



**RECORD OF THE MEETING  
OF THE LEGISLATIVE COUNCIL  
HELD IN STANLEY  
ON FRIDAY 12 SEPTEMBER 2008**

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**HELD IN STANLEY ON FRIDAY 12 September 2008**

THE SPEAKER OF THE HOUSE  
(Mr Darwin Lewis Clifton OBE)

**MEMBERS (Ex-Officio)**

The Honourable Chief Executive  
(Dr Timothy Rupert Thorogood)

**Elected**

The Honourable John Birmingham  
(Elected Member for Stanley Constituency)

The Honourable Dr Andrea Patricia Clausen  
(Elected Member for Stanley Constituency)

The Honourable Ian Hansen  
(Elected Member for Camp Constituency)

The Honourable Mike Rendell  
(Elected Member for Camp Constituency)

The Honourable Janet Robertson  
(Elected Member for Stanley Constituency)

The Honourable Richard James Stevens  
(Elected Member for Camp Constituency)

The Honourable Michael Victor Summers OBE  
(Elected Member for Stanley Constituency)

**PERSONS ENTITLED TO ATTEND**

The Acting Attorney General  
(Rosalind Catriona Cheek)

**CLERK:** Claudette Anderson MBE

**PRAYERS:** Reverend Richard Hines

**(ABSENT)**

The Honourable John Richard Cockwell  
(Elected Member for Stanley Constituency)

The Financial Secretary  
(Mr Keith Padgett)

**LEGISLATIVE COUNCIL FRIDAY, 12 SEPTEMBER 2008**

**A Debate on the Draft Constitution**  
(verbatim report prepared and checked by the Clerk of the House)

**Clerk of Councils: "The Speaker of the House"**

Prayers

**The Speaker of the House - Mr Lewis Clifton OBE:**

Honourable Members, good morning - Please be seated. Thank you very much.

Honourable Members, can I just beg your attention for one moment please check that all mobile phones and all electronic devices are switched off before we proceed? Thank you very much.

**Clerk of Councils: *Motion Number 5 of 2008 by the Honourable Mike Summers "That this House resolves that Chapters One to Ten and Annexes "A" and "B" of the Draft Constitution dated 2<sup>nd</sup> of September 2008 be submitted to Her Majesty's Government for its consideration. This is proposed by Councillor Mike Summers and seconded by Councillor Janet Robertson.***

**Speaker: The Honourable Mike Summers**

**Councillor the Honourable Mike Summers OBE:**

Mr Speaker, Honourable Members, it's a sobering thought that every day that goes past becomes a part of history. And, it's tempting sometimes to talk about events as they go past as historic and sometimes they are and sometimes they are not. But I think today probably is an historic day, at least in the life of this Council and this Government because we have the opportunity after several years of deliberation to recommend to Her Majesty's Government a new Constitution for the Falklands.

The Constitution, as we have said in our public discussions, is a fundamentally important document, not only for this country but for every other country. It forms the basis of all subsidiary legislation. And, that in itself is an important function. It sets out the rights and freedoms of individuals and forms the basis on which the community organises itself and its social laws and practices and that is, of course, a fundamentally important thing. And, it also describes the relationship between the Falkland Islands Government and the United Kingdom Government and for we, as a non-self governing Overseas Territory that is fundamentally important because it sets out the extent to which we exercise internal self Government and the extent to which we respond to the United Kingdom as our Parent State. So, for those reasons, the Constitution is a fundamentally important document.

It has taken eight years from the time that I proposed a Motion in this House to set up a Select Committee on the Constitution, which was, incidentally seconded, on that day, by our current Speaker. And, it's been a long process, I think, but an important and consultative process and I believe that it's resulted in a document that is suitable for the current governance of the Falkland Islands. That doesn't mean that it shouldn't change. It has become, sort of, accepted that the Constitution is the Constitution and that's it – it doesn't change. I think the Foreign and Commonwealth Office have made it clear to us in discussions that actually, you know, the Constitution shouldn't be a non-moving document and, if there are amendments that we would like to make in the future that it's not such a difficult process to make them. So, the Constitution is a live document, it's an important document.

Mr Speaker, I would be very pleased if you would agree that I should Lay on the Table now in front of the House the Final Report of the Select Committee on the Constitution dated May 2007, which effectively should be considered the report of the Select Committee on the Constitution and also the latest draft – as we have it – from the Foreign Office of the new Falklands Constitution, which is dated the 2<sup>nd</sup> of September 2008. And, that is the document from which we will be making reference today in our discussions.

Mr Speaker, this is an unusual discussion, an unusual debate and it needs to be given, I think, all the scope that it reasonably can to allow Members to participate in the discussion of all aspects of the Constitution. So, with your leave, it is our intention to go through the draft constitution chapter by chapter and raise points and make observations. And, in doing that, I would like to move that Standing Order 23 be suspended for the duration of this debate to enable Members to contribute on a regular and full basis to all discussions. On that basis, Mr Speaker, I am happy to propose the Motion.

**Speaker:** Thank you very much Councillor Summers. I am happy to receive both documents on the table at this time.

**The Honourable Janet Robertson:**

I rise to second the Motion.

**Speaker:** Thank you very much. One item of procedure before we go, I notice that the Honourable Richard Cockwell is absent so we record his absence. Thank-you very much

Before I proceed further, one other matter, I would also propose in respect of Standing Order Number 4 to allow the Honourable Dr Andrea Clausen to remain seated when she wishes to speak and I hope Honourable Members would agree and accept that. Thank you very much then. I am happy to accept a suspension of Standing Order Number 23, a relaxation of the rules that allows for the fullest debate of the Draft Constitution as presented as placed upon the table and that the debate will follow through each of the Chapters. I would beg Honourable Members' indulgence to complete the discussion on one Chapter before we move into the next Chapter or Annex as may be appropriate. That will ease note taking and referral back to the Foreign Office.

So with that I am happy to proceed, relaxation on Rule 23? Thank you very much. May we proceed?

**Clerk of Councils: Chapter 1: Protection of Fundamental Rights and Freedoms of the Individual.**

**Councillor Mike Summers:**

Mr Speaker, If I may I have a few observations about Chapter 1. Chapter 1 in many respects is the essence of the Constitution. It sets out the 'Bill of Rights', basically the protections of the fundamental rights and freedoms of individuals, for that reason it is a very important Chapter. For the Falkland Islands it is also a fundamentally important Chapter because it contains the reference to Self-determination. Self-determination previously was included in the preamble

to the Constitution. It has now, with the agreement of the Foreign and Commonwealth Office, been included as Part 1, Section 1 of Chapter 1 of the Falklands Constitution and that is fundamentally important for us and, I think, a significant move forward.

This first section of Chapter 1 also confirms the right of the people of the Falklands to exercise control over their natural resources. That, too, is a fundamentally important issue for us.

In terms of the balance of Chapter 1 there are some important issues, and if I may just comment on one or two of them, Section 6: The Protection of the Law has been amended slightly to allow for 'ticket offences' that is for the issuance of the likes of parking tickets and speeding tickets without reference to the Court. That is a modern practice and one that Council in future might wish to introduce here but it can't do under the current Constitution.

Mr Speaker, there is an issue under Section 8 of Chapter 1 and Section 8(3)(h) in particular, which makes provision for the removal overseas against their will of individuals who have otherwise the right to remain in the Falklands for treatment for Mental Health purposes. There is some concern amongst the medical professionals that's been raised just in the last day or two that perhaps removal to the United Kingdom is not the only option that ought to be considered and that there might be other circumstances in which the Court might think it appropriate for somebody to be removed to another country. I would like to suggest that we would remit that question to the Foreign and Commonwealth Office for further advice and consultation before a final conclusion is reached on that.

Section 10 is an important new addition to the Constitution. It brings the right to marry into the Constitution and the right not to be forced to marry. Section 12, which outlines the right to education free of charge through the primary stage, that is an important issue.

I would just like to make a quick comment on Section 15, which deals with the deprivation of property. The compulsory purchase legislation in the Falklands is ancient and arcane. It needs to be replaced. This provision on the deprivation of property removes the definition of public purpose to subsidiary legislation. But I am not sure that there is an adequate definition of 'public purpose' in the current legislation. We should note, therefore, that the completion of much more modern and appropriate compulsory purchase legislation is an issue of importance.

Section 16 deals with positive discrimination and I am delighted that we have retained in the Constitution the right to discriminate positively in favour of Falklands' people – Falklands Status Holders – and I think that's an important provision for us to have retained.

Mr Speaker, there are issues about Section 22, which deal with status, but with your leave, I might stop at that point and come back to Section 22 and see if other Colleagues wish to comment on any of the sections in Chapter 1 up and to Section 21 and we will then come back to Section 22.

**Speaker:** Honourable Members that seems an admirable way to proceed.

**The Honourable Janet Robertson:**

Yes, Mr Speaker, I would like to direct some questions to the Acting Attorney General, if I may? With regard to Section 9: Protection for Private and Family Life and for Privacy at Home and Other Property. I was wondering if she could tell me if any Constitutional Protection from having their premises damaged exists for those who, under 9(2)(d) can have their homes searched for the purposes of protecting Criminal, Customs or Immigration Law. I think that it is

an important provision that this has been put in but at the same time I would like there to be some protection for those who have their houses searched in this manner.

