

SECOND REPORT
OF THE
SELECT COMMITTEE
ON THE
CONSTITUTION

August 2006

INTRODUCTION

1. The Select Committee on the Constitution was set up by Legislative Council in April 2000, following the suggestion in the 1999 UK White Paper on the Overseas Territories that all OT's should examine their Constitutions and constitutional relationships with the UK, to ensure that they suited all the current day circumstances. No time limit has been placed on the review, and it is considered that getting all the constituent parts right is the most important issue. At the same time as reviewing Constitutional issues, Councillors and the Civil Service have been looking at ways to streamline Government to provide a more cost effective service. Several of these issues interact with each other.

KEY ISSUES

2. The key issues for the Committee have been:
 - a) to ensure that the Constitution of the Falkland Islands is appropriate for our current stage of political and social development;
 - b) that the Constitution properly reflects the principles of partnership set out in the UK White Paper, with which the FIG concurs. The stated principles that underlie that partnership are:
 - the partnership must be founded on self-determination. The Overseas Territories are British for as long as they wish to remain British
 - the partnership creates responsibilities on both sides. Britain is pledged to defend the Overseas Territories, to encourage their sustainable development and to look after their interests internationally. In return Britain has the right to expect the highest standards of probity, law and order, good government and observance of Britain's international commitments.
 - the people of the Overseas Territories must exercise the greatest possible control over their own lives.
 - Britain will continue to provide help to those Overseas Territories that need it.

There is no stated hierarchy in these principles; where they might of themselves deliver different solutions to a particular issue compromise must be found.

- c) that the structure of Government is appropriate to deliver cost effective and efficient services to the people of the Falkland Islands.
- d) that we have appropriate standards of human rights in accordance with the UK's obligations under the ECHR which now forms part of UK law.
- e) that the principles of openness and transparency are enshrined in our democratic process.

- f) that the people of the Islands have had full opportunity to participate in the review process and are comfortable with the proposed amendments.

PROGRAMME AND PROCEDURE

3. The Select Committee has met on 28 occasions as follows:

- 31 May 2000 - to consider scope and procedure
- 21 and 23 June 2000 - to meet Ian Hendry, Legal Advisor FCO
- 4 December 2000 - open session to receive written evidence from the public and presentations from the Attorney General, the Chief Executive and Arthur Donahue, Secretary-General, CPA
- 4/5 December 2000 - further sessions with Arthur Donahue
- 20 February 2001 - to consider a referendum on single constituency
- 24 May 2001 - further consideration of the referendum issue

The Select Committee was inactive through the latter part of 2001 until after the general Election in November 2001.

- 19 February 2002 - open session to consider a number of issues, in particular a new Chapter on human rights and fundamental freedoms drafted by Henry Steele, advisor to the FCO.
- 25 March 2002 - open session to consider revised rules for the conduct of Legislative Council, and suggestions from the Chief Executive on the committee system/structure of Government
- 16 May 2002 - open session to further consider the structure of Government
- 20 August 2002 - to consider the way forward on portfolio/committee issues
- 28 January 2003 - to consider the structure of Government, codifying the role of the Speaker, and further consideration on compulsory purchase legislation
- 24 March 2003 - to consider a composite Chapter One
- 3 June 2003 - Councillors workshop to develop ideas on revised structure of Government.
- 8 January 2004 - to further consider issues raised by the workshop and agree a way forward.
- 18 February 2004 - to review progress to date and set a future timetable.
- 26 October 2004 - to reach consensus on the structure of Exco and the supporting committee structure.
- 26 November 2004 - to reach final agreement on proposals for Chapters I, II and III.
- 25 January 2005 - to reach final agreement on proposals for Chapters IV, V, VI and VII.
- 22 February 2005 - to reach final agreement on proposals for the remaining Chapters
- 18 March 2005 - to review with the Attorney General and Chief Executive some issues raised in the previous three meeting.

The first formal report of the Select Committee was published in October 2005. Following the November 2005 election, the Select Committee

reconvened as follows to enable the new Council to consider the Report and propose amendments to it.

13 January 2006 - to review progress to date, timetable to completion, and outstanding issues.

20 February, 27 March and 17 April 2006 - to consider the structure of Government and reach final conclusions.

22 May 2006 - to consider some outstanding issues in Chapter 1 and reach conclusions.

27 & 30 June 2006 - to consider all other outstanding issues and reach conclusions.

1 August 2006 - to consider amendments to Section 17

This Second Report reflects the deliberations of the Select Committee to date.

The general public has been consulted on a number of occasions, generally through the publication of discussion documents raising particular subjects for consideration. In the early part of the review process some Councillors held discussion groups with small numbers of constituents. Participation by the public to date has been modest in its scale - much of that may be attributable to a lack of firm proposals for discussion. It has been the deliberate policy of the Select Committee to raise issues for discussion, but to leave them free of recommendations so that members of the public can contribute in whichever way they wish. Now that there is a set of proposals it is hoped that members of the public will indicate to the Select Committee their agreement or disagreement with the content.

4. The Select Committee has agreed that this set of proposals should now be published for public comment and discussion. None of the proposals in this report have been formally put to the FCO for discussion or approval. It is proposed to now enter into a series of presentations to the public and discussions on the content of the Report, following which it will be formally submitted to the FCO, hopefully in September '06; it is anticipated that they will then wish to meet with Councillors to discuss any outstanding issues.

For the sake of clarity it is noted here that the Constitution is not drafted in the Falklands nor amended in any respect by the Falkland Islands Government. The Constitution is an instrument of Her Majesty's Government and is amended by the Privy Council on the advice of the Foreign and Commonwealth Office. This does not mean that amendments will be made about which we have not been consulted, or that decrees will be handed down; nor does it mean that HMG will accept all the recommendations of the Select Committee. It is however a consultative process between the parties. Some members of the public have expressed the view that we should not seek change to the Constitution because it gives the FCO the opportunity to take away rights we currently have or impose obligations we do not want. Happily that is not the case.

RELATED ISSUES

5. A number of issues have been considered and resolved throughout this period which arose out of discussions in the Select Committee. Where these did not require Constitutional change in some cases action has already been taken; in some cases where action has been taken there still remain further issues that will require Constitutional change.

i. Constituencies. A referendum was held co-incident with the 2001 General Election to gauge support for a single constituency and revised voting system. The majority of votes in both Stanley and camp were against the single constituency, and no further actions were taken. However some members of Select Committee (and of the public at large) believe the issue was clouded by the proposals for a revised voting system that was complicated. This cannot of course be properly determined without a further referendum. In order that this matter can be considered again when the time is right the Select Committee is of the unanimous view that the matter of constituencies should be removed from the Constitution to the Electoral Ordinance. This will mean that if at any time there is a wish to re-examine the merits of such a change it can be done independently of further Constitutional change (which would not normally be for a further 5 - 7 year period).

Select Committee favours this option provided that the provisions in the Electoral Ordinance require that changes to constituencies can only be made following a referendum. For further comment see comment on section 22 of the Constitution.

ii. Legislative Council Standing Rules and Orders. These were reviewed and amended in a number of respects to enable and encourage greater debate in Legislative Council. In particular it introduced provision for a short debate during questions for oral answer. It is not evident that greater debate in Legislative Council has resulted, and it is still the case that legislation passes with a minimum of discussion, all such discussion having taken place beforehand in other fora. This issue is considered further in options for the structure of Government.

iii. Speaker. There is already provision in the Constitution for a speaker, and Legislative Council elected its first Speaker in 2003 (at the end of the term of office of the then Governor) and set out his duties and responsibilities. Select Committee agrees that there should be provision in the Constitution for a Deputy Speaker, and, since the Speaker is elected only for the life of the Council, transitional provisions from one Council to the next - in particular presiding at the first meeting of a new Council.

iv. Principal Auditor. The requirement for audit of Government's finances is rightly included in the existing Constitution, though in terms that are very brief and lacking in clarity. Also no reference is made to the appointment of external auditors who, technically, report to the Principal Auditor who oversees their work and reports thereon to the Governor and the Standing Finance Committee. The provisions do not therefore reflect current

arrangements which have been developed over time and take account of advice from UK District Audit Service. These are now contained in the terms of appointment of the Principal Auditor but should more properly be enshrined in minor amendments to the wording of the Constitution. In particular FIG, acting through the Governor in Council, should be able to appoint directly a body corporate as Principal Auditor and external auditors, without there necessarily being an additional layer of cost and administration by having a Principal Auditor in a personal capacity. This also has implications for the extent of liability and professional indemnity available to FIG, which would be available from a body corporate, but not necessarily from a person acting in a separate and personal capacity

v. Public Service Management Code. A new modern management code for the Civil Service has been introduced after wide ranging consultations and discussions with staff and after consultation with the FCO. This replaces General Orders, and has the effect of making Colonial Regulations redundant in most respects. In this context Councillors considered that exclusion of public servants from protection against unfair dismissal under the Employment Protection Ordinance 1989 was inappropriate, even though considerable protection does exist under the code. Accordingly the Employment Protection (Amendment) Bill was passed in Legislative Council on 25 May 2005 and came into force on 10 June 2005. Select Committee believes that it will be necessary to review the Management Code from time to time to ensure that it is appropriate and up to date, and that the Management Code should have status under the Constitution.

