

***THE REPORT***  
***OF THE***  
***SELECT COMMITTEE***  
***OF THE***  
***LEGISLATIVE COUNCIL***  
***ON THE***  
***REVIEW OF THE CONSTITUTION***

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The President and Honourable Members of  
The Legislative Council of the Falkland Islands

Your Excellency and Honourable Members,

*Introductory*

1. On 28th May 1994, the Legislative Council resolved, on the motion of the Honourable J E Cheek<sup>1</sup>, to establish a Select Committee consisting of all elected members of the Legislative Council, to be known as the Select Committee on the Review of the Constitution, and having the following terms of reference-

“1. To consider whether, and if so what, changes should be made to the Constitution of the Falkland Islands;

2. For that purpose-

(a) to invite and consider written, and if the Committee sees fit, oral representations on the subject from members of the public; and

(b) to seek and consider the advice and views of such officers of the Government as the Committee sees fit.

3. To submit its written Report to the Legislative Council within approximately twelve months from today with a view to any changes sought by the Legislative Council and agreed upon by Her Majesty's Government in the United Kingdom being implemented in time for the next General Election”.

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<sup>1</sup> Motion 3/94

We have not been able to submit our Report "within approximately twelve months" but this has been due to the need for us to consider fully the changes we should propose and the views of the public in relation to them. We hope nevertheless that the changes requested in subsequent paragraphs of this Report will be implemented in time for the next General Election.

2. The Select Committee has met in private on a number of occasions to discuss possible amendments to the Constitution (Schedule 1 to the Falkland Islands Constitution Order 1985). In October 1994 and on a number of occasions thereafter, the Committee issued invitations to members of the public to inform the Committee of any changes to the Constitution they considered desirable. While Members of the Select Committee themselves had in mind various possible changes to the Constitution, the Select Committee believed it would be useful if the Committee were to have the advice and assistance of the advice of a person experienced in matters relating to constitutions, constitutional change and political progress, including an increasing measure of self-government. Mr Walter Wallace, who had advised in relation to constitutional changes in the Turks and Caicos Islands and in the British Virgin Islands was recommended to the Committee and in December 1994, Mr Wallace was appointed to advise it.

3. Immediately after the appointment of Mr Wallace was announced, members of the public were invited to submit their views in writing to Mr Wallace or to seek an appointment with him during his proposed visit to the Falkland Islands. As is recorded in his Report to the Select Committee, during his visit to the Islands from 14 February to 16 March 1995, Mr Wallace received written submissions from six people and had discussions with 22 members of the public. The public was invited to attend a public meeting with Mr Wallace and members of the Select Committee to discuss constitutional change, and six members of the public did so.

4. Mr Wallace's report was received by the Committee in May 1995 which immediately published his Report. The Committee has met on a number of occasions to discuss the recommendations for constitutional changes made by Mr Wallace and its views on those recommendations, after taking into account views expressed by members of the public, are set out in the following paragraphs of this Report.

#### *Mr Wallace's recommendations*

5. References in italicised paragraph numbers in subsequent paragraphs of are to paragraphs of Mr Wallace's Report.

6. In *paragraphs 2.1 - 2.4* Mr Wallace recommends that the basic system of government should remain unchanged. The Committee agrees. But we do not agree with his views as to the Standing Finance Committee because we do not see any need for there to be any change in the present practice whereby the Standing Finance Committee considers requests by the Executive Council for additional expenditure. We do not believe that this

is in any way objectionable provided, as is the case, that *authorisation* for any additional expenditure is by way of appropriation legislation passed by the Legislative Council and the appropriation legislation is enacted before the expenditure is incurred. We are advised by the Attorney General that subject to that proviso and to the Standing Finance Committee acting entirely within its terms of reference, no breach of the Constitution is involved. We believe that the following points should be noted in relation to the consideration by the Standing Finance Committee of proposed expenditure-

