



A REGULATORY FRAMEWORK FOR THE 21ST CENTURY

CONSULTATION FEEDBACK

EXECUTIVE SUMMARY

On 7 May 2013 the Commerce and Employment Department ('the Department') issued a Discussion paper seeking feedback from the finance industry, the general public, and any other interested stakeholder, on a range of options for the reform of the regulatory framework which governs the Guernsey Financial Services Commission ("the Commission"). The key aspects of that consultation were:

- Clarifying the regulatory objectives of the Commission to ensure that proper account is taken of the economic priorities of the States of Guernsey,
- Introducing secondary matters to which the Commission should have regard including: supporting competitiveness, minimising the cost of regulation, encouraging innovation and adherence to good governance,
- Introducing a statutory obligation to engage in consultation with industry on regulatory policy,
- Improving governance of the Commission and clarifying the role of the Director-General,
- Improving decision making by introducing a financial services tribunal,
- Ensuring independence in the handling of complaints against the Commission.

The paper summarises the feedback received from that process. In addition this paper sets out what proposals will be taken forward, explains what changes have been adopted following the consultation, explains where the Department has decided not to proceed with the recommendations and also outlines those areas where further work will be necessary before finalising the detail of specific reforms.

THE CONSULTATION PROCESS

1. Following the release of the Ernst & Young ('E&Y') Independent Evaluation Review of the Commission the Commerce and Employment Department commenced work on a review of the governance, oversight and accountability arrangements of the Commission. The oversight and accountability of the Commission had improved in the previous 2 years, for example the Department's Finance Sector Development Unit Director became a member of the civil service team advising the Fiscal and Economic Policy Group ("FEPG") and that group has taken a more focused approach to oversight and accountability issues. Many of the findings of E&Y reflected historical issues rather than current practice. Nevertheless following E&Y's report it was considered appropriate to carry out a more detailed review in order to determine whether or not the arrangements could be further improved. Following the election of a new Commerce & Employment Board in 2012 it was given a high political priority and additional resources were allocated to the project.
2. On 7 May 2013 the Department released the original discussion paper "A Regulatory Framework for the 21st Century". That paper was circulated to all Deputies, provided to all finance industry associations, and released to the general public. There was a 2 month period for consultation responses. The paper was also discussed at the FEPG and at the Finance Sector Group meetings before, during and after its release. The paper had also been discussed with the Chairman and Director-General of the Commission prior to its release.

CONTRIBUTORS TO THE CONSULTATION

3. The Department received a significant number of contributions and many hundreds of pages of written material were submitted to the Department. In addition representatives from the Department met with numerous industry representatives where the issues in the paper were discussed and additional feedback sought.
4. Contributions were received from:
 - The Guernsey Financial Services Commission
 - The Guernsey International Business Association
 - The Guernsey Chamber of Commerce
 - The Guernsey Association of Trustees
 - The Guernsey Investment Funds Association
 - The Guernsey International Insurance Association
 - The Association of Guernsey Banks,
 - Nordben
 - The Royal Bank of Scotland International
 - St Peters Trust
 - BWCI
 - PwC
 - Ardel Trust
 - Nerine Trust

- The Guernsey Association of Compliance Officers
- The Guernsey Society of Chartered and Certified Accountants
- The Institute of Directors
- The NED Forum
- The Citizen's Advice Bureau
- Sovereign Group
- AO Hall
- Ms Rhonda Humphreys
- Mr Rupert Evans
- Mr Peter Neville

5. The Department is grateful for the time and effort that went into preparing responses to the discussion paper all of which contained detailed and helpful comments which have certainly assisted in refining the proposed reforms. All of the comments have been carefully considered and many of the suggestions have been adopted in this response document.

CONTRIBUTIONS FROM THE SCRUTINY COMMITTEE

6. The Scrutiny Committee independently commenced its own review of the regulatory framework for the GFSC. However, following the release of the Department's Discussion paper the Scrutiny Committee put its own review on hold pending the outcome of this process. However prior to making that decision the Scrutiny Committee had received a large number of written submissions regarding its review and specific terms of reference. Those responses were focussed on the issues that Scrutiny had identified in its call for evidence, but there was some similarity to the matters raised in the discussion paper. Scrutiny kindly sought permission from those respondents to provide the Department with a copy of their contributions. The Department is grateful to the Scrutiny Committee and the respondents who gave permission to share their contributions with the Department.
7. The Department has decided not to identify those who responded to the scrutiny committee review as some of the responses dealt with specific regulatory issues and therefore it would be inappropriate to identify those respondents and present an incomplete list of respondents. Nevertheless the Department would like to thank and reassure those contributors that their comments have also been carefully considered in the preparation of this response document. Much of the evidence put to Scrutiny related to governance, transparency and accountability. The Department is of the view that the reforms it proposes will be beneficial in addressing many of the issues raised in submissions to the Scrutiny review.

ISSUE ONE: ALIGNING PRIORITIES

8. The first section of the discussion paper concerned getting the tone of regulation right. It focussed on reforming the Commission's objectives and providing greater statutory guidance to the commission on the economic and policy issues it should consider in choosing how it meets its regulatory objectives.

CONSULTATION PROPOSALS: REGULATORY OBJECTIVES

9. One of the most important factors in getting the balance of regulation right for any economy is ensuring that the regulatory objectives strike an appropriate balance between economic growth, consumer protection, and financial stability without compromising the reputation of the jurisdiction.

REGULATORY OBJECTIVES

10. The Discussion paper first outlined the current regulatory objectives for the Commission which are set out in various parts of legislation conferring functions on the Commission. Those objectives can be summarised as follows:
 - To provide effective supervision of the financial services sector,
 - To make recommendations to the States on schemes for the statutory regulation of finance business,
 - To counter financial crime and the financing of terrorism,
 - To maintain confidence in the Bailiwick's financial services sector,
 - To ensure the safety, soundness and integrity of the Bailiwick's financial services sector.
11. In addition to the above, the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 ('the FSC Law') provides that the exercise of the general functions of the Commission may include the protection of the public and the protection and enhancement of the reputation of the Bailiwick as a financial services centre.
12. Overall this set of statutory objectives has served the Bailiwick well over the past two decades. However there have been substantial developments in financial services regulation with many jurisdictions having put in place clear and specific statutory objectives.

DISCUSSION PAPER RECOMMENDATION

13. The discussion paper proposed that the Commission's statutory objectives should be changed and sought feedback on the following proposed objectives:
 - Protecting Guernsey's reputation as an international finance centre,

- To effectively administer the supervisory legislation which confers functions on the Commission,
- To provide appropriate protection to retail consumers of financial services products,
- To maintain, promote and support the efficiency, competitiveness, and transparency of financial markets located in the Bailiwick and support this elsewhere (when in the interests of the Bailiwick),
- To combat financial crime in the financial services industry,
- To reduce, and support the reduction of, systemic risk in the financial services sector in the Bailiwick or elsewhere (when in the interests of the Bailiwick).