**Speaker: The Honourable Acting Attorney General**

**Ms Ros Cheek the Acting Attorney General:**

Mr Speaker, I am not aware of any Law of the Falkland Islands which does specifically provide for protection from damage and I presume that you are thinking about compensation under those circumstances. But I would only note that the provision provided in Section 9(2)(d) does use the words 'reasonably required.' So, I would imagine that certainly legislation would be put in place if it were not already in place and obviously the protection of reasonableness is there in the Constitution.

**Councillor Janet Robertson:**

So, I understand that we could probably deal with that through subsidiary legislation rather than through the constitution itself?

**Ag Attorney General:** That would be my understanding – yes.

**Councillor Janet Robertson:**

I would also, if I may, Mr Speaker? Protection from freedom of conscience in Section 11 – I was a little bit dubious about this. Clause 2 would suggest that a person, including a minor, can be required to receive religious instruction and to take part in a religious ceremony if the ceremony or instruction relates to their own religion. How is someone's religion determined and is this really the true intention of the clause and I don't just direct that to the Acting Attorney General but perhaps to my colleagues as well?

**Ag Attorney General:** Just in relation to how the religion might be determined – that would be determined by a Court as a matter of fact in relation to the particular circumstances.

**Councillor Janet Robertson:**

OK, would this mean that a child, say, if they refuse to take part in a religious ceremony the Court could deem that because it was their religion that they were required to take part and were not permitted to refuse?

**Ag Attorney General:** I think the provision is quite clear in relation to a child under the age of 16 that a parent could give consent on behalf of the child.

**Councillor Janet Robertson:**

Well, I would like to ask my Colleagues if at some point they could give me their view on whether they think that was actually the intention of this clause.

Just one more question in relation to this – to Chapter 1 – with regard to Section 20 – Proceedings which might affect freedom of conscience – does this clause in effect mean that under the section the person has a right to be absolved from a requirement to obey any particular law which contradicts the practice of their religious belief? If I could ask the Acting Attorney General for clarification?

**Ag Attorney General:** I would, Mr Speaker, answer that question in the negative. The question is simply imposing on the Court an obligation to have particular regard to the importance of that right. But that right, as all others, as set out under the Constitution are subject to certain provisions for the protection of the rights of others as there must be some balance in all cases.

**The Honourable Mike Summers:**

Mr Speaker I might be able to help the Honourable Member to a certain extent on the issue of religious instruction in relation to freedom of conscience. There was quite an active and lively debate on this issue throughout the period, a lot of the debate centred on the age at which a child might refuse to compulsorily take religious instruction. The issue there really is at what point do you take away from a parent that parental authority. That was the essence of the debate. As a parent you have your children, you presumably have the right to instruct your children in how to behave. Indeed, you have an obligation through the very large majority of their lives. But in respect of religion and religious instruction there was consideration as to whether it would be reasonable to allow a child at the age of 14 to refuse to take religious instruction. Or, should it be at the older age of 16? It is exactly this issue of parental authority and parental discretion that was being discussed and, on balance Members of the Select Committee concluded that 16 was an appropriate age at which somebody should be allowed to decline religious instruction of their own volition and therefore decline parental authority on that particular issue.

**The Honourable Janet Robertson**

I thank the Honourable Mike Summers for his explanation. I probably haven't been very clear in this. I don't dispute the issue of the age at which a child should be able to make their own decision on the matter. What I was querying is the way I understand this clause reads is that they may decline to take part in a religious ceremony or observe a religious ceremony if it is not their own religion, by default it seems to suggest that they cannot do so if the Court deems that is part of their religion. Therefore, the question – well first, is that what we really intended – and I can't believe that we did – but secondly, exactly how does someone to define what someone's religion is? But the critical question is, did we really mean that you can only refuse to partake in a religious ceremony if it was not a ceremony that related to your religion? I think I've got that right.

**The Honourable Mike Summers:**

Mr Speaker, as a matter of clarity, 11(2) to which I guess the Honourable Member is referring, refers only to religious instruction in a place of education and not to religious instruction generally. So it is restricted. This clause is restricted in its effect to places of education.

**The Honourable Janet Robertson:**

I'm sorry, it just seems to me that that, that a child for example, a child who is of the Muslim religion will be able to decline to have religious instruction in a Christian school, that's perfectly understandable and we appreciate that but would it also mean that a child who is considered a Christian and is considered a Christian by whom is not clear, would be required to have that religious instruction?

**The Acting Attorney General**

Mr Speaker, if I could assist, I wonder whether the words at the beginning of the subsection, 'except with his or her own consent' and obviously there's a proviso in relation to children, so the key here is that consent must be given and I presume that the circumstances you are

suggesting, consent would have been given by the parents in respect of the child against the child's wishes. And, I think the answer must be that yes – that the Constitution does permit that to occur whether that's what was intended is obviously a matter for policy.

**The Honourable Janet Robertson:**

I believe that the intention was that the same law should apply or in ways that shouldn't be a distinction between one child and another, that their religion or the belief of the family should, they should have the right to decline or to not attend these ceremonies whatever their religion is and it shouldn't be determined by what religion they are. That, I believe, was our intention.

**The Honourable Dr Andrea Clausen:**

My understanding of this was that it was for other religions, aside from their own, and I concur that it's down to parental authority and that we decide that 16 years was the appropriate age. And, if you are a Christian in a Christian School and you are 14 and you refuse but your parents have said yes, my understanding is 'that's tough luck' if the parent has the authority, if you are deemed by the Court to be a Christian in a Christian School and a parent said , that's my understanding. It's all down to parental authority. And, I don't have a problem with that.

**The Honourable John Birmingham:**

I can't be the only one that is slightly confused here. I would have brought a packed lunch if I had known - we have a long way to go. I'm not even sure if we can define our present schools as being Christian schools. I just thought I'd throw that in.

**The Speaker:**

Does any other Honourable Member wish to speak to Chapter 1 through 20? Yes – we do. I think, can we just tuck this one to one side for the moment and move forward on the other issues? Would that be helpful? Does any other Councillor wish to speak to Chapter 1?

**The Honourable Dr Andrea Clausen:**

Mr Speaker, Honourable Members. Yes, I just have a few observations. Many of them overlap with those made by my honourable colleague, Councillor Summers. I would like to reiterate that I believe that one of the most important changes in Chapter 1 is the move of the provision of our right to self-determination and the right to freely dispose of our natural wealth from the preamble of the current Constitution into the main body of the draft of the new Constitution is very important. And, whilst it may appear to be of little significance to some, I believe that it further strengthens our absolute right to these freedoms and enshrines in our Constitution properly the provisions of the Charter of the UN in respect to the right to self-determination in particular.

There are a number of changes obviously within sections that already existed as well as for new and I support many of those. I will speak in detail on just a few.

With regard to Section 12 – regarding the right to education, which, for the first time makes constitutional provision for free primary education, I would like to record my support for this and also that this enables us to charge for secondary education as I believe that we, as a

small country, require the opportunity to levy fees for students who may not normally be resident in the Islands and whose attendance at our schools may incur additional pressure on our often limited resources.

On Section 16, I also concur with my honourable colleague on protection from discrimination in terms of positive discrimination in favour of Falkland Islands' Status Holders. I believe this is a very important provision in a Falkland Islands' context. But I note that the application of this provision is then determined by subsidiary legislation and policy and that it can be targeted to suit our requirements without any given point in time.

The only other section I wish to speak on is Section 22 and I will stop there.

**The Honourable Richard Stevens:**

Mr Speaker, Honourable Members I would like to just raise a point that my colleague Dr Andrea Clausen has just raised and that's the protection of the right to education and to the issue of providing primary education free of charge. We did discuss this quite thoroughly at the Select Committee and requested information on our obligations to educate students of that age group within the Falklands. We were advised that we would be entitled to refuse education to visiting children whose stay in the Islands would be six months or less. I think a number of people in the community would be interested in our statement of not having free education in the secondary level.

I would like to ask the Acting Attorney General if primary education and to what level we would be funding this provision and what I mean by this would it be through not academic but the provision within the schools or would we be expected as the Government, say to pay for trips to the dairy or MPA for some reason. Perhaps you could answer that question before I carry on.

**Ag Attorney General:** Mr Speaker, I'm not sure that I can be of much assistance in relation to that question, again perhaps the issue of what is and what is not within primary education would be determined by the law as a matter of fact. I'm afraid it's really not something that I can assist with. I'm sorry about that.

**The Speaker:** Thank you. Which Honourable Member has the Education Portfolio?

**The Honourable Richard Stevens:**

Well, I have, and the reason I asked that question is many people in the community might wonder why we can't extend this provision to secondary education and like me, in a way it's very difficult to see us at any stage in the community that we live in not providing free education in the main areas. Perhaps in the periphery you would expect parents to contribute to things like cookery lessons perhaps paying for the ingredients or paying for trips or other areas outside education but to actually think that we would charge £10.00 per pupil for Maths or English, Geography, History – those types of things – for many people is hard to envisage. I don't know if any other Member would like to join the debate and put other points of view forward.

