

# EXECUTIVE COUNCIL

## PUBLIC

**Title:** Maritime legislation - Implementation Plan

**Paper Number:** 98/17

**Date:** 28 June 2017

**Responsible Director:** Director of Natural Resources /Attorney General

**Report Author:** Director of Natural Resources

**Portfolio Holder:** MLA Phly Rendell

**Reason for paper:** This paper is submitted to Executive Council:  
For policy decision (including budgetary policy)

**Publication:** Yes

**Previous papers:** 24/14 - Review of Falkland Islands Maritime Policies and Legislation  
24/15 – Maritime Legislation — Additional Policy Decisions  
85/17 - Maritime legislation – new and revised law

### List of Documents:

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#### 1. Recommendations

Honourable Members are recommended to —

(a) Approve the approach to implementation in part 6 of this paper which sets out the steps needed to give effect to implementing the legislation, in particular the actions and decisions required on the establishment of a Falkland Islands Maritime Authority and its staffing.

(b) Instruct the Attorney General to bring forward further legislation relating to subsidiary legislation to support the implementation of the legislation as set out in part 6 of this paper.

(c) To note that UK subsidiary legislation which applies to the Falkland Islands will continue to be used until domestic subsidiary legislation is made so that there is no gap in the law. This means that other draft legislation will be presented as per the implementation plan.

**EXECUTIVE COUNCIL FURTHER AGREED**

(d) Option 2 (5.4 of the paper) as the preferred option in the short to medium term noting that further work will be required.

### **Additional Budgetary Implications**

	<b>2016/17</b>	<b>2017/18</b>	<b>2018/19</b>	<b>Annual Recurring</b>
Operating Budget	£	£		£
Consultancy		30,000		
Project Officer MA		25,000	50,000	50,000
Legal drafting		15,000	45,000	45,000
<b>TOTAL</b>		<b>70,000</b>	<b>95,000</b>	<b>95,000</b>

## **2. Executive Summary**

2.1 The new maritime legislation was approved for publication at Executive Council on 29<sup>th</sup> May 2017. This paper sets out options and recommendations and identifies the necessary resources for implementation of the new legislation.

2.2 It is recommended that a phased or gradualist approach to implementation of the new legislation be adopted. This reflects the reality that secondary legislation and fine scale operating procedures and policies will take time to work out. The additional resource required in the short term is a project officer within the Department of Natural Resources and drafting resource in Law & Regulation Department, equivalent to a full time post (either locally or working remotely). A short term consultancy to advise on practical maritime administration and authority issues is also recommended. The annual cost is estimated at some £95,000 per annum. The project on secondary legislation is initially estimated to require at least 2 years, however it is anticipated that additional time may be required in view of the scale of the task. The additional resource recommended is in keeping with the scale of the maritime authority identified in the Fisher Report (considered at Executive Council as 24/14).

2.3 As part of the phased or gradualist approach it will be necessary to prioritise areas of the maritime legislation which are most relevant to the Falkland Islands. These areas should be focused on first to improve safety of shipping and for seafarers and environmental protection.

## **3. Background [and Links to Islands Plan and Directorate Business Plan/s]**

3.1 Honourable Members considered the Maritime Legislation<sup>1</sup> under ExCo Paper 24/14 (February 2014) and ExCo Paper 24/15 (March 2015) and approved the development of the legislation through to completion, giving authority to Government Legal Services together with the Head of Policy, the Marine Officer and the portfolio holder MLA Phyl Rendell to make policy decisions where necessary in order to update the maritime legislation on the Islands (see para 2.1 of ExCo Paper 24/15). This legislation was

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<sup>1</sup> Note – throughout this paper the Maritime Bill 2017 and the Harbours & Ports Bill 2017 are sometimes collectively referred to as the “Maritime Legislation” and sometimes as the “MA Bills”.

presented to Executive Council on 29<sup>th</sup> May 2017 and approved for publication as Bills in the Gazette.