vi. Commander British Forces. It has been unanimously agreed by members of the Select Committee that the CBFSAI should remain a member of both Legislative Council and Executive Council. Whilst there are legitimate questions as to whether it is appropriate in peace time to have a military commander in the formal structure of Government, the need for close co-ordination between civil and military communities is of critical and overriding importance. With the continuing Argentine claim to sovereignty of the Falkland Islands and occasional aggressive actions to pursue that claim, it is considered appropriate for public confidence that no change be made at this time. Having the CBF available to answer questions put by Councillors, either in public in Legislative Council or in private in Executive Council, is considered essential. He does not vote in either Executive or Legislative Council. There is therefore no proposed change to the current Constitution in this respect.

PROPOSED AMENDMENTS TO THE CONSTITUTION.

6. There are a number of issues that have been identified and agreed by Select Committee which require amendments to the Constitution to bring them into effect. These are set out below; only sections where there are comments or proposed amendments are listed. Where a section is not mentioned no changes are recommended by Select Committee to the current Constitution.

Chapter I. Protection of Fundamental Rights and Freedoms of the Individual

7. This Chapter is generally considered to be one of the most important parts of the Constitution so far as the individual citizen is concerned. It sets out the basic rights of the individual in society and provides certain protections. It also leads the way in protection against various forms of discrimination and enshrines the right to freedom of speech. The next section (section 8 a - v) sets out the proposed amendments to Chapter 1, many (but not all) of which have been proposed by Mr Henry Steele who has been retained by the FCO to advise on all Overseas Territory Constitutions, to ensure that they maintain conformity with UK obligations under the European Convention on Human Rights. Most of these are developments of rather than major change to current practice, but are considered desirable.
8. a) Section 1. **Fundamental rights and freedoms of the individual.** At the moment the right to self determination appears in the preamble to the Constitution. There has been considerable discussion on whether this right should be included in the body of Chapter 1; Select Committee and, we believe, the general public think it should, in order to give the provision greatest effect. The Select Committee has received varying legal advice on whether the right to self determination has greater effect in the body as opposed to the preamble; but all appear to agree that if there is a greater effect it will be in the body. Select Committee therefore takes the view that that is where it should be. Despite some initial resistance to this from FCO it is difficult to see how there could be a sustainable objection, given the prominence HMG gives to the right to self determination and given its adherence to the provisions of the Charter of the United Nations which sets out in Article 1 the requirement :

"To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples.....".

Article 73 of the Charter which deals with non-self governing territories requires that:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligations to promote to the utmost, within the system of

international peace and security established by the present Charter, the well being of the inhabitants of these territories,..."

Accordingly it is now proposed that section 1 of the Constitution should be amended and read as follows:

"Whereas —

(a) all peoples have the right to self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of economic co-operation, based upon the principle of mutual benefit and international law;

(b) the realisation of the right of self-determination must be promoted and respected in conformity with the provisions of the Charter of the United Nations;

(c) every person in the Falkland Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

i) life, liberty, security of the person, the enjoyment of property and the protection of the law;

ii) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association;

iii) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation.

The subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid individual rights and freedoms, subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

b) Section 2(1) which deals with **protection of right to life**, omits the exception contained in the current Constitution in relation to treason. This is because the death penalty for treason has now been abolished. Section 2(2)(a) omits the previously contained exception in relation to the defence of property. It is not in accord with current international human rights instruments to take a persons life intentionally in the defence of property.

c) Section 3 which deals with **protection from inhuman treatment** is identical in effect to section 5 of the existing Chapter 1, and no amendments are proposed.

d) Section 4 which deals with **protection from slavery and forced labour** is identical in wording to section 4 of the existing Chapter 1, and no amendments are proposed.

e) Section 5 which deals with **protection of right to personal liberty** corresponds to section 3 of the existing Chapter 1. It varies from that provision in minor respects:

- a proviso has been added in subsection (1)(d) the effect of which is to clarify that imprisonment on account of inability to pay a debt is prohibited;

- the words "or of such lower age as may be provided by law" have been added at the end of those appearing in the existing subsection (1)(g) to enable the law on compulsory education and parental authority to be altered at some other time.

The Henry Steele draft omits a provision corresponding to paragraph (k) of section 3(1) of the present Chapter 1 of the Constitution since he doubted whether it was in accord with international human rights obligations. That paragraph allows a deprivation of personal liberty authorised by law

"to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within the Falkland Islands or prohibiting him from being within such an area or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order or relating to such order after it has been made, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of the Falkland Islands in which, in consequence of any such order, his presence would otherwise be unlawful."

The Select Committee recalled that the Court in fact used this provision in a recent child abuse case, and it was thought to be a very useful provision in certain circumstances. Select Committee therefore proposes that it should be retained.

Subsections (2), (3), (5), (6), (7) and (8) of the draft are in exactly the same terms as the present section 3(2) to 3(7), and no amendments are proposed.

f) Section 6, which deals with **provisions to secure protection of law**, contains provisions intended to secure the protection of law to which section 13 of the present Chapter 1 relates. There are some minor but important differences between the two provisions. Section 6(1) now provides that a person charged with a criminal offence "shall have the right to a fair hearing within a reasonable time" while section 13(1) of the 1997 Constitution provides that such a person "shall be afforded a fair hearing". The reason for this change is that successive Councils have wished to have the ability to introduce "ticket offences", that is to say offences in relation to which people will have the choice of paying a fixed penalty (for example in relation to a parking offence) or, if they so choose, being prosecuted for the offence in the normal way in court. This amendment makes that possible.

There is a minor change in section 6(2)(d) compared with the existing section 13(2)(d). The existing provision provides for a person to defend himself "... where so provided by any law, by a legal practitioner at the public expense or, when he is unable to retain a legal practitioner of his own choice or at the public expense by such person as the court may approve". The new section 6(2)(d) provides for a person to be permitted to defend himself before the court or, at his own expense, by a legal representative of his own choice (as the existing section 13(2)(d) does) but continues "... or, when the interests of justice so require, by a legal representative at the public expense". This removes the option of representation by a non-lawyer when a person is not able to afford his own lawyer or obtain a lawyer under a statutory legal aid scheme, and instead provides that where the interests of justice so require, if he cannot afford to pay for a lawyer, he must be provided with a lawyer at the public expense. This new provision reflects the practice which has been adopted in the Falkland Islands during the last 11 years, which is more generous than the existing Constitutional provisions. Select Committee does not consider it satisfactory that potentially a person facing a serious criminal charge could be represented by a non-lawyer through lack of resource to defend himself.

The new section 6(2)(f) is to the same effect as the existing section 13(2)(f) but is in slightly different wording. The new section 6(2)(g) does not appear in the existing Chapter 1. It confers upon a person charged on information or indictment in the Supreme Court the right to be tried by jury or before a judge sitting alone, and in doing this it reflects the present law of the Falkland Islands.

Section 6(5) as currently written makes it impossible for a person once acquitted of a crime to be tried again for that offence. Developments in the law in UK have resulted in proposals to permit the reopening of a case on the basis of newly discovered facts or a fundamental defect in the proceedings. Select Committee is of the view that such a provision should be made here, but no drafting has been proposed. Further advice will be required on this, and an amendment would be required to the Constitution to make an ".....except as may be provided by Ordinance to the contrary....." provision.

Section 6(8) is entirely new and provides a constitutional right to compensation in certain cases where there has been a miscarriage of justice.

Section 6(11)(b) omits the words "internal security" which appear in section 13(10)(b) of the present Chapter 1. It has not been explained nor is it clear why these words are proposed to be omitted; further information and clarification from the FCO is required.

g) Section 7 which deals with **protection of rights of prisoners to humane treatment** contains provision identical in effect to that contained in section 5 of the present Chapter 1.

h) Section 8 deals with **protection of freedom of movement**, which is in section 6 of the existing Chapter 1. Sections 8(1) and (2) are identical to the existing section 6(1) and (2).