**Honourable Mike Summers:**

Mr Speaker, I understand this provision comes originally from UN directives on the provision of education world-wide. And it is my understanding that it is for each individual country to determine what is an appropriate level of primary education for each country, given the

resources they have at their availability so for a relatively wealthy country like this you might expect much broader and deeper provision of primary level education than we might in some much poorer countries, so I am not sure it is something on which you can put an absolute figure. But it is left for basically policy decision of the Government of the day.

**The Honourable Janet Robertson:**

I believe the question the Honourable Richard Stevens was asking was whether or not the provision should be extended to secondary education and if the argument is that we would not want to extend it in the Constitution to secondary education because it would prevent us from ever in the future making any charge for secondary education whatsoever. Therefore, we might find ourselves in a position of having unaffordable expenses. I understand the question that the Honourable Richard Stevens is further asking is that if we – although the main definition of primary education. And, as he argues, secondary education's in the Constitution. This would not prevent us for making charges for those activities which are periphery to the principle core functions of primary and secondary education so that we need not, if we place this provision in the constitution, extended it to secondary education – it need not restrict us from ever making charges – simply that we would prevent it from making charges for the principle core functions of secondary education.

I understand entirely what motivates this for you and I understand that for many people there is a concern that by not putting it in the Constitution we are considering making a charge for it in the future. I don't think there is any such intention to do that but I do feel – and this came out of the extensive debate that we had on it. I do feel very strongly that we cannot in any way commit ourselves to providing a service which we cannot guarantee that we will always be in a position to fulfil financially. And, whilst the intention will always be, as far as we are able, to provide free secondary education, and however that is defined, would probably be defined in subsidiary legislation, we cannot be entirely sure that we will be able to do that. Therefore, we have stayed with the minimum provision that has required by the UN and of secured free primary education.

**Mr Speaker:** Thank you very much

**The Honourable John Birmingham**

I'm actually content as it stands.

**The Honourable Mike Rendell:**

Yes, I would like to inform you that I am content that it remains as it stands. And, It was the Foreign Office themselves in their advice that gave us this UN restriction on where education was required up to the end of primary level, not into secondary level so we are merely following what the UN and the Foreign Office are suggesting we have to do and there's no need for us to go any further than that and I totally agree with that.

**The Honourable Ian Hansen:**

Mr Speaker, I would just agree with the interpretation of what Councillor Robertson has said. In the discussions we had, we certainly were very focused on the fact that we did not want to get into the issue of having unaffordable expenses in the future. I would agree that it stands as it is.

**The Speaker:** Thank you very much. Would any other Member wish to speak on the subject?  
The Honourable John Birmingham

**The Honourable John Birmingham:** Are we moving on?

**The Speaker:** We are moving on. I would record that for the purpose of the record that the majority view is that this clause stands as is. Thank you very much. The Honourable Richard Stevens, do you have any other point in Clauses 1 to 21? No? Thank you.

**The Honourable John Birmingham:**

Mr Chair – going back to the protection of freedom of movement – is that 3 (h)? I would like to put some wording in that Members may like to comment on and may be useful for sending back and where it says “the removal of a person suffering from a mental disorder from the Falkland Islands for treatment or detention in the United Kingdom”– after that I would like to put – “or such place as deemed appropriate by those responsible for making such a decision.” That at least would give the Foreign Office some idea what we felt was reasonable.

**The Honourable Janet Robertson:**

Yes and with regard to Section 8(3)(h) I do have a concern about the proposal to amend this section. Whilst I completely understand and sympathise with the motive behind it, and understand that for people suffering from mental health, it would be far better for them to be removed from the country in which they feel more culturally at home. The concern I have is that actually we have a reciprocal health agreement with the United Kingdom which is accorded to everyone who have residence rights in the Falkland Islands. My concern is, that if we alter it and specify that it should be United Kingdom or any other such country as decided by the Court, this effectively gives the Court the power over our decisions as to how we can fund this type of treatment. It leaves us exposed because financial concerns would not be taken into account simply the person’s best interests. Whilst obviously the person’s have got to be taken very seriously, I am concerned about the level of discretion and the level of control the Court will have over this particular issue.

**The Honourable Mike Summers:**

Mr Speaker, Honourable Members, I have some sympathy with the notion that this clause may need some additional wording. Regrettably this came very, very late in the discussion and Members collectively have not had an opportunity to sit and discuss the pros and cons of what has been suggested. I would certainly caution against trying to amend this clause in the House or offer alternative wording in the House but what I would like to propose is that we simply express our reservations about this particular clause. That it might need some amendment and refer the matter back to the Select Committee on the Constitution to come up with a response to the Foreign and Commonwealth Office for consideration in terms of the fact that it might be necessary to give the Court discretion to remove somebody to another country other than the United Kingdom.

**The Speaker:** The proposal, Honourable Members, is that the matter be referred back to the Select Committee for re-consideration. Are you happy with that?

**(Agreed)**

Thank you very much. May we proceed then? Does any other Honourable Member wish to speak to clauses 1 to 21?

**Councillor Richard Stevens:**

I just have another area of clarification and that was reading through the document, especially the first chapter there's many phrases like 'reasonable time, adequate time' and yet in other places it refers to specific days and specific lengths of time. I just wondered, why it's not consistent throughout in being either a specific number of days or throughout more phrases like 'reasonable time, adequate time' and statements like that?

**Acting Attorney General:** Mr Speaker, without looking at a particular example I can only comment generally that I was reading that where a specific period of time is set that is for a reason presumably relating to the importance of the rights, say for example of a period of 7 days was set it would be particularly important for that period to be met but where you have a discretion in terms of talking about 'reasonable time' that is presumably because it's acknowledged that in the circumstances (and the circumstances may change) that different times would be appropriate. So it's just about a matter of giving discretion where it's appropriate in the circumstances.

**The Honourable Richard Stevens:**

Yes, my thought was just, you know, if you were being, lets say, locked up or charged, a reasonable time might be different between you, if you were being charged or someone that is doing the charging. An example that I can give you is, provisions to secure protection of law in 6, and that talks about these sound bites of adequate time, reasonable time and then we get to, I can appreciate that it's talking about, you know, levels of severity, protection of persons detained under emergency laws, we have 7 days, 14 days, so that was – that's an example of the issue that I am trying to highlight.

**Acting Attorney General:**

Mr Speaker, again all I think I can underline is that there is the right and perhaps being breached, if I can use that term, and if it is a particularly significant one it would often be thought appropriate to specifically limit the relevant time, for example to 7 days whereas, if you are looking at rights or circumstances which are perhaps less significant, the exercise of discretion by the Court in the circumstances is going to be appropriate, (taking into account all the circumstances) rather than setting an absolute period of days. I am really not sure that I can add any more.

**The Speaker:** Thank you. Does any other Member have any issues to raise on this point? No? You are happy then. Thank you very much.

**The Honourable Mike Summers:**

Mr Speaker, may I take this to the issues raised by section 22? As it stands at the moment, Section 22(5)(a) reads "A person who immediately before the commencement of this Constitution had Falkland Islands status by virtue of the Falkland Islands Constitution 1985 retains that status absolutely." Mr Speaker, that was never the policy intention of the Select Committee on the Constitution and I think it has been made clear to the Foreign and Commonwealth Office and the drafts people that that was not the policy intention of the Select Committee on the Constitution. This clause as written provides an absolute Grandfather Clause for anybody who has conditional status before the 1<sup>st</sup> of January (2009) to retain that status absolutely even though that status prior to the 1<sup>st</sup> of January was conditional. There are a number of circumstances in which status can be conditional but largely status gained through marriage and under the ordinance. I do not regard it as acceptable that this status should become unconditional because, in the new Constitution, similar status remains

conditional. So, it makes no sense at all to turn conditional status into unconditional status for one group of people and to make it conditional for another. Mr Speaker, I am not sure if the Foreign and Commonwealth Office have misunderstood this issue or if they are deliberately trying to meddle in what is an immigration issue. It is not a human rights issue because the human rights of those people are already conditioned under the current Constitution. It was never raised as a human rights issue. It is absolutely and straight forwardly an immigration issue and immigration is a matter that is, provided there are no human rights obligations delegated to the territory. So, I can't see, for the life of me, why the Foreign and Commonwealth Office is trying to meddle in this issue. And so I think we need to refer it back to them and ask them to re-draft Clause 5a according to the policy intentions of the Select Committee on the Constitution.

There is one other issue in which there has been a change and that is Clause 22(7) the last couple of lines of Clause 22(7) provides that where a British Overseas Territories Citizen (BOTC) has been naturalised and have a right to apply for status, where that status is refused, that the revised draft now gives them the permanent right to remain. That wasn't an issue that was discussed or that was put in the negotiations with between the Select Committee and the Foreign and Commonwealth Office. And I would just like us to reserve position on that until we can resolve the whole of this section 22 but particularly 22 (5)(a).

