly recommends that safeguards be introduced to ensure that for cases involving the interpretation of financial reporting standards, the HKICPA should be consulted as to their views on the acceptable interpretations of the accounting principles in question.	See 5.9 above.
5.11	HKSA	As the FRRC's function is to enquire into compliance with relevant accounting requirements, there is a danger that it would result in the FRRC interpreting accounting standards and becoming a "rule-making" body by default.	See 5.9 above.
5.12	HKICPA	<ul style="list-style-type: none"> ● The power of the FRC to seek a court order to mandate rectification of the annual financial statements only apply to Hong Kong incorporated companies (clause 50 and Part 2 of Schedule 1 to the Bill). The effect will be that the FRC will be unable to oblige listed companies which are incorporated outside Hong Kong to revise their financial statements. ● The only manner in which non-Hong Kong companies can be compelled to revise their financial statements would be by giving statutory force to the Listing Rules. The Administration 	See 5.8 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		should move forward with the legislation necessary to give such statutory backing to the Listing Rules so that all listed companies are subject to the same degree of regulation.	
5.13	Peter WONG	<ul style="list-style-type: none"> ● Very disappointed that the FRC will not be empowered to seek a court order to mandate rectification of annual financial statements of listed entities generally. In UK, the FRC has been very effective in getting errant companies to correct their accounts using the appropriate accounting treatment with a minimum of fuss. The present proposal of only punishing the auditors is a very clumsy and ineffective way to trying to get his client to do the right thing and does not always achieve the real objective of high quality accounts which are compliant with accounting standards. ● While there are legal difficulties to legislate for listed companies which are constituted overseas, that barrier was surmounted by using the listed rules when it first surfaced. There should be other similarly imaginative ways round this problem. 	See 5.8 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
5.14	CHKLC	<ul style="list-style-type: none"> ● There is a genuine need to put in place a set of appeal procedures to check the very extensive regulatory power of the FRC and serve as a comparatively more objective yardstick on the quality of work of the FRC. ● If in case it turns out that there are not any irregularities or incidents of non-compliance, or that there is a legally justifiable defence made by it, the party under investigation should be entitled to seek reasonable compensation from the FRC for all costs and expenses incurred and loss suffered by it owing to the time and resources reasonably devoted for assisting and cooperating with the FRC in its investigations. In addition to the appeal procedures, this will serve as an effective check and balance measure to avoid any investigations being started unreasonably or when started, being carried on with undue delay. 	<ul style="list-style-type: none"> ● See 3.20 above. It should be emphasized that the FRC has no power to sanction any person for failing to revise its accounts as requested by the FRC. If the directors of a listed corporation do not comply with the request for voluntary revision of accounts, the FRC may apply to the Court for a declaration of non-compliance and an order for mandatory revision of accounts. The Court's decision in this regard is appealable. ● The FRC is established to serve the public interest in the integrity and quality of financial reporting of listed entities, which underpin investor confidence in Hong Kong's financial markets. Hence, we propose that the FRC should be statutorily empowered to require production of certain documents, provision of assistance, or attendance of certain persons during an investigation/enquiry. This thus becomes a public duty for the persons concerned to comply with a requirement of the FRC during the investigation/enquiry, and failure to comply without reasonable excuse is an offence. We see no reason that the person should be compensated or reimbursed for discharging a public duty.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<ul style="list-style-type: none"> ● In any case, the powers of the FRC must be exercised reasonably, legally and for proper purpose. If they are not so exercised, the FRC may be subject to a judicial review. This provides for a safeguard against any unreasonable requirements/requests imposed by the FRC on a person in the course of an investigation/enquiry.
5.15	HKCEA	The FRC's requirement for a listed entity to revise its financial report would have significant implications on the entity. A proper appeal mechanism should be set up for the aggrieved listed entities to appeal against the FRC's decisions.	It should be emphasized that the FRC has no power to sanction any person for failing to revise its accounts as requested by the FRC. If the directors of a listed corporation do not comply with the request for voluntary revision of accounts, the FRC may apply to the Court for a declaration of non-compliance and an order for mandatory revision of accounts. The Court's decision in this regard is appealable.
5.16	BCCHK	Where an error has been identified and the accounts amended, that costs of the FRRC can be recovered from the corporation, or the directors who approved the defective accounts.	<ul style="list-style-type: none"> ● It has been the duty of directors to prepare accounts which shall show the true and fair view of a company's financial position. By virtue of clause 50(8), we propose that the Court shall have regard to whether each of the directors who were party to the approval of the relevant financial report <i>knew, or ought to have known</i>, that the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			<p>report did not comply with any relevant requirement, where the Court orders pursuant to clause 50(6) that the costs and expenses referred to in clause 50(7) shall be borne by such directors. Clause 50(10) provides that, for the purposes of clause 50, the directors of a listed corporation at the time when the relevant financial report of the corporation was approved by them, <i>except any director who shows that he took all reasonable steps to prevent the report from being so approved,</i> would be taken to be the party to the approval of that report.</p> <ul style="list-style-type: none"> ● Clauses 50(6), (7), (8) and (10) are modelled on sections 245B(4) and (5) of the UK Companies Act 1985.
5.17	AIA(HK)	Accountability of financial information disclosed by public companies involves two parties, directors (who prepare the financial information) and auditors (who attest the financial information). Therefore, any regulatory regime established should be able to effectively police the works of both the directors and auditors.	The major driver of the establishment of the Financial Reporting Council (FRC) is the need to upgrade the investigation function with respect to any irregularities of the auditing profession in the audit of listed entities. In respect of preparation of financial reports, the FRC is also proposed to be empowered to request directors of listed entities to voluntarily revise accounts under clause 49. However, it should be noted that the

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			proposals in the Bill are not intended to build a regulatory regime for directors of listed entities, in addition to what is already stipulated in the Securities and Futures Ordinance (SFO, Cap. 571) and Companies Ordinance (CO, Cap. 32).
5.18	HKSA	While there should be a mechanism for recovery of expenses incurred by the FRRC, directors should be entitled to rely on the advice of professional advisors in the preparation of financial statements. Therefore, directors should not be made to bear the costs of the enquiry and any rectifications unless it is proved beyond reasonable doubt that they were party to deliberate falsification.	See 5.16 above.
5.19	BCCHK	The revised or amended accounts of listed entities should be published after the filing of a “caution” with the Registrar of Companies.	Noted. See clause 61 of the Bill which sets out the relevant consequential amendment to the CO.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
6	<i>Publication of investigation/enquiry report by the FRC (Clauses 35 and 47 of the Bill)</i>		
6.1	BCCHK	The FRC should have discretion as to whether reports about cases should be published; it is not appropriate that all cases should be published even on a no-names basis.	Noted.
6.2	CGCC	Expresses grave concern about the proposal that the FRC may cause to be published the investigation/enquiry reports. The discretion for the FRC to publish such reports may prejudice the interests of the listed companies involved in the cases under investigation or enquiry.	We believe that, having regard to the public interest and the need to maintain the transparency of the work of the FRC, there is a case for the FRC to have the discretion to publish investigation or enquiry reports. As provided in clauses 35 and 47, the FRC may cause to be published an investigation or enquiry report or any part of such a report. We have built in a requirement in clauses 35(4) and 47(4) for the FRC to take into account the following considerations in deciding whether or not to cause a report or a part of the report to be published :- (a) whether the publication may adversely affect any criminal proceedings before a Court or Magistrate, or any proceedings before the Market Misconduct Tribunal; or any proceedings under Part V or VA of PAO, that has been or is likely to be instituted; (b) whether the publication may adversely affect any person named in the report; and (c) whether