Section 8(3) of the draft, however, differs in some respects from the existing section 6(3). The biggest difference is that the new section 8(3)(a) in effect combines the existing section 6(3)(a) and (b) but does not permit any imposition of restrictions on movement on the grounds of "internal security". Again it is not clear why this is, and further advice is sought from the FCO. Section 8(3)(c) of the draft corresponds with section 6(3)(d) of the present section 6. A new provision incorporates limits the circumstances in which the imposition of restrictions may be applied on persons who do not belong to the Falkland Islands a) if they are lawfully in the Falkland Islands; b) if they wish to leave; and c) they may only be expelled in accordance with subsection 4.

It has been noted that a new section 8(3)(i) will be required which enables an exception to be made to this section so that a person suffering from a mental illness or disorder, which cannot be treated in the Falkland Islands, can be sent to the United Kingdom without their consent for treatment or secure detention.

The new subsection 8(4) makes new provisions relating to 8(3) and would require a relatively minor amendment to the present Immigration Ordinance in relation to immigration appeals.

For the sake of clarity this section does not introduce a "right to roam"; such a right would have to be introduced under separate law.

i) Section 9 deals with **protection for private and family life and for privacy of home and other property**, and corresponds to the existing section 8. Whilst it is different in its wording and structure it has largely the same effect.

j) Section 10 is an entirely new provision and deals with **protection of the right to marry**, and the right not to be forced to marry. It also provides equal rights and responsibilities to spouses as between themselves and as regards their children.

k) Section 11 deals with **protection of freedom of conscience** and corresponds to section 9 of the existing Chapter 1. It is in exactly the same terms as the existing provision except that it substitutes 16 years for 18 years in subsection (2), that being the age at which a person may decline to receive religious instruction at a place of education, if that religion is other than his own. It may be that this age will have to be reduced to 14 to take account of the "Rights of the Child Convention". Further advice on this is awaited from FCO legal advisors since the position is not entirely clear. Select Committee considered that in any event the age should be reduced to 14.

Section 11(3) is entirely new and makes it possible for religious communities or denominations to provide religious instruction in their own place of education.

- l) Section 12 deals with **protection of the right to education** and is entirely new. Its provisions are met by current law and practice in the Falkland Islands. It requires that every child of the appropriate age as provided by law shall be entitled to receive primary education free of charge, and also enables education in private schools. It is not clear at this point in exactly what circumstances free primary education must be provided (eg duration of stay, immigration status) and further clarification is required.

For the purposes of clarity, this does not entail a right to receive education in any language other than English, but there is probably an obligation to teach non-English speaking pupils enough English to receive a meaningful education in English.

- m) Section 13 deals with **protection of freedom of expression** and corresponds with section 10 of the existing Chapter 1. The new provision does not contain an equivalent of section 10(3) of the existing Chapter which defines "expression" and is considered by legal advisors to be unnecessary. It also omits wording contained in the existing section 10(4)(a)(ii) which Select Committee was advised is unnecessary; Select Committee at this stage does not accept that advice and proposes that 10(4)(a)(ii) be restored to the revised section.

- n) Section 14 deals with the **protection of freedom of assembly and association** corresponding to section 11 of the present Chapter 1 and is identical.

- o) Section 15 deals with **protection from deprivation of property** and corresponds to section 7 of the existing Chapter 1. There is no equivalent in the new chapter of the old section 7(4) which defines "public purposes". This will need to be addressed in new legislation to regulate in much more detail the circumstances in which property may be acquired through compulsory purchase, and the compensation payable. While section 15(3) of the new Chapter is the equivalent of section 7(2) it is much shorter. The effect of the whole of section 15 is, however, the same as that of the existing provision.

The draconian provisions of the existing land law are contrary to both the existing and the proposed new provisions, and need to be revised in replacement legislation.

- p) Section 16 deals with **protection from discrimination** and corresponds to section 12 in the existing Chapter 1. In this section "discriminatory" means affording different treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The option to include sexual orientation in this list was initially declined by Select Committee, not because members thought that discrimination on the grounds of sexual orientation was permissible (in fact normally quite the contrary) but Members were concerned that inclusion of sexual orientation might be legally construed as approving same sex marriages, and this was not favoured. Legal

advice on this matter says that the list of grounds is non-exhaustive; accordingly sexual orientation discrimination would not fall outside the scope of section 16(3) even if the words "sexual orientation" were left out. We are further advised that whether the words are included or not, it does not imply that same sex marriages should be permitted, unless at some future point the ECHR holds that it does. Select Committee decided therefore that "sexual orientation" should be included in the list.

There are exceptions to prohibited discrimination, and they are differently expressed in the new Chapter and, to some extent, more limited. The exception in the existing section 12(4)(b) which allows a law to make provision which is discriminatory "with respect to persons who do not belong to the Falkland Islands" do not appear in the new provision. This requires careful consideration on practical, political and legal grounds. It was noted in this context that the Constitution already allows, in certain circumstances, discrimination in favour of Commonwealth citizens. And by way of example the relatively recent decision to restrict the allocation of fishing rights to only status holders, which was held by the FCO to be legally enforceable under the current Constitution, might not be under the revised draft. Select Committee agreed therefore that either the existing provision 12(4)(b) should be retained, or an alternative savings clause inserted.

Since the introduction of the 1997 Constitution provision has been made for Permanent Residence Permits, and some consider that it would in many cases be unfair to discriminate against them. The issue of rights conferred by PRP's is currently under review, and will lead to further consideration of this section.

There were also discussions and consultations to ensure that these provisions did not confer equal rights on people from outside the country who might be hostile to the Falklands. Advice given was that the Constitution confers rights only on the citizens of the country (ie only to those who live here and in certain cases authorised visitors), but not generally not to people who do not live here.

Also in subsection (4)(c) of the 1997 Constitution the provision which allows discrimination on the grounds of disability or restriction is removed. Subsection (4) however allows discrimination provided for under the authority of any law "to the extent that it has an objective and reasonable justification and there is a reasonable proportion between the provision of law in question or, as the case may be, a thing done under it and the aim which that provision or the thing done under it seeks to realise". This general provision, subject to those safeguards, may permit things which would presently be allowable under the existing section 12(4). Select Committee has requested the AG to review these provisions to ensure there is a balance between services to the disabled and what is practically possible in a small society.

The special exemption in the existing section 12(5) in relation to qualification for service as a public officer (or similar public positions) is not contained in the new section 16 (but, again may be permissible, subject to the safeguards of "having an objective and reasonable justification" and "proportionality" required under the proposed new subsection (4)). Further clarity should be

sought on this, since members are of the view that "... may be permissible..." is a weak basis on which to be entering into Constitutional changes.

A new section 16(5) makes provision which does not appear in the existing section 12. It states that no person shall be treated in a discriminatory manner in respect of access to shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort. That subsection does not, however, make new law since similar provision appears in the Racial Discrimination Ordinance.

q) Section 17 sets out some **derogations from fundamental rights and freedoms** under emergency powers, and is the same as section 14 of the existing Constitution.

r) Section 18 deals with **protection of persons detained under emergency laws** and makes equivalent provision to that contained in the existing sections 14 and 15. It has been noted that this section would not allow for the detention of suspected terrorists and Select Committee agreed that a savings clause to this effect is required. Further consultations on this have been commenced but are not yet concluded.

s) Section 19 deals with **enforcement of protective provisions** contained in the existing section 16 and includes the role and duties of the Courts to uphold the Constitution. A new section 19(3) does not have an equivalent in the existing section 16 and clarifies that the Supreme Court has power to order or declare that the Court which made a reference to it of a constitutional question has power to make an award of damages. These powers are declared by the new section 19 (3)(c) to be without prejudice to the power under section 5(7) to award compensation for unlawful arrest or detentions. Section 19(6) is entirely new and requires the Supreme Court to take into account judgements, decisions etc of the European Commission of Human Rights, the Committee of Ministers of the Council of Europe and the superior courts in the United Kingdom in relation to the interpretation or application of the European Convention on Human Rights.

t) Section 20 deals with **proceedings which might effect freedom of conscience**, and requires that the Court in its deliberations should have particular regard to the right of freedom of conscience of religious organisations.

u) Section 21 deals with **proceedings which might effect freedom of expression** and sets out certain conditions that the Court must take into account in considering whether to grant any relief under section 13. This and section 20 are new provisions which do not appear in the existing Chapter 1.

v) Section 22 which deals with **interpretations** reflects the existing section 17 of the 1997 Constitution There are however under section 22(5) certain **citizenship** anomalies that are discriminatory in their effect and are to be modified . Some revised wording has been drafted to deal with anomalies affecting children born abroad (generally but not exclusively for medical

reasons) to mothers who are citizens of the Falkland Islands who are domiciled and normally resident here. Select Committee agrees that these children should be Falkland Islands citizens, but under current definition are not.

