

# STATES OF JERSEY



## **FINANCIAL INSTITUTIONS REGISTERED IN JERSEY: LINKS TO PANAMANIAN LEGAL FIRM MOSSACK FONSECA (P.42/2016) – COMMENTS**

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**Presented to the States on 18th May 2016  
by the Council of Ministers**

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**STATES GREFFE**

## COMMENTS

1. The Council of Ministers wish to provide the following comments on [P.42/2016](#). It is anticipated that Deputy G.P. Southern of St. Helier may wish to take his proposition in 2 parts, therefore these comments are structured with that position in mind with a number of legal, procedural and reputational issues concerning part (a) of the proposition being covered first and arguments concerning why part (b) of the proposition is unnecessary being outlined under a section entitled, ‘The “Panama Papers” – What is Jersey doing?’
2. It is hoped that in addition to responding to the proposition, these comments will provide a useful update to States Members concerning the “Panama Papers” and what Jersey is doing, particularly concerning the role of the Jersey Financial Services Commission (the “Commission”).

### **Legal, procedural and reputational issues with part (a)**

3. There are significant legal, procedural and reputational issues with taking the action requested of the Chief Minister by Deputy Southern.
4. The wording of the proposition is as follows –

*“to request that the Chief Minister, in co-operation with the Minister for Treasury and Resources, as appropriate –*

*(a) directs the Jersey Financial Services Commission (JFSC) –*

*(i) to request the handover of any information held by financial institutions registered in Jersey about their dealings with the Panamanian legal firm Mossack Fonseca, and*

*(ii) to ask what action the institutions concerned are taking as a result of any significant issues or relationships identified following internal investigation; and*

*should the results of steps taken under paragraph (a) suggest that further action is required –*

*(b) establishes, with appropriate funding, a taskforce, consisting of the JFSC, the Financial Crimes Unit and the Comptroller of Income Tax, to examine any abuse or breach of regulatory standards by those Jersey financial institutions identified in the “Panama Papers” which might jeopardise the Island’s international reputation.”.*

5. In order to explain why it is not possible for the Chief Minister to direct the Commission in the manner requested by the proposition, some background on the existence, structure and function of the Commission is required.
6. The Commission is established by Article 2 of the Financial Services Commission (Jersey) Law 1998 (the “Commission Law”) –

**“2 Establishment of the Commission**

- (1) ...
- (2) ...
- (3) ...
- (4) *Save as this Law provides to the contrary, the Commission shall be independent of the Minister and of the States and neither the Minister nor the States shall be liable for any act or omission or debt or other obligation of the Commission.”.*

7. The Functions of the Commission are set out in Article 5 of the Commission Law –

**“5 Functions of the Commission**

- (1) *The Commission shall be responsible for –*
  - (a) *the supervision and development of financial services provided in or from within Jersey;*
  - (b) *providing the States, any Minister or any other public body with reports, advice, assistance and information in relation to any matter connected with financial services;*
  - (c) *preparing and submitting to the Minister recommendations for the introduction, amendment or replacement of legislation appertaining to financial services, companies and other forms of business structure; and*
  - (d) *such functions in relation to financial services or such incidental or ancillary matters –*
    - (i) *as are required or authorized by or under any enactment, or*
    - (ii) *as the States may, by Regulations, transfer.”.*

8. The ability of the Chief Minister to give guidance and general directions to the Commission is set out in Article 12 of the Commission Law –

**“12 Guidance and directions**

- (1) *The Minister may, after consulting the Commission and where the Minister considers that it is necessary in the public interest to do so, give to the Commission guidance or give in writing general directions in respect of the policies to be followed by the Commission in relation to the supervision and development of financial services in Jersey and the manner in which any function of the Commission is to be carried out.*
- (2) *It shall be the duty of the Commission in carrying out any of its functions to have regard to any guidance and to act in accordance with any directions given to it by the Minister under this Article.”.*