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			the report, or a part of the report, should be published in the interest of the investing public or in the public interest. Having considered the deputations' comments, we are reviewing with the Department of Justice the provisions and considering whether there is a need to add an express provision in the Bill to require the FRC to give the relevant person a reasonable opportunity of being heard during the preparation of investigation/enquiry reports and before its publications. It is always our objective to ensure that the Bill is compatible with the Basic Law, including the provisions concerning human rights enshrined in the Hong Kong Bill of Rights.
6.3	SCCLR	Expresses concern about the appropriateness of empowering the FRC to publish AIB/FRRC investigation reports.	See 6.2 above.
6.4	Oscar WONG	<ul style="list-style-type: none"> ● The FRC's power to publish reports should be exercised with due care and the publication of reports should not prejudice subsequent proceedings or those persons affected by the publication. ● It would be helpful if the rights of the persons 	<ul style="list-style-type: none"> ● See 6.2 above. ● See 4.20 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		being affected can be further elaborated, for example, their right to be given reasonable opportunity to make representation prior to the publication of the report.	
6.5	E&Y	<ul style="list-style-type: none"> ● Clauses 35(4)(a)(i) and 47(4)(a)(i) require the FRC's consideration of whether or not the publication of an FRC investigation report may adversely affect "any criminal proceedings before a court or magistrate". The scope should be extended to include "any civil proceedings". ● Clauses 35 and 47 should include a requirement for the FRC to inform the affected auditors, reporting accountant, persons, etc of an intention to publish the report. There should be provisions for the affected parties to make representation and submissions to the FRC in respect of such a situation. The FRC should then be required to take these submissions into account in deciding whether or not to cause 	<ul style="list-style-type: none"> ● The proposal to include "any civil proceedings" is too wide since that could include any unrelated private law disputes between any persons named in the report with any other parties where the publication of the report may have no bearing on or relevance to on such private law disputes. In any case, the contents of any report published are not the conclusive evidence of the facts stated therein, and the auditor or other persons may adduce evidence to defend himself. ● See 6.2 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		publication of such an investigation report.	
6.6	HKICS	<ul style="list-style-type: none"> ● Apart from the factors provided in clause 35 for the FRC to take into account in deciding whether or not to cause an investigation report to be published, extreme care should be taken in determining the timing of publication of the report. ● Suggests that the FRC should issue guidelines on the circumstances and timing of the publication of investigation report with a view to balancing the need for transparency and protection of privacy. ● Suggests that an investigation report should only be published after the relevant authority or the Police has confirmed that it will take up and pursue the case. Consideration may also be given as to whether investigation reports relating to closed or suspended cases should be published. 	See 6.2 above. Where necessary, the FRC may exercise its power under clause 13 to publish guidelines to indicate the manner in which it proposes to exercise its powers under clauses 35 and 47.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
6.7	CIMA(HK)	<ul style="list-style-type: none"> ● There is inadequate protection offered to the parties under investigation. The FRC has immunity protection under clause 53, and clause 47(3) empowers the FRC to publish reports (or parts of them). ● Suggests that it should be mandatory for the AIB and FRRC to provide copies of draft reports to the individuals identified in those reports, and to consider any representations which might be made as a result, before such reports are formally submitted to the FRC. 	See 6.2 above.
7	<i>Miscellaneous (Part 5 of the Bill)</i>		
7.1	E&Y	<ul style="list-style-type: none"> ● Clause 51(3)(b)(ix) permits the FRC to disclose information to the Official Receiver. Clause 51(3)(c) permits the FRC to disclose information to a person who is a liquidator or provisional liquidator appointed under the Companies Ordinance. ● The disclosure of FRC investigation information or reports to a liquidator or provisional liquidator 	See 3.51 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>is wholly inappropriate. The purpose of an FRC investigation is different from a liquidator's purpose. It is inequitable that the investigative and other powers of the FRC should be available to liquidators in the pursuit of litigation against auditors. Furthermore, an FRC investigation report may contain information, and may be prepared with access to people, to which a liquidator may not be permitted access.</p> <ul style="list-style-type: none"> ● FRC reports should not be sent to the Official Receiver who is essentially in the position of a liquidator and/or would be able to make such FRC investigation information or reports available to a liquidator. 	
7.2	OPCPD	<ul style="list-style-type: none"> ● Although the Bill has made express provision under clause 51(8) that the duty of secrecy does not affect the operation of section 44(8) of the Personal Data (Privacy) Ordinance (PD(P)O) in relation to disclosure for the purpose of an investigation by the Commissioner, section 44(8) applies only when the Commissioner summons the person to furnish information and the Commissioner may not necessarily exercise such 	<ul style="list-style-type: none"> ● Section 44(1) of the PDPO provides that the Commissioner may require a person <i>whom he summoned before him</i> to produce any document or thing which, in the opinion of the Commissioner, is relevant to the investigation and which may be in the possession or under the control of any such person. Section 44(8) of the PDPO declares that no obligation to maintain secrecy or other restriction, imposed by law, upon the disclosure of

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>power in each and every complaint case especially when requesting for information in the preliminary enquiry stage.</p> <ul style="list-style-type: none"> ● It is advisable to include the Commissioner also under clause 51(3)(b) of the Bill so that the Commissioner falls within the excepted category 	<p>any information or documents that is or has been in the possession or under the control of any person referred to in section 44(1) of PDPO shall apply to its disclosure for the purposes of the Commissioner's investigation. To avoid any incompatibility with section 44(8) of the PDPO, clause 51(8) of the Bill expressly provides that the secrecy provision in clause 51(1) of the Bill does not affect the operation of section 44(8) of the PDPO. In other words, the FRC shall accede to the request for the production of any information when the Commissioner exercises his powers under section 44(1) of the PDPO. Furthermore, clause 51(2)(e) provides that the FRC may disclose information <i>in accordance with a law or a requirement made under a law</i>. This should be sufficient as a gateway for the disclosure by the FRC to the Commissioner, should the Commissioner request production of information in accordance with the PDPO or any requirement under the PDPO.</p> <ul style="list-style-type: none"> ● This being the case, we do not see the need to put in place an additional disclosure gateway in clause 51(3) for the Commissioner. Moreover, it must

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		of persons to whom information may be disclosed without fear of breach of duty of secrecy.	be noted that inclusion of the reference to “the Commissioner” in the list of persons under clause 51(3)(b) of the Bill will put any disclosure by the FRC to the Commissioner subject to the <i>restrictions or conditions</i> set out in clauses 51(4) to (7), hence rendering clause 51(3)(b) incompatible with section 44(8) of the PDPO.
7.3	Ombudsman	Welcomes clause 51(8) which ensures that The Ombudsman's investigation powers will not be affected by the FRC's duty to maintain secrecy.	We have consulted the Office of The Ombudsman during the drafting of the Bill. Clause 51(8) has been added to the Bill to expressly provide that the secrecy provision in clause 51(1) of the Bill does not affect the operation of section 13(3) of The Ombudsman Ordinance (Cap. 397), which provides that, subject to certain exemptions, no obligation to maintain secrecy or other restriction, imposed by law, upon the disclosure of any information, document or other thing, that is or has been in the possession or under the control of an organization, shall apply to its disclosure for the purposes of an investigation under The Ombudsman Ordinance.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
7.4	ACCA(HK)	<ul style="list-style-type: none"> ● Clause 52 sets out the provisions in respect of the avoidance of conflict of interests. It does not explain what is meant by an “interest” in a listed entity. The Bill should refer to a “direct or indirect interest”, thereby including the interests of a spouse, a trust of which a member is a trustee, or any other person included in subclause (3)(b). ● Internal guidelines (possibly in the form of a staff code of conduct) should also be released to provide for a sufficient “cool down period” for any members and other persons performing any function of the FRC. The guidelines should stipulate a period after they have left the FRC 	<ul style="list-style-type: none"> ● Given the proposed powers of the FRC, there are strong policy reasons to put in place a proper system to ensure that members or employees of the FRC, or other persons performing a function or exercising a power under the Bill are not involved in any possible conflict of interest, as such conflicts, whether genuine or perceived, would undermine the credibility of the FRC and the effectiveness of the whole new set-up. As the FRC's powers are closely modelled on sections 179 and 183 of the SFO, in the drafting of the Bill we have made reference to section 379 of the SFO to devise the declaration regime in relation to conflict of interests. However, in the light of the concerns expressed, we will reconsider the proportionality of the proposed provisions and, if considered appropriate, make revised proposals in due course for Members' consideration. ● The FRC may issue internal guidelines to indicate arrangement such as staff code of conduct. We consider that matters relating to, say, the post-appointment sanitization period of any members of the FRC and other persons performing any function of the FRC should be determined by