Following Extensive discussion about immigration policy and procedures (which are not yet concluded) it is also apparent to the Select Committee that certain changes are required to section 17(5) which describes the circumstances in which a person enjoys Falkland Islands status.

Section 17(5)(a)(ii) currently says that one has Falklands status if one is a citizen (which means a British Citizen or a British Overseas Territories Citizen) who was born outside the Falkland Islands, whose father or mother was born in the Falkland Islands. Select committee believes this should be tightened to require that the father or mother should also have been a citizen.

Section 17(5)(c) currently provides status to any citizen who is naturalized while resident in the Falkland Islands. This section has caused considerable difficulty since it became apparent that a British citizen can be naturalized as a BOTC (this was previously thought not to be possible). This therefore provides a short cut to status (to British citizens) after 5 years (which is the requirement for naturalization) and precludes any of the qualitative and quantitative checks that are normally required for grant of status, since the grant of naturalization is in the Governor's gift under the UK Nationality Act 1981. This is not acceptable and select Committee propose the removal of this section.

Section 17(5)(d)(ii) references the possibility that status can be revoked in certain circumstances defined by Ordinance. Select Committee is of the view that the circumstances of revocation should be reviewed and restricted.

Section 17(5)(e) provides *inter alia* that the spouse of a status holder holds status provided that they are not legally separated. Select Committee agree that this presents a number of problems, and the provision for the spouse of a status holder to automatically obtain status should be removed. This would not prevent them obtaining status in their own right in the prescribed manner.

Chapter II. The Governor

9. Section 18 deals with **the Governor**. Part of section 18(2) reads "Provided that the question whether the Governor has in any matter complied with any such instructions shall not be enquired into in any court of law." In this context instructions means instructions given by Her Majesty through a Secretary of State. Select Committee can see no reason why the Governor in the execution of his duties should not be subject to the due process of law, as is every other public servant. This has been put to the FCO for justification, modification or removal. A similar issue arises in section 18(5) and various other parts of the Constitution and should be dealt with in the same manner. The advice received to date is that provided the Governor acted lawfully (or indeed unlawfully) the question as to whether he had acted in accordance with the advice of Executive Council would be

irrelevant. A further reason for the provision is to avoid confidential advice to the Governor, such as would normally be given in Executive Council, having to be disclosed and examined in Court. In any event the advice to date relates only to section 18(5), and not to 18(2); further discussion will be required.

Section 18(4) makes reference to the Civil Commissioner. Select Committee agrees that this provision is redundant and recommends that it should be removed.

Section 20 deals with **defence and internal security**; there is notably no definition of the latter term in the Constitution. Some Governors have taken this to mean that they, and not the Chief Executive, have direct line responsibility for the police and the Falkland Islands Defence Force (FIDF). Select Committee has been advised that section 20 of the Constitution does not render the police force or FIDF a special responsibility of the Governor, and nor does any other provision of the Constitution. This mistaken interpretation has been a cause of confusion in the past and is likely if not clarified to lead to mis-understanding and poor government. Select Committee is therefore of the view that clause 20 should be amended to make it clear that the police and FIDF (except for provisions specifically made elsewhere in the Constitution or specific laws) are the responsibility of the Chief Executive in the same way as other public servants.

Chapter III. The Legislature.

10. Section 21(2) is the first reference in the Constitution to the Financial Secretary. Select Committee are of the view that this title is old fashioned and anachronistic, and should be re-titled Director of Finance.

11. Section 22 sets out the provisions for **constituencies**; as noted in 5 i) above Select Committee is of the view that the law defining the number and boundaries of constituencies, and representation in each constituency, would be better contained in an Electoral Ordinance. The reason for this is that modifications to constituencies may be required at times when it is not feasible or practical to further amend the Constitution; it would not be reasonable to hold back any proposed amendments to constituencies just for that reason.

Following the referendum in 2001 on the issue of a single constituency Select Committee decided to take no further action, the idea having been decisively rejected by the camp voters and clearly but more narrowly by Stanley voters. However not all members of Select Committee are happy with this result and feel that at some future point it should again be put to the vote, without the added complication of what form of voting would go with it. That would have to be decided after a vote in favour of a single constituency. Briefly the key arguments in the debate are;

For a single constituency

- i. we are a single country in which Councillors represent all interests.
- ii. many camp residents call Stanley Councillors on constituency issues, and vice versa - there is no real separation of representation.
- iii. camp residents would get more voting choice in a single constituency.

Against a single constituency

- i. there are camp issues that are separate from Stanley issues and require separate representation.
- ii. camp residents are a significant minority which could be swamped by Stanley interests.
- iii. unless camp voters voted decisively in favour it would be a heavy blow to morale in camp to lose separate representation.

Since these issues are ones on which there will be continuing discussion and debate and possibly changing views, Select Committee firmly recommends that the debate and any subsequent change should be free of Constitutional issues. However Select Committee is also firmly of the view that there should be formal consultation with all voters before any change is made (by way of referendum or similar method). It would be a condition of removal of this issue from the Constitution to the Electoral Ordinance that this requirement would have to be protected.

12. Section 23 deals with **qualifications for election**. Select Committee recommends an amendment to this section to reduce the age at which persons may stand for election from 21 to 18 to reflect modern trends and practice.

13. Section 24 deals with **disqualification for election**. Clause 24(1)(d) disqualifies any person who is an un-discharged bankrupt in any part of the Commonwealth and 24(1)(f) disqualifies any person who is under sentence of death in any part of the Commonwealth. Clarification is required of the need to have reference to the Commonwealth in sections 24(1)(d) and 24(1)(f).

14. Section 25 deals with **vacation of seats**. The issue also arises here of the need for reference to Commonwealth citizens as opposed to status holders. Clarification is required.

15. Section 27 deals with **qualifications of electors**. Select Committee is of the view that the whole of this section should be removed from the Constitution into the Electoral Ordinance. This is for much the same reason as the removal of constituencies - there are a number of circumstances in which the Legislative Council of the day might see fit to amend qualifications for electors, particularly in conjunction with changes to immigration law, and it would not be reasonable to await another round of constitutional review to effect it. Provisions would have to remain in the Constitution on a temporary basis until the necessary legislation could be enacted.

Notwithstanding this there are widely held views that the requirement to be a Commonwealth citizen to become an elector is anachronistic and represent vestiges of colonialism, and should be removed. It can be construed as oddly discriminatory that citizens from some countries with whom the Falklands has very little relationship (eg in Africa and Asia) have rights, whilst citizens from other countries with more relevance to us (eg in Europe or the USA) do not have these rights. It is in fact possible for some non-Commonwealth citizens to become qualified as electors by gaining status through marriage, so the principle is already compromised. It should additionally be noted that in order to stand for election one

must first be an elector; this argument therefore also has direct relevance in respect of those who may ultimately become Councillors.

There are counter arguments. It has been said that electors (and candidates for election) who are Commonwealth citizens will be used to the idea of HM the Queen as Head of State, and will have less difficulty with the concept of loyalty to the Crown. There are requirements as Councillors to swear an oath of allegiance which some foreign nationals might find difficult. The retention of the reference to Commonwealth citizens would therefore make it possible to restrict the number of foreign nationals who might in certain circumstances be eligible to vote, and therefore to stand for election. The Select Committee at this stage makes no firm recommendation until it has heard further argument; this can be reviewed in full at the time of removal of this section to the Electoral Ordinance, or at an earlier time. The option exists to add "...or European Union..." but in circumstances of expansion, and the admittance of new countries with little appreciation for the concept of the Overseas Territories, this may not be wise and will require further thought.

It should be noted in this context that if the amendments proposed to Section 17(5)(e) are accepted it will not be possible to be an elector without being a British or a Commonwealth citizen.

16. Section 29 deals with **prorogation and dissolution**. Select Committee recommends that the words "...at any time..." be removed from sections 29(1) and 29 (2) as being unnecessary and inappropriate. [Note: The 27/6/06 minute requires the removal of 29(1) and 29(2). I think this is an error of understanding of the Select Committee on the day - there must be provision to prorogue or dissolve

Chapter IV. Powers and Procedures of the Legislative Council.

