

# EXECUTIVE COUNCIL

## CONFIDENTIAL

**Title of Report:** Complaints Commissioner Bill

**Paper No:** 100/10

**Date:** 29 April 2009

**Report of:** Principal Crown Counsel

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### 1.0 Purpose

The purpose of this Bill is to seek approval of the amended Complaints Commissioner Bill for publication in the Gazette and submission to the Legislative Assembly.

### 2.0 Recommendation

It is recommended that the Complaints Commissioner Bill as attached is published in the Gazette and submitted to the Legislative Assembly.

### 3.0 Summary of Financial Implications

	2010/11	2011/12	Full Year
	£	£	£
<u>Operating Budget</u>	2,000	2,000	2,000
	(to be reviewed after six months)		

### 4.0 Background

4.1 The Complaints Commissioner Bill was submitted to Executive Council for first consideration in January 2010 (Executive Council paper 14/10).

4.2 Paper 14/10 also had annexed to it a detailed consultation paper which highlighted the key issues that would be covered by the Bill. Executive Council agreed that the Bill be made available for public consultation. The detailed consultation paper was made available to members of the public, together with the draft Bill, under cover of the Attorney General's invitation for public consultation of 28 January 2010.

### 5.0 Response to Public Consultation

5.1 The response attached at Annex A was the only one received following the public consultation exercise. The Attorney General met with Honourable Members on 6 April to discuss the response.

5.2 The issues raised were carefully considered by Members in conjunction with the Attorney General, and Members determined that, whilst not all the issues had merit or required action, the following amendments should be made to the Bill:

(a) Reference to South Georgia and the South Sandwich Islands should be removed from the definition of “Governor” in clause 3, on the basis that Members considered the reference to be unnecessary/inappropriate;

(b) Clauses 12(2) and 14(3) should be amended to remove reference to a complaint being made by someone who has died, on the basis that Members do not believe that the complaints system should extend to a complaint made on behalf of someone who has died;

(c) Clauses 14(2) and 14(4) should be amended to give improve clarity of the intended effect of those clauses, on the basis that it was not immediately apparent what the intention is (reference how complaints should be made by individuals and by other legal entities such as companies).

5.3 The amended Bill is attached as Annex B to the paper (which requires certain formatting amendments before publication).

## **6.0 Policy summary**

6.1 Section 95 of the Constitution provides that the Governor may appoint complaints commissioners to investigate complaints of maladministration in government, and to investigate any other matters which may be provided for by an Ordinance.

6.2 Section 96 of the Constitution provides that complaints commissioners will have the functions, powers and jurisdiction as provided for by an Ordinance.

6.3 The Bill therefore sets out the matters that complaints commissioners are to investigate, and their functions, powers and jurisdiction.

6.4 The key policies reflected in the Bill are as summarised in the Attorney General’s invitation for public consultation:

(i) a principal complaints commissioner and other complaints commissioners can be appointed to investigate complaints of maladministration in the government of the Falkland Islands and the statutory bodies such as FIDC, and other matters in respect of which a member of the public would reasonably feel a sense of injustice;

(ii) such a complaint can only be made if internal complaints procedures have been used first, and the complaint has been referred to a commissioner by a member of the Assembly or the Governor;

(iii) various matters are excluded from being the subject of a complaint, such as the merits of FIG policy, or complaints arising from conduct which occurred before the Ordinance comes into force;

(iv) a report on a complaint that has been investigated is sent to the person who has made the complaint, to the Governor, and to others specified in the Bill, and can include a recommendation that a payment should be made for any loss or inconvenience suffered by the complainant;

(v) such a recommendation is not binding on the body to which the report relates, but the body has to submit a response to the report to the Governor within three months stating which recommendations are accepted or rejected; and

(iv) the Bill also provides that the conduct of a member of the Legislative Assembly may be the subject of a complaint if it relates to an alleged breach of the principles of public life that apply to Members, or to a breach of the rules relating to personal interests.

6.5 A more detailed analysis of the Bill is also contained in the full consultation paper which was submitted with Executive Council paper 14/10.

6.6 An additional particular policy question; the extent to which the complaints commissioners' jurisdiction should extend to the actions of the Governor was considered by Members at their meeting with the Attorney General of 6 April. It was agreed by those Members present at the meeting that the correct avenue for a complainant who was aggrieved by a matter concerning the Governor acting in his discretion (ie the type of complaints which the Bill excludes from jurisdiction of the complaints commissioner), was to take the matter to the Secretary of State.

## **7.0 Financial Implications**

7.1 Like the Public Accounts Committee Ordinance, the Bill provides that funding for the complaints commissioner system will be appropriated by the Legislative Assembly. However, unlike the Public Accounts Committee Ordinance, there is no process for consultation with the Legislative Assembly in relation to a programme of work, because the work of the complaints commissioners will necessarily be reactive.

7.2 The Bill provides for complaints commissioners to be paid a daily allowance; the amount to be determined by Executive Council and notified in the gazette.

7.3 The Bill also provides for complaints commissioners, and witnesses requested or summonsed to appear before the commissioner, to be reimbursed their reasonable travel and accommodation expenses (subject to a maximum amount or rate set by Executive Council).

7.4 The advantage of appointing a Principal Complaints Commissioner is that it enables the person to play a proactive role in relation to the complaints system, and allows them to look across individual complaints to identify cross cutting issues that might need to be addressed. In recognition of the type of role expected of the Principal Complaints Commissioner, provision has been included to pay the person a daily allowance greater than that of an ordinary complaints commissioner.

7.5 The Bill provides for a public officer, or some other person, to be appointed as secretary to the complaints commissioners.