### The Power of Direction provided to the Chief Minister by the Commission Law

9. The above extracts from the Commission Law make it clear that there can only be general directions in respect of (1) policies or (2) the manner in which any function (under Article 5) is to be carried out. A direction to the Commission that it “... *request the handover of any information held by financial institutions registered in Jersey about their dealings with the Panamanian legal firm Mossack Fonseca*” would seem to be a specific rather than a general direction. It is the Commission and not the Chief Minister (or the States Assembly) that is responsible for the supervision of financial services in or from within Jersey. If the Chief Minister were able to give binding specific, case by case, directions to probe a matter that he thought suspicious, the Commission would not be able to operate independently of the Chief Minister (and of the States Assembly) as Article 2(4) of the Law stipulates.
10. The Chief Minister signed a Memorandum of Understanding (the “MoU”) with the Commission in December 2014 specifically outlining the position under which he would consider using his powers under Article 12 of the Commission Law. That MoU is published online and is also attached to these comments in the Appendix.
11. A particular reason for entering into the MoU was due to concerns expressed by the International Monetary Fund (the “IMF”) that the power of the Chief Minister to give guidance or direction to the Commission could affect the operational independence of the Commission and its carrying out of its regulatory obligations. The use of the power of the Minister to give guidance or direction to the Commission could, if used inappropriately, place Jersey in breach of international standards concerning financial regulation.
12. The MoU makes it clear in paragraph 3.1 that the powers granted to the Chief Minister under Article 12 “*will only be used when exceptional circumstances make it necessary to do so in the public interest, and there is no intention to use the powers on a regular or routine basis.*” It is difficult to see how the situation outlined in Deputy Southern’s proposition satisfies the exceptional circumstances test and whether it is necessary to use the powers in the public interest concerning this matter.
13. The MoU further makes it clear in paragraph 4.2 that “the Chief Minister confirms that any guidance as well as any direction given by him will be general in nature and will not be used so as to influence particular cases”. In Paragraph 4.4 it is further stated that the Chief Minister confirms “*that any guidance or direction of the type referred to in paragraph 4.3.1 above will not prejudice the operational independence of the Commission by dictating the specific manner in which the Commission should carry out its responsibilities in relation to the supervision and development of financial services in Jersey.*”
14. It appears clear to the Council of Ministers that were the Chief Minister to exercise the power of direction as requested in Deputy Southern’s proposition he would be in breach of both the position at law and the position in the MoU.

15. Finally, it is important not to underestimate the very real concerns that would arise if the Chief Minister did exercise the power despite the legal and MoU issues raised above. Interfering with the independence of the financial regulator can cause a jurisdiction to be in breach of international regulatory standards which could cause significant issues concerning restrictions on market access for the finance industry. Given that this issue has previously been raised as a concern by the IMF, interference with the independence of the regulator in the manner suggested would clearly not be in the public interest.
16. It would therefore appear that the proposition as presented by Deputy Southern, even if supported by the States Assembly, would present the Chief Minister with a significant legal obstacle if he was requested to use the power of direction in such a way. It may therefore be the case that the Chief Minister may conclude that the use of the power of direction cannot be justified in these circumstances.

### **Restricted information under the Financial Services (Jersey) Law 1998**

17. Article 37 of the Financial Services (Jersey) Law 1998 (the “Financial Services Law”) deals with limiting disclosure (by the Commission) of information received about persons conducting financial services in Jersey. It is set out in the following terms –

#### **“37 Restricted information**

(1) *Subject to paragraph (2) and to Article 38, a person who receives information relating to the business or other affairs of any person –*

(a) *under or for the purposes of this Law; or*

(b) *directly or indirectly from a person who has so received it,*

*shall be guilty of an offence and liable to imprisonment for a term not exceeding 2 years or a fine, or both, if he or she discloses the information without the consent of the person to whom it relates and (where sub-paragraph (b) applies) the person from whom it was received.*

(2) *This Article does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources, or to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.<sup>1</sup>”*

18. The proposition as lodged by Deputy Southern is therefore, arguably, not able to be fulfilled upon a request from the States as, quite simply, if the information was disclosed as outlined, the person disclosing such information would be committing a criminal offence under Article 37 of the Financial Services Law. This presents an additional concern in fulfilling part (a) of the proposition as drafted.