#### **The Honourable Andrea Clausen**

Mr Speaker, Honourable Members, I concur with what my Honourable Colleague has said in terms of it was not the intention of the Select Committee to get the result that we have in the current draft on that particular clause. Section 22 is one of the most fundamental as it determines exactly how you can qualify for Falkland Islands' Status. And on the grounds that I believe that all individuals who seek status should be subjected to, at the very least, basic objective immigration controls, I do not support any provision to automatic Falkland Islands' Status, except in the circumstances where it is derived by birth as provided by 22 (5) (b) (c) (d) (e). However, I do support the provision under 22 (7) whereby those individuals who have a right to apply but then do not qualify have some right to remain but I am not convinced that we expected it to be a permanent right with no checks. So, I also feel that that cannot be resolved until 22(5)(a) is resolved.

Given the fact that we are undeniably a British country, I am pleased to note that a pre-requisite for any person seeking status is that they are first a British Citizen. I think that's a very good move away from a Commonwealth to a British Citizenship requirement.

I am also pleased to note that the short-cut to status by virtue of the British Nationality Act has been removed ensuring that all applicants for status are treated equally in that the qualifying period is seven years' residency regardless of the route of application.

My final comment regarding 22(5)(a), the Grandfather Clause, I cannot support this clause for the grounds that have already been spoken about. It is illogical and provides for a privileged position to those individuals who have acquired status by any means in a time limited manner i.e. those who have status by virtue of marriage or Ordinance prior to the 1<sup>st</sup> of January 2009 will have status as if born and it is therefore irrevocable but those who were granted after 1<sup>st</sup> of January will, once again, have revocable status.

If HMG insists on the inclusion of Section 22(5)(a), as currently drafted, the only logical response I feel I could support is to provide for all status to be irrevocable by Constitutional right.

**The Honourable Janet Robertson:**

As a member of the Immigration Working Group, I would like to say that I am pleased with a lot of provisions in 22(5). I think that what it helps to do is enhance the privilege of status by making it that much harder to apply or providing for greater rules to achieve it, It enhances the extent to which people have had to show loyalty and commitment, to these Islands before they are granted the privilege and in that that respect I am glad. I am pleased that status is no longer to be acquired through marriage as I felt that this was, we all felt that indeed, that this was a short-cut and it undermined the meaning and the privilege of status and I am glad to see that that has gone.

It is true that the Constitution largely sets out the principles by which one can acquire status but it's in the Ordinance where there are specifics about how status can be lost. And in the current Ordinance, the only type of status that can be lost under certain circumstances is that status which is acquired by application under the Ordinance.

That is a debate which we still have to have in the future. There is probably a difference of opinion about what status should be. Some believe that it should be revocable some believe that it should be irrevocable. Those who believe that it should be irrevocable base it on the fact that the only way that status can have a real powerful meaning and mean as much to those who hold it as any citizenship is by making sure that status means the same thing to everyone and not one thing to one person and a different thing to another person.

That, however, is a debate we are going to have. However, I do concur with my colleagues that the way 22(5)(a) currently stands will mean that as from the 1<sup>st</sup> of January we will have two different types of status, one which is revocable and one which is irrevocable. And, it won't be as it is now (as many people would like it to be) a difference between those people who acquire status through birthright and those who acquire it through Ordinance. The difference won't be through those two. It will be based on an (as yet unspecified) date which is the 31<sup>st</sup> of December or the 1<sup>st</sup> of January between those who acquired it before and those who acquired it afterwards. And, as the Honourable Mike Summers said, it will mean that two people who acquired their status by exactly the same means have got two different classes of status, one which can be taken away and one which could not.

Further, I would like to point out that under this Grandfathering Clause, we cannot even be sure how many people would be Grandfathered in and it will be the case that there would probably be people who never set foot in these Islands who will be entitled to more than those people who have done their time, if you like, have contributed, have paid taxes, made great efforts to integrate themselves into their society, have waited 7 years and applied and got it, having gone through many loops and requirements and complying with lots of criteria, whilst those elsewhere in the world who have no interest in the Falklands who may never seek to return will obviously have more rights than they. And, I have a great difficulty with this.

I would therefore support the suggestions of my colleagues that we reserve our right on 22(5)(a) and that we enter into further dialogue on this matter with the FCO.

**The Honourable Ian Hansen:**

Mr Speaker, Yes, I believe the points have been well made by my colleagues. I have no desire to be repetitive and to run through them again. I would just like to say that I do believe that we should refer this matter back to the FCO and I support that suggestion.

**The Honourable John Birmingham:**

Mr Speaker - there will be a debate. I am sure it will be a warm debate at a later time but there has been plenty said on this and I support the reserving of the clause 22(5)(a).

**The Honourable Mike Rendell:**

Mr Speaker, Honourable Members, I would just like to reiterate the comments that everyone made on this matter and suggest that 22(5)(a) is referred back for further discussion.

**The Honourable Richard Stevens:**

Mr Speaker, Honourable Members, I think I would also like to agree with my colleagues that it returns to the Select Committee and that to carry on working towards a mechanism and consistency. Thank-you

**The Speaker:** Thank you very much. The majority view of all Members is that Clause 22(5)(a) be referred for further review and consultation. Two of the Members have spoken of the need to do similar to Clause 22(7)) in respect to the last two sentences. Do Honourable Members also agree with that? Do we have a clear view?

It seems, I suspect that..

**The Honourable John Birmingham:**

Could I say, Mr Speaker that actually I think that it is unanimous that all Councillors wanted that 22(5)(b) to be reserved – not the majority.

**The Honourable Mike Summers:**

Mr Speaker, may I move that Chapter 1, the Protection of Fundamental Rights and Freedoms of the Individual be included as a substantive part of the Motion with the exception of reservations on clauses 8(3)(h), 22 (5)(a) and 22(7).

**The Speaker:** Thank you very much. Honourable members are content with that?

Aye

Thank you very much, then. May we proceed?

We still have one outstanding issue in terms of, the early part of the debate, which was relating to I think to religious education rather than prolong the debate, Honourable Members, would you wish to reconsider this back in Select Committee?

**The Honourable Janet Robertson:**

Mr Speaker, if everyone is content, it was probably me that has misunderstood the exact meaning of this provision and if everyone else is content, then I would not wish to delay the matters on it,

**The Honourable Mike Summers:**

Mr Speaker I am content.

**The Speaker:**

OK the majority have agreed the clause and are content. Thank you very much.

**Clerk of Councils: Chapter Two – The Governor**

**The Honourable Mike Summers:**

Mr Speaker, there are very few changes to this Chapter. I have nothing in particular to say on it and therefore, unless anybody else does, I move that Chapter 2 be included as part of the Draft Constitution.

**The Speaker:** Thank you very much. Honourable Members are content? Thank you very much. May we proceed then to Chapter Three?

**Clerk of Councils - Chapter Three – The Legislature**

**The Speaker:** Does any Honourable Member wish to rise to speak to this?

**The Honourable Dr Andrea Clausen**

Mr Speaker, Honourable Members, I have a couple of points I'd like to make on this Chapter. Firstly, the name changes from the Legislative Council to a Legislative Assembly. This might seem too many a little inconsequential - why would we change our name? It seems to do the job as it is. But I would just like to make the comment that and I know it's been made during the public consultation but just to reiterate today, that having attended various conferences overseas representing the Islands I found that I spend a good deal of my time trying to explain exactly what our role is and that it is exactly not one of a parish Councillor as understood in the UK. So, I think this is a very sensible move. What's in a name? Actually, I think it's going to help in terms of our international face if not our national face. So I can support that.

The issue of constituencies: Sorry, section 27, firstly as a general point, I would like to state that I believe the Constitution should contain a broad mechanism that enables changes to constituency boundaries and representation. I understand that other Overseas Territories have managed to shift the issue of constituencies completely out but I would be content that a broad mechanism was contained in the Constitution but that the detail should be a matter of subsidiary legislation. I am content that Sections 27(3) allows for these, ad drafted, to be amended by ordinance. I'm completely in favour of a broad mechanism that provides a degree of protection for minorities, whether it's in the current Camp Constituency or in any other future constituency. However, I believe that this protection should be as reasonable as possible and not heavily skewed in a particular direction. I believe that the 2/3rds threshold provided in 27(3) is heavily skewed in favour of the minority group and I therefore do not support it. I believe that this threshold requires further consideration. I don't have a proposal as to what that ideal threshold would be. It might be that a simple majority would be sufficient but that that simple must be achieved in all affected constituencies.

In order to arrive at proposals for change to either representation or boundaries, I believe that there should be an independent body created that takes into account a wide range of factors so that changes in particular to balance of representation, it is not simply a numbers game.

Again, I believe this is something that should be contained within subsidiary legislation rather than the Constitution itself. We must ensure that we have a fair system in place that can accommodate any changes that the electorate would like to see and I don't believe that Section 27 in its current format achieves this.

Further comment that whilst we have tried to ensure that as wide a public consultation as possible has taken place on the review of the Constitution, I personally do not feel that I am clear about how the Stanley Electorate view this particular subject. It might be that we haven't heard any comment because the public is broadly content. It might be that they don't care but I don't feel personally that I am in touch with the majority of the Stanley Electorate on this particular subject. And I feel strongly that it needs more time to be debated.

I might just add that I do feel more confident about how the Camp Electorate think on this issue. That's all I have to say at this point. Thank you

**Mr Speaker:** Thank you very much.

The Honourable Mike Summers , I apologise for not including you on the first of the list.

