

FALKLAND ISLANDS GOVERNMENT



ATTORNEY
GENERAL

**LEGAL SERVICES
LEGISLATIVE DRAFTING

DRAFTING MANUAL AND
GUIDANCE**

3/3/17 (Updated 9/6/17)

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INTRODUCTION

Scope of Manual

This manual sets out —

- practices, approaches, procedures and guidelines for drafting legislation (Bills and regulations) for the Falkland Islands
- relevant legislative prescripts and processes

The legislative drafting function of the Falkland Islands Government Legal Services will follow the New Zealand style of drafting. This manual supplements the New Zealand Parliamentary Counsel's legislative drafting manual, and identifies changes applicable to the Falkland Islands. To avoid repeating material already set out in the New Zealand drafting manual this supplementary manual only contains and deals with material peculiar to the Falkland Islands context which is not adequately provided for in the New Zealand drafting manual.

The New Zealand Parliamentary Counsel's Office style manual is also to be followed as a guide when drafting for the Falkland Islands so as to encourage consistency. The New Zealand drafting manual and style manual, and this supplementary manual should be liberally referred to and consulted in accordance with the guidelines for consultation set out below.

Using the Supplementary Manual

Discretion and common sense are required in respect of identifying appropriate cases for departure from what is recommended; and in respect of the use of the New Zealand drafting manual (NZDM) alongside this manual:

- There are certain parts of NZDM which are clearly irrelevant to the Falkland Islands and should be ignored. Examples of these are Chapters 16 (Māori issues in legislation: Jurisprudence and language) and 17 (New Zealand Bill of Rights Act 1990)
- Other parts of NZDM are relevant to varying degrees; this manual focuses on areas in which practice or procedure in the Falklands is at variance with that in New Zealand, or on areas where additional information is required

- Chapters in NZDM with broadly similar content are to be treated as having been amended by this manual in areas of clear overlap.

A living document

The aim in writing this manual was to produce guidance that is relevant at all times to the practice of legislative drafting for the Falkland Islands. It will be periodically amended as and when necessary to reflect current practice. Users of this manual – particularly externally contracted drafters – are therefore encouraged to maintain regular contact with Falkland Islands Government Legal Services so as to keep abreast of any changes to the manual.

The Approach

In addition to the information in the Introduction, this manual specifically departs from the guidance in the following chapters from NZDM:

- Chapter 2 Approach to Drafting
- Chapter 4 From Bill to Act: Processes and Key documents
- Chapter 7 Delegated legislation
- Chapter 9 International standards and obligations
- Chapter 11 Budget Legislation

Hierarchy of legislation

Imperial vs local enactments

The specific legislative situation in the Falkland Islands, which is very different from that in New Zealand, stems from the Falkland Islands' status as a British Overseas Territory. The work of the local legislature is subordinate to Acts of the Westminster Parliament and Orders in Council made by Her Majesty either in exercise of the prerogative powers (in which case Orders in Council are primary legislation) or in exercise of power conferred by an Act of the Westminster Parliament (in which case Orders in Council are subsidiary legislation). Either way, an Order in Council overrides any Ordinance passed by the legislature of the Falkland Islands, as does any Act of the Westminster Parliament that applies to the Falkland Islands by virtue of its own provisions. There is a slight difference regarding indirectly applied (or "adopted") United Kingdom legislation as stated in section 83 of the Interpretation and General Clauses Ordinance.

There is, therefore, a top tier to the hierarchy. This is comprised exclusively of United Kingdom statutes applied directly by United Kingdom authorities to the Falkland Islands.

Local enactments

The legislature of the Falkland Islands has plenary legislative power, subject only as set out above. This power can be exercised to voluntarily commit the Falkland Islands to adopt United Kingdom statutes (or part of such a statute) which the United Kingdom authorities have not directly applied. When applied in this way, this United Kingdom legislation is referred to as “adopted legislation” (or, historically, as “adopted imperial enactments”), and has the same character as locally created legislation in that it can be disapplied at the pleasure of the local legislature. By contrast, United Kingdom legislation that applies directly, or by necessary implication, cannot be disapplied by the local legislature.

Primary legislation

The categories of primary legislation in the Falkland Islands are identical to those set out on the second page of the NZDM, but for the irrelevance of ‘Local Bills’ and the fact that primary legislation in the Falkland Islands is after enactment referred to as an ‘Ordinance’ rather than an ‘Act’.

Delegated or subordinate legislation

Delegated or subordinate legislation ordinarily includes: matters of administrative detail, process, and procedure, matters which need flexibility to be changed easily, fees and forms.

A notable exception to the rule is the annual Finance Ordinance, which is primary legislation used to amend fees set out in either primary legislation or in delegated or subordinate legislation.