7.6 Because of the reactive nature of the complaints commissioner system, it is difficult to make a realistic assessment of the likely financial implications at this stage. However, Honourable Members are invited to discuss and advise on certain parameters which could be used to initially restrain costs whilst a proper assessment of the likely workload of the complaints commissioner can be assessed:

(a) Daily allowance

It is recommended that an allowance rate of £100 per day be set for the Principal Complaints Commissioner, on the basis that appointment of the Principal Complaints Commissioner only will proceed in the first instance. If it is determined that appointment of other complaints commissioners is required, the question of an appropriate, potentially lower, rate, can be determined by Executive Council then;

(b) Maximum rate of expenses

It is recommended that the existing FIG subsistence and mileage rates, as provided for in the Management Code, be used as the maximum rate of accommodation and travelling expenses which may be claimed by a complaints commissioner or by a witness;

(c) Secretary and accommodation

It is recommended that a secretary be appointed from within FIG initially, (the appointment to be of an existing administrator and the workload be absorbed within an existing post), and that the secretary initially be paid for, accommodated and provided with all necessary administrative resources within FIG. The secretarial post with capacity to take on this role is yet to be identified.

7.7 On this basis, Honourable Members are invited to agree an initial annual budget of £2,000, for the complaints commissioners, with a view to review of the budgetary provision six months after appointment of the Principal Complaints Commissioner, or sooner if it becomes apparent that the budgetary provision is inadequate to enable the Principal Complaints Commissioner to work effectively.

## **8.0 Legal Implications**

8.1 If the Bill is to be submitted to the Legislative Assembly in May, it will need to be published in the Gazette at least ten clear days before the meeting of the Legislative Assembly (unless a certificate of urgency is to be issued, which it is suggested should only be utilised in situations of genuine urgency).

8.2 The Bill provides that the Ordinance would come into force on a date to be fixed by the Governor and published in the Gazette. It is proposed that the Ordinance come

into force on 1 July 2010 (giving time for all practical matters to be resolved before commencement).

8.3 The following matters would need to be resolved before appointment of the Principal Complaints Commissioner could be given effect to in accordance with the recommendations of this paper:

- (a) Publication of notice of amount of daily allowance in Gazette (paragraph 7.6(a) above);
- (b) Publication of maximum rate of travel and accommodation expenses (paragraph 7.6(b) above);
- (c) Identification of secretarial resource and Executive Council determination of terms and conditions of appointment of secretary (paragraph 7.6(c) above);
- (d) Allocation of funds by the Legislative Assembly reference paragraph 7.7 above; and
- (e) The making of an order by Executive Council to prescribe maximum fine (level 6 on the standard scale; currently £7,500, is recommended in line with the maximum fine under the Public Accounts Committee Ordinance).

## **9.0 Human Resources Implications**

None specific.

**Annex A to Executive Council paper 100/10**

**Response to Complaints Commissioner Bill public consultation**

Sent: 29 March 2010 16:16  
To: Claudette Prior  
Subject: Complaints Commissioner

Dear Claudette,

Grateful you would pass the following to Members.

My apologies that I did not meet the deadline for comments on the Complaints Commissioner due to extended absence. However I offer the following for your consideration.

Section 1. The reference to South Georgia, etc is superfluous since FIG law to no extent covers SG. It is a Governor's addition and is illustrative of FCO paranoia about the scope of the Commissioners remit.

Section 10(1)(a) along with item 20 of Secedule 2 seriously restricts the scope of the CC to deal with perceptions of mis-treatment by members of the public. I can think of a number of issues in the past which could very well have been reviewed by a CC, but which would be debarred by these provisions. The drafting seems to come from the wrong direction, and perhaps it would be better if the only areas in which the Governor is not subject to review should be those contained in Section 66(2) of the Constitution, possibly excluding (c) and (f). The real point here is that there are so many Government actions that are done in the name of the Governor, the provisions as written will allow a slippery customer to get FIG out of most poor reviewable situations except the ones they don't mind.

Section 10(1)(b) should probably not include a Member action as Chair of a Govt committee.

Section 14(2) doesn't make sense to me, and even if rewritten I think is deficient. There appears to be no provision for a complaint to be made by someone else on behalf of a minor, someone who was medically unable to complain themselves, someone who could not read and write or not formulate a good case.

Section 15(1) 3 months will be too short if the complaint first has to go through the FIG complaints procedure. That can take some weeks.

Section 30 to be effective will need SRO's to be amended since there is currently no sanction against bad behaviour. I think the Speaker has some proposals on this.

Section 39 needs to be more specific. FIG has a very record on disclosure of relevant information, even to the Courts. If a CC can only require specific documents he will be at a huge disadvantage in not being able to access documents he doesn't know about. There needs to be a general requirement to disclose all material facts and evidence as there is in Court, under sanction.

Section 43 This is not at all transparent, and at the very least needs to be reported to Exco with the reasons for use of such powers.

Schedule 2 needs much consideration. Item 1 I have commented on. Item 5 is not reasonable....Exco deals with all sorts of Management issues and should be reviewable, otherwise the escape for any review is to refer it to Exco !! Item 6 should not include members of the judiciary acting in a non-judicial capacity, ie when acting as managers. Item 20 I have commented on and will emasculate the bill. Item 21 seems both unnecessary and unreasonable. It leaves the Government free to mistreat any contractor.

Happy to discuss any element of this if anyone wishes to do so.

regards,

## **Complaints Commissioners Bill 2010**

(No:      of 2010)

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Clause

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# COMPLAINTS COMMISSIONERS BILL 2010

(No:      of 2010)

(assented to: 20[ ])  
(commencement: in accordance with section 2)  
(published: 20[ ])

A BILL

for

# AN ORDINANCE

To prescribe the functions, powers and jurisdiction of Complaints Commissioners who are appointed by the Governor under section 95(1) of the Constitution to investigate complaints of maladministration in the government of the Falkland Islands or such other matters as are prescribed by Ordinance; to prescribe other matters that a Complaints Commissioner may be so appointed to investigate; to make administrative arrangements for those purposes; and for related matters

BE IT ENACTED by the Legislature of the Falkland Islands —

## PART I

### INTRODUCTORY PROVISIONS

## 1. Title

This Ordinance is the Complaints Commissioners Ordinance 2010.