**The Honourable Mike Summers:** I have nothing to say at this time – no problem.

**The Honourable John Birmingham**

Mr Speaker - I broadly agree with this. I don't have a problem with a change of name. I can well understand the reasons behind that. There is yet to be a decision as to what people will be called in this House other than 'The Honourables.'

Following on the discussion that there's going to be I think that we do – and I would support the setting up of an independent body to oversee the representation of individuals on the Electoral Role. On the way in here this morning I happened to look at the two roles that are outside the door. The Camp Constituency has 255 voters. Stanley Constituency has 1309. Camp Constituency Councillors if we split that by three would be getting 85 voters per Councillor. If we pushed that across to the Stanley Constituency, we would have 15 Councillors. I wouldn't like to see us have that many. But clearly there is an imbalance and I am not happy and I will not support the Section 3 although I very much support the referendum I do not support that there would have to be at least 2/3rds agreement with changing any changes in constituency. So, that's my view.

**The Honourable Richard Stevens:**

Mr Speaker, Honourable Members, I suppose it's quite obvious that my views will differ and I think that this protection clause or a clause like this one should be within the constitution so that it can't be changed on a regular basis. I do believe that this clause is important and it protects the interests of the minority in Camp.

In the short-term, the majority of Councillors will have first-hand experience of one kind or another of Camp but over the next 20 or 30 years this will disappear just because not that many people now live in Camp, not that many families. In fact, Councillor Clausen probably represents the last age group when many families lived in Camp.

The interests of Camp and Stanley are different and this has been espoused in the past when economic pressure has been brought to bare. And it is apparent today that these differences also bring in a proper scrutiny, a scrutiny that we can't manufacture however much we have tried. Even today this Council with all its Camp credentials have differing views on the future of Camp.

I believe the political institutions of Stanley are getting stronger; the Chamber of Commerce, even with a large farm membership challenges the support the Government gives the rural community.

We have talked within the community about businesses and the Agricultural community being within a global market. And, to me this means recognising that many countries subsidise their rural communities. For instance, 60% of the EU budget, I believe, is invested in this way. Rural Councillors like me need to remind everyone that these subsidies form the real value of farm products down and so we have to perform within those parameters. If we didn't have subsidy of any kind obviously we couldn't fit in, we couldn't compete with the rest of the world that we're supposedly slotted into.

I do understand that there are some weaknesses and I think it is for the electorate of Stanley and Camp to make the decisions about their future and it might be at some stage that constituents in Camp and in Stanley were glad to see a change. But I think there should be proper safe-guards in place like the ones that are here in front of us this morning. Thank-you

**The Honourable Ian Hansen**

Mr Speaker, Honourable Members, first of all, just on the matter of representation and the alleged inequality. We actually represent all the Islands, all of us represent all the Islands even though we are elected by different people so sometimes to me that item doesn't really hold a lot of water. For instance, Councillor Stevens' portfolio is Education I am sure he spends an awful lot of time not dealing actually with just Camp matters and he doesn't consider just the Camp. He considers everybody.

I agree with Councillor Stevens' points that he's made that we must have some form of protection for minorities. I take the point that minorities shouldn't be able to hold sway. That's absolutely true but neither should they be battered into submission simply by changing the rules and changing the goal-posts because things didn't go the way the people wanted in the past. I totally do not agree with that. I believe this should remain in the Constitution. When we sat around this table in Select Committee, I thought that we'd agreed that this was the way forward. In consultation with the community, this was brought up at every opportunity by the Chair of the Select Committee and there was very little opposition to it. In fact I think it was less than 5% actually opposed the content let alone it being in the Constitution.

So I very much support this staying in our constitution as it stands and that's all I will say at the moment, Mr Speaker. Thank you.

**The Honourable Mike Rendell:**

Mr Speaker, Honourable Members. I think this is probably one of the biggest issues in the changes in the Constitution we are talking about here now and it is one which should be in the power of the people of the Falkland Islands to change, not us sitting around this table. And that is why I agree that this clause – 2/3rds – is appropriate. We can talk as much as we like but it's the people out there that will make the decisions as to whether they think that the system that we operate in at the moment is the right one or the wrong one. And I can't see

any reason why at some stage in the future why the people of the Camp might believe that it is better to have one constituency or less representatives. Why don't we just let the people decide what is appropriate other than ourselves.

The current system has served us well, I think we'd have to agree with and some remarks from fellow Councillors would indicate that the system as it operates means that Members represent the whole of the Falklands not just their own constituency and there are over-laps all over the place.

There are a number of issues that will need to be examined in terms of voting systems if the Camp is to be persuaded that the change will still give them adequate representation. And I suppose that's one of the reasons why the previous attempt or the previous referendum failed. There was some uncertainty about how it was going to move forward and so there will need to be a lot of work done if we are going to protect minorities.

But when the observations that I've made from some figures that the Honourable Mike Summers drew up for us a few weeks ago sloping to the different turn-outs and thresholds and so on and so forth was that it seems to me you are looking at the at the figures that it would only require if there was a 50% turn-out it would only require 33% of electors in both Camp and Stanley to pass or to change the system. We'd only require 33% and that seems to me to be quite a big weakness in what's being proposed. Because there is no discussion here OK it would be in subsidiary legislation. There is no discussion about what level of turn-out there would need to be in order for this to be binding. I know we had a lot of discussion about it and I think it's quite important and I would like to raise the possibility that we might even consider that it should be a compulsory referendum in order that it is absolutely clear all the way around what people think.

**The Honourable Janet Robertson:**

Yes Mr Speaker, Honourable Members, I do believe that the issue of constituencies should remain in the Constitution and that the thresholds should be defined in the Constitution for the very reasons that have already been given here today.

I do think, though that the level, the threshold as it is described here, probably warrants further discussion and I would certainly propose that we refer this back to Select Committee for further discussion.

I would just like to make the point though that I believe that the issue of constituencies and the issue of representation are two separate issues and it's easy to end up confusing the two and perhaps they need to be more clearly defined and separated within the Constitution.

Colleagues have already mentioned the issues of protection for minority interests, about the differences between Stanley and Camp, differences which need not be contradictory or confrontational but nevertheless do exist as it exists between all rural and urban areas all around the world.

The issue of representation, however, is something slightly different. Under this constitution Executive Council will still need to return one Member from Camp and one Member from Stanley. So even if we altered the balance of representation between Stanley and Camp, it would not actually affect representation in Executive Council and I think that that is an important consideration.

But I honestly don't think that we've had sufficient debate and discussion on either of these subjects so I would, again, reiterate that I would like and I would like to support to have this matter referred back to the Select Committee for further consideration.

**Mr Speaker:** Thank-you the Honourable Janet Robertson. Do you only wish only for Sub Clause 3 to be referred back or are you also saying that the issues of Executive Council need to be referred back.

**The Honourable Janet Robertson:** No indeed – I am referring entirely to Section 27(3)

**The Honourable Mike Summers:**

Mr Speaker, Honourable Members, in respect of Chapter 3, I think there are three important issues. One is the change of name of the Legislative Assembly and I think it just represents another piece of progress in the evolution of Democratic Government in the Falklands and I am pleased on that basis.

The constituency issues I will come to in a second but the other issue in Chapter 3 that I think is important is that the age a person may stand for election has been reduced from 21 to 18 to reflect modern practice and that's a good thing. The encouragement of young people to involve themselves in democracy and the management of their country can only be encouraged.

In respect of constituencies, I think we must all accept that this is a complicated issue. If I could just quote a word or two from the final report of Select Committee on the Constitution – it says:

*"Select Committee firmly recommends that debate on any subsequent change should be free of Constitutional issues. However, Select Committee is also firmly of the view that there should be formal consultation with all voters before any change is made by way of referendum or similar method. It would be a condition of the removal of this issue from the Constitution to the Electoral Ordinance that this requirement would have to be protected."*

I think by and large that remains the policy intention of the Select Committee and I am not sure that anybody in any of their comment has deferred from that.

In terms of the constituencies issue; there are three separate issues. It is not just a question of mathematics and you can do all the mathematical calculations you like and come up with all sorts of statistics but it doesn't solve the whole issue. There is the issue of whether there should be two constituencies, one constituency or, indeed, five constituencies or four or something, so that could and should be considered.

There is also the question of the numbers of Councillors. I know that in the discussions on the Constitution as a whole and it's not in this section the number of Councillors that should be elected is set at 8. I think there might be an argument for saying that in the discussion on constituencies and boundaries and representation that number might be varied. Then there is the issue of representation – the dividing up, if you like, between the constituencies of the numbers of Councillors that we have.

I think all of those things need to come together in a discussion to reach a final conclusion. And the public might be somewhat mystified as to why this issue hasn't been dealt with in the 8 years that we've been at this process. The fact of the matter is that the Select committee obviously did consider this and it expressed its views in the final report. In the negotiations with the Foreign and Commonwealth Office it was they who suggested that setting a relatively high

threshold is an important issue exactly because of the reasons that the Honourable Mike Rendell has raised that in a time of low turn-out you could have decisions being made by a minority of electors. And it was for that reason that they proposed that the threshold should be set reasonably high.