14. The States should be able to amend the statutory objectives by Ordinance to reflect changing circumstances.

FEEDBACK

15. There was general support for the proposal to review the Commission's objectives. However, when it came to the precise content of the statutory objectives there were mixed views about how those objectives should be precisely formulated. Some of the key points to come out of the feedback, and the Department's comments on those proposals is as follows:

Feedback	Department Comment
<p>It was suggested by several respondents that the first objective of protecting the Bailiwick's reputation was actually an outcome of the Commission effectively meeting its other objectives and therefore it should be removed. There was considerable feedback that the Commission had resorted to this objective as a means of stifling innovation and rejecting new business which was unusual or different.</p> <p>Several respondents argued that the Commission resorted to objecting to applications on reputational grounds as this was more difficult to challenge than other regulatory grounds due to the lack of clarity surrounding the meaning of the word.</p> <p>Several respondents argued that this was not the sole responsibility of the Commission and rather the Commission should recognise that the protection of the Bailiwick's reputation was primarily the responsibility</p>	<p>The protection of Guernsey's reputation as a finance centre has been a statutory consideration of the Commission for a quarter of a century as it is a matter which the Commission is obliged to take into account when exercising its statutory functions. It does not appear to have been a cause for concern for the vast majority of the Commission's existence and the Department believes it should be a primary objective. However, in order to address the concerns identified in the consultation exercise:</p> <ul style="list-style-type: none"> • The objective should be amended so that it refers to the Bailiwick's reputation as a competitive and well regulated international finance centre and also so that it requires the Commission to take account of the policy framework for the regulation of financial services set by the States. • The States should also make it clear to the Commission that when

<p>of the States and the role of the Commission was to support that activity.</p> <p>It was also argued that the term “reputation” required definition to ensure that licensees had clarity on when the Commission was likely to object to business on reputational grounds.</p>	<p>a significant novel issue which might have an impact on the reputation of the Bailiwick comes to the Commission’s attention via a licence application, that the Commission should offer Policy Council an opportunity to provide guidance to the Commission (as it is already entitled to do under the current law) in generic terms to help inform the Commission’s decision making. In the second half of 2013 the Commission twice sought such advice from the States at the behest of the Director General – a process the Policy Council thought appropriate and practical.</p> <ul style="list-style-type: none"> • That the Commissioners are asked, though the Commission meetings at which they hold the Commission executive to account, to ensure that the executive is not adopting a cavalier approach to the use of reputation. • The Commission should be requested to develop further the innovation unit which it, following conversations with Ministers, introduced in July 2013 to make sure it is better able to undertake good quality analysis of novel financial services proposals. • Attention should be drawn in the new secondary objectives to the need for the Commission to consider the economic importance of financial services to the Guernsey economy, thus providing a natural counter to the risk averse tendencies to which a duty to safeguard reputation, unattended by other considerations, could lead.
<p>Several respondents raised concerns about the objective of “combating financial crime” and suggested the use of the term “counter”. The primary rationale for this argument was that the term “combat” was considered too aggressive.</p> <p>Other respondents pointed out that the Commission is not the sole</p>	<p>The Financial Action Task Force sets the international standards for preventing money laundering and terrorist financing. Their recommendations are titled “International Standards on <u>Combating</u> Money Laundering and the Financing of Terrorism” (emphasis added). The use of the word “combating” is used to reflect that this is the</p>

<p>authority charged with preventing financial crime. Law Enforcement, the Law Officers and the Income Tax Authority all have a role to play in preventing, investigating, and prosecuting financial crime. It was suggested that this ought to be recognised in the legislative framework.</p>	<p>internationally accepted term as set out in the FATF Standards.</p> <p>It is accepted by the Department that the Commission is not the sole authority responsible for preventing financial crime and that ought to be reflected in the statutory framework.</p>
<p>A few respondents suggested that there should be consideration to the objectives including the concept of proportionality. For example one suggested that the primary objective could read:</p> <p><i>“to provide effective <u>and proportionate</u> risk based supervision of the financial services sector within the functions conferred on the Commission in the supervisory legislation”</i></p>	<p>The Department understands the rationale behind this suggestion and the desire by some to see a more proportionate approach to regulation. However the Department is of the view that the primary statutory objectives must be clear and the introduction of the concept of proportionately in the primary objectives adds unnecessary complexity. International regulatory standards set by the Basel Committee, IOSCO, IAIS etc. require all supervisors to be independent and have clear statutory objectives. The Department has concluded that including the concept of proportionality in the primary objectives could result in the Bailiwick failing to meet international standards on regulatory independence and the need for clear objectives, and that this proposal cannot be adopted as suggested.</p> <p>Nevertheless the Department considers that this could be something which could be included in the secondary matters which are discussed further below.</p>
<p>Several Respondents raised concerns that the tone of the document suggested that the Department would measure the performance of the Commission on the basis of economic growth. Several respondents raised concerns that this would lead to the necessary implication that the Department may seek to interfere in the regulatory framework to promote economic growth which could lead to the inference that the Commission was no longer appropriately independent. It was suggested that while this wasn’t expressed in the document the general tone of the document was heavily biased towards economic</p>	<p>The Department understands those concerns and confirms that it has no desire to introduce any obligation on the Commission to seek to stimulate economic growth. The Commission should, and always has, taken into consideration the broader economic policies of the States and that should continue into the future. However the Department fully acknowledges that the Commission will often have to take steps which may inhibit economic growth such as restricting certain types of business or imposing regulatory obligations on industry to protect consumers. However the Department remains of the view that the Commission should consider the</p>

growth.	economic policies of the States in carrying out its statutory functions.
A number of respondents raised concerns about any objective which expressly or impliedly requires the Commission to engage in promotional activity. In particular those respondents identified the objective to “promote and support the efficiency, competitiveness and transparency of financial markets” as an objective which might suggest the commission engaging in some form of promotion.	<p>The Department appreciates those concerns and agrees that it would be inappropriate for the Commission to engage in promotion of the Guernsey financial services industry. The context in which the word was used made it clear that it was about financial markets being transparent, efficient, and competitive and not promotion in a general sense.</p> <p>However the Department understands the potential implication and will revise the objective appropriately.</p>
Four respondents objected to the requirement to protect “retail” customers only, although each respondent had a different reason for that objection.	The Department agrees that the term “retail” is difficult to define and will revise the objective accordingly.
One respondent did not agree with the use of the word “administer” in the second objective as it was a word with a broad meaning and suggested that it may encourage the Commission to take steps such as drafting legislation at the expense of licensees when it should be charged with simply implementing the laws passed by the States and should not have a policy function	All financial services regulators have policy functions of some form or another. This concern seemed to be primarily about the ability of the Commission to prepare policy and legislation which it then has to implement and enforce. The Department intended the word “administer” to have its technical legal meaning which was making decisions under the legislative framework, as distinct from the process of developing legislation which is a policy function of the States and not a matter for the Commission except as delegated to it.

GENERAL FEEDBACK

16. A common theme which arose in the feedback is that the Commission in some respects has an excessive concentration of power for the finance industry. It formulates policy, develops legislation, implements that legislation, enforces that legislation and decides on the penalties to be applied under that legislation. While that may be the impression it is incorrect to suggest that the Commission is responsible for developing policy and legislation. As the Commission is not a Department of the States, it is not in a position to make formal recommendations to the States of Deliberation on policy proposals

and legislation. In the area of financial services and financial services regulation those functions are reserved to the Commerce & Employment Department and the Policy Council. Historically the States has been content to delegate to the Commission the initial process of developing proposals and conducting consultations as set out in the protocol agreement signed by all relevant authorities in 2008. However given the clear industry concerns the Department is of the view that that protocol must be revisited and the Policy Council and the Department must take a more significant role in the initial stages of developing proposals and legislation accepting that the Commission must retain a role in advising the States on areas where regulatory reform is required if the States are to remain appropriately well informed. However that is a separate project which will require a consideration of the resource implications.