## 2. Commencement

This Ordinance commences on a date to be fixed by the Governor by notice published in the Gazette.

### 3. Interpretation

(1) In this Ordinance, unless the context otherwise requires —

“action” includes a failure to act:

“aggrieved person” means a member of the public who claims to have suffered injustice in consequence of —

- (a) maladministration in the government of the Falkland Islands or in a body mentioned in Schedule 1; or
- (b) conduct mentioned in subsection (2);

“Complaints Commissioner” and “Commissioner” mean a person whom the Governor appoints under section 95(1) of the Constitution as a Complaints Commissioner;

“conduct” means an act or an omission;

“Governor’s reference” means a reference of a matter by the Governor to a Complaints Commissioner under section 31;

“member of the public” includes a body of persons (whether incorporated or unincorporated) other than a public body;

“person” includes a body of persons (whether incorporated or unincorporated);

“Principal Complaints Commissioner” means the Commissioner whom the Governor designates under section 4 as the Principal Complaints Commissioner.

(2) In addition to complaints of maladministration, this Ordinance applies to complaints of conduct in respect of which a member of the public would reasonably feel a sense of injustice despite the fact that it does not constitute maladministration.

(3) The conduct mentioned in subsection (2) includes but is not limited to the following conduct, when it does not constitute maladministration —

- (a) discourtesy;
- (b) a failure to provide a service;
- (c) a failure to tell a person about a legal remedy (for example, a right of appeal);
- (d) a refusal to answer a question;
- (e) a refusal to rectify a mistake; or
- (f) unhelpfulness,

in respect of which a member of the public would reasonably feel a sense of injustice.

#### **4. Designation of Principal Complaints Commissioner**

(1) On appointing a Complaints Commissioner under section 95(1) of the Constitution the Governor, acting in his or her discretion, may for the purposes of this Ordinance designate the Commissioner as the Principal Complaints Commissioner.

(2) The Principal Complaints Commissioner has, in addition to his or her other functions as a Commissioner, the administrative functions to which this Ordinance refers.

## **5. Allowances**

(1) A Complaints Commissioner is entitled to a daily attendance allowance, for each day on which the Commissioner is engaged in the performance of his or her functions, of such amount as the Governor sets by notice published in the Gazette.

(2) The Governor may set different daily attendance allowances for the Principal Complaints Commissioner and for other Commissioners.

(3) A Complaints Commissioner is entitled to be reimbursed his or her actual and reasonable travelling and accommodation expenses for each day on which the Commissioner is engaged in the performance of his or her functions.

(4) However, if the Governor by notice published in the Gazette sets a maximum amount or rate of travelling expenses or accommodation expenses, a Complaints Commissioner is not entitled to be reimbursed a greater amount or at a higher rate.

## **6. Staff**

(1) The Governor may appoint a public officer or some other person to be the secretary to the Complaints Commissioners.

(2) The appointment as secretary of a person who is not a public officer shall be on such terms and conditions as the Governor determines.

(3) The Governor may appoint other public officers as staff of the Complaints Commissioners.

(4) The secretary and other members of the staff are subject to the administrative directions of and responsible to the Principal Complaints Commissioner.

## **7. Funds**

The funds for the performance of the Complaints Commissioners' functions consist of money appropriated for the purpose by the Legislative Assembly.

# **PART II FUNCTIONS AND JURISDICTION OF THE COMMISSIONERS**

## **8. Additional functions of Commissioners**

(1) In addition to the function conferred on Complaints Commissioners by section 95(1) of the Constitution (the investigation of complaints of maladministration in the government of the Falkland Islands), Commissioners are to investigate —

- (a) complaints of maladministration in bodies mentioned in Schedule 1;
- (b) other complaints to which this Ordinance applies, in respect of the government of the Falkland Islands or of those other bodies; and
- (c) matters that the Governor refers to Commissioners under Part VII.

(2) The Governor may by Order amend Schedule 1 —

- (a) by adding a public body, or a body that has been granted a franchise to provide a service of a public nature; or
- (b) by deleting a body.

## **9. Jurisdiction of Commissioners**

(1) The Principal Complaints Commissioner has jurisdiction to investigate any complaint, other than a complaint or class of complaint in respect of which the Governor appoints another Complaints Commissioner.

(2) A Complaints Commissioner (other than the Principal Complaints Commissioner) has jurisdiction to investigate a complaint or class of complaint in respect of which the Governor appoints the Commissioner.

(3) Any Complaints Commissioner has jurisdiction to investigate a matter that the Governor refers to the Commissioner under section 31.

## **10. Limits of jurisdiction**

(1) A Complaints Commissioner does not have jurisdiction to inquire into or question any of the following matters —

- (a) the conduct of the Governor when he or she is acting otherwise than under section 66(1) of the Constitution;
- (b) conduct of a Member of the Legislative Assembly that does not relate either to standards that the Standing Orders of the Assembly require its Members to observe as holders of public office or to a matter in which the Member has a personal interest;
- (c) a matter of policy;
- (d) the merits of a decision taken without maladministration by a person or body, in the exercise of a discretion vested in that person or body;
- (e) a matter that is mentioned in Schedule 2; or
- (f) conduct occurring before this Ordinance commences.

(2) The Governor may by Order amend Part 2 of Schedule 2.

(3) A Complaints Commissioner is not to investigate a complaint in respect of which an aggrieved person has or had —

(a) a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative; or

(b) a remedy by way of proceedings in a court of law,

unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the aggrieved person to resort or have resorted to that right or remedy.

### **11. Personal interests**

(1) If any Complaints Commissioner has a personal interest in a complaint or matter that is forwarded or referred to the Commissioner, or considers that he or she may have or may reasonably be perceived as having such an interest, the Commissioner is to inform the Governor forthwith.