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<sup>1</sup> This type of limitation of disclosure is a common feature of regulatory regimes, for example, the FCA and PRA in the UK are subject to similar restrictions.”

**Part (b): The “Panama Papers” – what is Jersey doing?**

19. All Jersey based banks, trust companies and other financial institutions are regulated by the Jersey Financial Services Commission (the “Commission”) and the Commission is taking all necessary steps to ensure that regulated entities are complying with their regulatory requirements. This includes capturing beneficial ownership information, the purpose of the business relationship, the monitoring of transactions and all other due diligence requirements.
20. The action taken by the Commission in relation to Mossack Fonseca has been thorough in the circumstances and stands comparison with what is being adopted by counterpart regulators elsewhere. The Commission has sought relevant information from regulated firms on any connections they can identify with Mossack Fonseca, or with any material published through the Panama Papers. The Commission has also visited the Mossack Fonseca office in Jersey to verify that the firm’s current status here as an unregulated business remains a true reflection of the activity being conducted in the Island. This has been shown to be the case.
21. The Commission has relied on a high level of awareness in regulated firms of the issues raised by the Panama Papers. This has been borne out by the speed of self-reporting of any connections to Mossack Fonseca.
22. States Members will appreciate that it is neither appropriate nor possible to provide details on specific cases, but it can be disclosed that at the current point in time 28 connections have been identified. The Commission is evaluating each reported incidence for: any potential conduct of business concerns; suspicion of exposures to financial crime (including tax evasion) or other potential problems. It should be noted that mention of Jersey among the Panama Papers is not automatically an indication of any misconduct by the named Jersey entities.
23. The case by case review has currently revealed no significant concerns of inappropriate conduct by Jersey financial services practitioners. However, each case will continue to be monitored and can be reviewed if any further information emerges. In order to ensure that the jurisdiction is best placed to offer any necessary detailed comment on any matter arises that affects Jersey, on 5th May 2016 the Commission sent a structured request to firms about their links with Mossack Fonseca.
24. Members may be aware that on 9th May 2016 information on 200,000 entities contained in the Panama Papers was made available on the International Consortium of Investigative Journalists database. This database contains information about connections between entities – presence on the list is itself no indication of any wrongdoing.
25. Members should, of course, be aware that Jersey’s legislative framework requires that should an employee of a financial services firm in Jersey form a suspicion of financial crime, they are obliged to file a suspicious activity report with the Joint Financial Crime Unit of the States of Jersey Police and Customs (the “JFCU”).

26. It is therefore important to note that in addition to the action taken by the Commission, the JFCU have also carried out a review of any suspicious activity reports (“SARs”) related to Mossack Fonseca. Equally, communication about all matters concerning financial law enforcement in Jersey are regularly updated through the tri-partite financial crime law enforcement group that includes the Commission, the JFCU and the Law Officers’ Department.
27. It is for these reasons that the formation of a “taskforce” as outlined in Deputy Southern’s proposition is not required in the circumstances as the matter is being handled appropriately within existing resources. There is no indication at this stage that the injection of further resources into such a “taskforce” would have any material benefit. The matter will continue to be monitored by the relevant law enforcement authorities.
28. It is also of note that Jersey’s reputation as a stable, well-regulated international finance centre is widely established. The Commission plays a vital part in ensuring Jersey’s leading market position as a jurisdiction that supports high-quality financial and professional services providers. Jersey’s reputation for sound regulation and good business practice has been endorsed by a range of expert international bodies that assess compliance with the relevant global standards.
29. For example, Jersey has gained international recognition of its leading position from the World Bank, the IMF and MONEYVAL (the FATF style regional body for Europe) for the standard of compliance with the international standards of transparency and information exchange. Jersey is fully committed, as an ‘early adopter’, to automatic exchange of information in accordance with the international Common Reporting Standard and next year will be providing information to over 50 countries. Jersey has been a party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters since June 2014. Together with the Tax Information Exchange Agreements and Double Taxation Agreements that have been entered into, Jersey is currently in a position to exchange information on request with some 80 countries.
30. Jersey has also received commendations from the Secretary General of the OECD and the EU Tax Commissioner on the extent of Jersey’s commitment to and compliance with the international standards on transparency and information exchange. The results of Jersey’s 2011 OECD Peer Review (including the 2014 Supplementary Report) found ‘the Jersey authorities are fully committed to transparency and exchange of information for tax purposes’ and ‘Jersey’s practices to date have demonstrated a responsive and cooperative approach’. And Jersey is supporting the OECD’s Base Erosion and Profit Shifting programme and is currently engaged in consultation on the arrangements for information exchange through country by country reporting by multinational enterprises.
31. In addition to the Island’s engagement with multilateral bodies that set international standards, Jersey has also taken action locally to discourage the use of the Island by those engaged in tax evasion and abusive tax avoidance. Following the statement by the Chief Minister in July 2014 Jersey has further tackled the issues of tax evasion and abusive tax avoidance on 3 fronts –