- 4.2 The Falkland Islands Government Islands Plan for 2014-2018 gives a commitment by the current Legislative Assembly that “*a new maritime safety regime, improvements to emergency planning preparedness and updated environmental protection legislation*” will be enacted. These Bills give effect to this commitment by presenting the required draft legislation which provides for a new maritime safety regime.
- 4.3 ExCo Paper 24/15 sets out clearly the different policy decisions which needed to be taken to give effect to ExCo Paper 24/14 and the recommendations from the Interim Report on Marine Related Policy and Legislation carried out by Fisher and Associates consultants.
- 4.4 In addition to activities related to the implementation of the new maritime law, substantial work is required to address issues arising from:
  - MCA Monitoring Visit: the preliminary draft report from the recent MCA monitoring visit (March 2017) identifies a number of maritime issues which require progressing. A number of substantial issues have been raised, some of which are long overdue for progress.
  - Triple I Code: this is linked to the MCA monitoring visit. The Triple I code will result in the Falklands being assessed for how well we comply with the provisions of International Maritime Conventions, to which the Falklands are a party. There will be a process prior to the audit to assess compliance and to seek to address any shortfalls. The MCA visit identified some additional conventions which the Falklands may wish to consider for adoption. Again, this is likely to entail a substantial volume of work.

The point is that there are a number of significant work streams in the maritime sphere which require addressing. Whilst there are some elements which relate to the new law such as the legal drafting requirement much of the other work is necessary regardless of the advent of the new law. It will not be possible to address these issues without some additional capacity.

- 4.5 It is emphasised that for the most part, the new legislation does not imply new obligations. The MA Bills modernise, consolidate and improve accessibility to the law, but most of that law already applied through the mix of previous Falkland law and UK law extended to the Falklands. This current mix of laws can make it difficult to determine which law applies in some situations, creating a lack of clarity. It may appear that the new legislation requires additional capacity to implement it. If that is the case the arguments for that capacity apply equally to the existing legislation but the requirement for capacity also relates to the work streams referred to at 4.4 above.

#### **4. Proposals, Options and Reasons for Recommending Relevant Option Legislation**

- 5.1 The Maritime Bill 2017 and the Harbours and Ports Bill 2017 are currently circulated as draft legislation. Should they be passed into law in due course, two substantial issues arise:

- a) The implementation of the new legislation, and
- b) The establishment of a Falkland Island Maritime Authority which is part of implementing the new law.

## **Establishment of Falkland Islands Maritime Authority**

5.2 The Harbours & Ports Bill 2017 provides that:

### **4. Establishment or designation of Falkland Islands Maritime Authority**

*(1) The Governor must designate a body as the Falkland Islands Maritime Authority.*

*(2) The Governor may designate the department responsible for maritime, harbours and ports matters to be the authority (Department of Natural Resources).*

*(3) The Governor may confer functions or responsibilities to the authority under this Ordinance or under any other law.*

The Maritime Bill 2017 defines the Maritime Authority as being the authority designated under the Harbours & Ports Bill.

**5.3 Option 1:** Option 1 is the minimalist ‘no change’ option. In this case the existing officers who carry out maritime and harbour functions (Marine Officer & Registrar of Shipping) would be designated to continue in their existing roles and a FIG department would be designated as the Maritime Authority.

**5.4 Option 2:** Option 2 would incorporate option 1 so that existing marine and harbour staff will continue to carry out these functions and a FIG department will be designated as the Maritime Authority.

In addition, some short-term resources are proposed to provide implementation and legislative drafting support. It is proposed that two 2-year (extendable) posts be created – a Project Officer who will be situated within the MA, and a legislative drafter within the Law & Regulation Department. The latter could be a contracted resource working remotely. It is anticipated that the Project Officer will work within the MA to look at applied UK and FI secondary legislation and advise on the priority for amendment, implementation and promulgation, as well as identifying the necessary secondary legislation and regulation. The Legislative Drafting resource will be used to review the applied UK law and make it FI compliant so that it works with the new Ordinances, together with drafting any specific secondary legislation and regulations where necessary. It is anticipated that this arrangement might run for 2 years but could run on depending on progress.