PROPOSALS ON PRIMARY OBJECTIVES

17. Given the above feedback the Department proposes that the primary objectives of the Commission be as follows:

- To effectively administer the supervisory legislation which confers functions on the Commission,
- To provide appropriate protection to consumers of financial services products,
- To maintain and support the efficiency, competitiveness, and transparency of financial markets located in the Bailiwick and take such steps as the Commission considers appropriate to support this elsewhere,
- To combat financial crime and the financing of terrorism in the financial services industry, in co-operation with the other Bailiwick authorities charged with related duties
- To reduce, and support the reduction of, prudential risk in the financial services sector and the maintenance of financial stability in the Bailiwick and take such steps as the Commission considers appropriate to support this elsewhere,
- Protecting Guernsey's reputation as a competitive and well regulated international finance centre, taking account of the policy framework for the regulation of financial services set by the States.

CONSULTATION PROPOSALS: SECONDARY MATTERS

18. In addition to primary objectives the Department recommended the introduction of further secondary matters to which the Commission should have regard when carrying out its statutory functions. As explained in the discussion paper secondary matters provide guidance to the regulator in how they should go about achieving their regulatory objectives. They are subordinate to those primary objectives and are always a secondary factor in any regulatory decision making.

19. The discussion paper proposed the following secondary matters that the Commission should consider:

- The economic importance of financial services to the Guernsey economy,

- The need to retain Guernsey's competitiveness as an international financial centre,
- The need to ensure cost effective regulation that minimises the economic impact of regulation on the broader economy,
- The need to use its resources in the most efficient manner,
- The need to enable competition and innovation in financial services,
- That the primary responsibility for achieving regulatory outcomes rests with the owners and senior managers of financial services businesses,
- The need to adhere to generally accepted principles of good corporate governance.

CONSULTATION FEEDBACK

20. Again there was considerable support for the introduction of secondary matters. However a number of specific comments were made as follows:

Feedback	Department Comment
<p>Several respondents felt that the Commission should be able to provide support and guidance to licensees on various issues and that the Commission should be specifically required to support financial services in their meeting regulatory obligations. One commented that the Commission has recently become unhelpful when it comes to licensees which are having operational difficulties as well as those which are bringing potential new business to the Island. One respondent commented that the Commission has become more adversarial and less willing to provide guidance to licensees on how best to meet the regulatory requirements.</p> <p>It was suggested that it may be appropriate to introduce a statutory obligation on the Commission to "support financial services businesses within the Bailiwick to ensure compliance with international standards"</p>	<p>While the Department has some sympathy with the concerns of industry, these concerns are essentially operational matters for the Commissioners. It would be difficult and probably inappropriate for the legislation to specifically oblige the Commission to provide advice to licensees on how they should go about complying with their legal and regulatory obligations. It is also likely to be inconsistent with the concept of outcomes based regulation discussed further below.</p> <p>However the Department believes that taken as a whole the secondary matters provide important context for the Commission and should assist in ensuring the Commission has a better understanding of the expectations of the States. In addition several operational changes made in recent months may go some way towards addressing these concerns.</p> <p>Finally the Department is recommending review of the protocol agreement and that may be an appropriate means of resolving these concerns.</p>
A number of respondents pointed out that the secondary matters omitted	The Department considers that this ought to be included.

the existing obligation “to maintain confidence in the Bailiwick’s financial services sector”	
One respondent suggested that there should be an additional objective along the lines of that in the ASIC statement of expectations that “regulation should identify outcomes rather than prescribe how to achieve those outcomes.	The Department supports that suggestion as it accords with the proposals on moving to an outcomes based regime, however it has to be acknowledged that this is only possible within the confines of existing international standards. This is discussed in more detail below.
One respondent suggested that the third matter should be split to have one secondary matter dealing with cost-effectiveness and minimisation of compliance costs and another dealing with the need to assess the economic impact of regulation on the broader economy.	These points have been considered and are reflected in the redrafted secondary matters below.
One industry respondent raised a concern that the objective on enabling competition and innovation had overtones of promotional activity which it was felt was inappropriate for a financial services regulator.	It is accepted by the Department that the Commission cannot be engaged in promotion. However facilitating competition and innovation should not be interpreted as creating an obligation to engage in promotion. For example it is good for the economy and the people of Guernsey for there to be a competitive market for banking products such as savings and mortgage products. Recognising the need to have competition in that marketplace does not require the Commission to engage in financial services promotion. The Department does not propose to alter this objective but points out the context in which the objective should be considered.
One respondent suggested that the secondary matters should include an express reference to the need for consumers to take responsibility for their decisions.	In many jurisdictions it is common to include this type of statement in the secondary matters. However, Guernsey lacks a large consumer market and instead deals primarily in professional, institutional and corporate clients. Given the nature of the Guernsey finance industry the primary objective of providing appropriate protection to the consumers of Guernsey financial services industry implicitly recognises that certain types of consumers need less protection than others.

One respondent suggested that the secondary matters should include an obligation for the Commission “to provide transparent interpretation of the law and guidance”.	There is an obligation on all public authorities to properly explain and communicate their decisions. It is a generally accepted principle of administrative law that public authorities should not make decisions capriciously or without taking into account all relevant considerations. This administrative law principle applies to the Commission and therefore including a secondary matter such as this is unnecessary.
One respondent suggested that the Commission should be obliged to take steps to promote appropriate behaviour by licensees. It was argued that there was a predilection to impose fines or take regulatory action rather than working with licensees to achieve the appropriate outcome.	The Department considers that these are operational matters and it would be inappropriate to pass legislation which attempted to dictate the manner in which the Commission chose to exercise its regulatory authority. In any event many of the changes in the governance structure and appeals process below should address weaknesses in decision making and support a more open culture at the Commission. In the circumstance the Department does not consider it appropriate to include a specific secondary matter for along the lines suggested.
One respondent commented that there were distinct dangers to the Bailiwick in giving the Commission any secondary objectives which could be perceived by international authorities as contradicting (as opposed to merely influencing the implementation of) international standards to which the States are committed as a key means of ensuring the Bailiwick remains an acceptable counterparty for international financial services business.	The Department accepts it is important that secondary objectives could not be perceived as contradicting relevant international standards which the States has committed to meeting. In the revised secondary objectives set out below, the Department has made some alterations to the text of some of the proposed objectives to preserve the intention whilst ensuring that they are not inadvertently perceived to conflict with international standards.
One respondent made the point that the economic impact of regulation can be both positive and negative. It was originally conceived, at least in part, by British and American governments because they wished to instil confidence into participants in the economy and thereby promote growth.	The Department accepts that regulation can have both positive and negative economic impacts.