(a) it enables elected members as a whole to indicate to the Executive whether expenditure proposals will receive majority support in the Legislative Council. We believe this to be essential in the absence of a political party system of government which can count on the support of the members of the governing party of the day. and, further, we believe that were Mr Wallace's recommendation to be accepted public officers and elected members' time would fruitlessly be wasted because proposals for expenditure, reflected in appropriation Bills, might be presented to the Legislative Council, and perhaps special meetings of that Council called, when there is little prospect of the expenditure being approved. In a parliamentary democracy, with a political party in power, in the Westminster system, failure of an appropriation measure to pass the legislature would be regarded as a "confidence matter" and usually result in the resignation of the government of the day. This is clearly not appropriate in a non-political party, non-Ministerial, form of government;

(b) it enables elected members to be given information related to the desirability of proposed expenditure which cannot be given in public in Legislative Council because making the information public might be prejudicial to the interests of the Falkland Islands Government (for example, details of the estimated costs of works provided for within an item which would inform a potential tenderer of the amount the Falkland Islands Government expects to have to pay); and

(c) it does not prevent public debate in the Legislative Council, when the requisite appropriation Bill is presented, in relation to the desirability of expenditure as to which there is a division of views between elected members of the Council. On the other hand, even if the Standing Finance Committee were to be abolished, there would hardly be debate in the Legislative Council as to the desirability of expenditure in relation to which elected members are entirely agreed.

7. Mr Wallace states in his summary of recommendations that he recommends in *paragraph 2.4* that the review of Executive Council decisions by the Standing Finance Committee should cease. Since the body of the Report only relates to consideration of proposals for expenditure by the Standing Finance Committee, we merely point out, as a matter of record, that the Standing Finance Committee does not review decisions of the Executive Council generally. We fully appreciate that if the Standing Finance Committee were to do that (which would be beyond its terms of reference in the Standing Orders of the Legislative Council) it would indeed be acting unconstitutionally.

8. The General Purposes Committee (a committee of all of the members of the Legislative Council) is also mentioned in *paragraph 2.4*. This Committee would not, of course, at least with its present functions, be appropriate if there were to evolve a party political form of government in the Falkland Islands. For that reason we do not think it should be formally provided for in the Constitution. Mr Wallace does not, of course, propose that it should be, and regards the existence, and present functions, of the General Purposes Committee as unobjectionable. We agree.

9. We agree with Mr Wallace (see *paragraph 2.5*) that there is no present sign of political parties emerging in the Falkland Islands and that minor, but extensive, amendments to the Constitution would be required if they were to eventuate.

10. We further agree with Mr. Wallace's recommendation in *paragraph 2.5* that "constitutional certainty be given to what is largely the practice at present - viz., the association of individual members of the Legislative Council with responsibility for specific areas of the business of the government."

11. Mr Wallace in *paragraph 2.6* stresses that the constitutional responsibility of the relevant elected member would only be for the conduct of business in the Legislative Council relating to the relevant matter. This means that executive responsibility remains (in the words of section 50(2) of the Constitution) to be exercised "...by the Governor, either directly or through officers subordinate to him". Mr. Wallace is in effect suggesting a "half-way" house to a ministerial system and we agree with that proposal, since we do not believe that the Falkland Islands are yet ready to proceed to a ministerial system, nor do we think that full-time Councillors are yet justified, or indeed practicable. However, the "half-way house" proposal does have the inherent difficulty for the elected member that he is answerable to the Legislative Council (and may be called upon to answer questions in the Legislative Council) in relation to matters as to which he, constitutionally, has no power to direct and which may, indeed, have been done or omitted contrary to his wishes. We believe that the present Standing Rules and Orders of the Legislative Council (which permit questions to be addressed to an elected member in relation to a matter for which he is responsible, but permit him to redirect the question to an official member) make sensible provision for the elected member who finds himself in the difficulty we have mentioned.

12. We agree with Mr. Wallace's recommendation (*paragraphs 3.1-3.4*) that the powers of the Governor should remain unchanged..

13. Mr. Wallace recommends (*paragraph 4.3*) that consideration should be given to electing Executive Council Members for a four year term so that-

"Elected members of the Executive Council would thus serve for the life of the Legislative Council unless removed by a resolution of the Legislative Council."

We have considered the matter carefully, but we believe that in a small society it is particularly odious to take action by public resolution to remove a person from office and we therefore do not wish a change in the present provision of the Constitution which provides for members of the Executive Council to be elected to serve for twelve months at a time.