**5.5 Option 3:** Option 3 would entail putting additional resources into a Maritime Authority from the outset. Depending on the functions which the Maritime Authority takes on, there will be a requirement for additional staff. . An expanded MA could continue to function either separately or as part of an existing FIG department (option 3A). Alternatively such a MA could become more stand alone and be designated as a separate body (option 3B).

## **Principles & Policies - on implementing new maritime legislation**

- 5.6 Phased approach: *The Maritime Administration will develop at a pace aligned to the introduction of secondary legislation and the development of fine scale policy and procedures.* This recognizes that the scale of the task is simply too large to achieve in 'one go' or even in a short time scale. Even if the capacity is acquired instantaneously the clarity on secondary legislation is unlikely to be in place to underpin implementation for some time. There will need to be a process of prioritisation.
- 5.7 Capacity: *Modern maritime legislation should have a Maritime Administration capable of implementing the law to a high standard in pursuit of safer shipping and safeguarding the environment.* The MA Bills update and consolidate maritime, harbour and port legislation. The policy debate (Executive Council papers 24/14 & 24/15) held prior to commissioning the 2 MA Bills identified the long overdue requirement for modernising Falklands maritime legislation. That process identified the wide range of maritime, harbour and port issues which needed to be addressed.
- 5.7 Accessibility: *The process of modernising secondary legislation and regulations should be expedited to facilitate accessibility to the law and providing clarity on implementation.* The new legislation is intended to be published as Falklands law as opposed to having both Falkland law and UK law/legal instruments applied, as currently occurs. This in itself should make the law more readily accessible. There is however a lot of work still do be done to update secondary legislation so as to ensure it is compatible with the new law and that it supports policy objectives. That process should also provide clarity on the finer scale implementation issues and provide clarity to stakeholders.
- 5.8 Fit for purpose: *The programme of implementing secondary legislation should prioritise the elements of the MA Bills which maximise utility and benefits at the earliest opportunity.* The new maritime legislation covers a wide range of maritime issues. The Falkland Islands are frequently confronted with a wide and complex range of marine issues. The MA Bills are intended to address the full spectrum of current maritime issues although inevitably will need further development in the future. There are elements which have more immediate relevance and priority than others. These elements should have priority in the review and updating of secondary legislation. This process should ensure that secondary legislation/regulations are appropriate to the Falklands. It should also ensure that the application and impact of such regulations are clear and fully understood.
- 5.9 Cost effectiveness: *Implementing the maritime legislation should adopt a cost effective approach to maximising the impact of the new legislation and in identifying the best options for delivery.* As indicated the MA Bills cover a wide range of maritime matters. The process of introducing secondary legislation and regulations will be a major undertaking. In implementing legislation, there will often be a choice between whether the application of the regulatory framework is passive or active. In passive application the regulatory framework is there for when it is needed but may not consume a lot of resource in daily application. In the active approach the regulatory framework will test for compliance on either a sample basis or across the entire regulated sector if appropriate. Some areas may show greater benefits in quicker time than other areas and

these should be prioritised where appropriate. Cost effectiveness can also be achieved through using a mix of private and public sector resources as appropriate.

## **Choice of Options**

5.10 Option 2 is recommended as the preferred option in the short to medium term. It is the most realistic and will allow Government to implement its maritime legislation in a prioritized and efficient way.

Option 1 is considered untenable. Whilst the legislation could be commenced, the capacity to implement it would be very constrained. In terms of modernising and making progress on Maritime Administration, we would be going back to a time before the two Executive Council papers on developing maritime policy and legislation. Option 1 would not provide sufficient capacity to address many of the maritime matters facing the modern Falklands.