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		during which they may not work for an employer with whom they had involvement through the FRC.	the appointment authority and set out in the appointment contract instead of in the legislation. It is our policy objective to ensure that the terms and conditions of the appointments of the relevant persons would contribute to the public confidence in the credibility of the FRC.
7.5	LSHK	<ul style="list-style-type: none"> ● The proposed provisions in clause 52 may be too harsh. There are three points of concern: <ul style="list-style-type: none"> (a) The proposed provisions apply to members of the FRC, the AIB, the FRRC, committees established by the FRC and persons who perform a function under the FRC Ordinance. The list of interest to be declared is very extensive. For example, a person must declare his interest in a matter if the matter relates to another person whom he knows is or was a client of a third person who is or was his associate; (b) The consequence of contravention of the provision, including omission, is severe (i.e. a fine of \$1,000,000 and imprisonment for two years) (clause 52(7)). Persons 	See 7.4 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>appointed to serve on the governing bodies of many other statutory boards are not subject to the same onerous disclosure obligations and severe sanctions, e.g. MPFA and Town Planning Board; and</p> <p>(c) Given the onerous disclosure obligations and severity of the sanction, it may be difficult to persuade sufficient number of qualified and suitable candidates to take up the appointment as members of the FRC, the AIB and the FRRC.</p> <ul style="list-style-type: none"> ● Suggests that the Administration should review the disclosure obligations and sanctions in clause 52. 	
7.6	HKICPA	Consideration should be given to enunciating the general principle of avoiding bias and then providing examples of conflicts in clause 52.	See 7.4 above.
7.7	Peter WONG	<ul style="list-style-type: none"> ● In clause 52, there has been an attempt to be all inclusive in defining what are the conflicts. Such attempt is doomed to failure because it is impossible to foresee all circumstances, 	See 7.4 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>particularly in the future.</p> <ul style="list-style-type: none"> ● Suggests to enunciate the principle which is “that it is to avoid bias” and then set out examples to illustrate what are considered conflicts. 	
7.8	Deloitte	<p>Several subclauses of clause 52 are exceptionally wide and confusing. Examples are:</p> <ul style="list-style-type: none"> ● Subclause (2) provides that if a person (i.e. a member of the FRC, the AIB, the FRRC or a committee established by the FRC, or a person who performs a function under the FRC Ordinance) is required to consider a matter in which he has an interest, he shall immediately disclose the nature of the interest to the FRC. However, when a matter first comes before the FRC, a member might not appreciate that there is a conflict of interest until further facts are disclosed. Hence, a member should only be required to disclose an interest immediately when he becomes aware of it. ● Under subclause (3)(b)(iv), a person has an interest in a matter if it relates to another person 	See 7.4 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>whom he knows is or was a client of a third person by whom he is or was employed; or who is or was his associate. This potentially could involve a huge range of persons. The problem is further compounded when one is taken to the definition of "associate" in subclause (9) which is also very wide. In this connection, subclause (9)(k) is far too wide because it relates not only to directors of a corporation and its related corporations but, in respect of the related corporations, even extends to employees. The range of conflict of interests should be more tightly drawn.</p>	
7.9	E&Y	<ul style="list-style-type: none"> ● Given the nature of the type of investigations undertaken by the FRC, which may be complex, or involve an ongoing widening of focus and ongoing clarification of the situations and relationships being investigated, it may not immediately be apparent to an FRC member that a conflict of interest exists which requires disclosure under clause 52(2). ● The wording of clause 52(2) should be extended to include wording along the lines of "when the 	See 7.4 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		FRC member becomes aware, or reasonable grounds exist for him to become aware" that he is required to consider a matter in which he has an interest.	
7.10	OPCPD	<ul style="list-style-type: none"> ● Clause 54 provides that an auditor who communicates in good faith to the FRC any information or opinion on a specified matter is exempt from civil liability by reason of such communication. Since communication might involve the disclosure of personal data, the immunity so conferred will affect the operation of other statutory provisions where civil liability attaches, such as section 66 of the PD(P)O. This anomaly is undesirable in view of the powers given to the FRC to apply for court orders or search warrants to search and seize documents. ● The auditor who communicates with the FRC is no different from other informants who are still obliged to observe the requirements of the PD(P)O in their capacity as data users and be accountable for their own actions. The exemption given under section 58(2) of the PD(P)O is already sufficient to afford the 	<p>The development of financial markets and the increasing complexity of financial transactions have provided greater scope for persons responsible for fraud and other questionable practices to disguise the true nature of their activities. The past or present auditors and reporting accountants, in the course of carrying out their duties, may identify the possibility of a fraud or an irregularity/non-compliance. In such a circumstance, they may wish to serve the public interest by reporting their concerns to the FRC. The immunity referred to in clause 54 of the Bill is thus necessary as the auditors or reporting accountants "blowing the whistle", albeit in good faith, may face a civil claim (whether arising in contract, tort, defamation, equity or otherwise) brought by the listed entity in question for, among other things, breach of confidentiality and, consequently, suffer financial loss.</p> <p>Bearing in mind the aftermath of the corporate scandals in other parts of the world over the past</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
		<p>informant protection in disclosing information to the FRC. The immunity proposed in the Bill, if improperly handled, is a potential threat to personal data privacy.</p> <p><i>(Remarks: Sections 58 and 66 of the PD(P)O are attached in Appendix II.)</i></p>	<p>few years which have revealed the potential repercussions of auditors' irregularities and questionable financial reporting, we consider it justifiable to put in place this immunity provision, which is modelled on section 381 of the SFO and is similar to section 42A of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and section 53D of Insurance Companies Ordinance (Cap. 41).</p> <p>We cannot merely rely on the exemption under section 58(2) of the PDPO, which only relates to the relevant data protection principles under the PDPO. It does not cover other types of civil liability arising from communication with the FRC by the auditors or reporting accountants.</p>
7.11	BCCHK	Auditors should be able to have immunity in reporting to the FRC on any suspected fraud or irregularities in current or previous audits.	Noted. See 7.10 above.
7.12	Members of SFC's PSG	Enquire about whether there would be whistleblower protection provisions in the Bill, which are important for staff of audit firms and listed companies.	Noted. See 7.10 above.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
7.13	HKICPA	Consideration needs to be given to whether clause 58 (about destruction of documents) should be extended to require evidence to be kept upon the conclusion of an AIB/FRC investigation until either the HKICPA decides whether to prosecute or the prosecution (and any appeal) is concluded.	Clause 58 provides for an offence that targets at any person who intends to conceal any facts or matters from the investigator. This has nothing to do with the period for which the records or documents may be retained. If an investigator retains the records or documents under a warrant issued under clause 34, clause 34(4) deals with the period for which the records or documents may be retained by the investigator.
8	<i>Consequential and related amendments (Part 6 of the Bill)</i>		
8.1	HKICPA	Guidance should be given under clause 71 as to the level of costs to be awarded.	Clause 71 seeks to amend section 35(1) of the PAO to empower a Disciplinary Committee to order the certified public accountant to pay to the FRC the sum the Committee <i>considers appropriate</i> for the costs and expense in relation or incidental to the investigation <i>reasonably incurred</i> by the FRC. There is no existing provision under section 35(1) of the PAO to provide guidance as to the level of costs in relation to a Disciplinary Committee's power to order the payment of the investigation costs. The Bill does not alter this status quo. A certified public accountant aggrieved by an order made in respect of him under section 35(1) of the PAO may appeal to the Court of Appeal under

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
			section 41(1) of the PAO.
8.2	Ombudsman	Welcomes the inclusion of the FRC in the schedule of public organizations to be subject to The Ombudsman's jurisdiction (clause 76). This will enable members of the public who feel aggrieved by the administrative acts of the FRC to put their complaint to The Ombudsman for investigation if warranted.	We welcome The Ombudsman's agreement to the proposal of including the FRC in the jurisdiction of The Ombudsman Ordinance. This is a "checks and balances" measure to ensure that the FRC maintains a fair and efficient administration.
8.3	OPCPD	<p>Clause 79 amends section 2(1) of the PD(P)O to add the FRC under the definition of "financial regulator". There is no objection in principle to the proposed amendment insofar as the functions of the FRC can satisfy the CE to include protecting members of the public against financial loss arising from dishonesty, incompetence, malpractice or seriously improper conduct by persons concerned in matters allowed under section 58(3) of the PD(P)O. The exemptions afforded under section 58(1)(f)(ii) and (g) could avail the FRC in appropriate cases.</p> <p><i>(Remarks: Sections 2(1) and 58 of the PD(P)O are attached in Appendix II.)</i></p>	Noted.

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
9	<i>Other comments</i>		
9.1	E&Y	<p>Definitions of “associated undertaking” and “relevant undertaking” (clause 2) and “relevant requirement” (Part 1 of Schedule 1 to the Bill) all include similar lists of the relevant accounting standards requirements and the Listing Rules. The drafting of these provisions should set out the following details:</p> <ul style="list-style-type: none"> ● the following accounting standards - <ul style="list-style-type: none"> (a) the standards of accounting practices issued...under section 18A of the Professional Accountants Ordinance; (b) the International Financial Reporting Standards issued by the International Accounting Standards Board; or (c) any other generally accepted accounting principles allowed for usage under the Listing Rules; and ● the Listing Rules. 	<p>For the purpose of the definitions of “relevant requirements”, it is not necessary to deal with the question as to whether or not a set of accounting standards are mutually exclusive to the others. In Part 1 of Schedule 1, “<i>relevant requirement</i>” in relation to a “<i>relevant financial report</i>” means an accounting requirement as to the matters or information to be included in the report, as provided under the CO, the Listing Rules, the standards of accounting practice issued under section 18A of the PAO, the International Financial Reporting Standards, <i>or</i> other accounting principles allowed for usage under the Listing Rules. If the CO, the Listing Rules, or the various types of accounting standards or principles does not provide for any accounting requirement in relation to the particular “relevant financial report”, it is not necessary to consider that instrument in the context of the definition.</p>

	Name of Organization /Individual	Views of organizations/individuals on major issues of the Bill	Administration's responses
9.2	David GUNSON	Trustee investment law reform must be undertaken to make a success of the FRC Ordinance.	The major objective of the Bill is to establish the FRC, which is tasked to (a) investigate irregularities of auditors of listed entities; and (b) make enquiries into financial reports of such entities to ensure that they comply with the relevant legal, accounting and regulatory requirements. We would forward the comments relating to the trustee investment laws, tax laws and tax avoidance laws, which are separate matters outside the scope of the Bill, to the relevant departments for consideration.