(2) The Commissioner may also recuse himself or herself from considering the complaint.

## **PART III MAKING A COMPLAINT**

### **12. Who may complain**

(1) A complaint may be made only by or on behalf of an aggrieved person.

(2) A complaint may be made only if the aggrieved person is resident in the Falkland Islands.

(3) In subsection (2), "resident in the Falkland Islands" means, in the case of a complainant who is not an individual, having an office in the Falkland Islands.

### **13. Internal remedies**

(1) If an internal procedure is available, an aggrieved person or the person acting on his or her behalf must take reasonable steps to obtain a remedy under the procedure before making a complaint under this Ordinance.

(2) An internal procedure is available for the purposes of this section if —

(a) the body concerned has an internal complaints procedure for such complaints;

(b) it has taken reasonable steps to make the availability of the procedure known to the public; and

(c) the complainant has access to that procedure.

(3) In subsection (2), "the body concerned" means a body against which the complaint is made, or against one of whose members, officers or employees the complaint is made.

### **14. How a complaint is made**

(1) A complaint must be in writing.

- (2) A complainant who is an individual must ordinarily make a complaint in person.
- (3) However, if an aggrieved person is unable to act, the complaint may be made on his or her behalf by a family member; or by any other suitable individual.
- (4) A complaint by a person who is not an individual must be made on its behalf by an individual who is authorized by it to act as its representative.
- (5) A complaint is made —
  - (a) by delivering it to any Member of the Legislative Assembly, if it does not relate to a Member; or
  - (b) by delivering it to the Speaker of the Assembly, if it does relate to a Member.

#### **15. Time limit for complaint**

- (1) A complaint is not to be entertained unless it is made within three months after the day on which the aggrieved person first has notice of the matters alleged in it.
- (2) However, subsection (1) does not apply in any of the following circumstances —
  - (a) if, in the case of a complaint that does not relate to a Member of the Legislative Assembly, the Member to whom it is delivered considers that there are special circumstances that make it proper that the complaint should be entertained;
  - (b) if, in the case of a complaint that does relate to a Member of the Legislative Assembly, the Speaker considers that there are such circumstances; and
  - (c) if, in the case of a complaint that is sent or forwarded to the Governor under section 16, he or she considers that there are such circumstances.

#### **16. Forwarding the complaint**

- (1) Where a Member of the Legislative Assembly or the Speaker receives a complaint under this Ordinance, he or she is to decide whether or not to forward it to the Principal Complaints Commissioner.
- (2) The secretary is to send forthwith to the Governor a copy of each complaint that a Member of the Legislative Assembly forwards to the Principal Complaints Commissioner.
- (3) The Clerk of the Legislative Assembly is to send forthwith to the Governor a copy of each complaint that the Speaker forwards to the Principal Complaints Commissioner.
- (4) If a complaint that is delivered to a Member of the Legislative Assembly or to the Speaker is not forwarded to the Principal Complaints Commissioner within one month, and the complainant



is not told within that time that it has been forwarded, the complainant may forward it to the Governor.

(5) On receiving a complaint under subsection (4) the Governor, acting in his or her discretion, is to decide whether or not to forward it to a Complaints Commissioner.

#### **PART IV INVESTIGATING A COMPLAINT**

##### **17. Who is to investigate a complaint**

(1) Unless the Governor gives a direction under subsection (2), a complaint is to be investigated by the Principal Complaints Commissioner.

(2) The Governor may in writing direct the Principal Complaints Commissioner that a complaint is to be investigated by another Commissioner specified in the direction.

(3) Where the Governor gives a direction under subsection (2), the secretary is to refer the complaint to that other Complaints Commissioner.

##### **18. Commissioner to consider complaint**

(1) The Complaints Commissioner who is to investigate a complaint must proceed to consider it.

(2) For the purpose of deciding whether to conduct an investigation, the Commissioner may conduct such preliminary inquiries as he or she considers appropriate.

##### **19. Investigation to be conducted privately**

The investigation of a complaint is to be conducted privately.

##### **20. Mediation**

(1) A Complaints Commissioner may appoint a mediator, and refer a complaint to that person for mediation, if the Commissioner considers —

(a) that the complaint does not involve maladministration or other conduct to which this Ordinance applies; or

(b) that it only involves maladministration, or such other conduct, that is of a minor nature.

(2) The Complaints Commissioner is not to participate in the mediation.

(3) Participation by any person as a party in the mediation is voluntary, and no costs are payable by any of the parties.

(4) The mediator may terminate the mediation at any time.

(5) Where mediation does not resolve a complaint —

(a) the complaint is to be treated as if the Complaints Commissioner had not referred it to a mediator; and

(b) evidence of the referral to mediation or of anything admitted or said in the mediation is inadmissible in any subsequent investigation of the complaint and in any legal proceedings relating to the complaint.

## **21. Procedure**

(1) Before investigating a complaint, a Complaints Commissioner is to inform the principal officer of the department or other body concerned of the Commissioner's intention to conduct the investigation, and is to afford —

(a) the principal officer; and

(b) each person against whom the complaint is made,

an opportunity to comment on any allegations contained in the complaint.

(2) Subject to the other provisions of this Ordinance, a Complaints Commissioner may determine his or her own procedure in conducting an investigation into a complaint.

(3) In particular —

(a) a Complaints Commissioner need not hold a hearing;

(b) the Commissioner may obtain information from such persons and in such manner, as he or she thinks fit;

(c) the Commissioner may make such inquiries as he or she thinks fit; and

(d) the Commissioner may determine whether or not a person may be represented, by a legal adviser or by another person, in the investigation,

but this subsection does not limit subsection (2).

(4) If at any time during the course of an investigation, it appears to a Complaints Commissioner that there may be sufficient grounds to make a report or recommendation that may criticize or adversely affect a department or other body or person, the Commissioner is to give the department, body or person an opportunity to be heard.