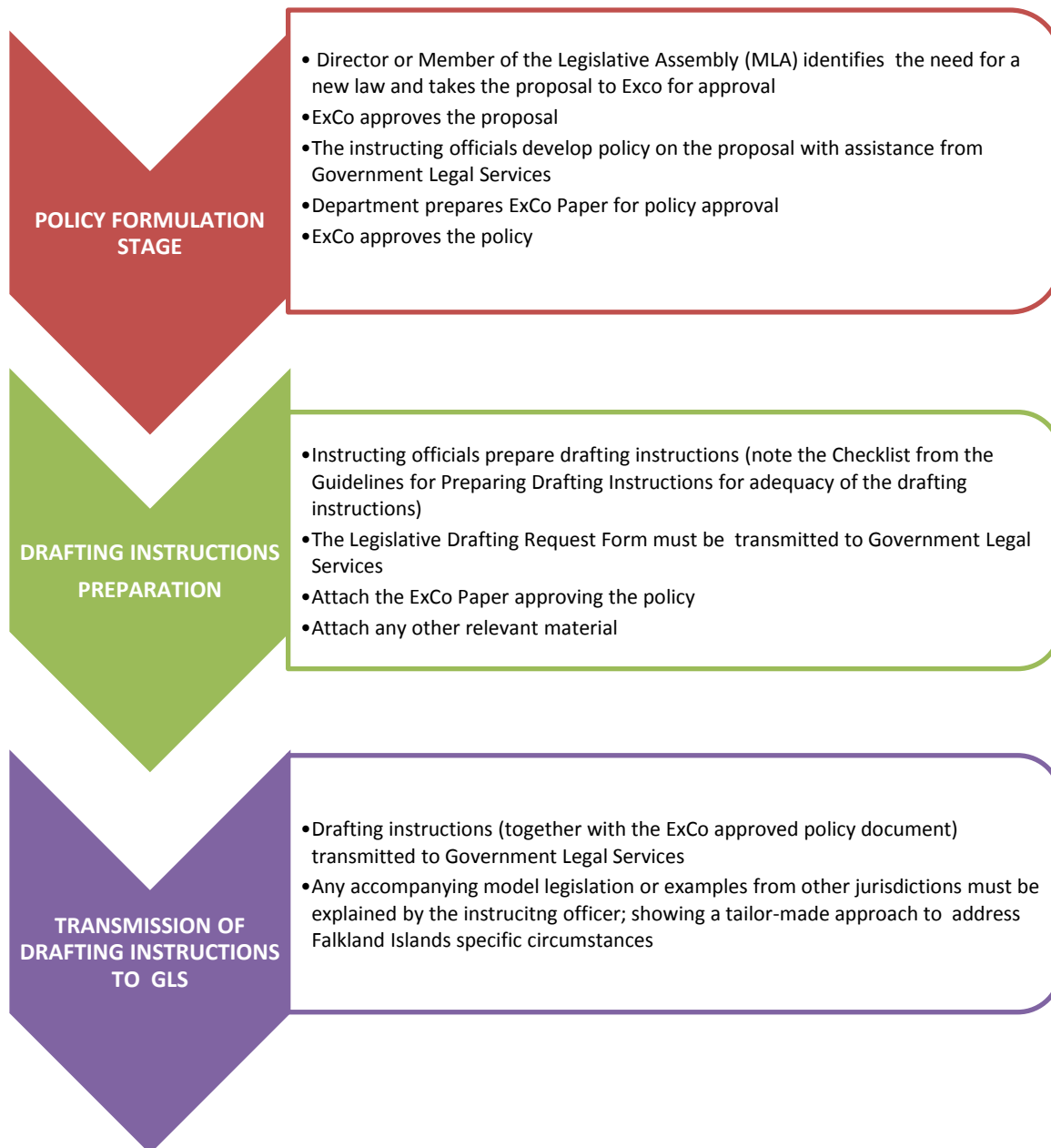
CHAPTER 1

FROM BILL TO ORDINANCE- PROCESSES AND KEY DOCUMENTS

PROCESS DIAGRAM

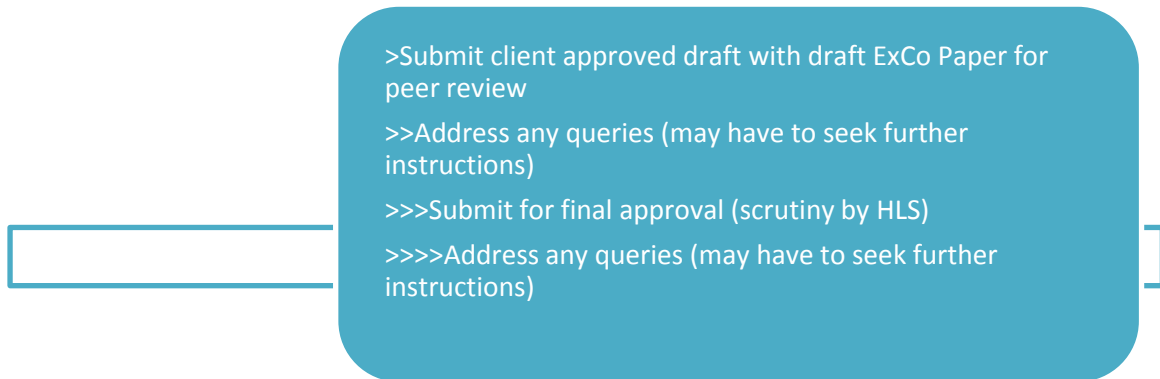
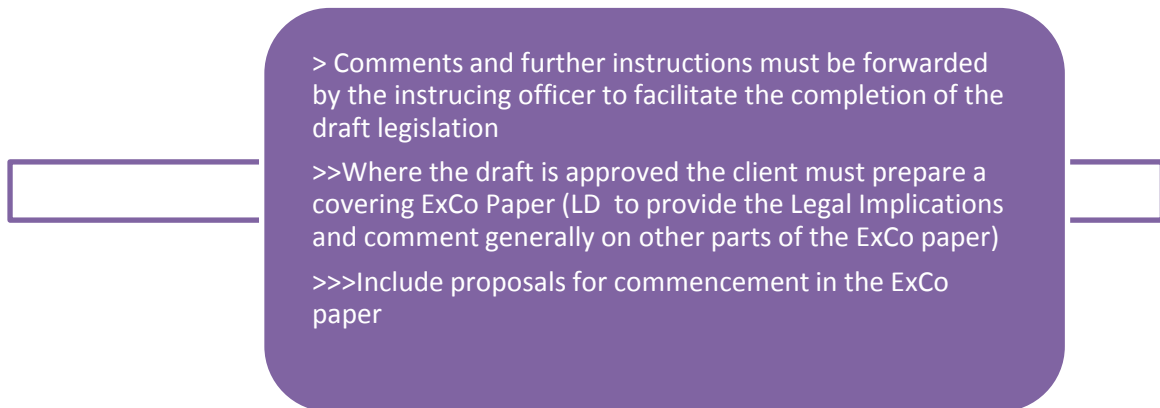
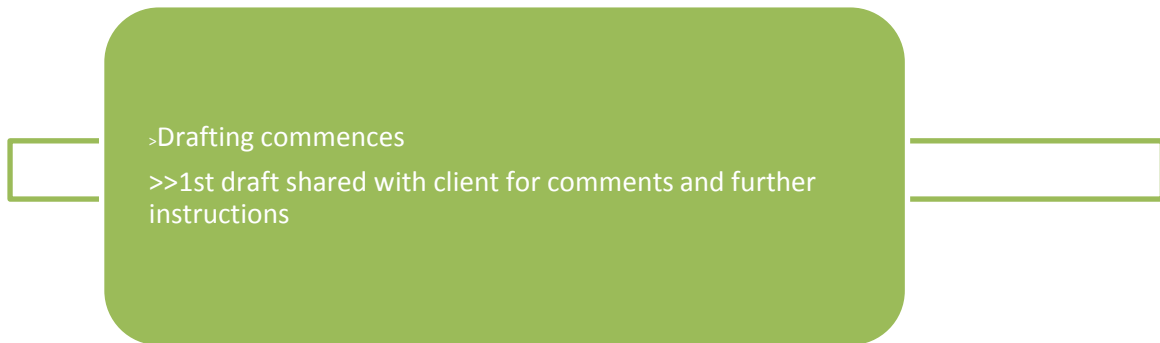
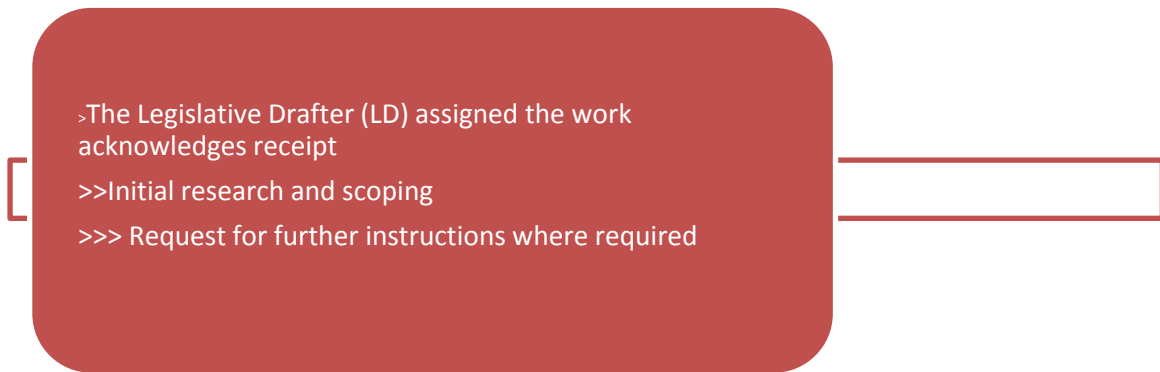
This Process Diagram shows the stages that a Bill follows from policy development all the way through passage in the Legislative Assembly

PART 1 - POLICY AND INSTRUCTIONS DEVELOPMENT¹

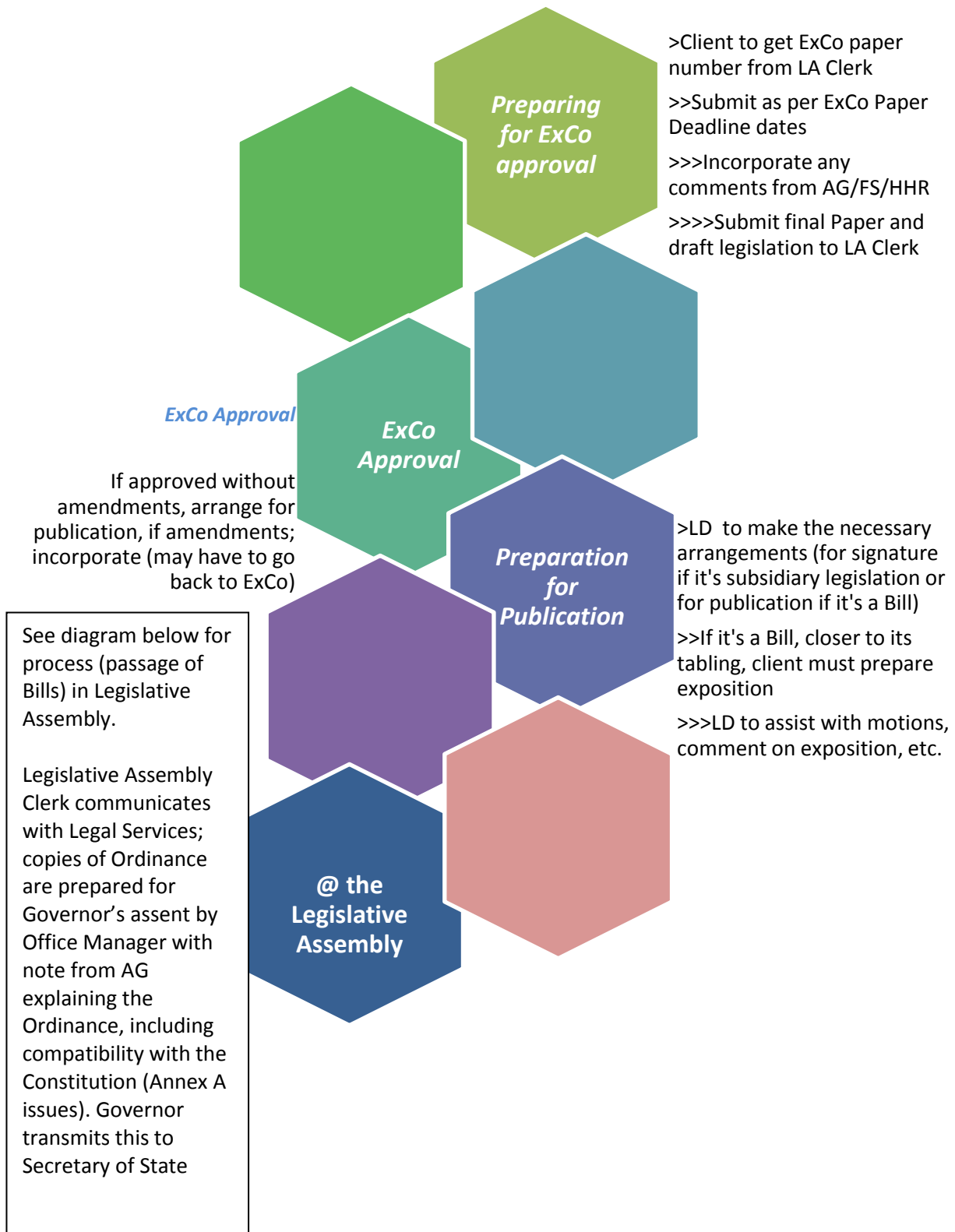


¹ Note that this process applies where Executive Council (ExCo) has approved the policy, and drafting is undertaken based on that approval (see ExCo Standing Orders, in particular Appendix H, for the ExCo approval process of policy to law)