Note : The “views of organizations/individuals on major issues of the Bill” column was summarized by the Secretariat of the Bills Committee, for response by the Administration.

27 October 2005

- ~~(4) (a) 凡紀律委員會依據第(3)款解散，以下條文即適用~~
- ~~(i) 在符合(b)段的規定下，理事會須同時成立另一個紀律委員會，以處理解散的委員會曾負責的投訴；及~~
 - ~~(ii) 在處理該投訴時，依據第(i)節的規定成立的紀律委員會須重新處理該投訴；據此，該委員會無須顧及在根據第(3)款被解散前曾負責該投訴的委員會的程序。~~
 - ~~(b) 凡紀律委員會根據第(3)款解散，則曾是該解散的委員會的委員，並曾以任何方式參與其程序的人，均沒有資格成為依據(a)(i)段的規定成立的紀律委員會的委員。~~

~~(由 1994 年第 96 號第 21 條增補)~~

34. 紀律條文

- (1) 如有投訴——
- (a) 指某會計師—— (由 2004 年第 23 號第 54 條修訂)
- (i) 曾被裁定犯有《刑事罪行條例》(第 200 章)第 V 部 (宣誓下作假證供) 所訂的罪行；
 - (ii) 曾在香港或其他地方被裁定犯有涉及不誠實行為的罪行；
 - (iii) 不論是否以會計師的身分—— (由 2004 年第 23 號第 54 條修訂)
 - (A) 捏造或安排捏造任何文件；
 - (B) 就任何文件作出關鍵性的陳述，而該陳述是該會計師明知是虛假的或不相信是真實的；
 - (iv) 在進行其專業工作時曾有疏忽行為；
 - (v) 沒有遵從或忽略遵從根據第 32F(2) 條發出的任何指示而無合理辯解，而該指示是執業審核委員會規定其遵從的；
 - (vi) 沒有或忽略遵守、維持或以其他方式應用專業標準；
 - (vii) 沒有遵從或忽略遵從調查委員會就該會計師而根據第 42D 條所作的任何規定而無合理辯解；
 - (viii) 曾犯有專業上的失當行為；

- ~~(4) (a) Where a Disciplinary Committee is dissolved pursuant to subsection (3), the following shall apply—~~
- ~~(i) subject to paragraph (b), the Council shall at the same time constitute another Disciplinary Committee to deal with the complaint with which the dissolved committee was concerned; and~~
 - ~~(ii) in dealing with the complaint, the Disciplinary Committee constituted pursuant to the requirement of subparagraph (i) shall deal with it afresh and, accordingly, it shall not have any regard to the proceedings of the committee which before its dissolution under subsection (3) was concerned with the complaint.~~
 - ~~(b) Where a Disciplinary Committee is dissolved under subsection (3), a person who was a member of the dissolved committee and who participated in any way in its proceedings shall not be eligible for membership of the Disciplinary Committee constituted pursuant to the requirements of paragraph (a)(i).~~

~~(Added 96 of 1994 s. 21)~~

34. Disciplinary provisions

- (1) A complaint that—
- (a) a certified public accountant— (Amended 23 of 2004 s. 54)
- (i) has been convicted of any offence under Part V (Perjury) of the Crimes Ordinance (Cap. 200);
 - (ii) has been convicted in Hong Kong or elsewhere of any offence involving dishonesty;
 - (iii) whether as a certified public accountant or not— (Amended 23 of 2004 s. 54)
 - (A) falsified or caused to be falsified any document;
 - (B) made any statement which is material and which he knows to be false or does not believe to be true, in respect of any document;
 - (iv) has been negligent in the conduct of his profession;
 - (v) without reasonable excuse, failed or neglected to comply with any direction issued under section 32F(2) and with which he was required by the Practice Review Committee to comply;
 - (vi) failed or neglected to observe, maintain or otherwise apply a professional standard;
 - (vii) without reasonable excuse, failed or neglected to comply with any requirement made under section 42D in relation to him by an Investigation Committee;
 - (viii) has been guilty of professional misconduct;

- (ix) 拒絕遵從或忽略遵從理事會訂立的任何附例或規則的條文，或理事會合法地作出的任何指示；
- (x) 犯不名譽的行為；
- (xi) 在作為執業法團的董事時，以公司董事或看來是公司董事的身分提供服務，而在提供該項服務時，該公司並不名列註冊紀錄冊第 II 部內；或
- (xii) 作為上述的董事，而在執業法團在專業彌償保險方面根本沒有受保或受保程度未達本條例規定時，以該執業法團董事的身分從事會計執業；

(b) 指某執業法團——

- (i) 或其任何董事——
 - (A) 捏造或安排捏造任何文件；
 - (B) 就任何文件作出關鍵性的陳述，而該陳述是該執業法團的任何董事明知是虛假的或不相信是真實的；
- (ii) 沒有遵從第 28D(6)(a) 或 (7) 條所提述的規定，或停止遵從或沒有遵從第 28D(2)(b) 或 (c) 條適用於該執業法團的任何規定；
- (iii) 以一公司名稱提供服務，而該名稱並非當時就該執業法團而列於註冊紀錄冊上的名稱；
- (iv) 作為上述的執業法團，而在專業彌償保險方面根本沒有受保或受保程度未達本條例規定的情況下從事會計執業；或
- (v) 作出或不作出任何事情，而假若該執業法團是一名個人會計師，作出或不作出該等事情即會被個別人士合理地視為不名譽的行為，

則該投訴須向註冊主任提出，而註冊主任須將該投訴呈交理事會，理事會可酌情決定，但須在符合第 32D(7) 條的規定下將該投訴提交紀律小組。（由 1992 年第 14 號第 6 條修訂；由 2004 年第 23 號第 36 條修訂）

(IAAA) 如理事會決定不將有關投訴提交紀律小組，而投訴人因理事會的決定感到受屈，投訴人可要求理事會將該投訴提交紀律小組，而除非理事會認為未顯示有表面證據支持該投訴，或該投訴屬瑣屑無聊或無理纏擾，否則理事會須將該投訴提交紀律小組。（由 2004 年第 23 號第 36 條增補）

(IAA) 第 (1) 款 (a) 段第 (iv) 至 (ix) 節的條文在加以必要的變通後適用於執業法團；據此，除第 (1)(b) 款指明的理由外，亦可基於如此適用於執業法團的上述各節條

- (ix) refused or neglected to comply with the provisions of any bylaw or rule made or any direction lawfully given by the Council;
- (x) was guilty of dishonourable conduct;
- (xi) while a director of a corporate practice, rendered any service as, or purporting to be, a director of a company whose name did not appear in Part II of the register at the time when the service was rendered; or
- (xii) being such a director, practised accountancy as such a director at a time when the corporate practice was covered by professional indemnity insurance either not at all or not to the extent required by this Ordinance;

(b) a corporate practice—

- (i) or any of its directors—
 - (A) falsified or caused to be falsified any document;
 - (B) made any statement which is material and which any of its directors knows to be false or does not believe to be true, in respect of any document;
- (ii) failed to comply with a requirement referred to in section 28D(6)(a) or (7) or ceased or failed to comply with any requirement of section 28D(2)(b) or (c) applying to it;
- (iii) rendered any service under a company name other than the name which then appeared in relation to the practice in the register;
- (iv) being such a practice, practised accountancy without being covered by professional indemnity insurance at all or to the extent required by this Ordinance; or
- (v) did or omitted to do something which, were the practice an individual certified public accountant, would reasonably be regarded as being dishonourable conduct by an individual,

shall be made to the Registrar who shall submit the complaint to the Council which may, in its discretion but subject to section 32D(7), refer the complaint to the Disciplinary Panels. (Amended 14 of 1992 s. 6)

(IAAA) If the Council decides not to refer the complaint to the Disciplinary Panels, the complainant who is aggrieved by the Council's decision may request the Council to refer the complaint to the Disciplinary Panels, whereupon the Council shall, unless it is of the opinion that no prima facie case has been shown for the complaint, or that the complaint is frivolous or vexatious, refer the complaint to the Disciplinary Panels. (Added 23 of 2004 s. 36)

(IAA) The provisions of subparagraphs (iv) to (ix) of paragraph (a) of subsection (1) shall apply mutatis mutandis in relation to a corporate practice and accordingly, in addition to those specified in subsection (1)(b), a complaint