## **22. Summons to witness**

(1) A Complaints Commissioner may summon a person to appear before the Commissioner and to provide information to the Commissioner, by serving on the person a summons.

(2) A summons is to be in writing in the prescribed form.

### **23. Evidence**

(1) A Complaints Commissioner who has requested or summoned a person to appear before the Commissioner may require the person to give evidence on oath or affirmation.

(2) The Complaints Commissioner or the secretary may administer the oath or take the affirmation.

### **24. Determining the complaint**

(1) On completing the investigation of a complaint, a Complaints Commissioner is to prepare a report setting out —

- (a) the Commissioner's findings of fact;
- (b) his or her opinion as to whether the aggrieved person has suffered injustice in consequence of maladministration or of other conduct to which this Ordinance applies; and
- (c) the Commissioner's reasons for that opinion.

(2) If the aggrieved person has in the opinion of the Complaints Commissioner suffered injustice —

- (a) the report is to set out the Commissioner's recommendations for the prevention of a recurrence of the injustice; and
- (b) it may include a recommendation that a payment be made for any financial loss or inconvenience that the aggrieved person has suffered because of the injustice.

(3) A recommendation in a report does not bind a body to which the report relates or any other person.

## **PART V REPORTING TO GOVERNOR ON A COMPLAINT**

### **25. Report to Governor**

(1) On completing a report under section 24 (other than one that relates to a Member of the Legislative Assembly), a Complaints Commissioner is to submit the report to the Governor.

(2) The Complaints Commissioner is also to send a copy of the report to the principal officer of the department or other body to which the complaint relates.

### **26. Consideration of report to Governor**

(1) On receiving a report under section 25(1) from a Complaints Commissioner, the Governor in consultation with the principal officer concerned is to consider whether it contains anything that, if disclosed, may damage the public interest.

(2) If the Governor considers that the report does contain material that, if disclosed, would damage the public interest, the Governor acting in his or her discretion may direct the Complaints Commissioner to remove that material from the report before it is disclosed under section 27.

(3) The Governor is to inform the Complaints Commissioner of the outcome of the consideration under this section of the report, and the Commissioner is to comply with any direction given under this section.

(4) In complying with a direction, the Complaints Commissioner is to indicate on the face of the report —

- (a) the fact that material has been removed on the direction of the Governor; and
- (b) the places in the report from which it has been removed.

## **27. Disclosure of report made to Governor**

(1) On being informed under section 26(3) of the outcome of the consideration of the report under that section, and complying with any direction given under the section, the Complaints Commissioner is to send copies of the report to the following persons —

- (a) the complainant;
- (b) the Governor;
- (c) the Member of the Legislative Assembly to whom the complaint was first made;
- (d) the Chief Executive Officer;
- (e) the principal officer of the department or other body concerned;
- (f) each person against whom the complaint was made; and
- (g) each person who is criticized in the report, or may be adversely affected by it.

(2) If so requested by the Member of the Legislative Assembly, the Governor is to explain to the Member the general nature of any material that has been removed and the reasons for its removal.

(3) The Complaints Commissioner may publish the report.

## **28. Response to report to Governor**

(1) If a report to the Governor under section 25(1) contains recommendations that a body to which the report relates should or should not take a course of action, a written response must be submitted to the Complaints Commissioner by whom the report was made within three months after the report is received by the body.

(2) The response is to be made —

- (a) by the Governor, if the body is a department; or
- (b) by the body itself, in any other case.

(3) The response is to state —

- (a) which recommendations are accepted;
- (b) which recommendations are not accepted; and
- (c) if a recommendation to take a course of action is accepted, how it is intended to take that course of action.

## **PART VI REPORTING TO SPEAKER ON A COMPLAINT**

### **29. Report to Speaker**

(1) On completing a report under section 24 that relates to a Member of the Legislative Assembly), a Complaints Commissioner is to submit the report to the Speaker.

(2) The Complaints Commissioner is also to send copies of the report to —

- (a) the complainant;
- (b) the Governor;
- (c) the Member of the Legislative Assembly to whom the complaint relates; and
- (d) the Clerk of the Legislative Assembly.

### **30. Consideration of report made to Speaker**

A report that is received under section 29(1) by the Speaker is to be dealt with in accordance with the Standing Orders of the Legislative Assembly.

## **PART VII REFERENCES BY THE GOVERNOR**

### **31. Governor may refer matter to Commissioner**

The Governor, acting in his or her discretion or on the advice of the Executive Council, may refer to a Complaints Commissioner —

- (a) any question of maladministration in the government of the Falkland Islands or in a body mentioned in Schedule 1;

- (b) any conduct mentioned in section 3(2); or
- (c) any other matter that the Governor, so acting, thinks fit to refer to a Commissioner

### **32. Commissioner to investigate and report to Governor**

A Complaints Commissioner to whom the Governor refers a matter under section 31 is to investigate and report to the Governor on the matter.

### **33. Commissioner's powers on Governor's reference**

For the purposes of investigating and reporting on a Governor's reference —

- (a) a Complaints Commissioner may conduct the investigation privately, and must do so if the Governor directs; and
- (b) the Commissioner and the secretary have the same powers as they have under subsections (2) and (3) of section 21, section 22 and section 23.

### **34. Persons who must be told of investigation**

(1) If at any time during the course of an investigation of a Governor's reference, it appears to the Complaints Commissioner who is conducting the investigation that there may be sufficient grounds to make a report or recommendation that may criticize or adversely affect a department or other body or person, the Commissioner is to give the department, body or person an opportunity to be heard.

(2) If a person is criticized in or may be adversely affected by a report by a Complaints Commissioner on a Governor's reference, the Commissioner is to give a copy of the report to the person.