ADDITIONAL ISSUE: DUTY TO CONSULT

21. The Discussion paper proposed the introduction of a specific duty for the Commission to engage in consultation with the industry. However following consideration of the consultation responses it has been decided that a better way to deal with this is through altering the secondary matters rather than creating a separate statutory duty. The feedback acknowledged that the Commission did engage in consultation with the industry however it also identified a range of concerns including claims that the Commission had, on occasion, failed to engage with industry representative bodies, preferring to seek feedback from specific individuals. The Department cannot comment on these specific claims, however as it is a matter for the Commissioners.
22. There was near unanimous support for the proposal to introduce some obligation on the Commission to engage in consultation. However the more detailed feedback did raise a number of issues which gave the Department cause for thought:
- It was argued by many that the duty to consult should not result in the creation of a bureaucratic process which delayed appropriate decision making. One respondent questioned whether the duty might lead to endless rounds of consultation where every time the Commission chose to adopt something that arose in a consultation that created a further obligation to consult on those changes,
 - Another questioned whether the obligation would result in public consultation on technical matters where there was no need for the public to be involved. For example regulatory arrangements for the captive insurance industry are unlikely to require full public consultation,
 - Another queried whether the duty would require consultation on minor matters which were not contentious,
 - Several respondents suggested that the duty should include a statutory minimum period in which the industry would respond to avoid short turnaround times which were sometime expected in the lead up to the previous IMF visit.
23. The Department acknowledges all of those issues and has concluded that rather than imposing a specific statutory duty to consult on the Commission that a better solution is to include appropriate consultation and feedback as a secondary matter to which the Commission should have regard when carrying out its functions. That will encourage good practice whilst avoiding the creation of a potentially bureaucratic process.
24. To deal with some of the other issues it is recommended that the Policy Council, the Department and the Commission revisit the protocol document and clarify the general expectations of the Department on the consultation process including minimum response periods etc.

FINAL PROPOSALS: SECONDARY MATTERS

25. Having considered the feedback the Department has revised the recommendations to take into account consultation feedback and will recommend that in carrying out its primary objectives, the GFSC should have regard to the following secondary matters:
- The economic importance of financial services to the Guernsey economy and the need for its status as a competitive high quality international financial centre to be preserved,
 - The need to maintain confidence in the Bailiwick's financial services sector,
 - The need to ensure cost effective and proportionate regulation,

- The need to ensure that it uses its resources in an efficient manner,
- The need to engage in appropriate consultation with the finance industry and the general public,
- The need to enable competition and innovation in financial services,
- The need to achieve good quality outcomes through regulation rather than simply policing processes, taking proper account of the standards of process required by relevant international regulatory standards, ,
- That the primary responsibility for achieving regulatory outcomes rests with the owners and senior managers of financial services businesses, to the extent this is compatible with the proper and proportionate application of relevant international regulatory standards,
- The need to adhere to generally accepted principles of good corporate governance.

ISSUE TWO: IMPROVING GOVERNANCE

POLITICAL RESPONSIBILITY

26. The discussion paper outlined proposals on the appropriate mechanism for ensuring that the Commission was appropriately accountable to the States. These proposals arose out of the E&Y independent evaluation review which concluded:

“At present the Commission’s reporting line and responsibility is to the Policy Council – which is a committee within a government rather than a department. This makes it hard to set and sustain clear regulatory strategy and objectives. Almost all commentators agree that a clear reporting line to a government department, with agreed areas of reporting, is highly desirable. This is difficult to achieve within the current arrangements.

We recommend that a single government department should be responsible for the Commission. It is, however, difficult to determine which department this should be.

Commerce and Employment Department clearly has the strongest capability to deal with this responsibility. There is good knowledge of the industry within the department and people with appropriate skill sets to liaise with the industry and the Commission. However, C&E also has a significant conflict because it is responsible for the development of financial services. Very strong safeguards would be necessary to deal with the conflicts that would arise from this dual responsibility.

Treasury and Resources Department is freer from conflict. Furthermore most jurisdictions with a significant finance sector vest responsibility for regulation in departments of government that are equivalent to T&R. However, there is currently less capability to execute this role within T&R. It would be less than optimal to leave the direction of regulation to a department that does not have the skills and resources to properly handle it.”

27. The discussion paper sought feedback on the possibility of transferring political responsibility for the Commission to the Commerce & Employment Department to provide for a single point of contact for the Commission as envisaged by the E&Y report.

FEEDBACK

28. The feedback to this proposal was mixed and there were clearly divergent views among some respondents. A substantial number of respondents supported the proposals, however a small number of respondents made clear and cogent arguments for alternative arrangements:
- Several industry respondents were in favour of a single point of accountability but argued that there were equally compelling arguments for the single point of accountability to be Commerce & Employment or Treasury and Resources Department and suggested that provided that adequate resources were provided either Department would be acceptable and capable of fulfilling the relevant function,

- Several respondents suggested that instead of a single Department which would take a view in line with its relevant mandate it may be better for a separate body to be established which had a more representative set of stakeholders which could include the Chief Minister, Commerce & Employment Minister and Treasury and Resources Minister, it was suggested along similar lines by one respondent that the Fiscal and Economic Policy Group would also be a more appropriate body,
- Two industry bodies argued against transferring functions to the Commerce & Employment Department on the basis that its mandate was too narrow and there was a clear conflict of interest between its objectives of promotion and development and that of managing the regulatory framework, it was felt by one of those respondents that the current arrangements had worked well and there was no need to change them provided that proper procedures were put in place to ensure that all proposals were considered by all relevant departments and committees.
- Some respondents suggested that having solely political accountability was too narrow and that the Commission should be accountable to other stakeholders and in particular the financial services industry. It was suggested that the Finance Sector Group could take this role or an advisory board which contained an equal mixture of government and industry representatives may be a more appropriate forum,
- One respondent noted that the FSC Law provided that the Policy Council was the body to whom the Commission had to report, but the Law enables the States of Deliberation to prescribe by ordinance such other body as it considers appropriate to exercise the functions conferred on the Policy Council.
- Several respondents suggested that the Scrutiny Committee, or some other committee of the States, should have the ability to exercise oversight of the Department and the Commission in a similar manner to the Select Committee process which exists in the House of Commons.

DEPARTMENTAL RESPONSE

29. While the Department understands the rationale for some of those suggestions, several of them would be inappropriate and contrary to the consensus system of government. The Commission is a creature of statute exercising statutory authority given to it by the States of Deliberation. Therefore the only body to whom it can be accountable is a Department or Committee of the States and then ultimately the States of Deliberation. The States of Deliberation and the Committees and Departments which form part of the States have democratic legitimacy and an obligation to represent the electorate. The suggestion that the Commission should be accountable to a body which comprised industry representatives would contravene a range of internationally accepted standards on the independence and accountability of regulatory authorities. Proceeding down that path would also lead to allegations of regulatory capture of the Commission and cause significant damage to Guernsey's international reputation. Therefore the Department will not be implementing this suggestion; nevertheless other issues set out below may address some of the concerns about ensuring appropriate representation of stakeholder interests.
30. The suggestion of some form of parliamentary oversight committee is not at first glance without merit. In the UK the Treasury Select Committee exercises oversight of HM Treasury and the regulatory authorities of the Bank of England and the Financial Conduct Authority. It is an effective and public forum for questioning and challenging the regulatory framework in the UK and has proven reasonably effective in scrutinising proposals for reform of the

regulatory system. However in the UK there is separation between the executive and the parliament as the UK operates a system of cabinet or ministerial government, which makes it appropriate for a separate parliamentary committee to have oversight of the regulatory authorities on behalf of parliament in addition to the department which has responsibility for the authorities on behalf of the executive. Guernsey operates a system of consensus government where the executive and parliament are fused and it is not therefore necessary to have an additional layer of scrutiny of the Commission over and above that applied by the Department or Committee that manages the relationship on behalf of the States, which is itself subject to oversight by the Scrutiny Committee.