17. Section 31 deals with **Power to Make Laws**. Members asked for the AG to clarify why "...may make laws..." is used instead of "...shall make laws...".

18. Section 33 deals with **who shall preside** in Legislative Council. Following the establishment in fact as well as in the Constitution of a Speaker, and the promulgation of a set of terms of reference for the Speaker (which were passed by a Motion to Legislative Council on 23 September 2005) Select Committee recommends that section 33(1)(a) be deleted - that is to say that the Governor is no longer on the list of those who may preside. Provision needs to be made in this section to allow for the appointment of a Deputy Speaker, and for transitional provisions for the Speaker from one Legislative Council to the next as noted in 5(iii) above.

19. Section 35 deals with **participation by non-members**. Section 35(1) makes provision for the Commander British Forces South Atlantic Islands to attend Legislative Council and to take part in proceedings, but not to vote. As explained in 5(vi) above Select Committee recommend that this provision should be retained.

20. Section 36 deals with the **taking of oaths**. In accordance with previous recommendations and current practice reference to the Governor should be replaced by the Speaker or presiding officer.
21. Section 37 deals with a **quorum**. Select Committee recommends that section 37(2) be amended to make it clear that the quorum for Legislative Council is six elected members.
22. Section 40 deals with **standing orders** of the Legislative Council. Select Committee recommends that this section be amended to remove the words "Provided that no such Standing Orders shall have effect until the Governor, acting in his discretion, by writing under his hand approves them." Select Committee takes the view that since the Governor no longer presides over Legislative Council it is not appropriate for him to have authority over how it conducts its business. There are other provisions providing reserve powers to the Governor if he believes that the Legislative Council is acting or intending to act improperly, or in a way that is prejudicial to the interests of Her Majesty's Government.
23. Section 45 deals with the **introduction of Bills** to Legislative Council. Select Committee questioned whether it remained appropriate that certain types of Bills could only be introduced to Legislative Council on the recommendation of the Governor (being Bills with effect on Government revenues and terms of employment of public servants); since in this respect the Governor is acting on the advice of Executive Council (to be confirmed) it is appropriate and should remain as is.
24. Section 46 deals with **assent to Bills**. Section 46(2) makes provision for the Governor, acting in his discretion but subject to the provisions of the Constitution, to refuse to assent to a Bill. Select Committee understand the need for such a provision in order that Her Majesty's Government can protect its position. However Select Committee is of the view that if refusal to assent to any Bill were contemplated there should be full consultation with and advice given to Legislative Council on the reasons, and a defined process of appeal to be followed if Legislative Council still did not agree with the Governor's decision. This matter will need to be discussed further with the FCO.
25. Section 47 deals with the **publication and commencement of laws**, and allows for the coming into effect of any law to be postponed and given retrospective effect. Whilst members are not opposed to this, there should be a defined process for this to happen.
26. Section 48 deals with **disallowance of laws**. Select Committee takes the same view on this as section 46 in terms of process.
27. Section 49 deals with the **Governor's reserved power**. Whilst Select Committee agrees that such powers should exist for the protection of HMG's legitimate interests, in the interests of proper democratic government the circumstances in which they can be exercised should be heavily circumscribed, and the process must be clear and open. There are three amendments that Select

Committee would propose to the current wording of section 49(1) which is set out here in full as currently written.

"If the Governor considers that it is expedient that any Bill introduced or any motion proposed at any sitting of the Legislative Council held in accordance with the provisions of this Chapter should have effect, then, if the Council fails to pass the Bill or to carry the motion within such time and in such form as the Governor considers reasonable and expedient, the Governor may, at any time that he thinks fit, and notwithstanding any provisions of this Constitution or of any Standing Orders of the Council, declare that the Bill or motion shall have effect as if it had been passed or carried by the Council either in the form in which it was introduced or proposed or with such amendments as the Governor thinks fit that have been moved or proposed in the Council, including any committee thereof; and the Bill or motion shall be deemed thereupon to have been so passed or carried and the provisions of this Constitution and in particular the provisions relating to assent to Bills and disallowance of laws, shall have effect accordingly:

Provided that the governor shall not exercise his powers under this subsection without prior instruction from a Secretary of State, unless in his judgement the matter is so urgent that it is necessary for him to do so before having consulted a Secretary of State."

- a) Select Committee does not approve of the use of the word "expedient" in this context. In its first use it should be replaced with "urgent" or something having similar meaning. Just because the Governor considers something "expedient" should not be cause to override the proper democratic process. In its second use it should be deleted since it adds nothing to the context.
- b) Select Committee is of the view that the last part of the last sentence should be deleted in its entirety (from "...unless in his judgement the matter is so urgent..."). Since this section deals with the passing of laws, which in itself is never a fast process, and modern communication being what it is, Select Committee cannot foresee a circumstance in which it would be impossible for the Governor to consult a Secretary of State before acting.
- c) In the interests of accountability and transparency Select Committee is of the view that it should be a requirement that before acting under this section, the Governor should first advise Legislative Council of his intention to do so, and the reasons therefore, and hear any further arguments from Legislative Councillors on the matter in hand.

Chapter V. The Executive.

28. This is a critical part of the Constitution and the one that has caused the greatest debate and discussion in Select Committee, since it deals with how the executive functions of Government are carried out. It deals *inter alia* with the structure and powers of Executive Council which is the Governments primary policy making body. A range of options for the makeup of Executive Council have been discussed, including maintaining the *status quo*, formalising the role of the currently informal General Purposes Committee, retaining three elected members

on Executive Council and assigning to them three "super-portfolios", having three elected members on Executive Council with portfolio responsibilities going to the non-Exco members, having five portfolio holding members of Executive Council and three non Exco members effectively forming the opposition, and having all eight elected members on Executive Council. There are a large number of background issues to each of these and detailed arguments for and against; a summary of these is attached as Annex I to this report, and they are not therefore repeated here.

The first Report of the Select Committee in October 2005 reported that Select Committee concluded that the interests of the people of the Falkland Islands would be best served by having all eight elected members as members of Executive Council, supported by an enhanced committee system with limited powers delegated to them from Executive Council. Not all members of that Select Committee agreed with that recommendation; two were opposed and others had reservations, but it is the only system that enjoyed majority support in the Committee.

The current Select Committee however has come to a different conclusion, and in the search for inclusiveness, transparency, accountability and adequate scrutiny has concluded that retaining three members on Executive Council, with portfolio responsibilities divided between the non Exco members, is the best system. One member preferred the eight member option, but is content to accede to this. This system would also be supported by a revised committee system with limited powers delegated to them From Executive Council.

29. Section 50(2) deals with **the exercise of executive authority** and states that "Subject to the provisions of this Constitution, the executive authority of the Falkland Islands shall be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him." Unless otherwise provided for in this Constitution or specific legislation, this means the Governor acting on the advice of Executive Council. This arrangement is unlikely to change, and Councillors will always be keen to ensure that all authority is exercised through the democratic processes in Executive Council unless it is strictly necessary for the Governor or the Secretary of State to intervene in the interests of HMG's international responsibilities and responsibilities for good government. Good government is not of course a defined term, and therefore capable of different interpretation by different parties. Select Committee has not attempted to try to define good government for these purposes, but is confident that continuing high standards of propriety and financial management will continue through the revised structures, and will give HMG no cause for concern.

30. Section 50(3) deals with **delegated authority** and will be important in terms of delegation of decision making from Executive Council to committees. Select Committee concluded that in this section it was not appropriate that in assigning responsibility to members of the Legislative Council the Governor should be "... acting in his discretion but after consultation with the members of Legislative Council...". This left it open to the Governor to decide on portfolio responsibility, and that cannot be right. Members therefore concluded that the Governor in the

exercise of this function in this section should act in accordance with the wishes of the Legislative Council.

31. Section 51 describes the **Executive Council**. No change is proposed to this section.

32. Section 53 deals with **tenure of office of elected members of the Executive Council**. Select Committee propose that section 53(d) which provides that a seat shall become vacant if the member is absent from the Falkland Islands without the permission of the Governor, would not be replicated in the revised Constitution.

33. Section 54 deals with **temporary members of Executive Council**. Select committee propose that 54(1) be amended to remove the words "...if the Governor informs them that it is desirable..." and 54(2) be amended to remove the words "...he is informed by the Governor that...". The purpose of these amendments is to put into the hands of Legislative Council the responsibility for electing temporary members of Executive Council to cover absence.