I mentioned in my early comments on the Constitution that it doesn't need to be set in stone and you can come back to some of these things and reassess them and this is one area in which the foreign and Commonwealth Office has said actually, you know, you can come back to this issue again and reconsider it if you wish. And I think we should.

But I do have some reservations about how the threshold will work and I do have reservations about putting in place an absolute block to change when that can't be intellectually and morally defended in terms of the overall electorate. So, my proposal, I think, on this would be to move forward with it as we have and to note that we think there are some issues here that need to be dealt with in terms of the numbers and representation in the constituency issues but to move forward with this as a mechanism for removing the debate from the Constitutional arena to the Legislative arena and to leave the threshold as it is but if in the discussion about it we think there is a need to readdress that threshold we can come back to the Foreign and Commonwealth Office and say that threshold is absolutely inappropriate.

So, Mr Speaker, those are my views on the Constituency Issue.

**The Honourable John Birmingham:**

Mr Chair I think the bottoming out of all is that there are two sides, aren't there? There are always two sides - some sides or more. There is a side that says and I heard a couple of comments this morning that I had heard before. 'The system has served us well.' I heard that some years ago when we changed it from 4 and 4 (Councillors were split evenly between Stanley and Camp) and don't rock the boat and all of this - if it isn't broke don't even fix it.

The point about the numbers game as the Honourable Member mentioned - yes - it's not just about numbers. It's also about perception and sometimes I find that there some individuals who use scare tactics, for instance - the Stanleyites are out to get you in Camp, don't allow any changes. On the other side you have them out to get whatever they can. For instance, there is not just one set of problems in the Camp. The Camp is not one place. The problems of somebody on an island are totally different to somebody on the south of the west Falkland or they are certainly different to somebody who lives within half an hour of Stanley but still lives in the Camp.

One of the Members mentioned that we all represent everybody and that's true. Honourable Richard Stevens' name came up as an example in the Education Department. He chairs the Education Board. That's correct. I get phone calls from the Camp. I am sure other Stanley Councillors get phone calls from the Camp. We represent one country. And hopefully at some point in the future we will have just the one constituency.

I am not actually sure and perhaps the Honourable Mike Summers could repeat I am not actually sure which way he wants to go forward now. It was slightly confused at the end there.

**The Honourable Mike Summers:**

Mr Speaker, my proposal is that notwithstanding the reservations people have about the threshold that is being proposed in Section 27(3) that we should proceed with this section as part of the Constitution but note the reservations that Honourable Members have about the threshold and how it would now operate and refer that for further discussion going forward,

but not to try to fix this at this time because otherwise I think it would hold up the whole of the constitutional process. So, the effect of that would be that the issues of numbers of people, of constituencies and representation could then be discussed in the policy arena. But that if we felt it necessary at some point to go back and change the threshold then that is something that we could do. So, in summary my proposal is that Section 27 should stand part of Chapter 3 but that we note the reservations and try to move forward in a practical manner.

**The Honourable Ian Hansen:**

Mr Speaker, Honourable Members, I would agree with the Honourable Mike Summers' sentiment because it is quite obvious that there is a lot of debate to be had on the subject and I agree that to try and do it here or in this sort of arena would definitely stall the process of moving forward. So I would be content to agree to that suggestion as it stands.

**The Honourable John Birmingham:**

Chair, the way I read this is that the proposal is that we accept this and it can be discussed later on but I think that as it stands now we accept this and it's discussed at a later date. That later date will be presumably after this becomes law and is part of the new Constitution.

**The Speaker:** The Honourable Mike Summers, would you like to reply?

**The Honourable Mike Summers:** I believe that would be correct. There's nothing to stop the discussion commencing immediately and my anticipation would be that it would run right up and through the next election because it is a matter of importance to a wide number of people. So that would be the effect – yes.

**The Honourable John Birmingham:** I accept that

**The Speaker:** The Honourable Andrea Clausen – do you have any further reservations or are you content for this matter to proceed along the lines proposed by the Honourable Mike Summers?

**The Honourable Andrea Clausen:**

I think I have been quite clear about how I feel about it. It is difficult. I do think we have to put in place a new Constitution. On balance there is a huge amount of good in the new Draft Constitution. And on those grounds I do support it but with all of the reservations I have made and I fully support that we, as fast as we can, start to address these issues and try and be very even more thorough in terms of understanding what all of our electorate feel about this. I know it's difficult to do that but on those grounds I support the proposal made by my Honourable Colleague.

**The Speaker:** Are all Honourable Members content with the proposal?

**The Honourable Janet Robertson:**

Yes, for the very reasons given I would support that. I would just like to be clear what the process would be whether that subject for discussion as the Honourable Mike Summers said is probably going to run right through until the next election.

Would this be through a Select committee of the House or would it be on a less formal basis?

**The Honourable Mike Summers:**

Mr Speaker I think it will become necessary shortly after we have final agreement on the content of the Draft Constitution to wind up the Select Committee on the Constitution. I don't think we just leave it open for other discussion. I would suggest therefore that those Honourable Members who have keen interest in this issue propose to the next meeting of Legislative Council the setting up of a Select Committee to consider these issues and start anew in that fashion.

**The Speaker:** Thank you very much Councillor Summers.

**The Honourable Janet Robertson:** I accept that. I think that's perfectly acceptable I agree with that procedure

**The Speaker:** No further reservations? May we proceed then?

**The Honourable Mike Summers:**

Mr Speaker I move that Chapter Three as it stands be included as part of the Draft Constitution.

**The Speaker:** Any further comments on Chapter Three by any Members? No. Thank-you very much

#### **Clerk of Councils: Chapter Four – Powers and Procedures of the Legislative Assembly**

**The Honourable Mike Summers:**

Mr Speaker, I am not sure there will be any great debate on this Chapter although there are some important provisions in it. Provision is made for a Deputy Speaker and transitional arrangements for the opening of the new assembly and that is an important administrative matter at least. A Quorum of this House is clarified as being six elected Members of the assembly. That clearly is important. Provisions for the Governor to approve the Standing Rules and Orders of the House are removed. That is regarded as anachronistic since the Governor no longer chairs the Legislative Council. It's not appropriate that standing rules and orders should be approved by the Governor. That therefore is removed and I know the current Governor doesn't object to that as his predecessor may have done.

The other new provision in here, which is important; is that there is a new provision for the Governor before exercising his reserve powers to pass laws without the assent of the assembly to inform the Executive Council of his intentions to do so and the reasons and allow Members to express their views. And, as before, the Governor may not exercise these powers without the approval of a Secretary of State.

We will come in Chapter Five I think, to perhaps the key change in the balance, if you like, between the role of the Governor and the role of the democratic Government in the governance of the Falklands. But this forms part of a re-balancing in modern terms of how we should move forward.

These are important provisions. I don't know whether other Members wish to speak to this Chapter. If they don't I Move that it be included as part of the Draft Constitution.

**The Speaker:** Honourable Members, are you content with the proposal to fast track the procedure this morning.

(All said Aye)

### **Clerk of Councils: Chapter Five – The Executive**

#### **The Honourable Mike Summers:**

Mr Speaker, as I just mentioned, this does contain important new provisions. And these are provisions that I should emphasise have been proposed to us by the Foreign and Commonwealth Office. So they are not provisions that we have had to sort of wrangle out through lengthy argument. The key issue here is that there is fundamental change in the way in which the Government and Executive Council interact and the key change is that on matters of governance in the Falklands the Governor must now consult the Executive Council and he must accept the advice of Executive Council except in certain specified circumstances.

And I think those circumstances are quite well known. There are also provisions that the Governor may act against the advice of Executive Council in certain circumstances and these are also set out in the constitution.

There was quite a long discussion in Select Committee over many years about how to achieve this type of balance. I am content that the new Draft does that and I am content that there is good will in this issue between the Foreign and Commonwealth Office, the office of Governor and the Council of the day. So, very important provisions

**The Speaker:** Thank you very much Councillor Summers. Does any Honourable Member wish to speak on this matter?

#### **The Honourable Dr Andrea Clausen:**

Mr Speaker, Honourable Members, I don't have very much more to add to this, just to agree with my Honourable Colleague. I think this section is pivotal in providing a significant step forward in terms of a forward thinking and moving democracy and it strengthens our internal self government quite significantly, I think, and I completely welcome that.

There is one quite small provision that might seem insignificant to some but I welcome it. It is in regard to a Member of Executive Council will now be able in certain prescribed circumstances to take part in a meeting of Executive Council remotely. Providing a number of boxes are ticked and given my current circumstance I think that's highly welcome news and you never know what might be around the corner and sometimes it could be a very useful provision so I welcome that.

**The Speaker:** Your declaration of interest is so noted. (Laughter) Does any other member wish to speak on this Chapter or may we proceed to Chapter Six?

#### **The Honourable John Birmingham:**

Clause 63 presiding in the Executive Council – page 47 – and I don't want to put the Acting Attorney General on the spot, unlike some of the Colleagues around here. It says here that there shall preside at any meeting of Executive Council the Governor or, in the absence of the Governor, such Member of the Executive Council as the Governor acting in his or her discretion may appoint to preside at that meeting. The question is - would that allow an Elected Member of the Assembly who was sitting on that Executive Council to chair that meeting?