31. The Department acknowledges that there are significant conflicts of interest in it assuming responsibility for the regulatory framework in addition to its current duty of promoting and developing the financial services industry. It became apparent whilst reviewing the responses that the Department would need to take a very different approach if it assumed responsibility for the regulatory framework. The Department could no longer act solely as the champion of industry and would have to be far more measured in the way in which it fulfilled its mandate within the financial services sector. To do otherwise would run the risk of Guernsey losing its international reputation as a credible finance centre, as an overly enthusiastic supporter of the financial services industry would give the impression that the regulatory framework had been tailored in the industry's favour. Losing a reputation for having a credible regulatory regime could cause a loss of confidence in the jurisdiction.
32. As far as the suggestion of the Commission being accountable to a body which contained representatives of the industry, that would be inconsistent with internationally accepted regulatory principles on regulatory independence. Not only must the Commission be independent from the Government but it must also be independent from the industry it regulates. However it is acknowledged that there appears to be a perception in the industry that the Commission does not always have the relevant experience or willingness to understand new business propositions and emerging business models and in some cases lacks sufficient knowledge of the commercial environment in which local financial services businesses operate. The Department does not express any views on whether that perception is accurate but merely notes that this is a concern expressed in much of the consultation feedback. The Department calls on the Commissioners to consider how they might best deal with this industry perception.

FINAL PROPOSALS: ACCOUNTABILITY

33. The Department considers that the current arrangements, while not perfect, are operating effectively particularly in recent years since the Director of Finance Sector Development became a member of the civil service team advising the Fiscal and Economic Policy Group. The FEPG is a political sub-group of the Policy Council comprising the Chief Minister, Deputy Chief Minister, Commerce and Employment Minister, Treasury and Resources Minister and Social Security Minister. In practice, the FEPG advises Policy Council on all matters relating to the Commission and the policy framework for financial regulation. However, it remains a sub-group of the Policy Council and does not itself have a voice in the States of Deliberation. The FEPG has in recent years been more effective in questioning the Commission and ensuring the Commissioners have a better understanding of the economic objectives of the

Policy Council and the States. The Commerce & Employment Minister has been able to be an effective advocate for the interests of the finance industry in that forum. So at present it is proposed to retain the existing arrangements subject to the following additional recommendations:

- The Policy Council, the Commerce & Employment Department and the Commission should revisit the protocol document to ensure that it expressly includes issues on accountability and reporting to the Policy Council (or the FEPC as a sub-group of the Policy Council) including issues such as, frequency of meetings, presentation of reports, the consultation process and that the amended protocol document be published, and
- That consideration be given to the Policy Council separately reporting to the States at the presentation of the Commission's annual report on the steps taken by the Policy Council (and the FEPC as a Policy Council delegate) to scrutinise the activities of the Commission and ensure appropriate accountability.

34. Of course the structure and operation of the States is currently under review and this situation may need to be reviewed in the future.

35. On the issue of the Commission taking steps to address the perception that it sometimes lacks an understanding of the commercial realities faced by local industry and to ensure access to a better understanding of new market developments the Department notes that section 10 of Schedule 1 of the FSC Law permits the Commissioners to create advisory committees able to provide advice to the Commissioners on the exercise of their functions. It would of course be inappropriate to form such a committee with respect to enforcement and licensing matters, however the Department considers that there may be considerable merit in the Commissioners considering constituting such a committee to advise on new business developments, innovations, and jurisdictional initiatives. The members of such a committee could contain industry representatives who could provide insight to the Commissioners on those issues. Of course the Commission would not be obliged to accept the advice of that committee but it may be a useful way of engaging with the industry, allowing the Commission to develop a greater understanding of new and emerging business models, and countering the perception that the Commission is too detached from the commercial realities faced by financial services businesses in Guernsey. The Department recommends that the Commissioners give consideration to forming such a committee.

36. Finally the Department considers that many of the accountability issues can be addressed through the Commission reviewing its annual report and changing the manner in which it presents that report to Deputies and other Stakeholders. For example the financial statements could be presented in a manner which provides meaningful segmentation by business activity and which, for example, provides better information on:

- Total enforcement costs and the level of successful enforcement cases presented,
- Detail of income received from regulatory fines and the application of such income
- Separation of administrative expenses from regulatory activity,
- Better understanding of the level of salaries paid to senior management, including publication of the salary of the Director General,

37. It may also be appropriate for the Commission to present its annual report to Deputies in a forum where Deputies can ask questions of the Commissioners and members of the senior executive.

38. These are matters which could be dealt with through the amended protocol agreement.
39. The Department also recommends that consideration be given to the introduction of some mechanism for allowing members of the States to question the Chairman and Director General of the Commission on a regular basis as to how they have met their statutory objectives.

DISCUSSION PAPER PROPOSALS: NUMBER OF COMMISSIONERS

40. The discussion paper recommended that the statutory maximum of 7 Commissioners be abolished and that there be no statutory limit on the number of Commissioners. The Discussion paper also recommended that the FSC Law should be amended to provide a Commission quorum of 3 Commissioners.
41. There were a number of other proposals in the discussion paper including:
- The ability to specify the term of appointment in the instrument of appointment,
 - That there would be the capacity to make overlapping appointments of Commissioners to enable continuity and transition,
 - That the current 3 year appointment period be retained as a minimum,
 - Comments were sought on whether the current policy of 2 reappointments (a maximum of 9 years as a Commissioner) should be made a statutory limit

CONSULTATION FEEDBACK

42. There was near unanimous support for the abolition of the statutory maximum number of Commissioners, the ability to have overlapping appointments, and the power to specify the term of office in the instrument of appointment. However there was some debate about the other issues:

Feedback	Department Comment
Many respondents agreed that there should be no maximum number of Commissioners prescribed in the FSC Law but felt that the number of Commissioners should not exceed 9 except on rare occasions. Several respondents commented that the ideal number of Commissioners was somewhere between 7 and 9.	The Department agrees that having a large number of Commissioners is unwieldy and unnecessary and that the ideal number is 7 and exceeding that number should only occur in circumstances of very high workloads or to facilitate transition between a retiring commissioner and his or her replacement.
One respondent commented that there should be a minimum number and that 3 appeared too low and perhaps it ought to be 5.	Given the need for a range of skills and expertise on the Commission, the Department agrees that in the ordinary course of events 5 would appear to be the minimum desirable number of Commissioners. However, the Department

	believes that this should be a matter of practice, not law. It is not inconceivable that there could in future be circumstances outside the control of the States where the number of Commissioners temporarily fell below any given threshold and in those circumstances the Commission would need to continue to be properly constituted until new appointments could be made.
Several comments were received about the need to ensure that the individuals appointed as Commissioners were suitable. One comment concerned the need to ensure that the Commissioners were sufficiently skilled and experienced and capable of expressing robust views where necessary. Several commented that the Commissioners should be predominantly Island resident to ensure proper understanding of the Guernsey environment and to ensure availability for decision making.	The Policy Council involves the Chairman in recruitment and selection of Commissioners to ensure that the Commission has access to a balanced skill set. The Policy Council also has a general policy of ensuring that a majority of Commissioners are island resident. The Policy Council is required by the FSC Law to nominate for election by the States persons appearing to it to have knowledge, qualifications or experience appropriate to the supervision of finance business in the Bailiwick and ensures that all appointees understand their obligation to be independent in exercising their statutory duties.
Several respondents commented that the Commission ought to have a number of executive members. It was suggested that the Director-General plus two senior directors of the Commission should also be on the Commission, it was argued that this would more appropriately reflect corporate governance standards that exist in the private sector.	One of the initial recommendations was to make the Director-General <i>ex officio</i> a Commissioner, although this recommendation is not being taken forward (see below). The Department does not intend to recommend that any other officers of the Commission are also members <i>ex officio</i> Commissioners but would encourage the Chairman to ensure that the executive are appropriately represented at all Commission meetings.
A number of respondents commented that reappointments of Commissioners should not be automatic but subject to some form of scrutiny and review to ensure that Commissioners performance is adequate. One respondent suggested that at the time the reappointment is put to the States there should be a report to the States setting out why that individual should be reappointed to the Commission.	The Policy Council always involves the Chairman in decisions on appointment and reappointment to ensure that he remains satisfied with their performance. However a failure to reappoint a Commissioner is a serious matter which could lead to suggestions of political interference unless there were clear evidence that it was justified. It would be a highly unusual event and one that the Department believes would only occur on very serious grounds.
There was general support for the introduction of flexibility in the	The Department accepts that a maximum length for each appointment is

