

The Constitution of the Falkland Islands – Summary of the key provisions, and how they operate in practice

The Constitution of the Falkland Islands is contained in The Falkland Islands Constitution Order, which is an Order approved by Her Majesty by and with the advice of Her Privy Council.¹

The Constitution itself is scheduled to the Order in Council and came into force on 1 January 2009.

Protection of Fundamental Rights and Freedoms

Chapter 1 of the Constitution – Protection of the Fundamental Rights and Freedoms of the Individual, sets out a number of fundamental rights and freedoms, which are capable of legal enforcement and which govern how laws should be made and individuals should be treated by public authorities in the Falkland Islands. Some of these rights and freedoms exist in order to enshrine in local law protections afforded by internationally agreed conventions which apply in the Falkland Islands, such as the European Convention on Human Rights.

The rights and freedoms are listed below:

1. Fundamental rights and freedoms of the individual
2. Protection of the right to life
3. Protection from inhuman treatment
4. Protection from slavery and forced labour
5. Protection of the right to personal liberty
6. Provisions to secure protection of law
7. Protection of rights of prisoners to humane treatment
8. Protection of freedom of movement
9. Protection for private and family life and for privacy of home and other property
10. Protection of right to marry and found a family
11. Protection of freedom of conscience
12. Protection of right to education
13. Protection of freedom of expression
14. Protection of freedom of assembly and association
15. Protection from deprivation of property
16. Protection from discrimination
17. Derogations from fundamental rights and freedoms under emergency powers
18. Protection of persons detained under emergency laws
19. Enforcement of protective provisions [this provides for application to the Supreme Court by any person who alleges that their rights and freedoms have been or are likely to be contravened]
20. Proceedings which might affect freedom of conscience
21. Proceedings which might affect freedom of expression

22. Interpretation [this section includes the definition of persons who are to be regarded as “belonging to the Falkland Islands”]

Roles and Responsibilities – The Government of the Falkland Islands

This part of the note seeks to summarise the way the Constitution of the Falkland Islands operates, and the roles of various different people in this. It is divided into the following sections:

1. Legislative Functions
2. Executive Functions
3. Internal Security / Defence
4. Foreign Affairs
5. Judicial Functions

1. Legislative Functions

UK Parliament

- Makes and amends legislation directly or indirectly applicable in the Falkland Islands.

UK Secretary of State

- Considers whether to disallow any legislation (exceptional – usually only relating to questions of constitutionality or compatibility with international obligations. Could relate to good government/ plain decency).
- Gives approval to any legislation reserved for approval by Her Majesty the Queen (HMQ)
- Power is reserved to HMQ in Council to legislate for the peace order and good government of the Falkland Islands – in effect the Secretary of State advises Her Majesty in Council.

Governor

- Signs Royal Assent (most legislation) (usually a ceremonial role in practice) (section 52)
- Submits to Secretary of State for Royal Assent (some legislation – see Annex A, para 5) (see s52(2) – reserve for HMQ approval any Bill “repugnant to or inconsistent with this Constitution”)
- Has power to refuse to give assent to any Bill (section 52)
- May force a Bill into law, against the wishes of the Members of the Legislative Assembly, on Secretary of State instructions (section 55)

Executive Council

- Approve policy principles which require legislation for implementation.

- Make recommendations as to Bills / Motions which would have the effect of making financial provision (tax, spending etc), or affect a public office (section 51)
- Make recommendations to the Legislative Assembly as to all Government Bills
- Make Secondary Legislation (where delegated by Legislative Assembly), or prepare secondary legislation for Legislative Assembly approval.

Legislative Assembly

- Have the power to make laws for the peace order and good government of the Falkland Islands (section 37)
- Initiate, consider and approve Bills (which can either be Government Bills (approved by ExCo) or non-Government Bills) (section 51)
- Receive Secondary Legislation approved by ExCo (some requires approval before it is made or can come into force; some is simply laid on the table to be noted)
- Established practice that Portfolio Holders set the agenda in their portfolio areas, and introduce the Bills that relate to their portfolio.

Chief Executive / Public Service

- Draft policy proposals for consideration by Executive Council.
- Draft legislation following approval by Executive Council of the applicable policy.
- Participate in processes at Legislative Assembly / Executive Council, giving advice as necessary.
- Prepare and publish Legislation when approved.
- Implement legislation (executive functions).