## **PART VIII OTHER PROVISIONS**

### **35. Witnesses' expenses**

(1) A person whom a Complaints Commissioner requests or summons to appear before the Commissioner is entitled to be reimbursed his or her actual and reasonable travelling and accommodation expenses of doing so.

(2) However, if the Governor by notice published in the Gazette sets a maximum amount or rate of travelling expenses or accommodation expenses, the person is not entitled to be reimbursed a greater amount or at a higher rate.

### **36. Duty of non-disclosure**

(1) Information obtained by a Complaints Commissioner or any member of the staff of the Commissioners in the course of or for the purposes of an investigation under this Ordinance, is not to be disclosed except for the purposes of —

(a) the investigation and of any report to be made under this Ordinance in respect of the investigation; or

(b) any proceedings under this Ordinance.

(2) A Complaints Commissioner or member of the staff of the Commissioners cannot be called to give evidence in any proceedings (other than under this Ordinance) of matters coming to his or her knowledge in the course of an investigation under this Ordinance.

### **37. Privilege**

For the purposes of the law of defamation, publication in any of the following circumstances is absolutely privileged —

(a) the publication by a Complaints Commissioner of a report under this Ordinance, or of any other matter by the Commissioner in making a report under this Ordinance;

(b) the publication for the purposes of this Ordinance of any matter by the Governor, a Member of the Legislative Assembly or the Speaker in communicating with a Commissioner or any member of the staff of the Commissioners; and

(c) the publication for the purposes of this Ordinance of any matter by a Commissioner, or by any member of the staff of the Commissioners, in communicating with the Governor, a Member of the Legislative Assembly or the Speaker.

### **38. Annual report to Assembly**

(1) The Principal Complaints Commissioner is to provide to the Governor, before 31<sup>st</sup> March in each year, a report on the performance by the Complaints Commissioners of their functions in the preceding year.

(2) The Governor is to lay the report before the Legislative Assembly within 3 months after receiving it.

### **39. Civil offences**

(1) If a person, in giving evidence to a Complaints Commissioner (whether or not on oath) knowingly or recklessly makes a statement that is false in a material particular, he or she is liable to a fine determined by a Commissioner in accordance with section 41.

(2) If a person —

(a) without lawful excuse obstructs a Complaints Commissioner in the performance of his or her functions under this Ordinance; or

(b) without lawful excuse obstructs any member of the staff of the Commissioners in the performance of his or her functions under this Ordinance,

he or she is liable to a fine determined by a Commissioner in accordance with section 41.

(3) If, without reasonable excuse, a person on whom a summons is served under this Ordinance —

(a) fails to appear before the Complaints Commissioner concerned, on the day and at the time and place specified in the summons; or

(b) fails to produce to the Commissioner on that day, and at that time and place, any document or publication that the summons requires the person to produce to the Commissioner,

the person is liable to a fine determined by a Commissioner in accordance with section 41.

(4) If a person, without reasonable excuse —

(a) on being required by a Complaints Commissioner to take an oath, refuses to do so or to make an affirmation instead of taking an oath; or

(b) refuses to answer any lawful and relevant question that is put by the Commissioner,

the person is liable to a fine determined by a Commissioner in accordance with section 41.

(5) This section does not require a person —

(a) to produce to a Complaints Commissioner any document or publication in respect of which a certificate is issued under section 43; or

(b) to produce to a Commissioner any document or publication of the Executive Council.

#### **40. Contempt**

If a person without lawful excuse commits any act, or makes any omission, in relation to an investigation under this Ordinance that, if the investigation were a proceeding in the Supreme Court, would constitute contempt of court, the person is liable to a fine determined by a Complaints Commissioner in accordance with section 41.

#### **41. Power of Commissioner to impose civil fine**

(1) If the Attorney General refers the matter to a Complaints Commissioner, the Commissioner may impose a fine, not exceeding the prescribed maximum fine, on a person who is liable to a fine under either of sections 39 and 40.

(2) The fine is recoverable by civil action in the Supreme Court at the suit of the Attorney General.



#### **42. Service on Governor's staff and British forces**

(1) If a Complaints Commissioner wishes to request or summon a member of the Governor's staff to attend before the Commissioner, the request or summons is to be delivered to the office of the Governor.

(2) If a Complaints Commissioner wishes to request or summon a member of Her Majesty's forces or of the civilian component of any of those forces to attend before the Commissioner, the request or summons is to be delivered to the headquarters of the Commander British Forces.

(3) A summons to which either of subsections (1) and (2) refers is served on the person to whom it is addressed when it is delivered in accordance with that subsection.

#### **43. Public interest certificates**

(1) The Governor, acting in his or her discretion, may certify in writing for the purposes of this Ordinance that —

(a) the production of a specified document or publication to a Complaints Commissioner;  
or

(b) the provision of any specified information to a Commissioner,

is not in the public interest.

(2) The Governor, acting in his or her discretion, may certify in writing for the purposes of this Ordinance that the public disclosure of any specified evidence is not in the public interest.

#### **44. Orders**

The Governor may make Orders for any of the following purposes —

(a) prescribing the form of a summons to appear before a Complaints Commissioner;

(b) prescribing procedures to be followed in the investigation of complaints; and

(c) prescribing the maximum fine that a Commissioner may impose under section 41.

### **SCHEDULE 1**

(section 8)

#### **BODIES IN RESPECT OF WHICH COMPLAINTS MAY BE INVESTIGATED**

1. Falkland Islands Development Corporation
2. Falklands Landholdings Corporation
3. Falkland Islands Meat Company Limited

4. Falkland Islands Tourist Board
5. Falkland Islands Museum and National Trust
6. Media Trust.

## **SCHEDULE 2**

(section 10)

### **MATTERS IN WHICH COMPLAINTS COMMISSIONERS DO NOT HAVE JURISDICTION**

#### **PART 1**

1. Any complaint in respect of which the Governor, acting in his or her discretion, certifies that it is not in the public interest that a Complaints Commissioner should investigate the matter.
2. The grant by the Crown of honours, awards or privileges.
3. The proceedings and deliberations of the Legislative Assembly.
4. The content of legislation.
5. The proceedings and deliberations of the Executive Council.
6. The conduct of a member of the judiciary.
7. The conduct of the Attorney General in respect of his or her powers under section 72 of the Constitution.
8. The conduct by any person or authority of an audit pursuant to section 80(1) of the Constitution.