length of individual terms of appointment of Commissioners, with a number of respondents agreeing that the current fixed appointment length of 3 years was inflexible. However, several respondents suggested that a maximum term was appropriate in order to allow for the review of appointments at reasonable intervals.	appropriate and has decided that the maximum should be 3 years. The Department therefore intends to recommend that the length of each appointment should be up to 3 years, rather than fixed at three years as at present.
There was some variance among respondents on whether the overall maximum of 9 years should be by way of policy or should be made a legislative requirement	The Department considers that each option has its own advantages and disadvantages. However the majority of respondents were content with this remaining a policy at the present time.

DEPARTMENTAL RECOMMENDATIONS

43. After considering the feedback and other issues raised in the discussion paper the Department will be recommending the following changes:

- Abolishing the Statutory maximum number of Commissioners, as a matter of policy it is recommended that the target for Commissioners be between 7 and 9 Commissioners with a minimum of 5,
- Allowing the term of office to be specified in the instrument of appointment with a maximum term of 3 years from the date of appointment. This will remove the need for the current regime of filling casual vacancies and allow a replacement commissioner to serve up to three years rather than the current regime of filling the unexpired term of the departed Commissioner, this will increase the flexibility of appointments and over time allow for more even appointment patterns enabling better transition between incoming and outgoing Commissioners,
- Retaining the current policy of only allowing Commissioners to serve for a maximum of 9 years, however this should be subject to the possibility of further extension where this can be objectively justified i.e. the policy should be applied on a 'comply or explain' basis.

TERM OF OFFICE OF THE CHAIRMAN

44. The discussion paper recommended that the current regime of annual reappointment of the Chairman be abolished and the Chairman's term to run concurrently with his or her term of office as a Commissioner. As pointed out in the Discussion paper this was a matter identified by the IMF as a potential weakness in the regulatory framework as it could lead to political pressure being applied on the Chairman, although the IMF noted that this was a theoretical issue and there was no evidence of it happening in practice.

CONSULTATION FEEDBACK

45. There was broad support for this proposal. However there were a number who believed that the annual reappointment process ought to be retained and an annual performance review process be initiated for the Chairman and all other Commissioners. Along similar lines it was argued by some respondents that as a matter of principle the performance of the Chairman of the Commission should be reviewed prior to reappointment and that there be mechanisms for removing the Chairman if performance is not satisfactory.

DEPARTMENT RESPONSE AND RECOMMENDATIONS

46. While the Department understands the desire for there to be regular performance reviews and the ability to remove the Chairman for poor performance there are clearly accepted international standards on regulation to which the States must adhere. Those standards require that office holders in regulatory authorities, which include the offices of Chairman and the Commissioners, must be sufficiently free from political interference to carry out their statutory responsibilities. Not only must their tenure be clearly stated but the grounds for removal specified in the FSC Law and any reasons for dismissal must be made public:¹ Presently the FSC Law provides that any Commissioner may be removed from office by the Chairman for the following reasons:

- Being absent from 3 or more consecutive Commission meetings,
- Has been declared insolvent,
- Is incapacitated by physical or mental illness, or
- Is otherwise unable or unfit to discharge the responsibilities of the office of Commissioner.

47. The States may remove the Chairman from office on the same grounds following a report from the Policy Council and public notice of the reasons for his dismissal must be given. Therefore there are already clear express grounds for removing the Chairman.

48. The Department intends to proceed with the recommendations as set out in the discussion paper. On the issue of accountability and performance the Department recommends that those issues be discussed with the Commission and perhaps included in the revised protocol document.

REMUNERATION OF COMMISSIONERS

49. One issue that was raised in the Discussion paper was the current arrangements for the setting of Commissioner remuneration. Feedback was sought on whether the current arrangement where remuneration was set by the Policy Council was appropriate. Feedback was also sought on whether the current open discretion of the Policy Council should be qualified as follows:

¹ See for example the Basel Committee's methodology for assessing compliance with the core principles for banking supervision

- To introduce a statutory obligation on the Policy Council to consult with the Commission before determining remuneration,
- To introduce a statutory obligation on the Policy Council to ensure that the Commissioner's remuneration is reasonably commensurate with their statutory obligations,
- To introduce a statutory obligation to review the fees not less than every three years.

CONSULTATION FEEDBACK

50. There was broad consensus that the current arrangements on the setting of remuneration were appropriate and should be retained. One respondent pointed out that theoretically the setting of remuneration could compromise regulatory independence and effectiveness by setting remuneration so low as to make it unattractive to result in no suitably qualified and experienced candidates being willing to fulfil the role of Commissioner, although it was acknowledged that this had not happened during the Commission's 25 year existence. One respondent felt that remuneration should be set by a panel which included industry representatives and not solely the Policy Council and suggested the Finance Sector Group might be an appropriate forum.
51. There were more mixed views on the proposals to introduce statutory obligations to consider the appropriateness or remuneration, consult with the Commission and review every three years. Some supported the proposals while many felt those additional obligations were unnecessary.

DEPARTMENT RESPONSE AND FINAL PROPOSALS

52. The Department considers that the current arrangements work well and do not warrant change. While the desire to have some stakeholder representation in setting Commissioner remuneration is understandable it is not consistent with international standards on independence and accountability.
53. Given the very mixed feedback on the additional statutory duties the Department has resolved to not make any change to the statutory regime but instead recommend to the Policy Council and the Commission that the Protocol Document be reviewed to include a commitment from the Policy Council to act in the manner outlined above. This will ensure that there is a suitable process which is reasonably flexible but avoids the needs to create additional statutory duties at this stage.

ROLE OF THE DIRECTOR-GENERAL

54. The discussion paper recommended a number of changes to the statutory role of Director-General the most significant of which was the proposal that the Director-General ought to be *ex officio* a Commissioner. The recruitment, selection and setting of remuneration for the Director-General would remain a matter for the Commissioners (excluding the Director General) however in all other respects he would be a Commissioner. This reflects the position in many other jurisdictions including Jersey and the Isle of Man.