5.11 Option 3 is possible, but requires more commitment of time and financial resources than is immediately necessary. . Until some of the work set out in the initial work programme for option 2 is complete, it is unlikely to be possible or beneficial to specify the exact 'shape' of a future maritime administration.. In due course as detailed secondary legislation is developed, the Department of Natural Resources (Maritime Authority) will have to return to Executive Council for additional policy decisions on issues such as resourcing, and on scale and scope of implementation, particularly where there is a choice between active or passive implementation.

## **Consultancy**

5.12 The option of having a short term consultancy to advise in more detail on the operation of a Maritime Authority has been discussed. Previous consultancies and reports (Pinsent Masons & Fisher Associates) have set out the breadth of functions involved in modern maritime administration. The purpose of this consultancy is to have an experienced maritime administrator provide focused advice on the shape, scope and scale of the MA, appropriate to the legislation and the maritime tasks outlined above, and taking into account the needs of the Falkland Islands Government.

## **Maritime Authority**

5.13 In the short to medium term (at least 2 years) it is anticipated that the Maritime Authority will continue to be a FIG department and if the proposals set out here are agreed, it will contain the following key personnel:

Marine Officer/Harbour Master  
Deputy Marine Officer/Harbour Master  
Registrar of Ships  
Project Officer (secondary legislation/regulations)  
Legal drafting resource in L&RD (may be contracted)

This compares to the Fisher report which recommended a Maritime Authority of three staff in the first instance, possibly expanding to five at a later stage. The roles were identified as:

- Principal surveyor/Harbour Master
- Registrar of Ships/Maritime Law Compliance Officer

- Surveyor/Deputy Harbour Master/Port State Control Compliance Officer

The initial proposal here differs from the Fisher proposal, largely due to the extensive task of reviewing and introducing appropriate secondary legislation to give effect to the primary legislation. For example, it is likely to be some time before we have the relevant secondary legislation, and/or procedures around Port State Control and therefore, we propose to implement that function once the appropriate procedures are in place.

5.14 In the longer term there may be a case to develop the Maritime Authority it may take on new functions, which might include:

- Small and large ship survey capability (contract/part time/private sector)
- 24 Hour harbour control by MA
- SAR/Coastguard/Emergency response

## **5. Implementation**

5.1 Clause 4 of the Harbours & Ports Bill 2017 provides for the Governor to designate a body as the Falkland Islands Maritime Authority (MA). It also provides that the Governor may designate the department responsible for maritime, harbours and ports matters to be the authority (Department of Natural Resources). In respect of the Maritime Bill 2017 it states the “Authority” means the Falkland Islands Maritime Authority established under the Harbours & Port Ordinance 2017.

5.2 The new legislation modernizes, consolidates and improves accessibility. Other than in some specific areas (Port State Control for example), it does not entail new obligations. For the most part these obligations equally exist in current law. It is recognised that in order to make the primary legislation fully effective there will be a lengthy process of adopting and where necessary drafting secondary legislation and regulations.

5.3 In terms of the creation of the Maritime Authority (MA) and implementation of the new legislation a phased approach is recommended. In the first instance it is recommended that the existing arrangements be designated as the MA. This includes the Marine Officer/Harbour Master function within the Department of Natural Resources and the Registrar of Ships function within Department of Emergency Services & Island Security. . In the future proposals may be forthcoming to create a more identifiable MA structure, including dedicated and co-located MA personnel, or the reorganisation of roles within existing departments.

5.4 The shorter term actions and resources include:

- c) Designation of Department of Natural Resources as the Maritime Authority with Marine Officer/Harbour Master, deputy Marine Officer and Registrar of Shipping (DESI-Customs) continuing their existing roles and functions.
- d) Recruitment of a Project Officer to work in the MA together with Legislative Drafting resource to work in L&RD. The latter could be contracted resource working remotely. It is anticipated that the Project Officer will work within the MA to look at applied UK and FI secondary legislation and advise on the priority for amendment and promulgation, including the nature of the amendment. The Legislative Drafting

resource will be used to review the applied UK law and make it FI compliant so it works with the new Ordinances, together with drafting any specific secondary legislation and regulations where necessary.