**The Attorney General:** Mr Speaker I believe the answer to that question must be yes as the provision clearly allows the Governor acting in his or her discretion to appoint such a Member of Executive Council.

**The Honourable John Birmingham:** Thank you

**The Speaker:** Declaration of early interests?

**The Honourable John Birmingham:** I beg your pardon?

**The Speaker:** Declaration of early interests. Would any other Honourable Member wish to speak on this matter?

**The Honourable Richard Stevens:**

Mr Speaker, Honourable Members it's just a general point that I would like to put forward and that is the importance that this part of the Constitution has when we go into the UN and in the last meeting that we had in the UN many people were interested in the area of what the Argentines would like to call a 'colonial' situation. In fact, they always say manifestations of a colonial situation. Many countries we spoke to are very interested in our political development and the relationship that we have with the UK, in particular with the Governor where his powers and our powers are clearly defined. And, a number of the countries that we spoke to, found our point of view very interesting and they took note.

**The Speaker:** Thank you very much, Councillor Stevens. Honourable Mike Summers, would you care to Move this Chapter please?

**The Honourable Mike Summers:** Mr Speaker I Move that Chapter Five be part of the Draft Constitution as it stands.

**Clerk of Councils: Chapter 6 – Finance**

**The Honourable Mike Summers:** Mr Speaker, this contains a number of repetitions of existing provisions to protect the way in which the finances of the country are managed and that is entirely appropriate. There are two significant amendments to this Chapter. One is that there are amended provisions for audit. Current provisions are somewhat anachronistic and therefore there are new provisions. And incidentally audit is one of those areas that falls under that section of business where the Governor may act against the advice of Executive Council if he thinks it appropriate to do so, so that audit of the Government finances is obviously a demonstrably independent function. That's important.

The other really important section of this Chapter is the provision of a Public Accounts Committee and the Constitution sets out how it should be constituted – there should be five persons, two of whom should be Elected Members and three who are independent and a number of people including the Director of Finance and the Chair and Vice Chair of Standing Finance Committee may not be members.

The key role of the Public Accounts Committee is to examine and report on all public accounts and audit reports that are required to be laid before the Assembly.

And then it goes on to say perhaps such other functions are prescribed to it under ordinance. Of course, that is the key. There has already been some quite active discussion amongst ourselves and indeed with members of the public about what role the Public Accounts Committee might play.

There is also, I think, emerging an important discussion on what is the interaction between the Public Accounts Committee and the Audit function. Because what we don't want to do is a Public Accounts Committee that effectively replicates the audit or does the same thing as the audit. It should be in our interests to make sure these things are either separate and different or connected together.

But I am very, very happy that we have for the first time in our Constitution and perhaps for the first time in our democratic institutions an authority like the Public Accounts Committee which has the function of checking and commenting on the way that public finances and the public service in general is being run. And there will be a whole series of issues coming out of the debate on the PAC as the extent in which they should be responsible for reviewing the efficiency and value for money of different parts of the public service.

So I am very pleased to see this. I was astonished to hear a discussion the other day that the Foreign and Commonwealth Office thought that this was their idea. In actual fact it was included in the Motion for the setting up of this Select Committee in the year 2000. So it's something that has come from democratic institutions and will form an important new part of democratic institutions.

**The Honourable John Birmingham:**

Chair, I very much support the setting up of the legal framework for the setting up of the Public Accounts Committee. There are some members of the public who are confused as to what this committee might be sitting around doing and there are some members of the public who have the idea it would only be looking at investigating areas within the Falkland Islands Government and I would just like to properly say as far as I can see that's not the case at all. And I think it says here under 6(a) the Public Accounts Committee shall have power to summon any person to appear before it.

I would just like to make that point, Chair

**The Speaker:** Thank you very much Councillor Birmingham

**Councillor the Honourable Dr Andrea Clausen:**

Mr Speaker, Honourable members, I have very little to add to this except for I also welcome changes to the section with regard to the audit and the Public Accounts Committee.

I hear what my Honourable Colleague says about the public not being sure we do have some way to go in terms of defining what will flow out of this in the subsidiary legislation so they need not fear just yet. This is merely a provision as I understand it so that we can establish this function and we have some way to go yet before all of those details are thrashed out. I think it is a very welcome move and I particularly support the idea that at least to some degree we will be able to investigate value for money in terms of projects and so-on within the Government and potentially outside the Government.

**The Speaker:** Thank you very much Councillor Clausen. No other Honourable Member wishes to speak? The Honourable Mike Summers, would you care to make a proposal?

**The Honourable Mike Summers:** Mr Speaker I move that Chapter Six be included as it stands as part of the Draft Constitution.

## **Clerk of Councils: Chapter Seven – The Public Service**

### **The Honourable Mike Summers:**

I will be brief on this; there are some important changes in Chapter Seven. I would just like to for the benefit of the public to run through what they are.

The role of the Chief Executive is more clearly defined in the new Constitution the Old Constitution simply mentioned that there will be one. It doesn't say what he would do, which is a bit of an omission. So the Chief Executive is appointed by the Governor but acting in agreement with Executive Council and this is an important provision to ensure that the Chief Executive enjoys the confidence of both sides, at least when he first starts his work. He is also appointed as Head of the Public Service under the authority of the Governor and that's an important provision because it, again, distances the Governor from one further stage from day to day administration of the government of the Falklands in which he or she should not be involved.

There are important issues in here and there were lengthy discussions about the power to make appointments and also the responsibility for discipline and dismissals. The power to make appointments under the new Draft is still vested in the Governor but it is delegated to the Chief Executive but prior approval is required for appointments at and above Head of Department. The Governor remains responsible for the appointment of the Attorney General, Chief of Police and the OC FIDF. Those are, I think, important provisions to which we agreed because it is important that the Attorney General in particular is demonstrably publicly free from any form of political influence because he is the Director of Public Prosecutions. And it's not in his role as Legal Advisor to the Government that you need those provisions but his role as Director of Public Prosecutions. So his appointment and any subsequent management must be free of political influence.

In future, and this took quite a lot of discussion oddly enough, but in future all discipline will be exercised in accordance with the Management Code. That, too, is an important provision because discipline previously was the responsibility of the Governor. So, the Governor, having made his decision, that was the end of the matter. You had nowhere to go. Now discipline is exercised in accordance with the Management Code and any decision may be appealed to the Governor.

I suppose I should just say when I said previously you had nowhere to go, you can, of course, go to Judicial Review and this was raised on a number of occasions. But Judicial Review whilst it is in theory available to all members of the public – it's an expensive and difficult process. So its right there should be a better mechanism; so, discipline in accordance with the Management Code and decisions may be appealed to the Governor.

Those are the most important, I think, amendments in this section.

### **The Honourable Janet Robertson:**

Yes Mr Speaker, Honourable Members I would like to Comment on Councillor Summers' comments on this Chapter. I think that it does more clearly and more better reflects the practices that we currently have the role of the Governor and the day to day management of the public service is, I think, modernised through this whole Chapter.

And, of course, I welcome the inclusion of the Office of Chief Executive although what I am a little bit puzzled about is that under 83 (2) it says that:

*"The Chief Executive shall comply with any directions given to him (or by the Governor) acting in his or her discretion."*

And as I said we spoke a lot in terms of trying to ensure the provisions in the Constitution or any changes in the Constitution should better reflect actual practice. In actual practice the Chief Executive receives directions from the Government as well as from the Governor. So I feel that the Clause as it stands is rather unbalanced. I was wondering if perhaps either the Acting Attorney General or indeed anyone else could perhaps clarify this situation for me.

**Ag Attorney General:** Mr Speaker all I can say is that it is a matter of policy why the Clause is as it is and I am afraid I am not aware of the background to it. I am going to have to rely on some of your colleagues.

**The Honourable Mike Summers:**

My understanding of this is that the management of the public service is the responsibility ultimately of the Governor. The Line Manager for the Chief Executive is the Governor, it is not possible to line manage somebody on a day to day basis through a committee or a council so I believe that is the reason that it's written in this way. It doesn't mean that the Chief Executive wouldn't be regularly taking direction and advice and indeed instructions from the Executive Council but, of course, the constitutional mechanism for that is that they come through the Governor.

**The Honourable Janet Robertson:**

Thanks for the clarification.

**The Honourable Dr Andrea Clausen:**

Very little and very briefly Mr Speaker, but just to say that I particularly welcome the clarity that the amendments are giving, in particular to who has the power to make the appointments and in terms of recognising the Management Code as the document that provides the process for disciplinary issues. I think that it's very important that we move away from just the option of Judicial Review and separate out into the Management Code and then the Governor as the role of appellate though I think that's really important and I think that the clarity that it provides is very welcomed. I support it.

**Mr Speaker:** Thank you very much. Any further comments?

**The Honourable Mike Summers:**

Mr Speaker I move that Chapter Seven be included as it stands as part of the Draft Constitution.

**Clerk of Councils: Chapter Eight – The Administration of Justice**

**The Honourable Mike Summers:**

Mr Speaker, this Chapter is largely unchanged but it makes provision for a Judiciary independent of the Executive, which is critical in any good democratic government. You don't always see it in other places around the world and you see the results of those failures. So the Administration of Justice is kept separate from the Executive and that's quite right.