34. Section 56 deals with **summoning of meetings of the Executive Council**. Section 56(1) gives sole responsibility for the content of any Executive Council meeting to the Governor acting in his discretion. That means he can introduce any item of business or refuse to accept any item of business. Select Committee does not consider this to be appropriate, and recommends that the section that reads "...and...shall determine what business shall be transacted at that meeting." should be deleted and replaced with "The Governor shall include on the agenda any items requested by elected members", and also add "Other business that is not on the agenda may be discussed at the meeting at the request of the Chair or any elected member."

35. Section 59 deals with a **quorum of Executive Council**. Select Committee recommends that a quorum should be three **elected** members, except where a member temporarily absents himself from the meeting because of a conflict of interest. At the discretion of the Chair of the meeting he may call on other elected members to make up a quorum if that appeared necessary. Select Committee also recommends that in extreme circumstances where there were for any reason insufficient members to vote on an issue, electronic communication should be used to register the votes of absent members if the business was of the utmost urgency and could not be deferred. The FCO would be asked to consider a suitable draft for this.

36. Section 60 deals with the **Governors sole right to propose questions**. Select Committee recommends that this clause should remain, but in a revised form so that elected members could also put questions to Executive Council.

37. Section 61 sets out **the circumstances in which the Governor is required to consult with Executive Council**. Section 61(1) reads "Subject to the provisions of this section, in the formulation of policy and in the exercise of functions conferred upon him by this Constitution or any other law the Governor shall consult with the Executive Council." Select Committee proposed to add to this "...and shall accept its advice." Section 61(2) sets out a series of circumstances where the Governor is

not required to consult with the Executive Council. Whilst Select Committee considers these are reasonable circumstances, it recommends that he shall in all cases, as soon as practicable, communicate to the Executive Council the measures he has adopted and the reasons therefore. As currently drafted he is only required to do so in restricted circumstances. Select Committee takes the view that it cannot be right in a democratic society, where the promotion of internal self government is one of the priorities, that the Governor is free to act without advising Executive Council.

38. Section 62 sets out the circumstances in which the **Governor may act against advice of the Executive Council**. Section 62(1) says that "In any case in which the Governor consults the Executive Council, he may act against the advice given to him by the Council if he thinks it right to do so." Select Committee is of the view that "...if he thinks it right to do so." adds nothing to the clause and should be omitted. Where the Governor does act against the advice of Executive Council he is required under section 62(2) to report his actions without delay to a Secretary of State with the reasons for his actions. Select Committee is of the view that in these days of instant communications the Governor should consult with a Secretary of State before acting against the advice of Executive Council, provided that it is practicable to do so, and there should be a mechanism for Executive Council to put its view to the Secretary of State before the matter is determined. Unless he is instructed by a Secretary of State to do otherwise the Governor shall accept the advice of Executive Council.

39. Section 64 deals with the **Advisory Committee on the Prerogative of Mercy**. Select Committee was not happy with the provision that the Committee should be entirely free to determine its own procedure. The Attorney General was requested to examine whether it could be further defined.

Chapter VI. Finance.

40. Section 73 deals with **public debt**. A minor amendment is required to change "sinking fund" to "capital equalisation fund" in accordance with decisions already implemented to change the way capital expenditure is funded.

41. Section 74 deals with **audit of Governments finances**. This section is considered by Select Committee to be adequate except as noted under item 5(iv) of this report. Provision needs to be made for the Principal Auditor to be a body corporate and the appointment time bound.

Chapter VII. The Public Service.

42. This Chapter has caused very considerable debate and calls for change; it contains only two sections, **the power to constitute offices** and **the power to make appointments**. In both cases the powers are currently vested exclusively in the Governor acting in his discretion.

43. After some debate Select Committee has accepted the need for the current drafting of section 75 to remain as it is. It reads "The Governor may, in her Majesty's name and on her Majesty's behalf, constitute offices for the Falkland Islands and shall so constitute the offices of Chief Executive, Financial Secretary, Attorney General and Principal Auditor." The reason that no change is recommended to this section is because Select Committee accepts that executive authority in the Falkland Islands is vested in Her Majesty and exercised on her behalf by the Governor (see sections 18(2), 50(1) and 50(2)). The role of the democratically elected Government in this process is exercised through proposals to change section 76.

44. Select Committee recommends that section 76 be deleted in its entirety and replaced. As drafted the present Constitution gives the Governor absolute power, in respect of public offices and officers, acting in his discretion to make, confirm and terminate appointments and exercise disciplinary control (at all levels from Directors to part time workers). Select Committee does not believe that in this modern age there is any practical necessity for the Governor to be involved in appointments below Director level; these, and other personnel management issues in the civil service should be the responsibility of the Chief Executive working to the Management Code - a document that has been formally approved by Executive Council and by the Foreign and Commonwealth Office. It is the Chief Executive after all, and not the Governor, who has actual day to day responsibility for the effectiveness of the public service, and needs the proper tools to carry out his tasks.

Select Committee respects the age old UK civil service mantra that politicians should not be involved in the appointment and dismissal of public servants, to ensure that nepotism and corruption continue to be avoided. Nevertheless elected members do work closely with many public officers, and often have more direct knowledge of their strength and weaknesses and of their effectiveness than the Governor, and in terms of directing Government policy Councillors are often more closely aware of the skill that may be required in new appointments. And it is elected members who at the end of the day are democratically accountable for the proper performance of the Government at all levels in the execution of its functions.

Select Committee recommends therefore that there should be considerable formal delegated authority to the Chief Executive in appointments and the exercise of disciplinary control, and a limited role for Executive Council in appointments as described below.

The authority to make **appointments** should be exercised differently at different levels:

Level 1. Senior Magistrates, Principal Auditors - appointments to be at the sole discretion of the Governor (after consultation with the FCO and others described elsewhere). Judges nominally would also fall into this category but are dealt with separately under section 79.

Level 2. Chief Executive, Attorney General, Financial Secretary, Chief of Police, OC FIDF, Director Civil Aviation - appointments to be made by the

Governor having consulted Executive Council, though he would be free not to accept that advice in accordance with section 62 of the Constitution (as revised).

Level 3. Heads of Departments - appointments to be delegated to the Chief Executive who should consult Executive Council, though he would be free not to take their advice using a mechanism similar to section 62 (as revised) but reporting to the Governor.

Level 4. All other public servants - appointments to be delegated to the Chief Executive who if appropriate and in his discretion might seek the advice of Executive Council, whose advice he would not be obliged to take.

The exercise of **disciplinary control** should for all public officers be in accordance with the Management Code; within the definitions section of the Constitution the Management Code should be defined as a document having been approved by Executive Council and the Secretary of State.

There has been lengthy debate and substantial difference of opinion, both amongst members of the Select Committee and amongst its advisors in the civil service, as to the merits in our circumstances of a **Public Service Commission**, which in other jurisdictions is the body that makes public service appointments. There is no agreement that such a body would currently make a useful or cost effective contribution to the running of Government, but it has been suggested that the Constitution could/should make provision for such a body, and it would be for Executive Council at some future point to activate it. This issue should be discussed further and its various merits fully considered.

Chapter VIII. The Judicature.

45. Section 77 deals with the **Supreme Court**. The Constitution does not deal with the setting up of subsidiary Courts which are dealt with in the Administration of Justice Ordinance. The Constitution therefore does not deal with the terms of appointment of the Senior Magistrate, but Select Committee supports the view of the current and previous Governors that the Senior Magistrate should be appointed for a period not exceeding three years with no provision for extension. This can be provided for in the Administration of Justice Ordinance, but may also require amendment to existing provisions in section 18 (The Governor) or section 76 (Appointments)

46. Section 85 deals with **appeals to the Court of Appeal** and *inter alia* sets the figure below which there is no automatic right in civil proceedings to reference to the Court of Appeal. The figure of £1000 in the current Constitution needs to be amended to £5000 in accordance with existing subsidiary law, or preferably to a higher figure that is more in line with the likely costs to be incurred. An appeal is of course always available with the leave of the Supreme Court, irrespective of the sum in question.

Chapter IX. Miscellaneous.

47. Section 87(1) deals with **reappointments and concurrent appointments**. This may require some amendment to enable the restriction on the term of office of the Senior Magistrate to be implemented.

48. Section 89 deals with **definitions**. Select Committee proposes that three definitions need to be checked for current accuracy and appropriateness: a) "gazette" to ensure that gazettes can be produced and distributed electronically; b) "minerals" to ensure co-ordination with more recent minerals legislation; and c) "Governor" to clarify that it means Governor in Council unless specifically set down otherwise.