文所指明的任何 1 項或多於 1 項理由，根據第 (1) 款提出針對某執業法團的投訴。
(由 1995 年第 85 號第 16 條增補)

(1A) 凡註冊主任有理由相信第 (1)(a) 或 (b) 款適用於某會計師或執業法團或按第 (1AA) 款而適用的第 (1)(a) 款適用於某會計師或執業法團，則註冊主任須將事實呈交理事會，而理事會可酌情決定將投訴提交紀律小組。(由 1977 年第 22 號第 12 條增補。由 1985 年第 14 號第 10 條修訂)

(2) 就第 (1)(a)(x) 及 (b)(v) 款而言，“不名譽的行為”(dishonourable conduct) 指會計師的作為或不作為，不論是否在履行專業工作的過程中或以會計師的身分作出，而該作為或不作為會合理地被視為損及或相當可能會損及該會計師本身、公會或會計師專業的聲譽。(由 2004 年第 23 號第 36 條修訂)

(3) 在執業審核委員會根據第 32D(5) 條作出投訴的任何時候身為該委員會委員的人，不得以紀律委員會委員的身分參與關乎該投訴的任何程序。(由 1992 年第 14 號第 6 條增補)

(由 1994 年第 69 號第 22 條修訂；由 1995 年第 85 號第 16 條修訂；由 2004 年第 23 號第 54 條修訂)

~~35. 紀律委員會的紀律處分權力~~

(1) 如紀律委員會信納根據第 34 條向其提交的投訴證明屬實，則該紀律委員會可酌情決定作出以下任何 1 項或多於 1 項命令——

- (a) 將會計師的姓名或名稱從註冊紀錄冊中永久刪除或刪除一段紀律委員會認為適當的時間的命令；
- (b) 譴責會計師的命令；
- (c) 會計師須向公會繳付不超過 \$500,000 罰款的命令；
- (d) 會計師須繳付根據第 VA 部針對他而進行的調查的費用及開支和附帶費用及開支的命令；
- (da) 取消會計師獲發的執業證書的命令；(由 2004 年第 23 號第 37 條增補)
- (db) 會計師永久或在紀律委員會認為合適的期間內不獲發執業證書的命令，(由 2004 年第 23 號第 37 條增補)
- (e) (由 2004 年第 23 號第 37 條廢除)

~~而紀律委員會可在任何情況下~~ (由 2004 年第 23 號第 37 條修訂)

under subsection (1) may be made against such a practice on any 1 or more of the grounds specified in those subparagraphs as so applied. (Added 85 of 1995 s. 16)

(1A) Where the Registrar has reason to believe that subsection (1)(a) or (b), or subsection (1)(a) as applied by subsection (1AA), applies to a certified public accountant or a corporate practice, he shall submit the facts to the Council which may, in its discretion, refer the complaint to the Disciplinary Panels. (Added 22 of 1977 s. 12. Amended 14 of 1985 s. 10)

(2) For the purposes of subsection (1)(a)(x) and (b)(v), “dishonourable conduct” (不名譽的行為) means an act or omission of a certified public accountant, whether or not in the course of carrying out professional work or as a certified public accountant, which would reasonably be regarded as bringing or likely to bring discredit upon the certified public accountant himself, the Institute or the accountancy profession.

(3) A person who was a member of the Practice Review Committee at any time when a complaint was made by it under section 32D(5) shall not take part as a member of a Disciplinary Committee in any proceedings relating to such complaint. (Added 14 of 1992 s. 6)

(Amended 69 of 1994 s. 22; 85 of 1995 s. 16; 23 of 2004 ss. 36 & 54)

~~35. Disciplinary powers of Disciplinary Committee~~

(1) If a Disciplinary Committee is satisfied that a complaint referred to it under section 34 is proved, the Disciplinary Committee may, in its discretion make any one or more of the following orders—

- (a) an order that the name of the certified public accountant be removed from the register, either permanently or for such period as it may think fit;
- (b) an order that the certified public accountant be reprimanded;
- (c) an order that the certified public accountant pay a penalty not exceeding \$500,000 to the Institute;
- (d) an order that the certified public accountant pay the costs and expenses of and incidental to an investigation against him under Part VA;
- (da) an order that the practising certificate issued to the certified public accountant be cancelled; (Added 23 of 2004 s. 37)
- (db) an order that a practising certificate shall not be issued to the certified public accountant either permanently or for such period as the Disciplinary Committee may think fit, (Added 23 of 2004 s. 37)
- (e) (Repealed 23 of 2004 s. 37)

and the Disciplinary Committee may in any case— (Amended 23 of 2004 s. 37)

42D. 調查委員會在其程序方面的權力

(1) 以下條文在調查委員會的程序方面適用——

- (a) 本段對其適用的任何人，如有關的調查委員會合理地相信有任何紀錄或其他文件是在其管有或控制之下，而該等紀錄或文件是該委員會覺得載有或相當可能載有與該委員會的程序有關的資料，則除第(5)款另有規定外，須——
 - (i) 在該委員會合理地要求的時間內及在合理地要求的地點，向該委員會出示或讓其取用該委員會指明的任何紀錄或其他文件，而該等紀錄或文件均屬該委員會指明的類別或種類，並且是在該人的管有或控制之下的任何紀錄或其他文件，而在上述任何一種情況下，該紀錄或其他文件均是與該程序有關的或是該委員會覺得是與該程序有關的；
 - (ii) 在該委員會要求下，就為遵從根據第(i)節作出的要求而出示或讓該委員會取用的任何物件，給予該委員會或委員該委員會指明的解釋或進一步的詳情；
 - (iii) 給予該委員會該人合理地能給予的與該委員會的程序相關的一切協助；
- (b) 凡與調查委員會的程序有關的任何資料或事宜是以非可閱形式記錄的，則(a)段所賦予要求出示任何紀錄或其他文件的權力，須包括要求出示任何該等資料或事宜或該等資料或事宜的有關部分的可閱形式複製本的權力；
- (c) 調查委員會可查閱、檢查或抄錄或複印根據(a)或(b)段的要求出示的紀錄或文件，或撮錄或摘錄該等紀錄或文件的內容；
- (d) 凡——
 - (i) 任何人為本條的目的提供任何紀錄或文件的副本；
 - (ii) 在行使根據本條賦予的權力下印製任何紀錄或文件的副本，並在印製該等副本時使用任何人的影印機或其他設施，

42D. Powers of Investigation Committee as regards its proceedings

(1) The following provisions shall apply as regards the proceedings of an Investigation Committee—

- (a) any person to whom this paragraph applies, and whom the relevant Investigation Committee reasonably believes to have in his possession or under his control any record or other document which appears to that Committee as containing or being likely to contain information relevant to the proceedings of the Committee, shall subject to subsection (5)—
 - (i) produce to the Committee or afford to the Committee access to, any record or other document specified by the Committee which is of a class or description so specified and which is in his possession or under his control being in either case a record or other document which is or appears to the Committee to be relevant to the proceedings, within such time and at such place as the Committee may reasonably require;
 - (ii) if so required by the Committee, give to it or him such explanation or further particulars in respect of anything produced or to which access is given in compliance a requirement under subparagraph (i) as the Committee shall specify;
 - (iii) give to the Committee all assistance in connection with its proceedings which he is reasonably able to give;
- (b) where any information or matter relevant to the proceedings of an Investigation Committee is recorded otherwise than in legible form, any power to require the production of any record or other document conferred under paragraph (a), shall include the power to require the production of a reproduction of any such information or matter or of the relevant part of it in legible form;
- (c) an Investigation Committee may inspect, examine or make copies of or take any abstract of or extract from a record or document which may be required to be produced under paragraph (a) or (b);
- (d) where—
 - (i) a copy of any record or document is supplied by any person for the purposes of this section;
 - (ii) a copy of any record or document is made in the exercise of any power conferred under this section and a photocopying machine or other facility of a person is used to make such copy,

則公會須向有關人士補還為印製該等副本而招致的合理影印或其他費用；

- (e) 憑藉根據第 42E 條作出的轉授而根據本條行使任何權力的人，在受其行使權力影響的人要求下，須將第 42E 條提述的有關文書或其副本出示供該人查閱。

(2) 第 (1)(a) 款適用於——

- (a) 調查委員會的程序所關乎的會計師、執業會計師事務所或執業法團，而——
- (i) 如該程序關乎會計師，第 (1)(a) 款亦適用於該會計師的僱主及前僱主（如有的話）及該會計師的任何僱員或前僱員；及
 - (ii) 如該程序關乎執業會計師事務所或執業法團，第 (1)(a) 款亦適用於該事務所或執業法團的任何僱員或前僱員；及
- (b) (a) 段指明者以外的任何會計師、執業會計師事務所或執業法團，以及該會計師、事務所或執業法團的任何屬會計師或公會註冊學生的任何僱員或前僱員。（由 2004 年第 23 號第 47 條代替）

(3) 任何人如遵從調查委員會憑藉第 (1) 款所作的要求，則該人不得僅因該項遵從而招致對任何其他人的任何法律責任。

(4) 任何人不得以遵從調查委員會根據第 (1) 款所作的要求可能會導致其入罪為理由，而獲豁免遵從該要求。但如該人在回答根據第 (1)(a)(ii) 款向其提出的問題前，聲稱該答案可能會導致其入罪，則該問題及答案均不得在刑事法律程序中接納為針對該人的證據。

(5) 本條的任何條文不得用作強逼任何人出示載有法律執業者以法律執業者身分所發出或所獲得而享有特權的通訊的紀錄或文件。

the Institute shall reimburse the person concerned the reasonable photocopying or other expenses incurred in making such copy;
(Amended 23 of 2004 s. 54)

- (e) a person exercising any power under this section by virtue of a delegation under section 42E shall, if so required by a person affected by such exercise, produce for inspection by such person the relevant instrument referred to in section 42E or a copy thereof.