PART 2 – DRAFTING STAGE and QUALITY CONTROL

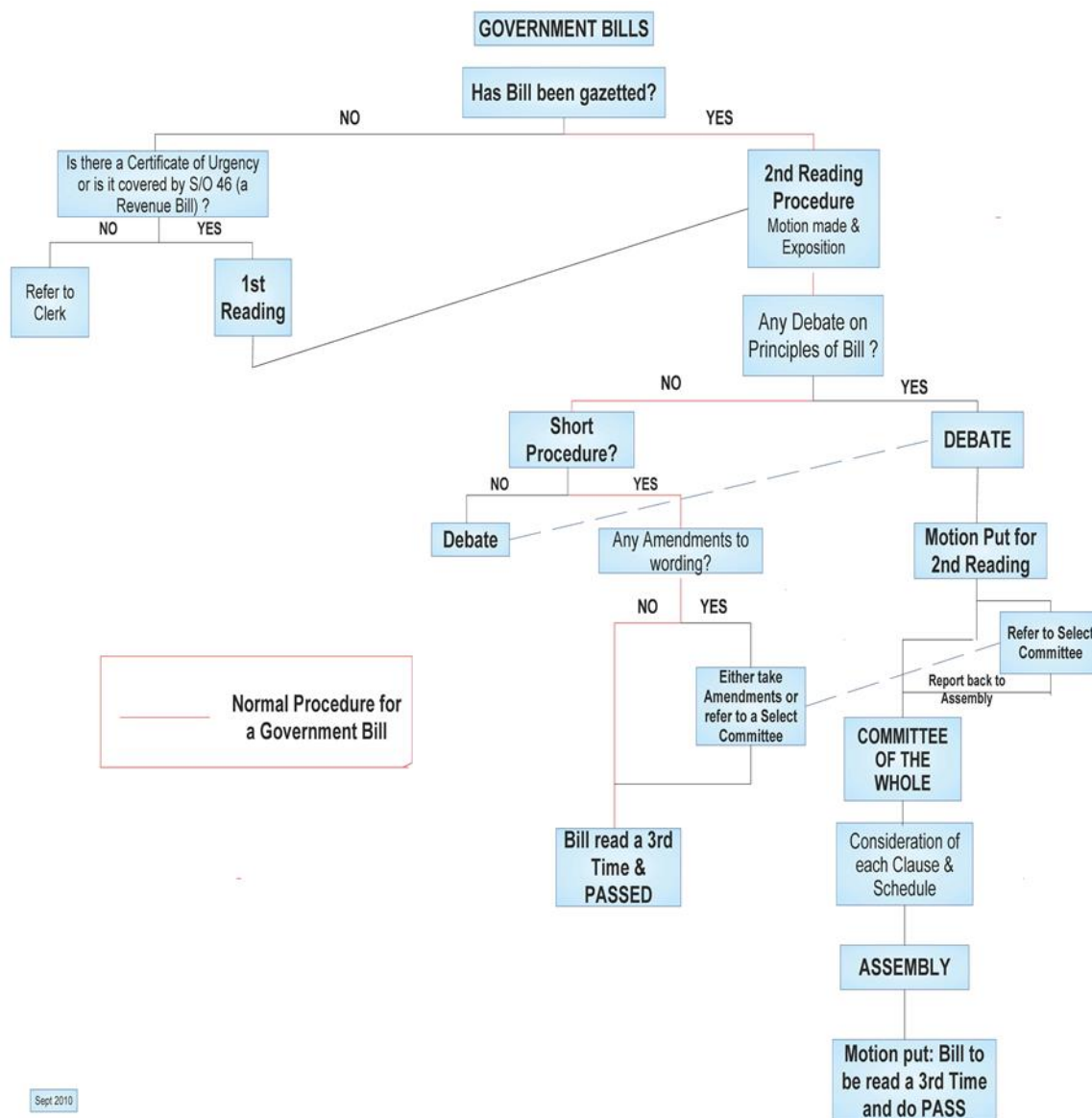


PART 3 – EXCO APPROVAL AND PUBLICATION



AT THE LEGISLATIVE ASSEMBLY

The diagram below illustrates the passage of a Government Bill through the Legislative Assembly (see Legislative Assembly Standing Rules and Orders)



After the Bill is passed by the Legislative Assembly, copies are prepared for the Governor's assent. The Clerk to the Legislative Assembly sends copies to Legal Services for onward transmission to the Governor. Bills are sent with a minute, and report from the Attorney General which takes a standard format to address the requirements of Annex A to the Constitution.

For completeness, whilst the law will be made on signature by the Governor (assent) in accordance with Section 52 of the Constitution, the law may still be disallowed by the Secretary of State, until a notice of non-disallowance is issued (see section 54 of the Constitution).

OUTLINE FLOW CHART/ADMINISTRATIVE PROCESS FOR LEGISLATION FROM DRAFT TO COMMENCEMENT

Throughout the different processes identified above, the drafter should consider the following questions as set out below:

1. Final draft agreed by Head of Legal Services for consideration by Executive Council

- How is this recorded, and how do we ensure correct internal version control at this stage?
- Consistent/formalised involvement of Attorney General?

2. Sent as attachment to ExCo paper to Gilbert House for circulation

- How is this recorded; and how do we ensure correct internal *and* external version control at this stage?

3A. Executive Council approves draft (go to 6A or 6B)

OR

3B. Executive Council requests amendments to draft

4. Amendments made by original legislative drafter (if ExCo require sight of amended draft, then go back to 1.)

- Process for ensuring that the original drafter receives the ExCo minutes as soon as possible so as to enable drafting of amendments?

5. Revised draft agreed by Head of Legal Services for publication

- How is this recorded, i.e. how do we ensure correct version control at this stage?
- Consistent/formalised involvement of Attorney General?

6A. Bill: published in Gazette

- Process for ensuring that happens correctly/timeously?

OR

6B. Subsidiary legislation: prepared for Governor's signature before publication

- Process for ensuring this happens correctly/timeously?

7. Commencement – publication of notice

- Process for ensuring this happens correctly/timeously?

8. After publication in the Gazette

8A. Process after Bills passed in the Legislative Assembly

- Process for ensuring Bills as passed are sent to the Governor for assent with the accompanying Memorandum explaining the Bill and compatibility with Annex A?
- Preparation for publication in the Gazette as Ordinance, and ensuring commencement issues are addressed?

8B. Laying of copies of subsidiary legislation before the Assembly

- Process for ensuring this is done and who lays the copies?

CHAPTER 2

APPROACH TO DRAFTING

Overview

Chapter 2 of NZDM goes into detail about the approach to drafting, which is referred to as the ‘heart of drafting’. These principles are fundamental, and while there is no departing from them (and they are more or less the same in most common law jurisdictions), it is important that this supplementary manual draws out processes which are relevant because of the Falkland Islands’ status as a British Overseas Territory and the resulting constitutional features it has.

Chapter 2 of NZDM covers the following:

Introduction

Five stages of drafting

Stage 1—Understanding

Stage 2—Analysis

- Verifying instructions

- Establishing objectives of legislation

- Checking that legislation is necessary

- Legal research

- Complying with existing law

- Identifying issues to be addressed

- Checking that proposed legislation is a sound legislative proposal

- Checking that legislation is what is needed to do job

- Approach to legislation—General versus detailed

- Open-textured legislation or detailed legislation?

- Self-contained versus referential legislation

Stage 3—Design

Stage 4—Composition

Stage 5—Scrutiny

This short chapter will make comments on the topics which have, or need to be given, a different outlook based on the needs of the Falkland Islands as stated above.

Introduction

The drafting of legislation for the Falkland Islands Government was, for approximately 20 years, largely carried out in-house at the Attorney General’s Chambers, mostly by a single drafter; the former Attorney General. In 2009 a legislative drafter was recruited to carry out most of the required legislative drafting. Some legislative drafting also has been outsourced through the use of contract drafters.

As a result of this and other factors, the Falkland Islands statute book does not have a consistent ‘house style’ but has what could be called a ‘mixed bag’ of drafting styles. This manual seeks to crystallise the “heart of drafting principles” the Falkland Islands adopts or follows. As stated under introduction to this manual, this is an attempt to clarify these principles so that going forward some form of consistency in approach can be achieved.

It is important to note that because of the status of the Falklands as a British Overseas Territory its statute book will always have different styles, given the different sources and ages of the laws that it is comprised of. This manual seeks to set a standardised house style for local Ordinances and subsidiary legislation. The approach with directly applied United Kingdom legislation is and will always be different.

It is important to note that, as with all legal transplants, a transplanted rule is not identical to the form in which it obtains in its place of origin. Accordingly, United Kingdom legislation may either find itself adapted to fit local circumstances/style, or it may simply be applied in its original form, with a modification schedule explaining the local equivalent for terms and offices etc (although section 76 of the Interpretation and General Clauses Ordinance has effect to apply some modifications to adopted United Kingdom legislation automatically).

In this regard, even where the United Kingdom legislation is translated into local legislation the style of the United Kingdom legislation may be maintained. This is especially so since United Kingdom judgments may be persuasive, as a result of which it may be important to preserve the language or to adhere to similar procedure or principles (see the Children Ordinance 2014 which is closely based on the UK Children Acts 1989 and 2004). So the statute book will continue to be comprised of this ‘mixed bag of styles’ to a degree. However, with the constant evolution of drafting practice in the Falkland Islands, the extent of the diversity of drafting styles reflected in the statute book will progressively decrease. The aim is to minimise this extent to the greatest degree possible while simultaneously maintaining the statute book’s integrity and its identity as the progeny of English legal values and principles.

Stage 1 - Understanding

As with legislative drafters in New Zealand’s Parliamentary Counsel’s Office, legislative drafters are involved in the legislative process pre-instructions phase. In other jurisdictions there are ordinarily lawyers within Government departments who assist with the development or production of drafting instructions. This is not the case in the Falkland Islands. Therefore the Legislative Drafting team is tasked with assisting clients to develop drafting instructions. This requires working closely with the instructing department to obtain policy approval from Executive Council as well as obtaining the information on which to base the drafting instructions. Sometimes this is quite demanding and requires the drafter to help in policy development. Hence the drafter will engage in scrutiny even before drafting instructions are developed.

The prevailing misunderstanding that most clients make is that once they have worked with a drafter on the policy the drafter can produce a draft despite having not received written drafting instructions. It is therefore important that drafters insist on written drafting instructions. The exercise of putting instructions into writing invariably forces instructing officers to address their minds to, and to decide on, matters of detail that may have been glossed over in earlier discussions. The workability of legislation is frequently dependent on these matters of detail having been clearly and definitively articulated.

Stage 2 - Analysis

In analysing instructions, drafters need to be aware of issues of accessibility, especially where the law relies on United Kingdom legislation or makes frequent cross-references to such legislation.

The current inaccessibility of Falkland Islands law, particularly with respect to United Kingdom legislation that applies, has led to some Ordinances containing reference material so as to make the law more centralised and accessible. Efforts are being made to make the laws of the Falkland Islands more accessible and easier to understand and these include the Revised Laws Project, which will make Falkland Islands legislation available online. The publication will also provide access to United Kingdom legislation which applies in the Falkland Islands; allowing users of the online resources to be alerted to the existence of United Kingdom source/related provisions, without reference to which, the Falkland Islands provisions would not be fully comprehensible.

Regardless of the mechanism employed to achieve the objective of easy accessibility and optimum comprehensibility, care should be exercised. Ideally, every attempt must be made to produce legislation that is highly self-sufficient. Only in the area of incorporation of international obligations into Falkland Islands legislation is considerable self-sufficiency unlikely to be attainable (see Chapter 5 Drafting to Incorporate International Obligations).

Drafters need to bear in mind the approach in incorporating such reference material into the legislation. Is legislation the necessary tool to draw attention to that particular legislation? The Interpretation and General Clauses Ordinance already sets out principles relating to all laws having to be read as one, etc. and it is a well-established drafting principle that all laws within a statute book must be cohesive and fit into one. Repeating what is already provided for may bring ambiguity, since that law applies anyway.

It is important to analyse how to incorporate or refer to that material. An example is the Marine Environment (Protection) Ordinance which applies some sections of the Food and Environment Protection Act 1985 and contains modified sections of the 1985 Act in a Schedule. The Companies (Auditors) Ordinance however does it differently in that the actual provisions from the Companies Act 1989 are reproduced in the schedule. If the reference material results in copious amounts of text set in a schedule it may be better to instead produce a local Ordinance which is closely based on that reference material, be it a United Kingdom Act or other international law. If it is a simple, short provision, it may be better to

just repeat the provision or directly incorporate it in local legislation. Since legislation will be published online after the law revision, it may be sensible to also include a hyper-link in a footnote to enable users to access the whole Act for completeness.