2. Executive Functions

“Executive functions” essentially covers all the day to day business of Government. Undertaking the works, delivering the services, developing policies and implementing those policies.

UK Secretary of State

- Approves the Management Code for the Public Service (section 85(3)). (Prior approval is required to any provisions affecting the discipline or removal of public officers).

Governor

- Exercises the executive authority of the Falkland Islands on behalf of Her Majesty (section 56).
- Delegates this to officers (sections 56 and Chapter VII – sections 82 & 83), but remains responsible.

- Consults Executive Council on the formulation of policy and exercise of functions, and accepts the advice of Executive Council, except as set out below (usually public officers prepare the papers on which ExCo are consulted, and usually public officers will be acting on the advice given) (section 66).
- Not **obliged** to consult Executive Council (arguably may still do so informally or formally, if considers appropriate) (section 66(2))–
 - When acting under instructions from a Secretary of State
 - When required to consult CBFSAI, or CBFSAI has given advice (see below)
 - When exercising “discretionary” functions (see below)
 - If the service of Her Majesty would be prejudiced by consulting Executive Council
 - If the matter is, in his judgment, too unimportant
 - If the matter is, in his judgment, so urgent that action is required before he can consult Executive Council
- To communicate to Executive Council measures adopted without consultation/ reasons for them (unless instructed not to by Secretary of State) (section 66(3)).
- May act against the advice of Executive Council in certain circumstances (section 67(1)), namely –
 - If, in his judgment, it would be right to do so in the interests of good governance; or
 - If, in his judgment, such advice would affect any of the following matters
 - External affairs
 - Defence
 - Internal security, including the police
 - Administration of justice
 - Audit, and
 - Appointments to the public service, discipline and removal of public officers, and management of the public service.
- Report to the Secretary of State and convey the views of Executive Council to the Secretary of State on any matters where acting against the advice of the Executive Council. (section 67(3)).
- May require the attendance of any public officer or the provision of any official papers, information or advice relating to any aspect of the government of the Falkland Islands (section 68).
- Issues the “Management Code” for the management of the Public Service (with the approval of the Secretary of State, and agreement of the Executive Council).
- Can give Directions as to how functions are to operate in practice.

Executive Council

- Advise the Governor (usually public officers) on the formulation of policy and exercise of functions. In this context as “advice” must usually be accepted, “advise” is equivalent to “direct”.
- May delegate any of its functions to a committee.
- (usually) approve policies and exercise functions not delegated to others.
- In this context, “Executive Council”, means the three members of the Legislative Assembly appointed to the Executive Council.
- Agree the Management Code for the management of the Public Service (s85(3)).

Legislative Assembly

- No direct function in approving policies or exercising functions.
- Established practice that members will be actively involved in policy development in their portfolio areas.
- May provide comments on reports taken to Executive Council in relation to their portfolio areas.
- May appoint the elected members to sit on Executive Council.
- Agrees the Budget for the delivery of the Public Services.
- Members informally consulted on relevant matters.

Chief Executive / Public Service

- Office of Chief Executive constituted by section 83 of the Constitution.
- Other public offices may be constituted by the Governor (section 82).
- Chief Executive is head of the public service (section 83), but must comply with the directions of the Governor (s83(2)).
- Officers exercise the functions delegated to them (section 56)– in reality this constitutes the bulk of the delivery of public services and exercise of public functions.

UKG

- Ultimately responsible for ensuring the good governance of the Falkland Islands

3. Internal Security / Defence

Not including Police-related matters

Governor

- Must consult CBFSAI before exercising functions which appears to relate to defence or internal security (section 25).
- Must act in accordance with advice from CBFSAI on such matters(section 25).

Executive Council

- No direct role.
- May be formally consulted by the Governor (but this is not obligatory).
- Decisions/functions may be affected if CBFSAI gives advice.
- Query informal consultation/involvement in decisions.

Legislative Assembly

- No direct role.
- Decisions may be affected if CBFSAI gives advice.
- Query whether informal consultation/involvement of members in decisions.