14. In *paragraph 4.4* Mr Wallace criticises the convention that in Executive Council only elected members of the Executive Council vote on any matter on which a vote falls to be taken. We very strongly disagree with Mr. Wallace on this point. The then Prime Minister of the United Kingdom at the time of the introduction of the Constitution informed the House of Commons that only elected members of the Executive Council could vote on any matter before Executive Council. That practice, which has never been departed from, has been reported to the United Nations on a number of occasions since then. We do not believe it can now be departed from and believe that the Constitution should be amended so as to reflect the long-standing practice, that is to say, so as expressly to exclude official members of the Executive Council voting on any matter coming before that Council.

15. We support Mr Wallace's proposal in *paragraph 4.5* that the number of elected members of the Executive Council should be increased to five, with a minimum of two from each constituency and his proposal in *paragraph 4.6* that the quorum of Executive Council shall be four members, of whom at least three shall be elected members with one at least from each constituency.

16. We agree (*paragraph 4.6*) that temporary members of the Executive Council should only be elected when requested by the Governor, but we believe that Mr Wallace may be unaware that there has been a standing request by Governors for temporary members of the Executive Council to be elected when a substantive member is likely to be absent. We agree that this might not so often be necessary with an increase in the number of elected members of the Executive Council.

17. We do not endorse Mr Wallace's proposal (*paragraph 5.3*) that the present reference to the number of constituencies should be removed from the Constitution, and believe that, on the contrary, the present provisions of the Constitution providing for the Camp and Stanley constituencies should remain. We agree that the number of elected members of the Legislative Council should be increased from eight to eleven (*paragraph 5.4*) and that provision to that effect should be made by the Constitution. We differ somewhat from Mr. Wallace's proposals in *paragraph 5.5*. Our proposals are that the Constitution shall provide that three members at least shall be returned by each constituency and that the remaining five members shall be returned as shall from time be prescribed by Ordinance. We have in mind that initially it would be provided by Ordinance that four of these five members would be returned by the Stanley constituency and that the remaining member would be returned by the Camp constituency. An elector might vote for as many candidates as there are seats to be filled in respect of the constituency in which he votes, but he would not be obliged to exercise all of his votes. We support Mr Wallace's proposal (*paragraph 5.7*) that the Constitution should be amended so as to remove the

requirement that a candidate who is otherwise qualified to stand for election must be registered as a voter in the constituency in which he seeks election. We agree that the quorum of the Legislative Council should be raised to seven members (including the person presiding if a member of the Council) (*paragraph 5.7*). We agree that provision should be made for an elected Speaker (*paragraphs 5.11 and 5.12*).

18. We accept the proposals set out in *paragraphs 5.18 and 5.19*. We believe, however, that it is possible to improve upon the wording proposed by Mr. Wallace in *paragraph 5.20* for amendments to the Constitution. We believe it is also possible and desirable to avoid the clash, which would otherwise result from Mr Wallace's proposals, and which could cause confusion, between the terms "person belonging to the Falkland Islands" and persons "who have the status of a Falkland Islander" each of which, if his proposals were to be adopted, would exist in the amended Constitution. We propose as follows-

(a) Section 27 of the Constitution should be replaced by a provision to the effect that a person is entitled to be registered as an elector if he is a person who has attained the age of 18 years and either-

(i) he enjoys Falkland Islands status; or

(ii) he is a Commonwealth citizen whose name appeared on the register of electors for a constituency in force on 31st December 1995,

and, in either case, he was resident in the Falkland Islands on the qualifying date<sup>2</sup> in relation to which his entitlement to be registered as an elector falls to be considered and had on that qualifying date been so resident for the qualifying period<sup>3</sup>.

(b) section 17(5) of the Constitution should be replaced by a provision reading as follows (where the amendments to the existing section 17(5) appear in italics)-

"(5) For the purposes of the foregoing provisions of this Chapter a person shall be regarded as belonging to the Falkland Islands *if he enjoys Falkland Islands status and a person enjoys such status* if that person is-

(a) a citizen<sup>4</sup> who was born in the Falkland Islands; or

(b) a citizen who was born outside the Falkland Islands-

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<sup>2</sup> "qualifying date" is at present 15th May in the year the register of electors for the time being in force was prepared (see Electoral Ordinance 1988).