Stage 3 - Design and Stage 4 Composition

The issues discussed above relating to analysis will impact on the design and composition of the material. If there are copious amounts of text in quotation for reference only this may impact on the flow of the legislation and take away clarity. Discussions on the best way to incorporate reference material may take too much time at the expense of clarifying policy decisions or may even delay the legislation.

Stage 5 - Scrutiny

It is important to adopt a detached approach to a draft and as NZDM says “never get so wedded to your draft that you lose the incentive to improve it”. This is especially true where a drafter is involved in developing the policy. In such an instance it is important to let someone else review the draft not only with a view to checking issues of form but also to engage in a detailed stage 2 analysis, including a legislative impact assessment and verification of the instructions.

An in-house peer review process continues to be used, and this process will be reviewed to further enhance the analysis stage and improve the quality of legislation.

CHAPTER 3

BUDGET LEGISLATION

Introduction

The Government of any country is entrusted with the use of public funds, and as part of the transparency and accountability that is demanded by citizens, most Governments have systems in place to ensure effective and efficient use of public moneys. This is even more important in a democratic set-up where this is seen as one of the most important areas that citizens use to gauge whether to elect a party into power or not.

Most Commonwealth countries follow a ‘central or consolidated fund’ system under which all public moneys (subject to variations here and there) are kept in one pot from which all public funds are paid in and all public service demands are paid out. Establishment and regulation of this central fund is usually provided for in the constitution (for those countries that have one), and for those with no constitutions, specific legislation expressly provides for this. The consolidated or central fund approach also feeds into the checks and balances required by the doctrine of separation of powers that seeks to provide a balance of power within the three arms of government. Any payments from or into this central fund are largely regulated by legislation. This feeds into the requirements of democracy to ensure that the legislature, as the representatives of the people (or the people’s choice), are seen as having ultimate control over public funds and therefore can be held accountable by their electorates.

It is important for the legislative drafter to know the different legislative mechanisms by which funds in this central fund are dealt with. This includes the constitutional legal mechanisms through which deductions from and payments into this central fund can be made. This usually depends on the expenditure, which usually takes two forms – supply expenditure, which is authorised through appropriation legislation, and statutory expenditure, which is usually charged directly on this central fund.

Rules for drafting budget/finance legislation – Falkland Islands

Section 50 of the Constitution provides rules for the enactment of laws generally. Section 51(2) provides specifically for budget legislation. It provides that no Bill may be introduced into the Legislative Assembly except on the recommendation of the Governor where –

- the Bill makes provision for imposing or altering any tax
- the bill makes provision for imposing or altering a charge on the revenues or funds of FIG
- the Bill makes provision for remitting or compounding any debt due to Government
- the Bill makes provision for alteration of salaries, allowances, pensions, gratuities and other similar benefits of any public officer

This is repeated in Standing Order 44 of the Legislative Assembly Standing Rules and Orders.

❖ The different funds

a) Consolidated Fund

Section 74 of the Constitution states that all revenues or other moneys raised or received for the purposes of the Government shall be paid into the Consolidated Fund (*excluding other revenues or other money payable by or under any law into some other fund, or money that can be retained by an authority that received it for purposes of defraying its expenses*)

Section 79 of the Constitution provides that all debts for which Government is liable are charges on the Consolidated Fund.

This is repeated under sections 3, 4, 5 and 6 of the Finance and Audit Ordinance. Section 6 of the Finance and Audit Ordinance in particular provides for specific rules to be followed for making any payments from the Consolidated Fund.

Section 89 of the Interpretation and General Clauses Ordinance provides that all penalties imposed under any written law must be paid into the Consolidated Fund.

There has been confusion in the past about the meaning of section 75 of the Constitution (“Withdrawals”) and the ability for legislation to place obligations directly onto the Consolidated Fund. The legislative drafting team prepared an opinion (approved by the Attorney General) entitled “*Opinion on Consolidated Fund Withdrawals*” and dated 13 August 2014 which provides clarification on this issue.

b) Contingency Fund

Section 78 of the Constitution provides for a Contingencies Fund from which advances may be made to provide for urgent and unforeseen expenditure for which no provision exists.

Section 9 of the Finance and Audit Ordinance provides for this to be done by warrant and sets the amount (not to exceed a third of the aggregate amount provided or services in the Appropriation Ordinance of the previous year) and, further, that the money expended must be set off against the sum specified in the Appropriation Ordinance once it comes into force.

c) Capital Equalisation Fund

The Capital Equalisation Fund was created under the Finance Ordinance 2004 as a special fund.

The Capital Equalisation Fund is regulated as follows —

(i) section 77 of the Constitution provides that the Capital Equalisation Fund is used for meeting expenditure necessary to carry out the services of the Government;

(ii) Part III of the Public Funds Ordinance provides for payments into the Fund, investments of the Fund as well as payments out of the Fund (sections 10 and 11).

d) Other Special Funds

Sections 29-30 of the Finance and Audit Ordinance provides for Special Funds; administration and dissolution (see also Special Funds Ordinance; repealed by Finance Ordinance 2004).

❖ WHAT LEGISLATION?

Depending on the type of expenditure, the legislation to be enacted takes different forms. As discussed above, the money may be deducted by way of warrant as provided for by section 77 of the Constitution, read with section 9 of the Finance and Audit Ordinance.

a) Supply expenditure

Supply expenditure is temporary in nature and is mostly provided for by appropriation legislation under which the executive makes and presents annual estimates seeking the legislature's approval to authorise funds to be deducted from the Consolidated Fund.

This is provided for under section 7 of the Finance and Audit Ordinance where the Treasury (through the Financial Secretary) is charged with computing and making annual estimates. Estimates must be completed in a timely fashion so as to fall within the Government financial year and fit in with the sitting of the Legislative Assembly.

These estimates contain a Bill (appropriation) which sets out the sums required to be deducted from the Consolidated Fund. See below the details about the different appropriation Ordinances.

b) Statutory expenditure/payments

Statutory expenditure is usually a straight-forward approach where the relevant legislation includes a provision charging the expenditure directly on the Consolidated Fund. Usually primary legislation (Finance and Audit Ordinance – see section 22: statutory payments) provides more details and covers instances where this is appropriate. In some jurisdictions this may be supplemented by guidelines or instructions from the Financial Secretary (Director of Finance) in terms of the practical and administrative process. Since this circumvents the appropriation procedure, a clear policy is required (and subjected to the legislature's approval) to charge certain expenditure directly on the Consolidated Fund. The resulting legislation is still passed by the legislature so the checks and balances would still be observed.

Direct charges on the Consolidated Fund are usually reserved for matters for which the legislature is seen not to have operational financial control over, such as the judicial salaries, bodies that conduct elections and referendums, and office of the auditor general. This varies across different jurisdictions.

❖ The different ordinances

a) Appropriation Ordinance

Section 75 of the Constitution provides that no money shall be paid out of the Consolidated Fund except to meet expenditure that is charged on the Fund by the Constitution or by any other law or as authorised by an *appropriation Ordinance* or in a manner as may be prescribed by section 77 (i.e. warrant as per section 9 of the Finance and Audit Ordinance).

Sections 76(2) and 78(2) of the Constitution (as well as section 8 of the Finance and Audit Ordinance) provides for this. Section 78(2) of the Constitution provides that where any advance is made from the Contingencies Fund (*that is where the FS is satisfied that an urgent and unforeseen need for expenditure for which no other provision exists*) an appropriation Bill shall be introduced as soon as possible for the purpose of replacing the amount advanced.

b) Supplementary Appropriation Ordinance

Section 76(3) of the Constitution provides that a supplementary appropriation Bill must be made before the end of the financial year or 30 days after that where –

- the money appropriated in the Appropriation Ordinance was found to be insufficient;
- a need arose for expenditure for a purpose for which no amount has been appropriated;
- money has been expended on any expenditure in excess of the amount appropriated for that purpose; or
- money has been expended for a purpose for which no amount has been appropriated.

Section 10 of the Finance and Audit Ordinance also provides for the making of a Supplementary Appropriation Bill (same reasons as discussed above).

c) Capital Appropriation Ordinance

Section 77 of the Constitution provides that where the Appropriation Ordinance has not come into operation at the beginning of any financial year the Financial Secretary may authorise the withdrawal of money from either the Consolidated Fund or from the Capital Equalisation Fund for the purpose of meeting expenditure necessary to carry out the services of the Government until the expiration of 4 months from the beginning of that financial year or the coming into operation of the appropriation Ordinance.

Where the money is withdrawn from the Capital Equalisation Fund the Public Funds Ordinance applies, and under section 11(1)(b) this can be done by an Appropriation or other Ordinance (i.e. Capital Appropriation) or according to paragraph (c) pursuant to an Order subject to subsection (2).

Subsection (2) provides that the Governor, with the approval of the Secretary of State, may make an Order to authorise the Financial Secretary to withdraw money from the Capital Equalisation Fund for any expenditure of a capital nature.

d) Finance Ordinance

In every financial year, as part of the annual budgetary procedures, adjustments are made to allowances, benefits, charges, contributions, fees and penalties specified within different legislation. The end result of this is a Finance Bill to reflect these legislative changes; this is consistent with the principle that wherever a tax or other levy or charge is imposed it must be stated in clear terms as there exists a presumption against the imposition of fees and charges². These adjustments should first be approved by the Budget Select Committee.

❖ **Specific rules for passage of Budget Legislation**

The Standing Rules and Orders provide for the manner of dealing with all Bills to be tabled in the Legislative Assembly.

- Standing Order 46(2) provides that the following are excepted from the usual requirement of publication 10 days before they can be considered by the Assembly—
 - Appropriation or Supplementary Appropriation Bills;
 - A Bill to which Standing Order 44(a)(i) or (ii) applies [*para (i) a Bill that makes provision for the imposition or altering of tax, imposing or altering any charge on the revenues or other funds of the Falklands*] OR [*para (ii) a Bill that has the effect of altering the salary, allowances or other conditions of service of any public office*] as recommended by the Governor (note Standing Order 45 about inferring Governor’s recommendation);
 - A Bill being a Government measure which the Governor certifies needs to be urgently considered even though it has not been published – ie a Bill subject to a Certificate of Urgency.
- Standing Order 49(1) provides that a Bill to which Standing Order 46(2)(a), (b), or (c) applies must be moved for a first reading. Thereafter where the motion for the Bill to be read a first time is seconded it shall, without debate, be put to the vote.
- Standing Order 65 provides that where an Appropriation Bill has been read a second time the Chief Executive must move that the Bill be referred to a Select Committee.