- (a) Jersey Finance Ltd. has issued a best practice document to finance industry practitioners;
  - (b) the Commission is looking for evidence of tax schemes being administered when undertaking on-site examinations;
  - (c) the government is refusing applications for licenses for the setting up of a business and the employment of staff where the activities are considered to pose a risk to the Island's international reputation.
32. The Commission and Government regularly host regulators and officials from other jurisdictions who come to learn from the experience on offer in Jersey. During this month, we have already had a visit of delegates from over 10 worldwide jurisdictions who have visited the Island to learn about "best-practice" in corporate registry matters.
33. Members will also be aware of the more recent developments in respect of exchange of beneficial ownership information and the worldwide fight against corruption and financial crime, which include –
- (a) a bi-lateral agreement with the United Kingdom by signing of Exchange of Notes on 11th April 2016 concerning enhanced provision for exchange of beneficial ownership information with law enforcement and tax authorities;
  - (b) confirmation on 10th May 2016 of Jersey's willingness to join the list of jurisdictions that have committed to the recently launched initiative for the development and subsequent implementation of a new global standard for the exchange of beneficial ownership information;
  - (c) the attendance of the Chief Minister, at the invitation of the Prime Minister of the United Kingdom, at the Anti-Corruption Summit held in London on 12th May 2016.
34. These examples are evidence of the strength of Jersey's regulatory regime and of the Island's hard-earned reputation as a high-quality, cooperative and transparent international finance centre. This is why over 12,000 members of our community choose to live and work in this sector in Jersey – a vote of confidence in our regulatory regime, and a vital source of the prosperity and growth that the Council of Ministers is resolved to promote and protect.
35. It is for the above reasons that the Council of Minister would encourage members to reject P.42/2016 in whole.



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**MEMORANDUM OF UNDERSTANDING**

**between**

**the Jersey Financial Services Commission  
(the "Commission")**

**and**

**the Chief Minister**

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**Financial Services Commission (Jersey) Law 1998**

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**Memorandum of Understanding**  
**Financial Services Commission (Jersey) Law 1998**

**1 Recitals**

- 1.1 The Commission is the Island's financial services regulator and was established under Article 2 of the Financial Services Commission (Jersey) Law 1998 (the "Law") as a body corporate with perpetual succession.
- 1.2 The Chief Minister is appointed by the States of Jersey and holds particular powers under Article 12 of the Law.
- 1.3 Whilst the Commission is an independent body, it is in practice accountable for its overall performance to the States of Jersey through the Chief Minister.
- 1.4 The Chief Minister has delegated responsibility for the day to day application of this Memorandum of Understanding to the Assistant Chief Minister with responsibility for Financial Services. The Chief Minister retains the power of direction as detailed in Points 3 and 4.

**2 Purpose of this Memorandum of Understanding**

- 2.1 Article 12 of the Law provides that:

"(1) The Chief Minister may, after consulting the Commission and where the Chief Minister considers that it is necessary in the public interest to do so, give to the Commission guidance or give in writing general directions in respect of the policies to be followed by the Commission in relation to the supervision and development of financial services in Jersey and the manner in which any function of the Commission is to be carried out.