<sup>3</sup> "qualifying period" is defined by the Electoral Ordinance 1988 and under it there are different qualifying periods depending on the circumstances of the person in question. Those provisions of that Ordinance may of course be amended by Ordinance.

<sup>4</sup> "citizen" is defined by s. 89(1) of the Constitution as "a person who is a British citizen, a British Dependent Territories citizen or a British Overseas citizen".

(i) whose father or mother was born in the Falkland Islands;  
or

(ii) who is domiciled in the Falkland Islands and whose father or mother became, while resident in the Falkland Islands, a citizen by virtue of having been naturalised or registered as such or as a British subject or as a citizen of the United Kingdom and Colonies; or

(c) a citizen by virtue of having been so naturalised or registered while resident in the Falkland Islands; or

(d) a Commonwealth citizen who is domiciled<sup>5</sup> in the Falkland Islands who either

(i) *was* ordinarily resident in the Falkland Islands for *the seven years immediately preceding 1st January 1996*<sup>6</sup>; or

(ii) *has been granted such status under the provisions of an Ordinance providing for the grant of that status to Commonwealth citizens who have been ordinarily resident in the Falkland Islands for a period of at least seven years and has not, in accordance with the provisions of that Ordinance, lost or been deprived of such status*<sup>7</sup>; or

(e) the *spouse, widow or widower* of such a person as is referred to in any of the of the preceding paragraphs of this subsection, and, in the case of a *spouse*, is not living apart from her husband *or his wife, as the case may be*, under a decree of a competent court or a deed of separation<sup>8</sup>; or

(f) under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law, of such a person as is referred to in any of the preceding paragraphs of this subsection.”

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<sup>5</sup> “is domiciled” : i.e. at any time his status falls to be determined. A Commonwealth citizen who has been ordinarily resident for the requisite period will cease to have Falkland Islands status immediately he settles outside the Falkland Islands..

<sup>6</sup> “*the seven years immediately preceding 1st January 1996*”. This will prevent any person in the future acquiring “Falkland Islands status” merely by being resident in the Falkland Islands for seven years and intending to make his permanent home in the Falkland Islands.

<sup>7</sup> He will automatically lose such status, under the opening words of sub-paragraph (d), if he settles outside the Falkland Islands.

<sup>8</sup> The effect of the amendments to this sub-paragraph is to remove the discrimination against men appearing in the sub-paragraph as it at present appears in the Constitution. Executive Council in 1994 agreed in principle that this should be done as soon as the Constitution was first amended.



19. We accept the recommendations for amendments to the Constitution made in *paragraphs 5.21 and 5.22 and 6.3* of Mr. Wallace's report.

20. We reject the recommendations contained in *paragraph 6.4* of Mr Wallace's report. We believe the present provisions of the Constitution and of the Electoral Ordinance 1988 in relation to public officers standing for election to the Legislative Council are satisfactory.

21. The subject matter of *paragraph 7.2(a)* has been dealt with by our paragraph 16, which in effect, accepts the recommendation in question. We accept the recommendation contained in *paragraph 7(2)(b)*. This merely requires the replacement of one word in Legislative Council SR & O 18(3). We accept the recommendations contained in *paragraphs 7(d) and (e)*. We note the recommendation contained in *paragraph 7(2)(f)* and await notification of Foreign and Commonwealth Office Legal Advisers' views upon it.

### ***Conclusion***

22. This Report sets out the consensus of elected members of the Legislative Council in relation to the subject matter referred to the Select Committee.

23. We present this Report to the Legislative Council and request that the Council should ask the Governor to forward a copy of it to the Foreign and Commonwealth Office with a view to the amendments to the Constitution agreed by elected members being made and brought into force before the next General Election of members of the Legislative Council, due in October or November 1997.

24. We wish to conclude by expressing our thanks to Mr Wallace for his Report which has greatly assisted us in considering what changes to the Constitution we should request and also to those members of the public who have spoken to or written to members of the Select Committee upon the subject. We have carefully considered all of the views they expressed.

J E Cheek  
Chairman of the Select Committee  
on behalf of the Committee

10 November 1995