Further reading

It may not be necessary to spell out in legislation that certain funds must be paid into the Consolidated Funds given section 74 of the Constitution, but across the statute book this provision is repeated. Both *Thornton* and *Craies on Legislation* discourage this repetition as ‘unnecessary’. [see the ‘Baldwin Convention’ page 60 of *Craies on Legislation* and page 287 of *Thornton* ‘Legislative provision for expenditure’]

² See AG V. Wilts United Diaries (1922) 91 LJKB 897 – some jurisdictions spell these out in their Constitutions

CHAPTER 4

DELEGATED LEGISLATION

As in other common law jurisdictions, delegated legislation in the Falkland Islands is secondary legislation. In the hierarchy of laws, it sits beneath primary legislation which, as we have already noted, are called ‘Ordinances’. Delegated legislation, then, derives authority for its existence from a related Ordinance that specifically states that such legislation may be made for specified purposes.

Conceptually, the basis for delegated legislation in the Falkland Islands is identical to legislation of the same name found throughout the Commonwealth. Matters of detail required to render functional a scheme laid out in broad outline in an Ordinance are reserved for delegated legislation. This permits focusing on framework rather than specifics at the stage of drafting primary legislation, thereby allowing thinking to be focused as appropriate on the macro level and, on a subsequent occasion, on the micro level. It also saves legislative time, as legislators do not have to be bogged down with trying to hammer out the finer details of a scheme to be set out in primary legislation. Further, it is referred to as “delegated legislation” because the power to make it has been delegated by the supreme law making body to another person or body.

The following excerpts from the New Zealand manual set out the matters that should be dealt with in primary legislation as against those that should be dealt with by delegated legislation. Subject to the appropriate substitution of terms and to a few exceptions, the excerpts are of equal application to the Falkland Islands:

“7.10 It is generally accepted that, in a legislative scheme, an Act will deal with matters of significant policy, and delegated legislation made under it will contain the detail. The principal justifications for delegating legislative powers are as follows:

- Parliament as the supreme law-making body should concern itself with higher-level policy:
- detail and technical matters required to implement an Act of Parliament are better left to be the subject of delegated legislation:
- delegated legislation is an appropriate mechanism if frequent changes are required to a legislative scheme:
- delegated legislation can be a more effective way of responding to emergencies:
- Parliament can delegate to the Executive the decision to bring an Act into force where regulations need to be made or other administrative arrangements put in place.

7.11 Expressed with a different emphasis, it might be said that the following matters should be contained in primary legislation rather than in delegated legislation:

- significant questions of policy, including new policy or fundamental changes to existing policy:
- rules that have a significant impact on individual rights and liberties:
- provisions creating offences that impose significant criminal penalties:
- provisions imposing taxes:
- procedural matters that go to the essence of a legislative scheme:
- amendments to Acts of Parliament:
- powers of search and seizure.”

In this arena we again see the clear connection between law and politics. The power to make delegated legislation of a specific type is usually conferred on a member of the political directorate or a Government board or statutory body. So, in many instances in the UK, power to make delegated legislation is given to the Secretary of State or a Minister of Government. In many other countries, such power is almost invariably given to a Minister of Government. On occasion it is given to a board and the exercise of the power is made subject to approval by the relevant Minister. Any legislation made in exercise of this power must be exercised within the parameters of the authority thus conferred by the legislature. The same principles are applicable in the Falkland Islands, but the implementation of it is somewhat different since there is no ministerial system here.³

The Constitution provides in section 37 as follows:

“Power to make laws

37. Subject to this Constitution, the Governor, with the advice and consent of the Legislative Assembly, may make laws for the peace, order and good government of the Falkland Islands.”

The legislature is defined in section 100(1) as follows:

““the Legislature” means the Governor acting with the advice and consent of the Legislative Assembly and includes the Governor acting in exercise of the powers conferred on him or her by section 55;”

Section 55 gives the Governor power to “... declare that a Bill or motion shall have effect as if it had been passed or carried by the Assembly ...” despite the fact that the Assembly has failed to pass the said Bill. Subsection (6) of section 55 provides as follows:⁴(6) The powers

³ Accordingly, all secondary legislation in the Falkland Islands is made by Executive Council

⁴ There remains an anomaly because, constitutionally, the Governor makes the primary legislation which creates the power to make secondary legislation, but also makes the secondary legislation - usually on the advice of Executive Council; see ss. 56 & 66 of the Constitution. The key difference is the procedure followed in each case. It is therefore arguable that delegated legislation should be made by a person or body other than the Governor and Executive Council (see s. 56 (2) for example), if it is to be truly delegated legislation.

conferred on the Governor by this section shall be exercised by the Governor in his or her discretion.”.

The practice in the Falkland Islands is for power to make subsidiary legislation to be “delegated” to the Governor in Executive Council. Falkland Islands primary legislation is replete with provisions specifically “conferring” on the Governor power to make regulations. Based on section 37 of the Constitution, this is a power that the Governor already has.

However, that is the practice that has been consistently adhered to without any legal challenge and, unless and until a decision is taken to change the situation, this must continue. This state of affairs is a basis for the inapplicability to the Falkland Islands of the final bullet point in paragraph 7.10 of the New Zealand drafting manual (set out above). In the Falkland Islands there can be no instance of the Legislature delegating to the Executive power to bring a primary enactment into force, since the Governor holds that effective authority in accordance with section 56(2) of the Constitution. That said, there is another view regards subtleties which render the above-mentioned final bullet point relevant to the Falkland Islands. On this view, since the Legislative Assembly delegates commencement of legislation to the Executive Council and the Legislative Assembly is a different body from the Executive Council, delegation from the Legislature to the Executive does – in a sense – take place in the Falkland Islands. Different views notwithstanding, the relevant provisions of the Constitution retain their prominence.

Another characteristic of the delegated legislation-making power is that it is not subject to Cabinet approval (although in some jurisdictions this is done on the basis of collective responsibility and the delegated legislation will be taken by the responsible minister before Cabinet for information and consultation purposes and not approval). In the UK and most other Commonwealth countries, where primary legislation gives power to a Minister to make regulations the Minister is free to exercise that power as and when they see fit, without the need for further authorisation. The power to make regulations is usually made subject to either affirmative or negative resolution, which provides the opportunity for some level of Parliamentary scrutiny so that it can be ensured that the regulations made are not ultra vires. In the Falkland Islands, however, the drafting of regulations is invariably preceded by the preparation and submission of an Executive Council paper; the same process that precedes the drafting of primary legislation. Since Executive Council papers contain policy proposals, submitting papers before drafting regulations in exercise of a power already conferred by Ordinance is tantamount to seeking approval twice for the same activity (although it is often sensible to seek approval of the policy before expending time on a draft, the policies underpinning which may not be approved).

“Delegated legislation” is synonymous with “subsidiary legislation” as both terms refer to secondary legislation made in accordance with power specifically conferred by primary legislation on a person or body other than the Legislature. At this stage it is important to take note of the following definition found in section 4 of the Interpretation and General Clauses Ordinance:

““**subsidiary legislation**” and “**regulations**” mean any proclamation, rule, regulation, order, resolution, notice, rule of court, by-law or other instrument made under or by virtue of any Ordinance and having legislative effect;”

Two points to note from this definition are that:

1. Subsidiary legislation in the Falkland Islands encompasses the various types spoken of by Thornton.
2. Interestingly, “regulations” is both a type of subsidiary legislation and a synonym for “subsidiary legislation” (in the latter meaning, then, one can safely interpret any power to make “regulations” as being a power to make a proclamation, order, rule, etc.)

In light of point number 2, the drafter is left to determine the best instrument through which to exercise the power to make “regulations”. The drafter is unlikely to have this latitude in many other common law jurisdictions, if any.

In this regard the following excerpts from the New Zealand drafting manual are pertinent:

- “7.1 At the highest level in the legislative landscape, there are Acts of Parliament, sometimes referred to as primary legislation. Then there are regulations made under the authority of Parliament by the Governor-General and traditionally referred to as secondary legislation. At a third level are instruments, described in a variety of different ways, made by Ministers of the Crown and administrative agencies established to regulate particular activities, and commonly called tertiary legislation.
- 7.2 These second-level and third-level instruments are delegated legislation because they derive their legal effect from the Acts of Parliament under which they are made. A legislative scheme will typically consist of an Act of Parliament and regulations and, increasingly, some form of tertiary legislation as well.”

The significance of these excerpts is that they contrast with the position in the Falkland Islands in important respects, as is evidenced by the above-referenced definition from the Interpretation and General Clauses Ordinance. Clearly, the Falkland Islands equivalents to the terms ‘Acts of Parliament’ and ‘Governor-General’ are ‘Ordinances’ and ‘Governor’ respectively; however, it is difficult to identify Falkland Islands equivalents to ‘Ministers of the Crown’ (although this usually refers to the Governor), and ‘administrative agencies established to regulate particular activities’. The three tiers that exist in New Zealand are therefore difficult to identify here, particularly because “regulations”, i.e. New Zealand’s second tier, in the Falkland Islands means the same as rules, orders etc, which would fall into New Zealand’s third tier. It therefore appears that in the Falkland Islands there is a two-tiered system, consisting only of Ordinances as the first tier, and subsidiary legislation of all types – on equal footing – constituting the second tier.

Particular attention should be paid to Part IV of the Interpretation and General Clauses Ordinance, which makes general provisions in relation to subsidiary legislation.

When is delegated legislation drafted?