(2) Subsection (1)(a) applies—

- (a) to the certified public accountant, firm of certified public accountants (practising) or corporate practice to whom the Investigation Committee's proceedings relate and—
- (i) where the proceedings relate to a certified public accountant, also to that accountant's employer and former employer (if any) and to any employee or former employee of such accountant; and
 - (ii) where the proceedings relate to a firm of certified public accountants (practising) or corporate practice, also to any employee or former employee of such firm or corporate practice; and
- (b) to any certified public accountant, firm of certified public accountants (practising) or corporate practice other than those specified in paragraph (a), and any employee or former employee of such accountant, firm or corporate practice who is a certified public accountant or a student registered with the Institute. (Replaced 23 of 2004 s. 47)

(3) A person who complies with a requirement of an Investigation Committee which is made by virtue of subsection (1) shall not incur any liability to any other person by reason only of the compliance.

(4) A person is not excused from complying with a requirement of an Investigation Committee under subsection (1) on the ground that to do so might tend to incriminate him but, where that person claims, before he answers a question put to him under subsection (1)(a)(ii), that the answer might tend to incriminate him, neither the question nor the answer is admissible in evidence against him in criminal proceedings.

(5) Nothing in this section shall be taken to compel the production by a person of a record or document containing a privileged communication by or to a legal practitioner in that capacity.

第 486 章

個人資料(私隱)條例

本條例旨在在個人資料方面保障個人的私隱，並就附帶事宜及相關事宜訂定條文。

[第 II 部、第 71 條(以涉及附表 2 為限)及附表 2	}	1996 年 8 月 1 日	1996 年第 343 號法律公告
其他條文，但第 30 及 33 條除外	}	1996 年 12 月 20 日	1996 年第 514 號法律公告
第 30 條	}	1997 年 8 月 1 日	1997 年第 409 號法律公告]

第 I 部

導言

1. 簡稱及生效日期

- (1) 本條例可引稱為《個人資料(私隱)條例》。
- (2) 本條例自民政事務局局長以憲報公告指定的日期起實施。(由 1997 年第 362 號法律公告修訂)

2. 釋義

- (1) 在本條例中，除文意另有所指外——
- “文件”(document)除包括書面文件外，包括——
- (a) 包含視覺影像以外的資料的紀錄碟、紀錄帶或其他器件，而所包含的資料能夠在有或沒有其他設備的輔助下，從該紀錄碟、紀錄帶或器件重現；及
 - (b) 包含視覺影像的膠卷、紀錄帶或其他器件，而所包含的影像能夠在有或沒有其他設備的輔助下，從該膠卷、紀錄帶或器件重現；

CHAPTER 486

PERSONAL DATA (PRIVACY)

An Ordinance to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith.

[Part II, section 71 (as affects Schedule 2) and Schedule 2	}	1 August 1996	L.N. 343 of 1996
The other provisions, excluding sections 30 and 33	}	20 December 1996	L.N. 514 of 1996
Section 30	}	1 August 1997	L.N. 409 of 1997]

PART I

PRELIMINARY

1. Short title and commencement

- (1) This Ordinance may be cited as the Personal Data (Privacy) Ordinance.
- (2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Home Affairs by notice in the Gazette.

2. Interpretation

- (1) In this Ordinance, unless the context otherwise requires—
- “act” (作為) includes a deliberate omission;
- “adverse action” (不利行動), in relation to an individual, means any action that may adversely affect the individual's rights, benefits, privileges, obligations or interests (including legitimate expectations);
- “appointed day” (指定日) means the day appointed under section 1(2);
- “approved code of practice” (核准實務守則) means a code of practice approved under section 12;
- “code of practice” (實務守則) includes—

“使用”(use),就個人資料而言,包括披露或移轉該等資料;

“披露”(disclosing),就個人資料而言,包括披露自資料推斷所得的資訊;

“指明”(specified),就格式而言,指根據第 67 條指明;

“指定日”(appointed day)指根據第 1(2) 條指定的日子;

“訂明人員”(prescribed officer)指根據第 9(1) 條獲僱用或聘用的人;

“相當可能損害”(would be likely to prejudice)包括可能會損害;

“保障資料原則”(data protection principle)指在附表 1 列明的任何保障資料原則;

“查閱資料要求”(data access request)指根據第 18 條提出的要求;

“紀錄簿”(log book),就資料使用者而言,指由資料使用者根據第 27(1) 條備存及維持的紀錄簿;

“個人身分標識符”(personal identifier)指——

(a) 由資料使用者為其作業而編配予一名個人;及

(b) 就該資料使用者而言,能識辨該名個人的身分而不虞混淆,的標識符,但用以識辨該名個人的該人的姓名,則不包括在內;

“個人資料”(personal data)指符合以下說明的任何資料——

(a) 直接或間接與一名在世的個人有關的;

(b) 從該等資料直接或間接地確定有關的個人的身分是切實可行的;及

(c) 該等資料的存在形式令予以查閱及處理均是切實可行的;

“個人資料系統”(personal data system)指全部或部分由資料使用者用作收集、持有、處理或使用個人資料的任何系統(不論該系統是否自動化的),並包括組成該系統一部分的任何文件及設備;

“核准實務守則”(approved code of practice)指根據第 12 條核准的實務守則;

“核對程序”(matching procedure)指將為 1 個或 1 個以上的目的而取自 10 個或 10 個以上的資料當事人的個人資料與為其他目的而自該等資料當事人收集的個人資料比較的(用人手方法的除外),而——

(a) 所作比較(不論是全部的還是部分的)是為了產生和核實某些可(即時或於其後任何時間)用作對任何該等資料當事人採取不利行動的資料的;

(b) 所作比較產生和核實某些資料,而就該等資料而言可合理地相信將該等資料(即時或於其後任何時間)用作對任何該等資料當事人採取不利行動是切實可行的;

“核對程序要求”(matching procedure request)指根據第 31(1) 條提出的要求;

“enforcement notice”(執行通知) means a notice under section 50(1);

“financial regulator”(財經規管者) means any of—

(a) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66);

(b) the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571); (*Replaced 5 of 2002 s. 407*)

(c) a recognized clearing house, a recognized exchange company, a recognized exchange controller or a recognized investor compensation company within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571); (*Replaced 5 of 2002 s. 407*)

(d) a person authorized under Part III of the Securities and Futures Ordinance (Cap. 571) to provide automated trading services as defined in Schedule 5 to that Ordinance; (*Replaced 5 of 2002 s. 407*)

(e)-(ea) (*Repealed 5 of 2002 s. 407*)

(f) the Insurance Authority appointed under section 4 of the Insurance Companies Ordinance (Cap. 41);

(g) the Registrar of Occupational Retirement Schemes appointed under section 5 of the Occupational Retirement Schemes Ordinance (Cap. 426);

(ga) the Mandatory Provident Fund Schemes Authority established by section 6 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); (*Added 4 of 1998 s. 14*)

(h) a person specified in a notice under subsection (7) to be a regulator for the purposes of this definition;

“inaccurate”(不準確), in relation to personal data, means the data is incorrect, misleading, incomplete or obsolete;

“inspection”(視察) means an inspection under section 36;

“investigation”(調查) means an investigation under section 38;

“log book”(紀錄簿), in relation to a data user, means the log book kept and maintained by the data user under section 27(1);

“matching procedure”(核對程序) means any procedure whereby personal data collected for 1 or more purposes in respect of 10 or more data subjects are compared (except by manual means) with personal data collected for any other purpose in respect of those data subjects where the comparison—

(a) is (whether in whole or in part) for the purpose of producing or verifying data that; or