CONSULTATION FEEDBACK

55. There were mixed views on this proposal:

Feedback	Department Comment
Many respondents supported the proposal on the basis that the Director-General should be as responsible for Commission decisions as the Commissioners. Under the current arrangements it was felt that the Director General could avoid being responsible and accountable for decisions which he may have recommended to the Commissioners.	The Department acknowledges that there was a substantial amount of support for the proposals.
Several respondents felt that the role of Director-General should be recast as it had become overly powerful and the role instead should be considered a more managerial role such as a General Manager or Chief Operating Officer implementing the decisions of the Commission rather than a Chief Executive Officer	This appears to be a perception of the role becoming too powerful and the Commissioners being unable to exert proper oversight of the Director-General. This is a matter that the States should consider when appointing Chairman and the Commissioners to ensure appropriately experienced individuals are appointed who can properly exercise that corporate governance function. It is also a matter which could be addressed through changes to the decisions and appeals process to be discussed below.
Several Respondents argued that the role of Director-General was already too powerful and making him a Commissioner would create difficulty for industry in providing feedback to the Commissioners about the performance of the executive in General. As one respondent put it, it is useful to be able to talk about the Director-General "behind his back".	The Department acknowledges that occasionally there may be benefits in being able to give confidential feedback to the Chairman and other Commissioners about the performance of the executive. However that should be able to be achieved regardless of whether the Director-General is a Commissioner.
A number of respondents suggested that in order to more properly reflect corporate governance arrangements in the private sector the Director-General and two of the other members of the Executive should also be Commissioners to provide a balance on the Commission of executive and non-executive views.	The Department notes these comments but considers that it is possible to achieve this outcome through the Chairman ensuring that members of the executive attend Commissioner meetings and are involved in discussion and debate.

Several respondents suggested that the Director-General should be able to be removed by the Commissioners for poor performance. Along similar lines were proposals that the Director-General's employment relationship should be purely contractual and not the subject to statutory protections.	International standards on independence of financial regulators set requirements for the grounds on which heads of regulatory authorities may be dismissed. The FSC Law provides specific grounds for the dismissal of the Director-General which are similar to those which apply to Commissioners, including where he or she is otherwise unable or unfit to discharge the functions of Director General, and which the Department considers to be adequate at the present time. This will however be monitored and reviewed on an ongoing basis in line with international standards and practice.
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FINAL RECOMMENDATIONS

56. On balance, the Department believes, on the grounds of good governance and accountability and to reflect the position in comparator jurisdictions, that there is merit in the Director-General being a Commissioner and recommends that the Policy Council should nominate the Director General for appointment as such by the States. The Department would expect any such appointment to be on an unremunerated basis. Further, the role of the Director-General should be clarified through the preparation of a statement by the Commission which publicly specifies the roles and responsibilities of the Chairman and the Director-General. An example of this is that used by the Hong Kong Securities and Futures Commission which has a public statement specifying the respective roles of the Commission Chairman and its Chief Executive. By way of example the HKSFC's statement is available at:

<http://www.sfc.hk/web/EN/about-the-sfc/corporate-governance/governance-structure/>

57. In addition the Department recommends that the Commission develops a statement setting out its governance structure which should make it clear which members of the executive are entitled to attend Commission meetings. It would be the Department's expectation that the Director-General, Chief Operating Officer and Commission Secretary would routinely attend meetings of the Commission along with relevant directors where appropriate.

ISSUE THREE: COMMISSION DECISIONS AND APPEALS

58. The discussion paper reviewed some of the issues facing the Commission and the ability of the Commissioners to effectively fulfil their corporate governance oversight role whilst also being regulatory decision makers. The discussion paper outlined two options for resolving this problem:

- The creation of a Financial Services Tribunal to allow a referral of significant decisions which are presently made by the Commissioners, or
- Expanding the rights of appeal to the Royal Court to allow appeals to be heard on their merits rather than on judicial review grounds which currently apply.

59. As set out in the discussion paper this was an initial consultation and there was likely to be a need for further development of the concept and consultation in the future before any final decision could be reached on the regime.

INDUSTRY FEEDBACK

Feedback	Department Comment
A large number of respondents supported the concept of introducing a financial services tribunal, although many commented that further detail was necessary before a final decision was made on its implementation.	The Department agrees that further work on the proposals is necessary and, subject to the comments in paragraphs below, will be carried out in the future including further consultation on detailed proposals for reform including the constitution, functions and powers of the tribunal.
Many respondents commented that it would be necessary for the meaning of “major decision” to be clearly defined as it was necessary to ensure that the jurisdiction of the tribunal was clear. Several respondents also felt that the tribunal should be able to hear appeals from the more minor decisions taken by the Commission.	The Department notes those comments and will ensure they are reflected in any final proposals when released.
There were a significant number of respondents who were concerned that the tribunal should not have a discretion on whether legal representation should be permitted and felt that legal representation was a fundamental right that should not be denied.	The Department notes those comments and will take them into consideration in developing the proposals any further. It would not be the Department’s intention to unreasonably restrict access to legal representation. Regulatory enforcement is a serious matter which has the potential to seriously damage people’s reputation and impact on their ability to earn a livelihood and in the circumstances legal

	representation should be available without unreasonable restriction.
A number of respondents commented that if a tribunal was introduced then that would reduce the responsibilities of Commissioners and that there should be a corresponding reduction in Commissioner remuneration as a result.	At present, participation in Decisions Committees is partially remunerated on a per diem basis as this time commitment goes beyond the ordinary duties expected of Commissioners. If a tribunal were introduced then there would therefore be some reduction in the entitlement to payment of per diem remuneration to be offset against the cost of a tribunal. This is a matter to be considered when developing any final proposals.
There were a number of respondents who were concerned that the tribunal should operate in public with several responses suggesting that the tribunal should not be open to the public and that decisions should only be published in a suitably anonymised state	<p>This is an area where reasonable minds may differ. On the one hand having open proceedings encourages parties that wish to avoid publicity to negotiate an agreed resolution with the Commission before proceedings go to the Tribunal, resulting in a cost saving to the industry and the Commission alike. The publication of decisions also allows the industry to understand what is acceptable and allows regulatory practice to evolve as the tribunal develops its own jurisprudence. This is an important aspect of all judicial systems as they facilitate behaviour change over time.</p> <p>Open justice also avoids criticism that the process of enforcement is unfair or being exercised capriciously as the potential publicity surrounding a regulatory investigation would be embarrassing to the Commission. Public scrutiny of the investigation and enforcement processes will ensure good practice at the Commission.</p> <p>On the other hand publicity surrounding regulatory failures may cause wider reputational problems for the Island which ideally should be avoided where possible. Of course the failure to properly communicate effective enforcement actions also leads to the impression outside the Island that the regulatory framework is not being actively enforced, a criticism laid at the door of many of Guernsey's competitors.</p>
There was a general rejection of the option to further expand the jurisdiction of the Royal Court as an alternative as it was felt that that would lead to excessive delays and costs and a tribunal would be able to act more swiftly which is often necessary in the financial services	The Department acknowledges those concerns and agrees that further expansion of the jurisdiction of the Royal Court should not be investigated further.

tribunal.	
There were several comments surrounding the overall cost of the proposals with many raising issues concerning the potential increase in licence fees which may be necessary to cover the costs of operating a separate tribunal.	The Department is very concerned to minimise the costs to industry. However it is also clear that the current regime is not providing a cost effective solution with regulatory enforcement costs increasing significantly in the past few years although the number of successful enforcement cases remain relatively low. By improving the overall efficiency of the process there will be potential costs savings compared to the current system. The Department is mindful that any change should create efficiencies which should minimise the need for a significant increase in regulatory costs.