#### **PART 2**

9. The conduct of any person (other than a member of the judiciary) while acting in a judicial capacity.
10. The commencement or conduct of civil or criminal proceedings before any court of law or civil or military tribunal.
11. The exercise of any function under section 71(1) of the Constitution.
12. The investigation of crime.
13. Action relating to extradition or to fugitive offenders.
14. The conduct of a police officer (other than the Chief of Police).
15. The defence and the security of the Falkland Islands.
16. The conduct of the Commander British Forces or of any other member of Her Majesty's forces.

17. The conduct of any member of the civilian component of Her Majesty's forces in the course of his or her employment.

18. Passports.

19. The conduct of an employee of the Foreign and Commonwealth Office who is a member of the Governor's staff.

20. Any matter relating to the appointment, remuneration, pension, discipline, redundancy of office, suspension, or dismissal or terms of service of an officer or employee of the Government or of any body mentioned in Schedule 1.

21. Any contractual or commercial transaction.

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## OBJECTS AND REASONS

Under Chapter IX of the Constitution, the Governor may appoint Complaints Commissioners to investigate complaints of maladministration in government, and other matters that may be prescribed by Ordinance.

A Commissioner must be someone other than a Member of the Legislative Assembly or a public officer.

The functions and jurisdiction of a Commissioner are to be prescribed by Ordinance. In carrying out an investigation, he or she is not to be subject to the direction or control of anyone else.

Accordingly, the purposes of this Bill are to set out other matters that Commissioners are to investigate, and their functions and jurisdiction. It also provides for administrative and procedural arrangements in respect of investigations.

The Bill is arranged in the following way —

### **Part I — Introductory provisions**

*Clause 1* gives its name.

*Clause 2* provides that it will come into force on a day to be fixed by the Governor by a notice published in the Gazette

*Clause 3* defines words that are used in the Bill.

*Clause 4* enables the Governor, when appointing a Commissioner, to designate him or her to be for the purposes of the Ordinance the Principal Complaints Commissioner

The person designated as the Principal Complaints Commissioner will have the administrative responsibilities to which the Bill refers.

*Clause 5* provides for the payment of daily attendance allowances for the Principal Complaints Commissioner, and daily attendance allowances for other Commissioners. They will be set by the Governor, by notice in the Gazette.

The clause also provides for the payment of Commissioners' actual and reasonable expenses in performing their functions.

*Clause 6* provides for the appointment of a secretary to the Commissioners and of other staff.

Under *clause 7*, the funds for the discharge of the Commissioners' functions are those that the Legislative Assembly decides to appropriate.

## **Part II — Functions and jurisdiction of the Commissioners**

*Clause 8* gives the Complaints Commissioners additional functions to that, already set out in the Constitution, of investigating complaints of maladministration in government.

There will be three other categories –

- (a) complaints of maladministration in public bodies mentioned in Schedule 1;
- (b) conduct (for example discourtesy, or a refusal to provide a service) that would cause a member of the public to reasonably feel a sense of injustice, even though it may not amount to maladministration; and
- (c) matters that the Governor refers to Commissioners under Part VII (which may but will not necessarily relate to complaints).

The Governor may amend Schedule 1 by Order.

*Clause 9* provides that the Principal Complaints Commissioner has jurisdiction in respect of any complaint unless the Governor refers it to another Commissioner.

Other Complaints Commissioner have jurisdiction in respect of complaints that the Governor does refer to them.

Every Commissioner has jurisdiction in respect of a matter that the Governor refers to that Commissioner under Part VII.

*Clause 10* excludes matters from the jurisdiction of Commissioners.

The Bill will not apply to conduct occurring before it comes into force.

The exceptions include the conduct of the Governor when acting otherwise than under section 66(1) of the Constitution; the conduct of a Member of the Legislative Assembly (except in respect of standards of conduct imposed by its Standing Orders, and matters of personal interest);

the content of legislation; the proceeding of the Executive Council; the conduct of members of the Judiciary; policy; and the exercise of a lawful discretion (where it does not amount to maladministration).

They also include matters (not mentioned above) that are set out in Schedule 2. The Governor may by Order amend Part 2 of Schedule 2.

*Clause 11* requires a Commissioner to inform the Governor, if the Commissioner has or may be perceived as having a personal interest in a matter. The Commissioner is also entitled to decline to investigate the matter.

### **Part III — Making a complaint**

*Clause 12* provides that a complaint may be made only by or on behalf of an aggrieved person who is resident in the Falkland Islands or, in the case of a body corporate or other organization, has an office here.

*Clause 13* provides that if a body to which a complaint relates has an accessible internal complaints procedure, a complainant must take reasonable steps to obtain a remedy under it before using the complaints procedure in this Bill.

*Clause 14* provides that a complaint under the Bill must be in writing.

A complaint by an individual must ordinarily be made in person. However, a family member or any other suitable person may bring it on behalf of a complainant who is unable to act for himself or herself.

A complaint that does not relate to a Member of the Legislative Assembly is to be made by delivering it to any Member.

Complaints in respect of Members are to be delivered to the Speaker.

*Clause 15* provides that a complaint must be made within three months after the aggrieved person first has notice of the matters to which it relates. However, it also provides for extensions of time in special circumstances.

*Clause 16:*

On receiving a complaint, the Member or the Speaker is to decide whether to forward it to the Principal Complaints Commissioner. If he or she does so, a copy is to be sent to the Governor.