(b) produces or verifies data in respect of which it is reasonable to believe that it is practicable that the data,

may be used (whether immediately or at any subsequent time) for the purpose of taking adverse action against any of those data subjects;

“財經規管者” (financial regulator) 指任何以下人士或機構——

- (a) 根據《外匯基金條例》(第 66 章) 第 5A 條委任的金融管理專員；
- (b) 《證券及期貨條例》(第 571 章) 第 3(1) 條提述的證券及期貨事務監察委員會； (由 2002 年第 5 號第 407 條代替)
- (c) 《證券及期貨條例》(第 571 章) 附表 1 第 1 部第 1 條所指的認可結算所、認可交易所、認可控制人或認可投資者賠償公司； (由 2002 年第 5 號第 407 條代替)
- (d) 根據《證券及期貨條例》(第 571 章) 第 III 部獲認可提供該條例附表 5 所界定的自動化交易服務的人； (由 2002 年第 5 號第 407 條代替)
- (e)-(ea) (由 2002 年第 5 號第 407 條廢除)
- (f) 根據《保險公司條例》(第 41 章) 第 4 條委任的保險業監督；
- (g) 根據《職業退休計劃條例》(第 426 章) 第 5 條委任的職業退休計劃註冊處長；
- (ga) 由《強制性公積金計劃條例》(第 485 章) 第 6 條設立的強制性公積金計劃管理局； (由 1998 年第 4 號第 14 條增補)
- (h) 屬根據第 (7) 款刊登的公告為本定義的目的所指明為規管者的人；

“第三者” (third party), 就個人資料而言, 指除以下人士外的任何人——

- (a) 資料當事人；
- (b) 就資料當事人而屬有關人士的人；
- (c) 資料使用者；或
- (d) 獲資料使用者為以下事情以書面授權的人——
 - (i) 在資料使用者的直接控制下收集、持有、處理或使用有關的資料；或
 - (ii) 代資料使用者收集、持有、處理或使用有關的資料；

“執行通知” (enforcement notice) 指第 50(1) 條下的通知；

“專員” (Commissioner) 指根據第 5(1) 條設立的個人資料私隱專員；

“處理” (processing), 就個人資料而言, 包括將資料修訂、擴增、刪去或重新排列 (不論是否藉自動化方法或其他方法)；

“提出要求者” (requestor), 就——

- (a) 查閱資料要求或改正資料要求而言, 指已提出該項要求的個人或代該名個人提出該項要求的有關人士；
- (b) 核對程序要求而言, 指已提出該項要求的資料使用者；

“matching procedure request” (核對程序要求) means a request under section 31(1);

“personal data” (個人資料) means any data—

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable;

“personal data system” (個人資料系統) means any system, whether or not automated, which is used, whether in whole or in part, by a data user for the collection, holding, processing or use of personal data, and includes any document and equipment forming part of the system;

“personal identifier” (個人身分標識符) means an identifier—

- (a) that is assigned to an individual by a data user for the purpose of the operations of the user; and
- (b) that uniquely identifies that individual in relation to the data user,

but does not include an individual's name used to identify that individual;

“practicable” (切實可行) means reasonably practicable;

“prescribed officer” (訂明人員) means a person employed or engaged under section 9(1);

“processing” (處理), in relation to personal data, includes amending, augmenting, deleting or rearranging the data, whether by automated means or otherwise;

“register” (登記冊) means the register of data users kept and maintained by the Commissioner under section 15(1);

“relevant data user” (有關資料使用者), in relation to—

- (a) an inspection, means the data user who uses the personal data system which is the subject of the inspection;
- (b) a complaint, means the data user specified in the complaint;
- (c) an investigation—
 - (i) in the case of an investigation initiated by a complaint, means the data user specified in the complaint;
 - (ii) in any other case, means the data user the subject of the investigation;
- (d) an enforcement notice, means the data user on whom the notice is served;

“relevant person” (有關人士), in relation to an individual (howsoever the individual is described), means—

- (a) where the individual is a minor, a person who has parental responsibility for the minor;
- (b) where the individual is incapable of managing his own affairs, a person who has been appointed by a court to manage those affairs;

(2) 凡——

- (a) 個人資料是為第 (1) 款所提述的目的而使用 (不論該等資料是否為該等目的而持有); 及
- (b) 第 3 保障資料原則的條文就該等使用而適用便相當可能會損害該款所提述的任何事宜,

該等資料獲豁免而不受第 3 保障資料原則的條文所管限, 而在為任何人違反任何該等條文而針對他進行的法律程序中, 如該人證明他當時有合理理由相信不如此使用該等資料便相當可能會損害任何該等事宜, 即為免責辯護。

(3) 就任何個人資料是否需有第 (1) 款下的豁免或曾否在任何時間需有第 (1) 款下的豁免的問題, 可由行政長官或政務司司長決定, 而一份由行政長官或政務司司長簽署並證明需有或曾在任何時間需有該項豁免的證明書, 即為該事實的證據。 (由 1997 年第 362 號法律公告修訂; 由 1999 年第 34 號第 3 條修訂)

(4) 就第 (2) 款而言, 一份由行政長官或政務司司長簽署的證明個人資料是為或曾為第 (1) 款所提述的任何目的而使用的證明書, 即為該事實的證據。 (由 1997 年第 362 號法律公告修訂; 由 1999 年第 34 號第 3 條修訂)

(5) 行政長官或政務司司長可在第 (3) 或 (4) 款所提述的證明書中, 就該證明書所關乎的個人資料及為該證明書所指明的理由, 指示專員不得進行視察或調查, 而在此情況下, 專員須遵從該項指示。 (由 1997 年第 362 號法律公告修訂; 由 1999 年第 34 號第 3 條修訂)

(6) 看來是第 (3) 或 (4) 款所提述的證明書的文件, 須獲收取為證據, 而在沒有相反證據的情況下, 該文件須當作為該等證明書。

(7) 在本條中——

“保安”(security) 包括防止或排拒無權進入香港及留在香港的人 (包括按照《入境條例》(第 115 章) 的條文被扣留的人) 進入香港及留在香港; (由 1997 年第 80 號第 103(1) 條修訂)

“國際關係”(international relations) 包括與任何國際組織的關係。

58. 罪行等

(1) 為——

- (a) 罪行的防止或偵測;

(2) Personal data are exempt from the provisions of data protection principle 3 in any case in which—

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.

(3) Any question whether an exemption under subsection (1) is or at any time was required in respect of any personal data may be determined by the Chief Executive or Chief Secretary for Administration; and a certificate signed by the Chief Executive or Chief Secretary for Administration certifying that the exemption is or at any time was so required shall be evidence of that fact. (Amended L.N. 362 of 1997; 34 of 1999 s. 3)

(4) For the purposes of subsection (2), a certificate signed by the Chief Executive or Chief Secretary for Administration certifying that personal data are or have been used for any purpose referred to in subsection (1) shall be evidence of that fact. (Amended L.N. 362 of 1997; 34 of 1999 s. 3)

(5) The Chief Executive or Chief Secretary for Administration may, in a certificate referred to in subsection (3) or (4), in respect of the personal data to which the certificate relates and for the reasons specified in that certificate, direct the Commissioner not to carry out an inspection or investigation and, in any such case, the Commissioner shall comply with the direction. (Amended L.N. 362 of 1997; 34 of 1999 s. 3)

(6) A document purporting to be a certificate referred to in subsection (3) or (4) shall be received in evidence and, in the absence of evidence to the contrary, shall be deemed to be such a certificate.

(7) In this section—

“international relations”(國際關係) includes relations with any international organization;

“security”(保安) includes the prevention or preclusion of persons (including persons detained in accordance with the provisions of the Immigration Ordinance (Cap. 115)) entering and remaining in Hong Kong who do not have the right to enter and remain in Hong Kong.

