



Foreign and Commonwealth Office

London SW1A 2AH

1 May 1982

Prime Minister

MS

*No longer of immediate relevance -
but you may still wish to see.*

*A.F.C. 4/5**Den John*

Falkland Islands: Implementing
Legislation

In your letter of 28 April you asked whether the draft protocol on the Special Interim Authority would require to be implemented by an Order in Council and whether such an Order would need to be laid before Parliament.

The Haig proposals of 23 April consist of three documents: a Memorandum of Agreement, the Protocol on the Special Interim Authority and a letter from the US Government accepting the verification function. All three would require implementing legislation. Our Legal Advisers have been considering the nature and content of such legislation and have been preparing, on a contingency basis, drafts of the instruments which they think would be necessary; and in so doing they have kept in close touch with the Law Officers' Department. Their view is that an Act of Parliament would not be required, but that amendments would be needed to the existing Falkland Islands constitutional instruments. An Order in Council conferring privileges and immunities on the Special Interim Authority and persons connected with it, and on US observers, would also be necessary.

The existing constitutional instruments consist of Letters Patent, Royal Instructions and the Falkland Islands (Legislative Council) Orders 1948 to 1977. Unless the settlement excluded the Dependencies, we do not think the Letters Patent would have to be amended. The other two instruments would however need amendment to provide for Argentine members in the Executive and Legislative Councils and for decisions and laws to be approved by the Special Interim Authority. The amendments to the Royal Instructions are not subject to any Parliamentary procedure but the Order amending the Legislative Council Orders would have to be laid before Parliament after it had been made. The amending Order would not, however, be subject to any negative resolution procedure.

The Protocol and the US letter accepting the verification function require privileges and immunities to be

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accorded to the Special Interim Authority, to persons connected with it and to the US observers. Although it would be possible to do this by a local ordinance once British administration has been restored it would in the circumstances probably be preferable to do it by an Order in Council made under the British Settlements Acts 1887 and 1945 (the legislation under which the Legislative Council Orders would be amended). This Order would also have to be laid before Parliament after it had been made but, unlike Orders made under the International Organisations Act 1968 conferring privileges and immunities on international organisations, would not be subject to any affirmative (or negative) resolution procedure. Although the scale of privileges and immunities would be higher than would normally be justifiable, in the very special circumstances of this case we would not expect the Order to provoke much, if any, criticism in Parliament.

I am copying this letter to David Omand (MOD), David Wright (Cabinet Office) and Henry Steel (Law Officers Dept).

(J E Holmes)
Private Secretary

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FALKLAND ISLANDS: CONSTITUTIONAL POSITIONNote by the FCO Legal Adviser

The "traditional local administration" of the Falkland Islands has to be viewed within the framework of the three basic constitutional instruments providing for the government of the colony.

2. The Letters Patent of 1948 (modified in minor respects in 1954 and again in 1962) provided for the appointment of a Governor and Commander-in-Chief in and over the Colony [i.e. the Falkland Islands themselves] and the Dependencies. The term "Governor" in the Letters Patent is defined as including "the Officer for the time being administering the Government". Under the Letters Patent, the Governor has very wide-ranging powers, including:-

- (a) the power to make laws for the peace, order and good government of the Dependencies;
- (b) the power to appoint judges and other officers;
- (c) the power, for cause shewn to his satisfaction, to dismiss or suspend from the exercise of his office and person holding public office in the Colony;
- (d) the right of pardon;
- (e) subject to any law for the time being in force in the Colony, the power to make and execute grants and dispositions of land within the Colony or the Dependencies.

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3. The Letters Patent also constitute an Executive Council consisting of "such persons, appointed in such manner as We shall direct by Instructions" (these are known as Royal Instructions - see paragraph 4 below). Finally, they reserve to the Secretary of State a power of disallowance of laws made by the Governor for the Dependencies.

4. The Royal Instructions of 1949 (as amended in 1951, 1955, 1964, 1973 and 1977) provide for the constitution of the Executive Council which consists of:

- (a) two ex-officio Members, namely the Chief Secretary and the Financial Secretary;
- (b) two Unofficial Members appointed by the Governor from among persons who do not hold offices of emolument under the Crown in the Colony;
- (c) two Elected Members, elected by the Elected Members of the Legislative Council from those Elected Members.

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The Royal Instructions also provide that if inter alia an ex-officio Member of the Executive Council is administering the Government, the Governor may appoint a person to be a temporary Member for the period of the vacancy. The Executive Council is not to be summoned except by the authority of the Governor; and the Governor is, so far as it is practicable, to attend and preside at all meetings of the Executive Council (provision being made that, in his absence, he may appoint another Member, or, if no such Member is appointed, the Senior Member of the Council actually present shall preside). The Royal Instructions then go on to provide that, in the exercise of his powers and the performance of his duties, the Governor shall consult the Executive Council, except in cases:-

- (a) which are of such nature that, in his judgment, material prejudice would be sustained by consulting the Executive Council;
- (b) in which the matters to be decided are, in his judgment, too unimportant to require their advice; or
- (c) in which the matters to be decided are, in his judgment, too urgent to admit of their advice being given in time.

The Governor may act in opposition to the advice given to him by the Members of the Executive Council; but is then required to report to the Secretary of State at the first convenient opportunity. Certain specified categories of laws cannot be made by the Governor without the approval of the Secretary of State (exception being made for cases of urgency when the Governor must report to the Secretary of State with the text of the law, giving his reasons for assenting to it).

5. The third basic constitutional instrument is the Falkland Islands (Legislative Council) Orders, 1948 to 1977, made in pursuance of powers conferred by the British Settlement Acts, 1887 and 1945. The Legislative Council consists of:

- (1) the Governor, as President;
- (2) two Ex-officio Members;
- (3) six Elected Members.

The Ex-officio Members are the Chief Secretary and the Financial Secretary. Under the Orders, no person is qualified to be elected as an Elected Member or, having been so elected, to sit or vote in the Council who is "by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power of State" (this would not exclude a nominated Member). Broadly similar provisions apply in the case of vacancies on the Legislative Council as apply in the case of vacancies on the Executive Council.

6. The Dependencies are legally distinct from the Falkland Islands but are, as already indicated, administered from the Falkland Islands. The Executive Council is common to both the Falkland Islands and the Dependencies. On non-legislative matters relating to the Dependencies, the Governor must consult the Executive Council (subject to the exceptions indicated in paragraph 4 above).

7. The question of who exercises the functions of Governor, whether with respect to the Falkland Islands or with respect to the Dependencies, when the Governor is absent is governed by Articles 7 and 8 of the Letters Patent of 1948. In the present circumstances, the relevant provision is Article 7(1) which reads as follows:-

"(1) Whenever the Office of Governor is vacant, or the Governor is absent from the Colony or is from any cause prevented from, or incapable of, acting in the duties of his Office, then such other person as We may appoint under Our Sign Manual and Signet, or if there is no such person in the Colony so appointed and capable of discharging the duties of the administration, the Senior Member of the Executive Council then in the Colony and so capable, shall, during Our pleasure, administer the Government of the Colony".

In normal circumstances, the Chief Secretary would act as Officer administering the Government and would be able to exercise all the powers of the Governor. If the Chief Secretary were absent from the Falkland Islands (as, it is understood, he is at present) the next Senior Member of the Executive Council would be the Financial Secretary. If the Financial Secretary were also absent, then the next most Senior Member of the Executive Council would be the most Senior of the Unofficial (i.e. appointed) Members of the Council or, alternatively, it would of course be open to Her Majesty to appoint a person to perform the functions of the Governor under Article 7(1).