(2) It shall be the duty of the Commission in carrying out any of its functions to have regard to any guidance and to act in accordance with any directions given to it by the Chief Minister under this Article."

- 2.2 The Commission and the Chief Minister wish to enter into this Memorandum of Understanding to clarify certain matters concerning the use of the power granted to the Chief Minister under Article 12 of the Law. This follows concern expressed by the International Monetary Fund (IMF) that the power of the Chief Minister (formerly a power of the Economic Development Committee at the time that the IMF raised its concerns) to give guidance or direction to the Commission "could affect the operational independence of the Commission and its carrying out of its regulatory obligations".<sup>1</sup>

- 2.3 Articles 5 and 6 of the Law confer on the Commission certain functions. In the light of the International Monetary Fund's concerns, this Memorandum of Understanding focuses particularly on the Commission's responsibility for the supervision and development of financial services in Jersey under the following laws:

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<sup>1</sup> Source: International Monetary Fund's October 2003 'Assessment of the Supervision and Regulation of the Financial Sector'.

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**Financial Services Commission (Jersey) Law 1998**

- Financial Services (Jersey) Law 1998
- Banking Business (Jersey) Law 1991
- Collective Investment Funds (Jersey) Law 1988
- Insurance Business (Jersey) Law 1996
- Control of Borrowing (Jersey) Law 1947

2.4 This Memorandum of Understanding is also concerned with the arrangements whereby the Government and the Commission will work together to establish solid foundations for policy decision making.

**3 Use of the powers granted under Article 12 of the Law**

3.1 The Chief Minister confirms that the powers granted to him under Article 12 of the Law would only be used when exceptional circumstances make it necessary to do so in the public interest, and that there is no intention to use the powers on a regular, or routine, basis.

3.2 The Chief Minister recognises that the Commission, in exercising any of its functions, is required, under Article 7 of the Law, to have regard to certain "Guiding Principles". These are:

- (a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
- (b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
- (c) the best economic interests of Jersey; and
- (d) the need to counter financial crime both in Jersey and elsewhere.

3.3 The Chief Minister confirms that, should he find it necessary to exercise the power granted to him under Article 12 of the Law, he would do so in a manner which would be in accord with the Commission's obligations to have regard to the Guiding Principles listed in Article 7 of the Law when exercising any of its functions.

3.4 The Chief Minister accepts the Commission's interpretation of the Guiding Principle to have regard to "the best economic interests of Jersey", namely that:

- 3.4.1 the Commission should not compromise regulatory standards in order to allow a line of business which a section of the Industry might find attractive;

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- 3.4.2 the Commission should have regard to the Strategic Plan for Jersey approved by the States of Jersey from time to time, and in particular its objectives in relation to jobs and economic growth;
- 3.4.3 the Commission should take full account of the costs and other burden of regulation recognising the international nature of the Island's finance industry and the need to be competitive from the perspective of persons carrying on the business of financial services and users of such services;
- 3.4.4 subject to the need to maintain regulatory standards, the Commission should assist in the development of business by resourcing and organising itself to provide timely responses to proposals from persons that are, or are seeking to, carry on the business of financial services and by adopting a regulatory approach that is proportionate to the risks posed by the business concerned;
- 3.4.5 the Commission should facilitate innovation by persons carrying on the business of financial services.
- 3.5 Paragraph 3.4.4 above refers to the Commission's role in the development of business. The Chief Minister agrees with the Commission that a distinction should be drawn between "development" in the context of regulatory legislation and "development" in the context of legislation supporting opportunities for business expansion. A distinction can be drawn between regulatory legislation where the Commission is the initiator and Government and industry are consulted and business development legislation where the Government is the initiator (in many cases, after receiving recommendations or suggestions from Industry) and the Commission is consulted. The Commission's role in responding to Governmental development initiatives is as a facilitator through proportionate, pragmatic and flexible regulation.