The only real change to this section is that the Senior Magistrate is added to the list of judicial appointments made by the Governor acting in his discretion. There is a process described under the Constitution for the removal of judges and the Senior Magistrate is added to the list of those people who can be removed by the Judicial Committee of the Privy Council and this creates a clear process for the removal of the Senior Magistrate. There is no other way in which they can be removed to keep them free of political influence.

**Mr Speaker:** Thank-you very much Councillor Summers.

**The Honourable Janet Robertson:**

Yes. I just wanted to comment briefly on the change of name of this Chapter. It was 'Judicature.' It's now being changed to Administration of Justice. I would just like to say that the *Concise Oxford Book of the Meaning of Words* – "judicature" actually has three meanings. It means the Administration of Justice – yes – but it's also a judge's term of office and a body of judges or a Court of judges. What we have achieved therefore is more words, more syllables and less meaning. I am not sure that that's progress at all.

**The Honourable John Birmingham:**

Chair, I'd like to thank the Honourable Member for that information and it is so true that each day we learn a little bit more.

**The Speaker:** Thank you very much Councillor Birmingham. I take it Honourable Members that you are content with this Chapter as is?

The Honourable Mike Summers, care to Move, please?

**The Honourable Mike Summers:**

I Move that this Chapter with its new title be included as part of the Draft Constitution.

**Clerk of Councils: Chapter Nine – Complaints Commissioner**

**The Honourable Mike Summers:**

Mr Speaker this is an entirely new Chapter to the Constitution. It was also proposed during the setting up of the Select Committee on the Constitution in the year 2000 and is another important new edition to the protections, particularly for the individual in society.

We have many of us often observed that if you fall out with the Government in the Falklands it's not a very comfortable position and there isn't an independent place to go where you can have your legitimate complaint reviewed.

And so, the setting up of a Complaints Commission is an important addition to the institutions of the Falklands. And it is set out in the Constitution that the role of the Complaints Commissioner is to hear complaints of mal-administration by the Government in the Falkland Islands and any other matter referred to it under Ordinance.

And so there will be a fair amount of discussion about how our complaints are to be referred to the Complaints Commissioner and what role he will have.

It is provided for that no person who is a member of the Legislative Assembly or Public Officer may be appointed as Complaints Commissioner and that is clearly important. But there is much work to do in completing the provisions for this office and the Attorney General and his staff have been tasked with producing a policy report to the Executive Council in the last quarter of this year as they have on the Public Accounts Committee and we look forward to some further advice on how we might take this matter forward.

**The Honourable John Birmingham:**

Chair I very much support the introduction of a Complaints Commissioner. I have a question for the Acting Attorney General which isn't too bad. And that's on the term 'public officer' is a public officer anybody who is in the employment of the Falkland Island Government?

**At Attorney General:** Mr Speaker a public officer is one of the terms that is defined under Section 100 of the Constitution together with public office and the public service but essentially in short the answer to your question is yes.

**The Honourable John Birmingham:**

Also just for clarification the Complaints Commissioner would not be – I take it – would not be a sitting commissioner of any sort and that the wording here is 'from time to time" the Governor would appoint.'

**The Honourable Mike Summers:**

Mr Speaker, the policy intention of that was that it would not be strictly necessary to appoint somebody as commissioner for a long period of time. Given that we are a very small community very often people are related to each other or know each other or have interrelating interests. So this provision makes it possible for the Governor to appoint a complaints commissioner for a particular purpose. And once that purpose is fulfilled his tenure is completed.

Mr Speaker, I Move that Chapter Nine be included as part of the Draft Constitution.

**Clerk of Councils: Chapter Ten – Miscellaneous**

**The Honourable Mike Summers:**

Mr Speaker there are just a couple of issues I would like to raise here. This chapter contains two new elements for the Constitution. For the first time there is a definition of the Governor, which means the Governor acting in accordance with the advice of Executive Council, that with all those other provisos we talked about earlier under earlier chapters.

In discussion with lawyers we were advised it wasn't strictly necessary to have a definition of the Governor but we did it for the sake of clarity because not everybody is always clear about what the Governor means in terms of the overall Constitution of the Falklands so that's what we have done.

And there are changes to oaths to be sworn by Officers of the Government and it was noted in our deliberations that it seemed to be rather odd that the people and the Constitution and the laws of the Falklands were not referred to in any of the oaths that were being sworn, either for public office or as a member of the judiciary. And so the Oath of Due Execution of Office now includes a responsibility to serve the people of the Falklands and to uphold the constitution and the laws in force in the Falklands. The Judicial Oath now contains new requirements to do right to all manner of people according to the constitution and other laws in force in the Falkland Islands and that is important, I think, not only cosmetic but important fundamental change.

Mr Speaker there is one other issue that has been brought to our attention in recent days and that is in respect of Section 100 and the Section was raised a moment ago by my colleague, where the public service means and includes the Falkland Islands Defence Force. The interaction between this and other provisions of the Constitution and the Electoral Ordinance conspire against members of the Falkland Islands Defence Force to make it impossible for them to stand for election. The Acting Attorney General has proposed that this can be fixed by an amendment to the Electoral Ordinance and I think we should just take note that that would be necessary because that wasn't any policy intention.

**The Speaker:** Thank you very much Honourable Mike Summers. Does any Honourable Member wish to speak to this Chapter?

**The Honourable Mike Summers:** Mr Speaker I Move that Chapter Ten as it stands be part of the Draft Constitution.

**Clerk of Councils: Annex "A" – Rules for the Enactment of Laws**

**The Honourable Mike Summers:** Mr Speaker, Annexes "A" and "B" are largely technical and I have no intention to comment on either.

I Move that Annexes "A" and "B" be included as part of the Draft Constitution.

**The Speaker:** Thank you very much. Honourable Mike Summers, as the principle mover, would you care to wind up?

**The Honourable Mike Summers:** Mr Speaker I reserve my right to wind up at the end.

**The Speaker:** We have reached this point on the relaxation of the rules, Honourable Members, so would any Honourable Member wish to make a general comment?

**The Honourable John Birmingham:**

Chair I would just like to say to the members of this Council and the previous council that it's been going on for eight years. The Honourable Mike Summers has been there since the very beginning and I think that there has been a lot of work done by him and others. I've come along in the early part of this year, having touched on it a couple of years ago but I do believe there has been – as I say – a lot of work done and I congratulate the Committee.

I know we are not going to have any speeches at the end of this but could I just – for the sake of this House – say a word about our colleague who is in hospital at the moment and hope that he's getting better and that the thoughts of the Council are with him at the moment. (All respond – Hear, Hear)

**The Speaker:** Does any other Honourable Member wish to make a general summing up? No ?

**The Honourable Mike Summers:**

Mr Speaker, If there are no other comments I would just like to wind up this discussion by formally proposing that this Motion be submitted to Her Majesty's Government for consideration and add my thanks to all of those who contributed to this process over a good number of years.

I would like to thank all those members of the public who have contributed in the process. Those of you who are old enough will remember that we started off by having some public open sessions in which individual members of the public came and were invited to make submissions. We also had submissions from officers and others.

I would particularly like to thank the former Attorney General who put in a lot of work on many issues, the current Attorney General and the Acting Attorney General who all have made major contributions to this process over the years. I also would like to thank all those Members of the Council who were around in the Year 2000, those Members in the Council after that and this one who have all contributed to this important process.

I think this is a good Draft Constitution. I think it will be good for the Falklands. I don't expect it to have the longevity that the last one had, which effectively runs from 1985, although there was an amendment in '97 because I suspect the way in which we govern the Falklands and the way in which we move forward will change. And I know that there are people in the community who feel that the current arrangements for governance (in respect of Executive Council I should say) and non-party government, and no government and opposition, is not appropriate. Well the point I would make here is that this Constitution does not prevent any of that emerging if anybody has public support for it to be put into place.

The only restriction that this Constitution provides for is that only three elected members can be a Member of Executive Council. So if you wanted to move to a government and opposition type model you would probably want to make an amendment to that but I think that would be relatively easy.

I am content, I think, that this Draft Constitution reflects the wishes of the people of the Falklands and that the people of the Falklands are content with this as the document to oversee, if you like, our relationship with the United Kingdom for the next few years and on that basis I am very content that we have virtually reached an end to this process and formally Move that the Motion be carried.

**The Speaker:** Honourable Members? Would Honourable Members like to agree that the Motion be carried

(All said Aye)

**The Speaker:** Thank you very much. Honourable members this meeting was all about considering the Draft Constitution and considering the report of the Select Committee. We've done that in a fairly relaxed form in terms of suspending rule 23. We now have to wrap up so I would propose, given the lateness of the hour - although there is something said about

adopting Camp Time for this session – it seems we started at 0930 had are finishing at 1035 – I would propose, therefore a Motion for Adjournment without the need for Members to speak to it because the next sitting of Legislative Council is due on Friday, 26 September.

Honourable Members, would you kindly support a Motion for Adjournment on that basis?

(All Agreed.)

**Clerk of Councils: The Motion for Adjournment**

**The Chief Executive Mr Tim Thorogood:** Mr Speaker I beg to Move that this House stands Adjourned sine die.

**The Speaker:** Thank you very much.