- e) Commissioning a short term consultancy to advise in more detail on the operation of a MA.

## 6. Resource Implications

### 6.1 Financial Implications

	2016/17	2017/18	2018/19	Annual Recurring
	£	£		£
Operating Budget				
Consultancy		30,000		
Project Officer MA		25,000	50,000	50,000
Legislative drafting		15,000	45,000	45,000
TOTAL		70,000	95,000	95,000

If the requirement for reviewing and introducing secondary legislation and regulation continues beyond 2 years the cost will run at c £95,000, per annum. The long term requirement for updating and responding to new developments should run at a much more modest level although could take up c 1 month's legal drafting time each year. Either before the main legal drafting project concludes, or at about that time, there is likely to be some requirement to modify the staffing in the MA so we anticipate that the funding requirement is likely to continue. The consultancy proposed may also help to clarify the likely longer term requirements.

### 6.2 Human Resource Implications

In the short term the requirement for additional staff resource is set out in 6.4 above and includes:

- a) Project Officer within MA
- b) Legal Drafting Resource – this is more likely to be contracted remotely than employed directly.

It is anticipated that this additional resource should be for 2 years in the first instance. There is a view that the programme to review secondary legislation and regulations will in fact take rather longer. If it is a normal FIG 2 year contract for the Project Officer the option to extend will be included. On the current timetable for the legislation it is anticipated that this recruitment/resource could be put in place for January 2018, so half the forthcoming financial year at best. There is potential that the MA will evolve with a requirement for additional skill sets.

Any staff recruited from overseas will require access to accommodation. Based on the projected demand on the current 'contractor pool' of government housing, there may not be the capacity to accommodate this Project Officer postholder and any dependents.

This will be influenced in part by the recruitment timeline and therefore it may be that another contractor post is affected by the lack of government housing. In this case the Government may be required to secure housing from private sector landlords.

### 6.3 Other Resource Implications -

There may be a requirement to source additional office space for the MA Project Officer. The second floor/loft area of the Department of Natural Resources may be an option but requires some further development.

## 7. **Legal Implications**

The Bills giving effect to the new policy requirements were considered and approved for publication in the Gazette at Executive Council on 29<sup>th</sup> May 2017. It should be noted that significant secondary legislation will be required to give effect to this legislation which will require significant resource. Honourable Members should also note prioritisation of secondary legislation may need alignment to other industries such as fishing or oil. In addition significant liaison will be required on implementation between the Director of Natural Resources and the UK maritime authorities to ensure the correct level of assurance can be given to allow the repeal of orders directly applying UK legislation to the Islands.

## 8. **Environmental & Sustainability Implications**

The new legislation modernizes Falkland Islands maritime legislation which includes parts which provide protection for the environment and for addressing oil pollution.

## 9. **Significant Risks**

There are significant risks in not proceeding with the legislation or developing the Maritime Authority. These relate to the Falkland Islands Government's ability to discharge its functions in relation to maintaining a Red Ensign register and its wider Maritime Administration. Implementing the legislation and addressing the wider maritime issues will depend on having the right staff in place.

## 10. **Consultation**

An element of consultation was undertaken within the Maritime Sector with stakeholders at the time the policy options were developed through the process with Pinsent Masons and Fisher Associates.

Stakeholders will have the opportunity to peruse the Bills once they are published and sessions can be arranged to present the main features of the new law if there is a demand.

## **11. Communication**

The legislation will be published in the normal way. In due course it will be for the MA to publicise anything noteworthy arising either from the new legislation or as a result of progressing the wider maritime issues.