Chief Executive / Public Service

- Where exercising functions delegated by the Governor, must consult CBFSAI before exercising functions which appears to relate to defence or internal security (section 25).
- Must act in accordance with advice from CBFSAI on such matters (section 25).

Commander British Forces South Atlantic Islands

- Able to attend Legislative Assembly.
- Able to attend Executive Council.
- Must give advice where requested or where considers it necessary in the interests of defence or internal security (excluding police matters) (section 25).

Police-related matters

Governor

- Appoints Chief Police Officer, and determines the rank of the officer (PO2000, Section 4).
- Appoints to Police posts (PO 2000, Section 5).
- Consult Executive Council on the policing objectives, before approving these.
- Approve circumstances/arrangements for control permitting police officers to bear and use arms for or in connection with the performance of their duties.

Police Committee

- Established under Police Ordinance 2000 – responsible for advising Governor in relation to the maintenance of an efficient and effective police service
- Consider the policing objectives for the coming year and advise the Governor

Executive Council

- No direct role in the operational control of the Police
- Consulted on the policing objectives.
- Informally consulted on relevant matters (at discretion of Chief Police Officer/Governor)

Legislative Assembly

- No direct role in the operational control of the Police
- Appoint two MLAs to the Police Committee
- Vote to provide funds for the maintenance of the police service.
- Portfolio holder appointed covering the Police

Chief Executive / Public Service

- If Direction in force from the Governor delegating this function, agree the appointment of Police Officers, other than the Chief Police Officer (Constitution, Section 84; PO2000, s5).
- No direct role in operational control of the Police.

Chief Police Officer

- Has the command, superintendence and direction of the police, subject to orders and directions of the Governor (PO2000, Section 4).
- Unless Governor determines otherwise, deals with all complaints about the conduct of any other police officer (PO2000, s15)
- Subject to discipline under the Management Code (Constitution, s85)
- Operationally independent.

4. Foreign Affairs

UKG

- Responsible for external relations (take all substantive decisions in this area)
- Encourage and assist FIG in building productive links with the wider world
- Can give specific authority (a specific or general entrustment) confirming authority of FIG to enter into discussions/treaties

Governor

- Link between UKG and FIG

Executive Council

- No direct role in foreign affairs matters.
- Can seek UK authority to enter into negotiations with an international or regional organisation or negotiate a treaty.
- Consulted on matters affecting the Falkland Islands

Legislative Assembly

- No direct role in foreign affairs matters.
- Will approve legislation to conclude treaties etc if authorised.
- Members informally consulted on matters affecting the Falkland Islands

Chief Executive / Public Service

- No direct role in foreign affairs matters.

- Can deal with negotiations etc when authorised.
- Informally consulted/ give advice where the interests of the Falkland Islands are affected.

5. Judicial Functions

Governor

- Appoint President of the Court of Appeal, Justices of Appeal and Chief Justice, in pursuance of instructions from a Secretary of State (Section 88(1)).
- Appoint the Senior Magistrate (Section 88(4)).
- Appoint acting judge of the Supreme Court. (Section 89(1)).
- Appoint justices of the peace (Administration of Justice Ordinance 1949, section 3).
- No direct role in the administration of justice (respecting the independence of the judiciary).

Executive Council

- Approve proposals for funding.
- Approve policies, and draft legislation, for creation, allocation and operation of other judicial and quasi-judicial functions.
- No direct role in the administration of justice.

Legislative Assembly

- By way of Appropriation Ordinance, approve the budget for the exercise of judicial functions.
- By way of legislation, create or allocate judicial or quasi-judicial functions in addition to those set out in the Constitution (for example certain tribunals and commissions).

Chief Executive / Public Service

- Public officers administer the courts and tribunals service to support judicial / quasi-judicial functions.
- No other direct role in the administration of justice.

Judiciary

- Operate independently in the exercise of their judicial functions.
- Participate in policy development in relation to certain matters, including the work of the Criminal Justice Council (and Sentencing Guidelines Committee).

ⁱ The Falkland Islands Constitution Order 2008 (Statutory Instrument No. 2846 of 2008) was made in exercise of the powers contained in the British Settlement Acts 1887 and 1945, which provide that Her Majesty may, by and with the advice of Her Privy Council to establish such laws as may appear to be necessary for “the peace, order and good government” of her subjects and others within the Falkland Islands.