OTHER ISSUES

49. **Ombudsman**. There has been considerable discussion and public comment and general agreement that there should be provision for an ombudsman, or complaints commissioner. It has yet to be agreed how such an office should be set up and resourced. It has also been argued that such an office could be created without need for reference to it in the Constitution, and that is very probably correct. Nevertheless Select Committee prefers that provision should be made in the Constitution for this office, which should also act as the Human Rights Commission. Some draft provisions for a complaints commissioner have been made by the Attorney General and communicated to Select Committee under a memorandum dated 12 April 02.

50. **Public Accounts Committee**. Select Committee believe that there should be provision in the Constitution for a Public Accounts Committee (or other appropriate name), which would be an instrument of either Executive Council or Standing Finance Committee, to investigate value for money or other issues put to it. It would not be a standing committee nor would it necessarily have a permanent membership, but would be called when required by one of those two bodies; its membership is likely change from one investigation to the next depending on skills required. Further discussion needs to take place to more precisely define its make-up, role and reporting lines, but like the Ombudsman Select Committee recommends that provision should be made in the Constitution for this Committee.

51. **Internal Self-Government**. There is a need to solidify, and in some cases codify, the extent of internal self-government, which underpins the right to self-determination. A clearer description of the role of the Governor as head of the Public Service and the role of the Chief Executive as head of the Civil Service is hopefully achieved by the amendments to section 76. However the circumstances in which the Governor may intervene in domestic affairs in the name of "good governance" is an issue that has concerned all Overseas Territories in recent years. Good governance is something to which we all collectively aspire; it is not the preserve of a single person or group of persons, and should not be confused with cultural or political differences. It remains the concern of this Select Committee (and its successors) to ensure that the balance between the UK's legitimate interests and the maximisation of internal self government is properly maintained.

Mike Summers
Chairman
Select Committee on the Constitution
10 August 2006

Report of the Select Committee on the Constitution
Annex I - The Executive

1. As noted in paragraph 28 above, the question of how the Executive should be structured for the future has been the subject of considerable discussion. There are a number of differing views, and a number of background issues that form the basis to this discussion. The key requirements that Select Committee agree should guide these considerations are:

- i) we should be internally self governing to the maximum extent possible whilst delivering the highest standards of probity, law and order, good government and observance of Britain's international commitments, in accordance with the terms of the 1999 UK White Paper on the Overseas Territories.
- ii) Executive Council should continue to be the most senior Government body
- iii) we should continue to strive for greater openness in Government so far as is practicable
- iv) elected members should be more accountable for the decisions and actions they take
- v) to achieve greater accountability members must take greater responsibility through development of the portfolio system.
- vi) there must be sufficient scrutiny in the system, to critically examine decisions and their application

2. There are a considerable number of factors to be taken into account in devising a structure of Government through which this can be delivered. Not only must the structure through which Elected Members work be effective, it must co-ordinate with the overall structure of Government. The last two FIG Chief Executives have been firmly of the view that the size and shape of Government needs addressing, and in tandem the Committee system needs streamlining. In an Executive Council paper in 2004 (239/04) Chief Executive Chris Simpkins wrote:

"Shortly after I took up office, members asked me to produce a list of personal priorities for discussion with them. Following a brief examination of the process of Government, I identified nine priorities for action that were subsequently endorsed by Executive Council. Prime among these priorities was a "review of decision making structures and processes of Government with the objective of delegating responsibility to the lowest competent levels". The need for such a review was, among other things, illustrated by the extent of upwards delegation and downwards dabbling in the organisation by both members and senior managers perhaps because the degree of mutual trust and confidence between tiers of Government could be significantly enhanced."

In his presentation to the Select Committee on the structure of Government the previous Chief Executive Michael Blanch wrote:

"The core of the (UK Government's "Modernising" agenda) is to make democratic government more open, more responsive to customers and citizens, allow politicians to deliver their electoral mandates and above all to be accountable for their actions. It is in all these areas that governance in the Falklands does not work.

There are, I think, four critical failings in our system of governance:

- i) Lack of leadership. The current 8-member group finds it difficult to achieve consistent and focused vision, and to pursue any single mindedness of policy. The lack of a "political executive" means decisions often take far too long, and are punctuated by reversals. Every single successful Government requires leadership. (Further comment/comparison with the Blair Government omitted).
- ii) No democratic empowerment. Members with portfolios have no real delegated authority. Indeed there is a plethora of unproductive committees and talking shops. (Further comment/comparison with the Blair Government omitted).
- iii) No separation of legislative and executive, hence no adequate scrutiny. Scrutiny is a central requirement if Chairs are to have more power. Scrutiny does not mean asking the officers searching questions. It means an opposition asking difficult questions of the political executive, usually in public open Select Committees, exposing for instance poor value, ill considered decisions and lack of consultation. This function in the present Constitution is intended to be carried out by the Legislature and its select committees scrutinising Executive Council. In practice it is quite impossible for 8 elected members (all of whom, with portfolios, are part of the "executive") to inquisit themselves. Of course, Members do try to do this but the result is that they can end up criticising their own decisions, reversing policies and appearing politically schizophrenic.
- iv) Government is too secret, too closed. Committees are now more open, which is welcome. But Executive Council, the ultimate decision making body is closed. It covers an infinite variety of business, very little of it needing secrecy and arguably much of it being quite inappropriate for a senior decision making body."

Both of these observations, whilst very differently expressed, lead to a similar broad conclusion - that the structure of Government needs to be reformed along with the committee system, in a manner that delivers as many of the desired objectives as possible. Both Michael Blanch and Chris Simpkins have devised what they consider to be suitable (and largely similar) committee structures. The outstanding question is how they can be merged with the elected members portfolio structure and how can the executive/scrutiny relationship be maintained.

3. There are a number of additional factors about the Falklands, its demographics, perceptions of how democratic Government currently works and how it should work or be constructed, that contribute to this debate:

- i) there are currently 8 Councillors to represent around 2,600 constituents; there would seem to be little scope to increase numbers.
- ii) there are no parties or groupings, nor are any likely to emerge in the foreseeable future.
- iii) there is no elected political leadership (either direct or indirect).
- iv) Government largely works on a consensus system. All Councillors take the Exco oath and receive Exco papers. Until the last election in 2005 all Councillors together discussed Exco papers in advance of meetings and gave directions to Exco members on how they wish to see decisions made. Under the terms of the Constitution the Exco members were free not to accept that direction (and on very few occasions did not) but they were under considerable moral pressure to "conform". Presumably anyone who did not would never be elected to Exco. Since the 2005 election Councillors have decided to keep GPC as a "caucus" mechanism, and still discuss together Exco papers. However no formal conclusions are reached and no instructions given to Exco members who must make their own decisions. However the possibility clearly exists to revert to the previous system.
- v) All members receive and debate in Committee and elsewhere Bills that are to be submitted to Legislative Council. Objections and difficulties are mainly ironed out during this process (only on limited occasions in public Committees, though this is very much improved in the early days of this new Council) but still rarely is there debate in Legco about either the principles or the detail of legislation. The public is thus deprived of the opportunity to hear and understand the purpose and content of new legislation.
- vi) under this type of consensus system it is very much more difficult to see where the scrutiny function sits. Who is scrutinising whom ?
- vii) notwithstanding this there are views that in order to fulfil the necessary workload all Councillors must be involved in at least some parts of the decision making process (the executive). In practice under the present system all Councillors tend to want to be involved or have a say in all major decisions, whether they are the portfolio holder or not. That makes the executive/scrutiny model almost impossible to operate in any transparent manner.
- viii) some also feel that the dissipation of decision making powers over all members is preferable to it being concentrated amongst fewer members.

- ix) at present Councillors are not full time and are not paid a wage (though expenses are paid for time spent on Council work). There are differing opinions on whether some or all Councillors should be full time or fully paid positions. Some argue that this would significantly improve the quality of democratic Government, others argue that a different type of candidate would emerge who would stand for election for the money on offer and not for the concept of service to the community; others argue that there are good candidates who cannot afford to give up gainful employment to become Councillors unless there is some realistic financial reward or compensation.
- x) Until such time as the Falkland Islands does have full time Councillors, full ministerial responsibility (in which Councillors take full legal and executive responsibility for their portfolios) is unlikely to be a practical option. This severely restricts both the authority and the accountability of Councillors.
- xi) At present all Councillors hold portfolio responsibility for certain aspects of Government, though this falls short of any executive authority. Attempts have been made in recent Councils to ensure that the distribution of work/responsibility is roughly equal.
- xii) A new portfolio system has been devised by the current Council that provides for eight portfolios, each with a lead Councillor and two supporters. A copy of the current portfolio structure is attached. This has served to much better focus Councillors attentions in particular areas, and gives the public better focus on who is responsible for which areas of Government. However it does not change accountability.