The practice in the Falkland Islands is to attempt, as far as is practicable, to draft delegated/subsidiary legislation contemporaneously with the enabling legislation, i.e. Ordinance. There are undoubtedly instances where the circumstances do not lend themselves to this. Where an Ordinance is being drafted to regulate an area of activity for the first time, policy makers are likely at the conceptualisation stage, to foresee the need for regulations to make operational the scheme to be set out in the legislation. In these circumstances it is very useful and efficient to instruct on the drafting of regulations at the same time as instructing on the drafting of the Ordinance. This has the distinct advantage that the regulations are made, i.e. signed into law, by the Governor soon after the enabling legislation is passed, thereby avoiding the time lag between these two events that is frequently encountered in other common law jurisdictions. However, it is not in every instance that the need for regulations is immediately apparent and even if it is, the regulations may not be required immediately. More time may be needed to develop the policy that is to underpin the regulations, whereas the enabling legislation may be needed urgently for other reasons. In such cases the regulations may be made whenever the need arises, once adequate enabling provisions are already in place.

Drafting delegated legislation

At present delegated/subsidiary legislation in the Falkland Islands is drafted under the heading of the Title under which the enabling Ordinance falls rather than under the name of the enabling Ordinance itself. So, for example, regulations relating to Stanley Common are to commence with the heading ‘Environmental Planning’, the heading of Title 34 under which the Stanley Common Ordinance falls, rather than with the heading ‘Stanley Common Ordinance’ (although it should be noted that the planned revision of the laws due for publication in 2017 will remove the classification system, so this situation is likely to change). The enacting formula must specifically reference the enabling provision, and is to be written in the first person.

Definitions in the enabling principal enactment generally apply to subsidiary legislation, thereby obviating the need to repeat the definitions in the subsidiary legislation. While it is permissible to use a term in subsidiary legislation in a different sense from how it is used in the principal enactment, this is discouraged. The use of an alternative word is recommended instead so as to avoid confusion.

The Falkland Islands statute book evidences a variety of approaches to the drafting of subsidiary legislation. This variety appears to be reflective of the vastly different styles and legislative drafting backgrounds amongst those who have drafted Falkland Islands legislation over the years. Some regulations have moved away from the traditional distinction between the subject matter that is suitable for primary legislation and that which is suitable for subsidiary legislation, as there are Ordinances that do little more than ‘give power to’ the

Governor to make subsidiary legislation. These Ordinances therefore leave all the substantive provisions to be made by subsidiary legislation. Not surprisingly, this subsidiary legislation is replete with provisions that are usually far more appropriate for primary legislation. On the other end of the spectrum there is some subsidiary legislation that evidences a clear drafter preference for brevity and conciseness over voluminous prescriptiveness and over-codification. Many recent regulations are very brief indeed.

The preferred position going forward is to find the correct balance between the use of each type of legislation.

A drafting practice leaning more towards brevity may need consideration of the underdeveloped state of Falkland Islands' jurisprudence (whilst at the same time recognising the applicability of United Kingdom caselaw). There are very few legal challenges here and correspondingly few opportunities for local judicial pronouncements that can shed light on the meaning of skeletal legislative provisions. A balance therefore has to be struck to use both primary and secondary legislation so as to prescribe the law, in the most helpful way possible. The overriding obligation in the Falkland Islands must be to make the law as clear (and therefore certain and understandable) and accessible to the reader as possible. Discretion, then, is a vitally important tool in the hands of the drafter until the position is conclusively clarified and a firm and settled way forward is articulated.

CHAPTER 5

DRAFTING TO INCORPORATE INTERNATIONAL STANDARDS AND OBLIGATIONS

The procedure by which international standards and obligations are incorporated into Falkland Islands legislation is an area in which settled guidance is extremely difficult to come by. This state of affairs is attributable to inevitable complications attendant on the Falkland Islands' status as a British overseas territory. A settled practice in this area will only be achieved once a clear approach and procedures agreed on by all the relevant officials are adopted. Until definitive determinations are made as to the way forward, what follows is a survey of the existing range of practices and a recommendation as to those that appear preferable.

➤ WHERE DO INTERNATIONAL OBLIGATIONS COME FROM?

The term deliberately used in the heading is one to which close attention should be paid. The word "obligations" is self-explanatory and in the same province as the word "law". A relevant consideration in this area, however, is adherence to international standards. The question, then, is how is it to be determined whether something is a standard voluntarily being adopted or an obligation with an obviously diametrically opposed impetus?

Much of the discussion on this subject is of necessity based on Article 38(1) of the Statute of the International Court of Justice ("ICJ"), which is the universally accepted authoritative enunciation of the sources of international law:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;***
- b. international custom, as evidence of a general practice accepted as law;***
- c. the general principles of law recognized by civilized nations;***
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.***

As Article 38(1)(a) indicates, treaties are the preeminent source of international law. Treaties go by a variety of different names, but at their root are written agreements, governed by international law, between two or more subjects of international law. Traditionally, the definition referred to “States” rather than “subjects of international law”, reflective of an era when States were considered to be the only subjects of international law. Developments resulting in international organisations being accorded what is referred to as “international legal personality” have necessitated the change.

Treaties can be either bilateral (i.e. between only two subjects of international law) or multilateral (i.e. involving more than two subjects of international law). Treaties are subject to the maxim “*pacta sunt servanda*”, which means that treaties are to be performed in good faith and in accordance with their terms. Further, treaty law is understood to be governed by the *1969 Vienna Convention on the Law of Treaties*, which has significance which transcends its being a treaty; this as its provisions are now generally accepted to be rules of customary international law (more will be said on this subject below).

The important thing for the Falkland Islands is that the definition of treaties requires parties to treaties to be either States or international organisations. As the status of an international organisation is obviously irrelevant to the Falkland Islands, the question immediately becomes whether the Falkland Islands is a State. While there may be very useful and productive debate on this issue, the appropriate answer for the present purposes is ‘no’, because the Falkland Islands’ status as a British overseas territory would appear to preclude it from being so regarded in the international community.

The inevitable result is that the Falkland Islands is incapable of being party to a treaty in its own right, as it lacks what in municipal law terms would be the equivalent of ‘capacity to contract’. The question that follows, then, is does this mean that no treaty provision can ever impose an obligation on the Falkland Islands? The answer to that question is “No” - but the United Kingdom Government has committed to the Falkland Islands that the United Kingdom will not extend a treaty to any British overseas territory without that territory’s prior consent.

➤ APPLICATION OF TREATIES/CONVENTIONS TO THE FALKLAND ISLANDS

The relevant literature on British Overseas Territories asserts that this status means that the United Kingdom is responsible for the territory’s Defence and Foreign Affairs. Generally speaking treaty obligations can only become binding on such a territory if the United Kingdom extends the application of a given treaty to the territory. Within Her Majesty’s Government, responsibility for the overseas territories is vested in the Foreign and Commonwealth Office (FCO) which is often defined as ‘the Ministry of Foreign Affairs’ in the overseas territories’ legislation. FCO is therefore expected to be the repository of authoritative information on the treaties that have been extended to particular overseas territories.

Another relevant consideration in relation to treaties generally is the question of the approach to the relationship between municipal law and international law. Of the two approaches (1. Monism, in which international law takes precedence over municipal law and becomes enforceable law in the State immediately upon the relevant treaty coming into force in the territory of that State; and 2. Dualism, in which municipal law and international law are considered to be in two separate planes, resulting in the further step of incorporating treaty provisions into domestic legislation being taken before the treaty's provisions can be enforced at the domestic level), dualism is the one consistent with the common law legal tradition. However, it must be noted that there are few, if any, purely dualist or purely monist States. Just about all States on closer examination will be seen to have elements of both approaches. However, it is fair to say that the United Kingdom and its territories are overwhelmingly dualist in their approach.

A further relevant consideration is that in some territories the approach is set out in the Constitution. Botswana⁵, South Africa⁶ and Australia⁷ are prime examples of Commonwealth jurisdictions whose Constitutions stipulate the approach. However, clearly, with the United Kingdom not having a written Constitution in the sense of there being a single document said to constitute the British Constitution, it should not be at all surprising that this does not apply to the United Kingdom even though practice shows that the United Kingdom is mostly dualist and the courts have crystallised this to some degree. Interestingly, though, each overseas territory has a written Constitution. It is pertinent to observe that the Falkland Islands Constitution does not contain any provision stipulating the approach. It follows, then, that the common law approach of being overwhelmingly dualist applies to the Falkland Islands.

The result of the two immediately foregoing paragraphs is that extension of a treaty to the Falkland Islands must be accompanied or followed by legislative incorporation on behalf of or by the Falkland Islands in order for the treaty to be enforceable here. Therefore before drafting a law that incorporates any international agreement into Falkland Islands law the drafter must first establish whether the United Kingdom has extended that international agreement to the Falkland Islands and in what form the extension has been done. This can be an onerous and complicated task.

It has not been easy to find conclusive information as to the treaties which have so far been extended to the Falkland Islands and online guidance falls short of being comprehensive or up to date. Further, where the information is available, it does not always specify the method of extension. It appears that the same approach is not utilised on every occasion.

This reflects the lack of standardisation of approach to incorporation of treaties in the UK itself, a state of affairs acknowledged by Professor Emeritus of the University of Oxford, Francis Reynolds.

⁵ Section 50(1) read with section 86 of the Botswana Constitution

⁶ Section 231 of the South African Constitution

⁷ Section 51(xxix) of the Australian Constitution

The method of extension of a particular convention to the Falkland Islands is important for a number of reasons. One of the reasons is that the method used will determine whether or not the extension needs to be supplemented or followed by incorporative, legislative action in the Falkland Islands. Documents available online clearly suggest that most of the extensions take place on the same date as United Kingdom accession to or ratification of the treaty, which is typically not preceded nor accompanied by the legislation by which the treaties are to be incorporated into United Kingdom legislation, in keeping with the dualist approach. This means that the necessary legislative action is undertaken by the United Kingdom subsequently and does not necessarily also constitute the required legislative work for the overseas territories. Rather, the United Kingdom sometimes (perhaps most times) leaves each overseas territory to independently pass the necessary legislation to give effect to the extended treaty provisions. At other times, the United Kingdom will pass legislation incorporating the provisions of a particular treaty into its domestic legislation but will specifically state in that legislation that it is not intended to apply to any country other than the United Kingdom, i.e. the legislation is not intended to apply to the overseas territories. Such a provision usually also expressly provides that Her Majesty may at a later date by Order in Council extend the provisions of that legislation to any of the overseas territories. Merchant shipping legislation in the United Kingdom is a good example of such provisions.