If the complainant is not told within one month that it has been forwarded to the Principal Complaints Commissioner, the complainant may forward it directly to the Governor. In that event, the Governor is to decide whether or not to refer it to a Complaints Commissioner.

### **Part IV — Investigating a complaint**

*Clause 17* provides that complaints are to be investigated by the Principal Complaints Commissioner unless, in a particular case, the Governor directs that a matter is to be investigated by another Commissioner.

*Clause 18* requires a Commissioner who is to investigate a complaint to proceed to do so. For that purpose, the Commissioner may make preliminary inquiries as he or she sees fit.

*Clause 19* provides that investigations are to be conducted privately.

*Clause 20* allows a Commissioner to refer a complaint to a mediator.

Participation is voluntary, and no costs will be payable by any party. If the complaint is not resolved, it is to be treated as if it had not been referred to mediation.

*Clause 21* relates to the procedure to be followed in an investigation. The principal officer of the body concerned, any person against whom the complaint is made and other persons who may be adversely affected must be given an opportunity to be heard. Subject to this and the other provisions of the Bill, a Commissioner may determine his or her own procedure and need not hold a hearing or take evidence on oath or affirmation. Commissioners will also have a discretion whether to allow parties to be represented.

*Clause 22* provides for the summoning of witnesses.

*Clause 23* provides for the taking of evidence on oath or affirmation.

*Clause 24* provides that on completing an investigation, a Commissioner is to determine the complaint and prepare a report. This must set out his or her findings of fact, conclusions and reasons.

If the Commissioner finds that there has been injustice, the report must also set out his or her recommendations for the prevention of any recurrence of that injustice. These may include a recommendation for compensation.

A Commissioner's report will not be legally binding on any body or person.

## **Part V — Reporting to Governor on a complaint**

This Part applies only to complaints that are not made against Members of the Legislative Assembly.

*Clause 25* provides that in the first instance a Commissioner is to submit his or her report to the Governor, and send a copy to the principal officer of the body concerned.

*Clause 26* provides that on receiving the report, the Governor is to consider in consultation with the principal officer whether it contains anything that, if disclosed, may damage the public interest.

If the Governor so directs, the Commissioner must remove from the report any material that in the opinion of the Governor may damage the public interest. However, in doing so, the Commissioner must also show on the face of the report the places from which it has been removed.

*Clause 27* provides that the Commissioner is then to send copies of the report (as edited, where required under clause 26) to the complainant, the Governor, the Member of the Legislative Assembly to whom the complaint was made, the Chief Executive Officer of the Falkland Islands Government, the body and persons to whom the complaint relates and to anyone else adversely affected by it.

The Commissioner may also decide to publish the report.

The Member is entitled to obtain from the Governor an explanation as to the general nature of the material removed and the reasons for its removal.

Although a Commissioner's report is not binding, *clause 28* requires the body to whom it relates to submit to the Commissioner within three months a written response to any recommendations in the report. This must say which recommendations are and are not accepted, and how it is intended to take any course of action that is recommended in the report.

## **Part VI — Reporting to Speaker on a complaint**

This Part applies only to complaints against Members of the Legislative Assembly.

*Clause 29* provides that on completing a report relating to a complaint against a Member of the Legislative Assembly, a Commissioner is to submit it to the Speaker, and send copies to the complainant, the Governor, the Member and the Clerk of the Assembly.

*Clause 30* provides for the Commissioner's report to the Speaker to be dealt with in accordance with the Standing Orders of the Legislative Assembly.

## **Part VII — References by the Governor**

This Part applies only to matters that the Governor himself (acting in his own discretion or on the advice of the Executive Council) decides to refer to a Complaints Commissioner.

The reference may relate to a complaint of maladministration in government or a public body, or to other conduct that could be the subject of a complaint by a private person. However, the Governor's power of referral under this Part is not limited to those matters.

*Clause 31* provides for the Governor to make such a referral.

*Clause 32* provides that the Commissioner is to investigate the matter and report to the Governor.

*Clause 33* provides that the Commissioner may do so privately (and shall, if the Governor so directs). It also gives the Commissioner the procedural powers that he or she would have under Part IV if investigating a complaint.

*Clause 34* provides that in conducting an investigation, the Commissioner must give persons who may be adversely affected the opportunity to be heard, and a copy of the report to the Governor.

## **Part VIII — Other provisions**

*Clause 35* provides for witness expenses.

*Clause 36* provides that information obtained in an investigation may only be disclosed for the purposes of a report or proceedings under the Bill.

*Clause 37* confers absolute privilege on the Commissioners, their staff, the Governor, a Member of the Assembly and the Speaker in proceedings under the Bill.

*Clause 38* requires the Principal Complaints Commissioner to provide an annual report to the Governor, who will lay it before the Legislative Assembly.

*Clause 39* (which is to be read with clause 41) provides for civil offences in respect of false statements, the obstruction of Commissioners and their staff, failure to comply with witness summonses and refusals to give evidence.

*Clause 40* (which is also to be read with clause 41) provides that conduct before a Complaints Commissioner that, in proceedings in the Supreme Court would amount to contempt, will be a civil offence.

*Clause 41* provides that on the reference of the Attorney General, a Commissioner may fine a person who commits an offence under the Bill. The fine may not exceed a maximum amount to be prescribed by the Governor, by Order. It will be recoverable as a civil debt.

*Clause 42* provides for service of requests and summonses by a Commissioner on members of the Governor's staff and the armed forces.

Under *clause 43*, the Governor may certify that in a particular instance the production of a document, the provision of information or the public disclosure of evidence would not be in the public interest.

*Clause 44* enables the Governor to make Orders prescribing forms, procedure and the maximum permissible civil fine under the Bill.



*Schedule 1* lists public bodies (other than the Falkland Islands Government) in respects of which complaints may be investigated.

*Schedule 2* sets out matters in respect of which Complaints Commissioners do not have jurisdiction to investigate complaints.