An Alternative Proposal from the Commission

60. In its response to the consultation proposals the Commission echoed the concerns from the industry on the issue of costs. The Commission helpfully proposed an alternative mechanism modelled on the Financial Conduct Authority's internal procedures which operate prior to a matter being referred to the tribunal in the UK.
61. The Commission suggested that instead of a tribunal a separate panel could be created in the Commission's existing structure to sit as a Regulatory Decisions Committee. That panel would be comprised of a legally qualified Chairman with a further panel of experts experienced in financial services. Those individuals would be equivalent in status to Commissioners but instead be tasked with the responsibility of taking regulatory decisions rather than overseeing the operations of the Commission.
62. Under this system the staff of the Commission would be responsible for investigating matters under the supervision of the Commission who would attempt to negotiate a settlement with the body under investigation if that is appropriate. If the matter cannot be resolved through negotiation then the Commissioners would refer the matter to the Regulatory Decisions Committee ('RDC'). The investigating staff could then present the case to the 'RDC' which could then hear both sides of the case before coming to a conclusion. The Commission believe that this process would achieve the goal of the Department in improving decision making and removing the potential conflict that the Commissioners face, at a lower cost than the creation of a tribunal.
63. Having considered the case put forward by the Commission the Department believes there may be considerable merit in the proposals provided that it could be delivered at a lower cost than a tribunal. The Department also comments that in some respects this option is the introduction of a tribunal under a different name as it will face many of the issues raised with respect to a tribunal, albeit constituted somewhat differently.

FINAL RECOMMENDATION

64. There was overwhelming support for a review of the regulatory decision making process with many supporting the introduction of some form of tribunal or reform of the present system. As set out in the original discussion paper it was always the intention of the Department to carry out additional investigations into the proposals and the consultation process was a mechanism by which the level of support could be gauged.
65. The Department intends to review the need for a formal regulatory decisions mechanism, informed by developments in practice since the issue of the consultation paper and further discussion with the Commission over the potential development of a RDC and will therefore recommend the introduction of an enabling measure in the FSC Law to permit an appropriate mechanism to be introduced by Ordinance at a later date if necessary. Issues to be considered include:
- The costs and benefits of introducing a regulatory decisions tribunal/‘RDC’;
 - The potential for cost savings to the Commission from having a more streamlined enforcement process;
 - Whether proceedings of any tribunal/‘RDC’ should be made public;
 - The level of resources required for each alternative and how those resources could be managed.

ISSUE FOUR: RESOLVING COMPLAINTS AGAINST THE COMMISSION

66. The Discussion paper proposed the introduction into the FSC Law of a statutory obligation on the Commission to implement an independent complaints regime which would allow complaints against the Commission to be investigated by an independent and impartial third party. The proposed scheme would be based on the following principles:
- All complaints should first be made to the Commission under the current policy,
 - If the complainant were dissatisfied he or she could refer the complaint to the independent person ,
 - That person could then investigate the complaint and provide a report to the Commission and to the Complainant with his conclusions.
67. Frivolous, vexatious or abusive complaints would be disallowed at the discretion of the independent person. The person would be appointed by the Commission subject to consultation with the Policy Council and any appointment would be for a fixed term with appropriate protections against removal. The role would be a part time as complaints against the Commission are relatively rare. The person would be remunerated on a case by case basis and the costs would be met by the Commission.

CONSULTATION FEEDBACK

68. There was unanimous support for the principle of introducing a form of independent complaints mechanism, although there were a range of comments on the proposals:

Feedback	Department Comment
Many finance sector businesses felt that the current regime was ineffective as the Commission may take complaints into account in regulatory action taken against them in the future. It was observed by one respondent that the introduction of an independent process may not resolve this issue.	The Department is not in a position to comment on this feeling but it certainly raises concerns about the relationship between the Commission and the financial services industry. It is the Department's hope that the Chairman and the Commission will take these concerns on board and provide some form of reassurance to the industry that these concerns are without foundation.
Several commentators felt that the proposal that the Commission appoint an independent person to investigate complaints was inappropriate as the person would not be sufficiently independent. It was suggested that the person should instead be appointed by the Policy Council or the States.	The Department notes those concerns. It may be that an appropriate mechanism is for the Commission to appoint an individual but for that appointment to be approved by the Policy Council. The Department is also mindful that a materiality threshold has to be passed before an external investigation mechanism is activated if Commission (and therefore industry) costs are not to rise markedly.

There were a number of comments concerning the potential cost of the proposals. One suggestion that was made by a number of respondents was that where a complaint was considered to be vexatious, capricious or unfounded then the complainant should be responsible for meeting the Commission's costs of responding to that complaint. It was argued that this would be a disincentive to making unfounded complaints.	The Department agrees with the need to ensure that the introduction of an independent complaints process should not add undue costs to the Commission or the industry. The complaints process should allow for the quick dismissal of vexatious or malicious complaints and consideration should be given to as to possibility of recovering costs from vexatious or malicious complainants in clearly defined circumstances.
One respondent that supported the proposals suggested that the independent complaints process ought to be subject to the same oversight and scrutiny process as the Commission as a whole.	The Department agrees with this in principle and believes that the Commission should be required to publish a review of complaints handling as part of its annual report.
One respondent queried whether this function could be fulfilled by the Financial Services Ombudsman ('FSO') which is being developed on a Pan-Channel Island basis at the present time.	The functions of the FSO are to provide a form of consumer redress for losses suffered in the course of financial services provided to members of the general public. It is intended to perform a very different function to that proposed to be established for the Commission and the Department does not consider it likely that the FSO will be able to perform this function in addition to its consumer redress duties.

FINAL PROPOSALS

69. The Department has concluded that appointing one permanent office holder to act as the independent person investigating all complaints would not be the right way forward, as it may create an additional layer of cost that would ultimately be passed on to licence holders and as one individual will not always be the most appropriate person to investigate all complaints the subject matter of which will vary and may be technical in nature.
70. The Department therefore intends to proceed with recommending to the States that a statutory obligation should be introduced into the FSC Law to make and publicise arrangements for the investigation of complaints and for the Commission to consult with the Policy Council in doing so.
71. The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly and in a cost effective manner and must include provision for investigation by an external independent person where a complaint has not been resolved to the satisfaction of the complainant.

72. The arrangements should allow for the summary dismissal of vexatious, capricious, malicious or unfounded complaints and consideration should be given to the possibility of recovering costs from vexatious or malicious complainants in clearly defined circumstances.
73. The Department would encourage the Commission to explore the possibility of shared or reciprocal complaints handling arrangements with its counterparts in the other Crown Dependencies where this would lead to efficiencies.

CONCLUSION: THE NEXT STEPS

74. Following the release of this feedback document the Department intends to take the following action:

- Prepare a States Report for submission by the Department and the Policy Council to the States recommending amendments to the FSC Law as follows:
 - Introducing new statutory primary objectives for the Commission
 - Introducing secondary matters to which the Commission must have regard
 - Removing the statutory cap on the number of Commissioners
 - Allowing for the term of office of Commissioners to be specified in the instrument of appointment, which will be a maximum of three years, this will also allow the abolition of the casual vacancy process which currently exists
 - Aligning the Chairman's term of office with that of his tenure as a Commissioner
 - Introducing an enabling power to allow for the introduction of a regulatory decisions appeal mechanism by Ordinance at a later date, if this proves necessary
 - Requiring the Commission to make and publicise arrangements, following consultation with the Policy Council, for the investigation of complaints, including provision for investigation by an external independent person where a complaint has not been resolved to the satisfaction of the complainants.
- Work with the Commission and the Policy Council in furtherance of the Department's intentions regarding regulatory decisions and appeals and complaints resolution.
- The Department will also recommend to the Policy Council the production of a revised Protocol Document to cover the various issues set out in this paper that can properly be dealt with in that document.