Another consideration that is relevant to the Falkland Islands' status as a British overseas territory is that both the Westminster Parliament and Her Majesty in exercise of the Royal Prerogative reserve the right to legislate for the Falkland Islands. The Falkland Islands' statute book therefore contains a range of law derived from the various sources described in the Introduction. The relevance of this is that it is vitally important to always bear in mind that whatever the local legislature does by way of legislation purportedly incorporating international conventions into Falkland Islands law (whether or not these conventions have been extended to the Falkland Islands), either Parliament or Her Majesty may at any time supplant and supersede this legislation. In practice there will be prior consultation; but prior consultation is, strictly speaking, not required.

The United Kingdom Government has committed to consulting with each British overseas territories before a treaty is extended to any of them. However in practice, the length of time allowed for such consultation varies and it can be overlooked, particularly if the FCO are not the lead department. Admittedly this is rare, as consultation with individual territories usually precedes extension of treaties/conventions to them, and especially tends to precede legislative action directly incorporating the provisions of treaties into the law of a particular territory.

It follows from the foregoing that *the drafter must always first consider the source of the impetus for the Falkland Islands to adhere to international standards or obligations*. Does a particular treaty/convention apply to Falkland Islands and what is the method by which the United Kingdom has applied that treaty/convention to the Falkland Islands?

1. If there is a directive from the United Kingdom, then one can safely conclude that legislation incorporating that treaty's provisions into Falkland Islands legislation has

not already been passed by the United Kingdom as a directly applicable imperial enactment; although *it might nevertheless be prudent to check that this has in fact not been done already*, as errors have been made in the past.

- Subject to confirmatory checks, the directive may itself constitute the method of extension, which may include the legislative instrument itself or a schedule with the international instrument.
 - In the instance of a directive, then there is no need for any legislative action to be taken unless there is further detail that needs to be legislated for by way of subsidiary legislation.
 - The directive may just be an instrument of extension which is devoid of accompanying legislative action on behalf of the Falkland Islands in which case the selection of the most appropriate legislative design option will be within the drafter's prerogative.
2. A United Kingdom statutory instrument, most frequently an Order in Council, may also be enacted with the effect of extending a particular treaty to the Falkland Islands and making direct changes to the law of the Falkland Islands. An example of this is the Merchant Shipping (Oil Pollution) (Falkland Islands) Order 1997 which extends certain provisions of the Merchant Shipping Act 1995 to the Falklands which, in turn, also results in the Falkland Islands implementing certain provisions to the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.
 3. Other times a United Kingdom statutory instrument, most frequently an Order in Council, will be enacted with the effect of extending a particular treaty to the Falkland Islands. An example of this is the Child Abduction and Custody (Falkland Islands) Order 1996 – which in the schedule to the order provides under Part I Paragraph 1(2) that specified provisions of the Convention on the Civil Aspects of International Child Abduction have force of law in the Falkland Islands and under Part II that the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children have force in the Falkland Islands.
 4. The case where the impetus to adhere to international standards comes from within the Falkland Islands is less straight forward. What happens where, for instance, the Falkland Islands Government has expressed an interest in a particular treaty but the United Kingdom is not party to this treaty?

➤ FALKLAND ISLANDS INTERESTED BUT UK NOT PARTY

At first blush it would appear to follow that if the United Kingdom is not itself party to the relevant treaty then there is no possibility of it extending the application of that treaty to the Falkland Islands or any other British overseas territory.

This conclusion is invalidated by the fact that the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, was said to have been extended to the Falkland Islands by the United Kingdom even though the United Kingdom was not at the time (and still appears not to be) party to the convention. This is based on the records available on the FCO website. The relevant note states that the United Nations accepted the United Kingdom's ratification on behalf of the Falkland Islands despite the treaty not applying the United Kingdom itself. This practice demonstrates that the United Kingdom can choose to extend a treaty for the benefit of overseas territories, even when the United Kingdom does not apply the treaty to itself.

This is peculiar and neither the rules governing such extensions nor the particular circumstances of this instance is readily available. Suffice it to say that there is precedent for the United Kingdom extending to the Falkland Islands a treaty that it is not itself subject to. This undermines the accuracy of any assertion that the Falkland Islands would have to convince the United Kingdom to itself become party to a treaty in which the Falkland Islands is interested in order to be in a position to extend this treaty to the Falkland Islands and thereby authorise the Falkland Islands to adhere to the treaty standards in the capacity as something akin to a State party.

N.B.: The procedure would, therefore appear to be as follows –

1. Where the impetus for adherence to an international standard comes from within the Falkland Islands, the first step is to check to see whether that convention has already been extended to the Falkland Islands. The checks therefore have to be specific to Falkland Islands extension; it is not sufficient for one to merely check to see if the United Kingdom is a party and, if it is not, to automatically conclude that there could not be an extension of that treaty to the Falkland Islands.
2. If the treaty in which the Falkland Islands is interested has not been extended by the United Kingdom to the Falkland Islands, the appropriate procedure would be for the relevant officials in the Falkland Islands to formally indicate the Falkland Islands' interest in the treaty and to request that the treaty be extended to the Falkland Islands. Such authority can be given in the form of a specific or general entrustment (i.e. a letter to the territory Government confirming that it can enter into negotiations and conclude a treaty). Before issuing an entrustment or agreeing to the conclusion of a treaty, the United Kingdom Government will consider whether the territory is able to meet the obligations that membership of the treaty imposes. It will then be for the United Kingdom, if it agrees to determine what steps need to be taken to extend the treaty accordingly.

3. It might be that the United Kingdom is already party to the treaty, in which case extension would be straightforward. However, if the United Kingdom is not party and is not prepared to become party, it must then engage in the more complicated exercise of approaching the depository of the treaty with a request that it be allowed to extend the treaty to the Falkland Islands while maintaining its decision not to become a party itself.
4. In any of the cases set out above, the Falkland Islands may specifically request that upon extension the United Kingdom go ahead and pass the relevant legislation to incorporate the treaty's provisions into Falkland Islands law. Alternatively, it may ask that it be allowed to draft the legislation itself. In either case, the United Kingdom is not bound to accede to the request.

➤ **METHODS OR STYLES OF IMPLEMENTING CONVENTIONS AND TREATIES – the FALKLAND ISLANDS APPROACH**

Most dualist jurisdictions do not have one settled approach to incorporating international instruments into their own national laws. This is because the conventions and treaties themselves are drafted in different ways. The distinction between dualism and monism is sometimes blurred because of this one important element tied to the text of the treaty. Notwithstanding that a convention or treaty will become binding on a monist State at ratification, it is sometimes necessary that the monist State pass domestic legislation which gives effect to that international instrument because the text is such that you need to put in place the machinery which will be responsible for implementing that particular instrument (*this is one of the reasons why there is a debate around whether there is really a need to distinguish States as monist/dualist; over and above issues of when the instrument being ratified becomes binding and enforceable*).

There are some conventions and treaties which are self-executing such that a State will not need to do much to incorporate (for the monist States anyway). For a dualist State the direct method will be preferred in this instance. This is done by drafting the legislation in such a way that the full or partial text of the international instrument is directly made a part of that legislation (usually by appending that treaty/convention in a schedule).

A DIRECT METHOD

(i) formula method – this is used where mostly the text of the convention or treaty is such that it can be incorporated into the law as is. The formula method has distinct features as below -

The short title – sometimes the short title of the legislation will refer to or contain the name of the international instrument which is being incorporated. See the Geneva Convention (Criminal Appeals) Ordinance.

The long title – the long title will explain/state what the purpose of the legislation is and the common wording is: “to give effect to such and such an international instrument”. For example the Consular Relations Ordinance states “to give effect to the Vienna Convention on Consular Relations...” and the Marine Environment (Protection) Ordinance states “to enable

the provisions of the London Dumping Convention 1972 to be implemented in the Falkland Islands and in Falkland Islands waters” (NB- sometimes used even for the indirect method).

Application provision – the clause usually states that the international convention or treaty has the force of law (e.g. the same Consular Relations Ordinance states in section 2 “Subject to...*the Articles or part of the Vienna Convention on Consular Relations signed in 1963 set out in Schedule 1 shall have the force of law in the Falkland Islands...*”).

Some legislation will just end with the application provision and attach the text of the convention or treaty as a schedule but, again depending on the text of the convention or treaty, it may be necessary to give more detail on the application of the instrument within the domestic context. Specific parts of the convention or treaty may be given the force of law. Looking at our example of the Consular Relations Ordinance it states which articles of the Convention have force of law; spells out how certain terms should be construed within the domestic context, and it goes on to ‘domesticate’ aspects of the Vienna Convention so that it can fit in with other national laws and confer the obligations, duties, etc on the relevant equivalent persons. See also the Nuclear Safeguards Ordinance, which goes on to provide for penalties and making of subsidiary legislation for giving effect to some of the articles of the convention.

(ii) wording method

The wording method is usually used where certain portions of the text of the instrument being incorporated are lifted off directly as they appear in the convention or treaty and specifics are added as and where required. Even though the international instrument itself may not be attached as a Schedule it is referred to in the implementing legislation as though it is a part of it as the text will be taken directly from that international instrument. See the Nuclear Safeguards Ordinance which gives effect to some of the articles of the Convention and does not attach the Treaty and Protocols but just uses cross-references and the Marine Environment (Protection) Ordinance.

B INDIRECT METHOD

As most conventions and treaties are usually drafted in general terms it may be necessary to restate these general requirements so that it is clear how they are to be given effect to. The indirect method therefore is usually used where it is necessary to implement that convention or treaty by incorporating its substance rather than by its wording.

(i) wording method

The wording method can be used under both the direct and indirect methods. Where under the direct method the text of the instrument is taken, as it is under the indirect method, this is usually done by restating the text of the convention or treaty by adapting it to fit in with the language of the statute book and the house style. Even though the international instrument itself may not be attached as a schedule it will be referred to in the legislation and substantive provisions will refer to parts of the instrument which they are seeking to give effect to.

Examples: See the Falkland Islands Constitution Order in relation to giving effect to some of the provisions of the European Convention on Human Rights under Chapter 1, and the Fisheries (Conservation and Management) Ordinance, which gives effect to different conventions (Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas adopted by the Conference of the United Nations' Food and Agriculture Organisation on 24 November 1993, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks)

(ii) subordination method

This is where the primary legislation is drafted to authorise the making of subsidiary legislation to give effect to the international instrument. This is usually preferred for those instruments which are frequently amended or contain some technical changes that will not justify the constant amendment of the primary legislation and the need for a full legislative process taking that amendment through the Legislative Assembly.