58. Crime, etc.

(1) Personal data held for the purposes of—

- (a) the prevention or detection of crime;

- (b) 犯罪者的拘捕、檢控或拘留；
- (c) 任何稅項的評定或收取；
- (d) 任何人所作的不合法或嚴重不當的行為、或不誠實的行為或舞弊行為的防止、排除或糾正 (包括懲處)；
- (e) 防止或排除因——
 - (i) 任何人輕率的業務經營手法或活動；或
 - (ii) 任何人所作的不合法或嚴重不當的行為、或不誠實的行為或舞弊行為，
 而引致的重大經濟損失；
- (f) 確定有關的資料當事人的品格或活動是否相當可能對以下事情有重大不利影響——
 - (i) 由該資料使用者執行法定職能所關乎的事情；或
 - (ii) 與本段憑藉第 (3) 款而適用的職能的執行有關的事情；或
- (g) 本段憑藉第 (3) 款而適用的職能的執行，

而持有的個人資料，在以下情況下獲豁免而不受第 6 保障資料原則及第 18(1)(b) 條的條文所管限——

- (i) 該等條文適用於該等資料便相當可能會損害本款所提述的任何事宜；或
- (ii) 該等條文適用於該等資料便相當可能會直接或間接識辨屬該等資料來源的人的身分。

(2) 凡——

- (a) 個人資料是為第 (1) 款所提述的目的而使用 (不論該等資料是否為該等目的而持有)；及
- (b) 第 3 保障資料原則的條文就該等使用而適用便相當可能會損害該款所提述的任何事宜，

則該等資料獲豁免而不受第 3 保障資料原則的條文所管限，而在為任何人違反任何該等條文而針對他進行的法律程序中，如該人證明他當時有合理理由相信不如此使用該資料便相當可能會損害任何該等事宜，即為免責辯護。

(3) 第 (1) 款 (f)(ii) 及 (g) 段適用於財經規管者的以下職能——

- (a) 保障公眾免受因以下事情導致的財政損失的職能——
 - (i) 屬——

- (b) the apprehension, prosecution or detention of offenders;
- (c) the assessment or collection of any tax or duty;
- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (e) the prevention or preclusion of significant financial loss arising from—
 - (i) any imprudent business practices or activities of persons; or
 - (ii) unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (f) ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on any thing—
 - (i) to which the discharge of statutory functions by the data user relates; or
 - (ii) which relates to the discharge of functions to which this paragraph applies by virtue of subsection (3); or
- (g) discharging functions to which this paragraph applies by virtue of subsection (3),

are exempt from the provisions of data protection principle 6 and section 18(1)(b) where the application of those provisions to the data would be likely to—

- (i) prejudice any of the matters referred to in this subsection; or
- (ii) directly or indirectly identify the person who is the source of the data.

(2) Personal data are exempt from the provisions of data protection principle 3 in any case in which—

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.

(3) Paragraphs (f)(ii) and (g) of subsection (1) apply to any functions of a financial regulator—

- (a) for protecting members of the public against financial loss arising from—
 - (i) dishonesty, incompetence, malpractice or seriously improper conduct by persons—

- (A) 從事銀行、保險、投資或其他財經服務的提供；
- (B) 從事公司的管理；
- (BA) 從事已根據《強制性公積金計劃條例》(第 485 章) 註冊的公積金計劃的管理； (由 1998 年第 4 號第 14 條增補)
- (C) 從事《職業退休計劃條例》(第 426 章) 所指的職業退休計劃的管理；或
- (D) 公司股東，
- 的人的不誠實行為、不勝任、不良行為或嚴重不當的行為；或
- (ii) 已獲或未獲解除破產令的破產人的行為；
- (b) 維持或促進提供 (a)(i)(A) 段所提述的任何服務的任何體系的一般穩定性或有效運作的職能；或
- (c) 為本款的施行而在第 (4) 款下的公告中指明的職能。
- (4) 行政長官可為第 (3) 款的施行藉憲報公告指明財經規管者的職能。 (由 1999 年第 34 號第 3 條修訂)
- (5) 現聲明——
- (a) 第(3)款的施行不得損害第 (1) 款 (a)、(b)、(c)、(d) 及 (f)(i) 段就財經規管者而施行的概括性；
- (b) 第(4)款下的公告是附屬法例。

59. 健康

與有關的資料當事人的身體健康或精神健康有關的個人資料，獲豁免而不受以下任何或所有條文所管限——

- (a) 第 6 保障資料原則及第 18(1)(b) 條的條文；
- (b) 第 3 保障資料原則的條文，

但上述豁免僅在以下情況適用——

- (i) 該等條文適用於該等資料便相當可能會對該資料當事人的身體健康或精神健康造成嚴重損害；或
- (ii) 該等條文適用於該等資料便相當可能會對任何其他個人的身體健康或精神健康造成嚴重損害。

60. 法律專業保密權

假如在法律上就某些資訊而享有法律專業保密權的聲稱是能夠成立的，包含該等資訊的個人資料獲豁免而不受第 6 保障資料原則及第 18(1)(b) 條的條文所管限。

- (A) concerned in the provision of banking, insurance, investment or other financial services;
- (B) concerned in the management of companies;
- (BA) concerned in the administration of provident fund schemes registered under the Mandatory Provident Fund Schemes Ordinance (Cap. 485); (Added 4 of 1998 s. 14)
- (C) concerned in the management of occupational retirement schemes within the meaning of the Occupational Retirement Schemes Ordinance (Cap. 426); or
- (D) who are shareholders in companies; or
- (ii) the conduct of discharged or undischarged bankrupts;
- (b) for maintaining or promoting the general stability or effective working of any of the systems which provide any of the services referred to in paragraph (a)(i)(A); or
- (c) specified for the purposes of this subsection in a notice under subsection (4).
- (4) For the purposes of subsection (3), the Chief Executive may, by notice in the Gazette, specify a function of a financial regulator. (Amended 34 of 1999 s. 3)
- (5) It is hereby declared that—
- (a) subsection (3) shall not operate to prejudice the generality of the operation of paragraphs (a), (b), (c), (d) and (f)(i) of subsection (1) in relation to a financial regulator;
- (b) a notice under subsection (4) is subsidiary legislation.

59. Health

Personal data relating to the physical or mental health of the data subject are exempt from the provisions of either or both of—

- (a) data protection principle 6 and section 18(1)(b);
- (b) data protection principle 3,

in any case in which the application of those provisions to the data would be likely to cause serious harm to the physical or mental health of—

- (i) the data subject; or
- (ii) any other individual

60. Legal professional privilege

Personal data are exempt from the provisions of data protection principle 6 and section 18(1)(b) if the data consist of information in respect of which a claim to legal professional privilege could be maintained in law.

~~作出該作為或從事該行為或在其受僱用過程中作出該類作為或從事該類行為，即為免責辯護。~~

~~(4) 為免生疑問，現聲明：本條不就刑事法律程序而適用。~~

66. 補償

(1) 除第(4)款另有規定外，任何個人如因符合以下說明的違反事項而蒙受損害，則該名個人有權就該損害向有關的資料使用者申索補償——

- (a) 遭違反的是本條例下的規定；
- (b) 違反規定者是資料使用者；及
- (c) 該違反規定事項全部或部分關乎個人資料而該名個人是資料當事人。

(2) 為免生疑問，現聲明：第(1)款所提述的損害可以是或可包括對感情的傷害。

(3) 在憑藉本條針對任何人提出的法律程序中，如證明以下事項，即為免責辯護——

- (a) 該人已採取在所有情況下屬合理所需的謹慎措施，以避免有關的違反規定事項發生；或
- (b) 在因有關的個人資料不準確而發生的有關違反規定事項的個案中，該個人資料準確地記錄有關的資料使用者從資料當事人或第三者處所收到或取得的資料。

(4) 凡因有關的個人資料不準確而發生第(1)款所提述的違反規定事項，並因此而導致有關的個人蒙受該款所提述的損害，則不得就緊接本條開始實施後1年期屆滿前的任何時間所發生的損害，根據該款獲支付補償。

第 X 部

雜項條文

67. 專員指明格式的權力

(1) 在符合第(2)款的規定下，專員可就本條例規定須符合指明格式的任何文件，及就為本條例的施行而須有的其他文件，訂明他認為合適的格式。

~~case may be, by an employee of his it shall be a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing that act or engaging in that practice, or from doing or engaging in, in the course of his employment, acts or practices, as the case may be, of that description.~~

~~(4) For the avoidance of doubt, it is hereby declared that this section shall not apply for the purposes of any criminal proceedings.~~

66. Compensation

(1) Subject to subsection (4), an individual who suffers damage by reason of a contravention—

- (a) of a requirement under this Ordinance;
- (b) by a data user; and
- (c) which relates, whether in whole or in part, to personal data of which that individual is the data subject,

shall be entitled to compensation from that data user for that damage.

(2) For the avoidance of doubt, it is hereby declared that damage referred to in subsection (1) may be or include injury to feelings.

(3) In any proceedings brought against any person by virtue of this section it shall be a defence to show that—

- (a) he had taken such care as in all the circumstances was reasonably required to avoid the contravention concerned; or
- (b) in any case where the contravention concerned occurred because the personal data concerned were inaccurate, the data accurately record data received or obtained by the data user concerned from the data subject or a third party.

(4) Where an individual suffers damage referred to in subsection (1) by reason of a contravention referred to in that subsection which occurred because the personal data concerned were inaccurate, then no compensation shall be payable under that subsection in respect of so much of that damage that has occurred at any time before the expiration of 1 year immediately following the day on which this section commences.

PART X

MISCELLANEOUS

67. Power of Commissioner to specify forms

(1) Subject to subsection (2), the Commissioner may specify the form of any document required under this Ordinance to be in the specified form and the form of such other documents required for the purposes of this Ordinance as he thinks fit.