**4 The nature of guidance or direction**

- 4.1 The Chief Minister notes that under Article 12 of the Law he may only exercise his power to give to the Commission guidance or direction when it is in the public interest.
- 4.2 The Chief Minister confirms that any guidance as well as any direction given by him will be general in nature and will not be used so as to influence particular cases, e.g. to require the Commission to grant (or refuse) a regulatory consent in relation to a particular person.
- 4.3 Whilst not limiting his discretion, the Chief Minister confirms that any guidance or direction given by him will generally relate to:
- 4.3.1 matters of public policy that the Chief Minister considers that the Commission should take into account in carrying out its responsibilities in relation to the supervision and development of financial services in Jersey;
- 4.3.2 matters relating to the economy, efficiency and effectiveness of the Commission;

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4.3.3 matters relating to the accountability of the Commission; or

4.3.4 ensuring that the Commission adheres to what are generally accepted in Jersey and the United Kingdom as being principles of good corporate governance.

4.4 The Chief Minister confirms that any guidance or direction of the type referred to in paragraph 4.3.1 above will not prejudice the operational independence of the Commission by dictating the specific manner in which the Commission should carry out its responsibilities in relation to the supervision and development of financial services in Jersey.

4.5 The Chief Minister recognises that Jersey is committed (whether by a decision of the States of Jersey, or one of the Ministers of the States, or otherwise), to complying with standards set by internationally recognised bodies (for example, on anti-money laundering provisions). The Chief Minister notes that it is in the public interest to honour such commitments and he will not give any guidance or direction that could adversely affect the ability to do so.

**5 Procedure for the use of the powers granted under Article 12**

5.1 The Chief Minister notes that Article 12 of the Law requires the Chief Minister to consult the Commission before giving it guidance or direction.

5.2 The Chief Minister recognises the importance of the Commission being given sufficient opportunity to comment on any proposed guidance or direction. To facilitate this, the Chief Minister confirms that he will give the Commission a consultation period of at least two months. However, the Chief Minister reserves the right to reduce the length of the consultation period should exceptional circumstances require it.

5.3 The Chief Minister confirms that any guidance or direction would be given in writing to the Chairman of the Commission by means of a copy of the relevant Ministerial Decision, certified by the Greffier of the States as being a true copy of that Decision.

**6 Publication of guidance or direction**

6.1 The Chief Minister recognises that he should be held publicly accountable in respect of any guidance or direction given to the Commission.

6.2 The Chief Minister confirms that within three working days of any guidance or direction having been given to the Commission, he will publish in a manner calculated to bring it to the attention of the public a statement containing details of the guidance or direction and the reasons for giving it.

6.3 The Chief Minister further confirms that such a statement shall be laid before the States of Jersey at the earliest practicable opportunity.

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6.4 The Chief Minister recognises that the Commission may wish to separately publicise the existence of any guidance or direction and agrees that the Commission may do so in any manner it sees fit.

**7 General policy decision making**

7.1 The Chief Minister recognises that there is a need for Government and the Commission to have clear roles in policy decision making. There are policy areas where Government leads with the Commission providing input and areas where the Commission leads with operational independence. In between there are areas of policy to be discussed jointly.

7.2 The Chief Minister accepts the need for Government and the Commission to work together to establish solid foundations for policy decision making to enable fast decision-making and inform more complex cases.

7.3 The Chief Minister confirms that a series of structured meetings will be set up between Government and the Commission.

**8 Amendments to this Memorandum of Understanding**

8.1 This Memorandum of Understanding may be amended by the agreement, in writing, of both the Commission and the Chief Minister.

**9 Effective date**

9.1 This Memorandum of Understanding will be effective from the date of its signing by the Commission and the Chief Minister and succeeds the previous equivalent Memorandum of Understanding between the Commission and the Minister for Economic Development dated January 2012.

**10 Publishing this Memorandum of Understanding**

10.1 The Chief Minister and/or the Commission will make a copy of this Memorandum of Understanding, or the text of it, publicly available.

Executed by the parties:

For the Commission:



Lord Eatwell of Stratton St. Margaret

Chairman

Date: 10<sup>th</sup> Dec '14



Senator Ian Gorst

Chief Minister

Date: 10<sup>th</sup> Dec 2014