Examples: See the Livestock and Meat Products Ordinance, which provides for regulations to be made to give effect to EU directives and regulations; and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations which give effect to Annex 13 of the Chicago Convention; and the Deposits in the Sea (Exemption) Order, made under the Marine Environment (Protection) Ordinance referred to above which sets out (in the schedule) some articles of the Convention on the prevention of Maritime Pollution by the Dumping of Wastes and Other Matter.

Thornton and other textbooks discuss these methods in more detail and point out the advantages and disadvantages of each. It is in this work that Professor Francis Reynolds is quoted as lamenting the lack of standardisation of approach regarding the incorporation of international conventions into United Kingdom law. Accordingly, there appears to be no basis for asserting that there should be a standardised approach in the Falkland Islands whenever the task of drafting incorporating legislation is left to the Falkland Islands itself.

It is left to the drafter to determine which of these approaches is best suited to the particular international instrument being incorporated.

CHAPTER 6

AMENDING LEGISLATION

1. GENERAL PRINCIPLES

(a) Direct and textual amendment.

The use of indirect and non-textual amendments must be avoided, as this hinders accessibility of legislation and assumes that the reader will have access to the other law being referred to which may not always be the case.

(b) Maintain language consistency with the principal legislation BUT –

- adhere to gender neutral drafting
- where possible use plain language [*particular care needs to be given that new words introduced do not take away from the original intention/meaning of words in the principal legislation*]
- remove all references/use of ‘shall’ (in favour of ‘must’ or ‘may’ as the context and intention requires)
- maintain style consistency (*if possible and if it doesn’t change meaning below/above-eg tax legislation!*)

(c) Use narrative style.

2. AMENDING FORMULA

	CURRENT SYSTEM	PROPOSED SYSTEM
Amending headnotes	Inconsistencies between – Amendment of section 5 And Section 5 amended – (text of the headnote)	Section 5 amended – (text of headnote)
Omit	Used for small units	Keep current
Repeal	Used for whole provisions	Keep current
Inserting (Headnote must specify what is being inserted)	Used if placing text in between or at the end of an existing provision	Use if placing text in between existing provisions
Adding	Use if adding a new provision at the end of an existing series	Keep current/style issue and it doesn’t take away
Replacing/Substituting	Some amendments Ordinances use ‘substituted’ while some use ‘replaced/replacing’	Use ‘replaced/replacing’

Introductory words	<p>This Part amends/ This section amends, etc.</p> <p>As opposed to – Going straight into the text being amended e.g.</p> <p>5. Section 8 amended – (<i>Bee farming requirements</i>) (1) This section amends section 8. (2) Section 8 is amended by... OR 5. Section 8 amended – (<i>Bee farming requirements</i>) Section 8 is amended by...</p>	Keep current/style issue and it doesn't take away

3. NUMBERING PROVISIONS

(a) Numbering of Inserted provisions in Legislation

	CURRENT SYSTEM	PROPOSED SYSTEM
PARTS/CHAPTERS		
Inserting a new Part/Chapter between two original Parts/Chapters e.g. inserting a new Part/Chapter between Part/Chapter 3 and Part/Chapter 4	The new Part/Chapter should have an alphabetical letter (in capitals) alongside the number of the part preceding it e.g. Part /Chapter 3A	Maintain
Inserting a new Part between an existing 'inserted' Part and an original Part e.g. inserting a new Part between Part 2A and Part 3	Number as Part 2B	Maintain
Inserting a new Part between an original Part and an existing 'inserted' Part e.g. inserting a new Part between Part 3 and Part 3A	Number as Part 3AA (If there is already a 3AA, renumber as 3AB)	Number Part 3AB
Inserting a new Part /Chapter between two 'inserted Parts/Chapters' e.g. between Part 3A and Part 3B	Think about replacing the whole Part and consolidating it or re-enacting! If you cannot re-enact	Matter for the drafter - as long as it is clear

	number as Part 3AA	
Any further insertions	Repeal and re-enact	Repeal and re-enact
SECTIONS		
Inserting a new provision between two original sections e.g. inserting a new section between sections 3 and 4	The new provision should have an alphabet (in capitals) alongside the number of the original section it is inserted after e.g. section 3A	Maintain
Inserting a new section between an existing 'inserted' section and an original section e.g. inserting a new section between section 3A and section 4	Number the new section as 3B, etc.	Maintain
Inserting a new section between an original section and an existing 'inserted' section e.g. a new section between section 3 and section 3A	Number as 3AA	Maintain
Inserting a new section between two 'inserted sections' e.g. between sections 3A and 3B	Number as section 3AA (provided section 3AA does not exist already as a result of the example above in which case it must be numbered as 3AB)	Maintain
Any further insertions	Re-enact?	Matter for the drafter as long as it is clear
SUBSECTIONS		
Inserting a new provision between two original subsections e.g. inserting a new subsection between subsections (2) and (3)	The new provision should have an alphabet (in capitals) alongside the number of the original subsection it is inserted after e.g. subsection (2A)	Maintain
Inserting a new subsection between an existing 'inserted' subsection and an original subsection e.g. inserting a new subsection between subsection (2A) and subsection (3)	Number the new subsection as subsection (2B), etc.	Maintain
Inserting a new subsection between an original subsection and an existing 'inserted' subsection e.g. a	Number as subsection (3AA)	Maintain

new subsection between subsection (3) and section (3A)		
Inserting a new subsection between two 'inserted subsections' e.g. between subsections (3A) and (3B)	[Amend and replace the whole section] and if not possible number as subsection (3AA)	Maintain
PARAGRAPH		
Inserting a new paragraph between two original paragraphs e.g. inserting a new paragraph between paragraphs (a) and (b)	Number as paragraph (ab)	Maintain
Inserting a new paragraph between an existing 'inserted' paragraph and an original paragraph e.g. inserting a new paragraph between paragraph (ab) and paragraph (b)	Number as paragraph (aba)	Maintain
Inserting a new paragraph between an original paragraph and an existing 'inserted' paragraph e.g. a new paragraph between paragraph (b) and paragraph (ba)	Number as paragraph (baa)	Maintain
Inserting a new paragraph between two 'inserted paragraphs' e.g. between paragraphs (ba) and (bb)	Number as paragraph (bab)	Maintain
SUB-PARAGRAPH		
Treat the same way as paragraph adding an alphabet after the roman numerals e.g. (ia), (ib), etc	Same as above for paragraphs	Same as above for paragraphs

The same approach/practice applies to Regulations and Orders.

Note - Do not renumber or reletter provisions when amending to avoid creating problems with cross-references (Statute Law Commissioner role).

CHAPTER 7

DRAFTING PENAL PROVISIONS

In some legislation the offences and penalties are dealt with in the same clause while in others they are dealt with separately. The length of a clause should guide the approach. For example if a clause contains a long list of prohibitions which have different penalties it may be advisable to have a separate penalty clause specifying penalties for each prohibition to make it easier for the reader.

Example 1 – dealt with in different provisions (in the same Part)

10. Prohibited activities

- (1) It is an offence to — (list of prohibited activities)
- (2) A person must not deface, write on, alter, or in any other way modify a street sign.
- (3) A person must not remove, destroy....
- (4) A person must not litter, etc .

11. Penalties

- (1) Any person who does any of the activities set out under section 10(1) and 10(4) commits an offence and is liable on conviction to a fine of up to level 1 on the standard scale.
- (2) A person who pursues a course of conduct in breach of section 10(2) and (3) is guilty of an offence and is liable on conviction to a fine of up to level 3 on the standard scale.

Example 2 - dealt with in the same provision

10. False information or declarations

- (1) It is an offence for a person to provide false and incorrect information or make a false or incorrect declaration.
- (2) A person guilty of an offence under this section is liable on conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

11. Ongoing duty to disclose

- (1) A person must disclose....
- (2) A person who fails to comply with this section commits an offence and is liable on conviction to a fine of up to level 4 on the standard scale.

There are also instances where the offences and penalties are grouped together and addressed at the end of the legislative instrument either in a part dealing with general matters or a part dealing with miscellaneous matters.

Example 3 – dealt with at the end of the Bill (General Provisions)

76. Offences and penalties

(1) A person convicted of an offence under sections 7, 8 and 11 is liable on conviction to a fine of up to level 5 on the standard scale.

(2) A person who fails to comply with the ongoing duty of disclosure under section 17 commits an offence and is liable on conviction to a fine of up to level 4 on the standard scale.

(3) A person who pursues a course of conduct in breach of Parts 4 and 6 is guilty of an offence and is liable on conviction to a fine of up to level 3 on the standard scale.

(4) Any person who does any of the activities set out under sections 60, 63, 69 and 70 commits an offence and is liable on conviction to a fine of up to level 2 on the standard scale.

(5) A person convicted of any offence within this Ordinance for which a penalty is not specified is liable on conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 3 on the standard scale, or both.

This note reflects what happened in 2011 to update the standard scale of fines that applies under the Criminal Justice Ordinance.

The standard scale had been introduced in 1993 and updated in 2001.

Work had been undertaken to translate the monetary fines in the Road Traffic Ordinance to levels on the standard scale (this followed a case in which the previous Senior Magistrate had criticised the fact that the maximum penalty for an offence was only £50.)

This prompted a review of the standard scale of fines.

Unlike the United Kingdom standard scale, there are 12 levels in the Falkland Islands standard scale.

The approach taken is set out in Executive Council paper 116/11 (copies of which can be accessed from Public Folders or from Gilbert House), but – in summary – the 1993 and 2001 figures were updated by the increase in the Falkland Islands Retail Prices Index and a round figure approximately in line with those updated figures was chosen.

The ratio between each step on the scale was not consistently maintained between 2001 and 2011, but there had already been some variation between the 1993 and 2001 ratios. When drafting new legislation the draft should make reference to a “fine not exceeding level [x] at the standard scale” rather than to financial value.

The standard scale of fines is now provided for under Schedule 8 of the Criminal Procedure and Evidence Ordinance 2014 which came into force on the 21 April 2017.

There has been confusion in the past about whether fines were matters about which amendments can be made in the Legislative Assembly due to a misunderstanding of the scope and intention of section 51(2) of the Constitution. The Attorney General has issued an opinion on this matter entitled “*Advice on the limitations of the Legislative Assembly’s right to amend bills during the legislative process: Section 51(2) of the Constitution and Legislative Assembly Standing Rules and Orders, Orders 44 and 45*” dated 11 September 2016, which proves clarification on this issue.