4. These considerations have led to a range of possible solutions that have been discussed to try to balance the often competing factors set out above (and on which not everybody is agreed). These are described below with some brief explanations of the arguments in favour and against (although in doing this it is accepted that what one commentator might consider good another might think is undesirable):

A. Maintain the Current Arrangement.

This is the system that is described in the Constitution, with three members on the Executive Council, elected each year by Legco. All Councillors hold portfolio responsibility, but with limited authority. Very consensus orientated through GPC.

Pros

It is a known and understood system.

The committee system and portfolio responsibility can be refined and made more efficient without changing the whole system.

Spreads workload/decision making throughout all members.

Cons

The role of GPC and the development of consensus politics means that there is scope for it not to work as described in (or intended by) the Constitution (in the pre 2005 fashion described above).

There is no transparent scrutiny of decisions.

The public perceive the system as secretive and lacking openness.

The under-developed portfolio arrangements do not deliver responsibility and accountability.

Inefficient use of peoples time.

B. Three Executive Council Members Holding All Portfolio Responsibility.

This system envisages a three member political executive who would be the Executive Council members, each with a major portfolio holding a) industries and development (including camp issues); b) health, education and public protection; and c) corporate services including public works and land use. The other five members would have the traditional legislative role of representing constituents, inquisition and scrutiny, committee work, setting the budget, and annual appraisal of performance. This appraisal of performance would be manifest through elections to Exco.

Pros

Re-introduces the executive/legislative separation improving scrutiny.

Creates political leadership and opportunity to approve/disapprove performance.

Stimulates greater public debate.

Cons

Probably requires full time Councillors on the executive.

Difficulties with changing Exco members.

Significantly reduces role of other Councillors - waste of resource.

Creates a "political elite".

The executive is in the minority.

C. Three Executive Council Members. Non Exco Members Hold Portfolio Responsibility

This system proposes to retain the current three member Executive Council, with Executive Council being the principal decision making body for strategy, policy and major management decisions. Portfolio responsibility would sit with the five non-Exco members as chairs of five portfolio groupings, with a limited amount of delegated authority from Exco to Committees. Exco would retain the right to "call in" any decisions of Committees that it wished to review, Committees would scrutinise the work of Exco and send back for review decisions that were thought to be incorrect. The five portfolios shown as Annex III would be a) camp issues; b) health, education and public services; c) corporate services and public protection; d) industries and development; and e) public works and land use. There are doubts in some areas that the health, education and public services portfolio might be too big, and an alternative has been suggested which appears workable; some refinement of

this may still be required therefore. Exco members would have a right/obligation to attend Committee meetings, and each Committee would have two other non-Exco members. As an alternative Exco members might retain some limited portfolio responsibility (e.g. administration, finance and legal services) to take some more of the burden. It might also be desirable to extend the tenure of office of Executive Council members from one to two years.

Pros

All members fully involved in decision making, but at different levels.
Provides scrutiny up and scrutiny down.
Maintains a workable size Exco.
Enhanced authority and accountability of members.

Cons

Potential for division between two decision making levels.
Need to avoid duplication of effort.

D. Eight Member Executive Council

This proposal emerged from discussions on how the competing requirements can be balanced to provide a system that is not replicated elsewhere, but would work for the Falklands. It proposes to formalise the current system of "all inclusiveness", with eight portfolio areas (as currently operated, see Annex II), each chaired by a Councillor, and all eight Councillors would be members of Exco. There would be significant delegation of decision making powers to Committees, but strategic and policy decisions would remain the responsibility of Exco. Each Committee would have three other Councillors in addition to the Chair. EXCO would have the right to "call in" decisions made in Committee.

Pros

All members are fully involved in Government.
Significant decision making can be delegated to Committee level.
Exco can "call in" and scrutinise decisions of Committees.

Cons

An "internal" scrutiny function may be seen as cosy and not transparent.
Will not contribute to more debate in Legco.
Exco would become unwieldy.
Too much debate would be held in Exco which is not open

5. There is firm agreement in Select Committee that the system of government needs to change to adapt to new circumstances, and there was no support for Option A to maintain the *status quo*. Option B equally attracted little support - it was considered by most to be too radical, too elitist and an inefficient use of scarce resource. There was a strong majority in favour of Option C, as the best and most efficient development of the current system (although this was not supported by one member

who preferred D). Only one member supported Option D which was largely considered to be too unwieldy.

6. Following Select Committees expressed preference for Option C a meeting was held with the Chief Executive and Attorney General to brief them on previous discussions and to hear any comments they might have. Neither saw any difficulty with the proposals and could see many merits. A number of attendant issues were discussed:

- the issue of lay members on Committees and their future role
- the role of advisory groups
- how many Members for each portfolio
- detailed structure, operation and servicing of Committees
- delegation from Executive Council to Committees
- legal responsibilities for delegated powers
- parallel structure of the public service
- role of the Standing Finance Committee
- pay and pensions for elected Members
- when to implement agreed changes

7. The issue of lay members will be discussed during public consultation. On the one hand there is the argument that the inclusion of lay members often gives a wider perspective to discussions, on the other there is the question of how they are selected and whether it is democratically acceptable for them to be allowed to vote. Some existing Committees (eg Planning & Building) have statutory provision for lay members. One option is for Committees to consist of only elected Members and relevant officers, and for lay members to make their input through advisory groups. For example the Agricultural Advisory Committee (as is) might become advisory to the Industries and Development Committee, rather than to Exco.

8. Options were discussed on how many additional members should be on each Committee. In view of the fact that at least one Exco member would attend each Committee, the Committee itself should include the Chair plus two other elected (non-Exco) members. Provision should be made for one of them to be vice chair, and if any member was going to be absent they should nominate a substitute in their place, the nomination being made in advance to the Chair and Secretary.

9. It was agreed that there was no reason why the majority of non-policy matters should not go to Exco, but be determined at Committee or officer level. Such delegation to open Committees would add to democratic transparency. Legal responsibility for decisions would remain with relevant officers or Exco.

10. As the new structure bedded down it would be possible for the structure of the public service to change to reflect this more streamlined approach. However it was not essential the public service exactly mirrored the portfolio structure; it would however be essential for the public service to provide support to this structure.

11. It was agreed that the Standing Finance Committee should remain as it is.

12. Some Members believe that it is time for the Falkland Islands Government to move to a fully paid if not full time role for Councillors. This is an important issue for discussion during public debate of the Select Committee Report; where the money would come from is obviously a key issue. The issue of pensions for service was also considered worthy of further discussion.

13. Members considered when and how to implement this new structure, the options being immediately (or as soon as details could be finalised), mid term, or after the next election. The collective view was that the revised system should be implemented in September 2007 and bedded down by this Government before the next election. It would be unfair to drop on a new Government a substantially new system of working with which officers were not yet familiar.

MVS
10/8/06

Annex II - Current Portfolio Structure

Camp Issues	Health Services & Public Protection	Corporate Services	Regulatory Services	Education & Training	Public Works	Industries & Development	Land Use
Agriculture	Medical Service	Administration	AG's Chambers	Education	Utilities	Fisheries	Public Land Management
Tourism	Social Services	Human Resources	Registry	Training	Waste Management	FIDC	Housing
FIGAS	Police	Public Relations	Customs	Youth Development	Municipal Services	Port & Harbour	Environment
Transport	Fire & Rescue Service	FIGO	Immigration	Leisure Services	Roads	Minerals	Planning
Shipping	FIDF	Treasury & Taxation	Civil Aviation		Design		Heritage
FLH		Information Technology	Justice		Plant & Vehicles		
Fox Bay Village		Legal Services	Post		Quarry		
		EU Issues	Telecommunications		Energy Conservation		
		SSL					

Annex III - Five Portfolio Structure

Camp Issues	Health, Education & Public Services	Administration & Central Services	Public Works, Infrastructure & Land Use	Industries & Development
Agriculture	Medical Service	Administration	Utilities	Fisheries
FIGAS	Social Services	Human Resources	Waste Management	Mineral Resources
Transport	Education	Public Relations	Municipal Services	Tourism
Shipping	Training	Economy Relations	Roads	Economic Development
FLH	Youth Development	External Relations	Quarry	Port & Harbour
Fox Bay Village	Child Protection	Information Technology	Public Land Management	
	Leisure Services	Legal Services	Housing	
		Post & Telecommunications	Environment & Conservation	
		Civil Aviation	Planning, Land Use & Heritage	
		Emergency Services	Energy Conservation	
		Customs & Immigration		

