EXECUTIVE COUNCIL

PUBLIC

Title of Report: Revised Laws Project - Updating adopted United Kingdom statutes from 2017

Paper No: 221/15

Date: 16 December 2015

Report of: Law Commissioner

1.0 Purpose

The purpose of this paper is to provide Executive Council with additional information on policy proposals about updating adopted United Kingdom statutes from 2017.

2.0 Recommendations

Executive Council is recommended to agree:

(a) that a general policy of "automatic updating" of adopted United Kingdom laws is reintroduced from the date of publication of the revised laws in 2017; and

(b) that recommendations for exceptional cases, ie where there is a strong case for the adoption (or retention) of a United Kingdom law which is no longer in force in the United Kingdom, will be put to Executive Council and the Legislative Assembly in due course as part of the revised laws project.

Responsible Officer: Law Commissioner

Due date: See project milestones in the Project Initiation Document

Publication: Publication of this paper is recommended

Executive Council resolved that further detailed discussion was required before agreeing the recommendations.

3.0 Additional Budgetary Implications

None.

4.0 Summary

4.1 The basis for the recommendation of this paper is summarised as follows:

(a) Movement towards greater self sufficiency in Falkland Islands law is important; it has already been achieved to a considerable extent (see the lists of laws in paragraph 6.4 below), and is continuing

(b) In some areas where social conditions and policy in the United Kingdom and the Falkland Islands are the same, it makes sense to adopt United Kingdom law rather than reinvent the wheel ourselves (avoiding duplication of policy, legal, and drafting resources)

(c) Where we decide to adopt law, it will normally make sense to adopt that United Kingdom law including future amendments; to ensure that the law continues to match real-world changes

(d) The Law Commissioner will monitor and report to Executive Council and the Legislative Assembly on adoption of United Kingdom law and will, in particular:

(i) consider when it is practicable and helpful to move to local law; and

(ii) monitor all future amendments of United Kingdom law to check that the law remains Falkland Islands compatible.

5.0 Background

5.1 In September 2015, under cover of paper 164/15, Executive Council considered the Revised Laws Project Initiation Document (PID). The PID built on the proposals for revision and publication of our laws made in the Davies/Greenberg consultancy report.

5.2 A number of policy principles underpinning the project plans were summarised in 164/15 (and are duplicated as Annex 1 to this paper for ease of reference; see paragraph (d)(iv) in particular). Executive Council approved most of those policy principles.

5.3 However, Executive Council asked for more information about the proposals for the process of continuing to update United Kingdom laws which we have adopted as our own, after they are published in 2017. The proposals involve the concept of "automatic updating" of those adopted United Kingdom laws.

6.0 How does adopted United Kingdom law fit into Falkland Islands law in general?

6.1 United Kingdom statute law applies to the Falkland Islands in two ways:

(a) the *United Kingdom* legislators have determined that a particular UK law should apply to the Falkland Islands; or

(b) the *Falkland Islands* legislators have determined that a particular UK law should apply to the Falkland Islands (ie "adopted" laws).

6.2 We are concerned here with "adopted" UK statutes.

So how much law are we talking about, and what does it deal with?

6.3 We currently rely on a substantial number of adopted laws. We have just under 550 of our own statutes, and have adopted, very approximately, 1000 UK statutes.

6.4 An analysis of the subject areas currently used to categorise laws published in the Falkland Islands gives a very broad brush picture of how our laws are split between our own bespoke laws and UK derived laws (most of which are adopted, rather than applied by UK authorities):

Entirely FI bespoke law:

Banking
Co-operative societies
Currency
Economic development
Elections
Electricity
Immigration
Pensions
Planning and building
Police
Ports and harbours
Printing and publishing
Road traffic
Social security
Town services
Taxation

Largely FI bespoke law:

Agriculture
Customs and excise
Education
Employment
Fisheries
Liquor licensing
Oil and mineral resources
Prisons
Public health
Telecommunications

Mixture of FI bespoke law and UK derived law:

Animals
Armed Forces
Civil procedure
Companies and partnerships
Constitutional and administrative
Contract
Courts and legal services
Criminal law [to become largely FI bespoke law when Crimes Ordinance is commenced]

Criminal procedure [to become largely FI bespoke law when Criminal Procedure and Evidence Ordinance is commenced]
Entertainment and recreation
Environmental protection
Explosive substances
Family (children and divorce)
International relations
Land (sale/purchase & mortgage of property etc)
Medicines and pharmacy
Mental health
Money (loans, stocks)
Post office
Registration and census
Statutes (rules of interpretation etc)
Trade and industry (unions, weights & measures etc)
War and emergency

Largely UK derived law:

Aviation
Bankruptcy and Insolvency
Charities
Evidence
Intellectual property
Nationality
Shipping and navigation
Succession (eg rules about wills)
Tort (eg liability for slander, fatal accidents)

Entirely UK derived law:

Admiralty
Agency
Auction
Bills of exchange (financial transactions)
Bills of sale (transfers of property)
Carriers (carriage of goods)
Civil rights and liberties
Ecclesiastical
Extradition
Highways
Insurance
Landlord and tenant
Limitation of actions
Trusts

7.0 Why do we need to borrow law from the UK?

7.1 As a historical starting point, the general rule was that British colonists would "carry with them … so much of the English law as is applicable to their own situation and the condition of the [colony]". In this way, "statutes of general application …[ie] laws not based upon politics or circumstances peculiar to England", were routinely adopted across the British Empire (*Roberts-Wray - Commonwealth and Colonial Law*).

7.2 We have obviously moved on significantly from that position, and have built up a substantial statute book of our own to replace many English laws with our own bespoke Ordinances and regulations. However, like some other British Overseas Territories, we still rely on a fairly large number of United Kingdom laws to fill the gaps where our policy and law making resources have not yet enabled us to

make our own bespoke policies and laws. We have neither party political mechanisms nor enough dedicated policy officers within government to yet support the sort of detailed policy making which is required for complete self sufficiency in these areas.

7.3 Whilst it is accepted that it is desirable for the Falkland Islands to work towards greater self sufficiency in its policies and legislation over time, the pragmatic solution of borrowing policy and law in some areas from our UK parent jurisdiction is an effective solution to our resource limitations in the short to medium term. If the United Kingdom has developed a policy and law in a subject matter which is relevant to the Islands and can be readily applied here; adopting that law is an attractive and effective alternative to duplicating the policy and legislative drafting work with our own resources. The concept continues to work in practical terms because of the strong cultural ties which remain between the Falkland Islands and the United Kingdom - a broad familiarity throughout the Falkland Islands with UK society and the law that underpins it is something we can capitalise on.

8.0 Problems caused by reliance on "old" adopted UK law

8.1 The Revised Laws project's main objective is to improve accessibility to the law, and it aims to do this by publishing all our law in one place; on-line. However, the form of our current reliance on UK law creates a potential significant difficulty in achieving that.

8.2 That is because most of the adopted UK law applying in the Falkland Islands is old UK law, which is no longer in force in the United Kingdom (most of our adopted UK law was "frozen" with effect from 31 July 2004).

8.3 This makes our law inaccessible because:

(a) only *some* of that old UK law is still publicly available;

(b) what old UK law is publicly available is difficult for an ordinary member of the public to identify (in terms of identifying the correct version of the law);

(c) whilst the old UK law is available through commercial publications, they are very expensive to access;

(d) there are decreasing numbers of lawyers (in the Falkland Islands and elsewhere) who have worked with, and so are familiar with, the old UK law - and any familiarity will often be faded - so lawyers find it difficult to advise on the old UK law as it applies to the Falkland Islands, even if they can identify what the relevant law is;

(e) because the law has moved on in UK, so have the cases which help us interpret the laws - ie there is less and less relevant case law on which the lawyers and courts in the Falkland Islands can rely on to understand what the laws mean.

8.4 Inaccessibility of the law created by our reliance on old UK law, in turn, threatens the rule of law and the credibility of our laws, and can act as a barrier to economic development.

8.5 For these reasons, Members have accepted the general policy principle that we should revise our laws by bringing our adoption of UK law up to date before we publish the law in 2017. The process will involve wide consultation so that appropriate exceptions may be made if necessary; ie where we have sufficiently good reason to wish to rely on old UK law in a few exceptional cases.

8.6 The project plan also proposes that general policy position should continue after publication of our laws in 2017; meaning that the application to the Falkland Islands of any adopted UK law should be automatically updated (ie if a United Kingdom law which applies in the Falkland Islands is amended or replaced, the amending or replacing law will automatically apply in the Falkland Islands).

8.7 However, Members expressed concerns about the recommendation for automated changes to Falkland Islands law, because of the potential for that automatically adopted law not to reflect Falkland Islands Government policies.

9.0 The history of automatic updating of adopted UK laws in the Falkland Islands

9.1 The concept of automatic updating of UK law adopted in the Falkland Islands is not new. The automatic updating of UK law adopted by the Falkland Islands as first explicitly introduced in 1977 (and the Attorney General suggested to the then Legislative Council in 1987 that the explicit introduction of automatic updating of UK adopted law was simply reflecting what had long been intended).

9.2 That process of automatic updating continued through until 31 July 2004, when the application of most (but not all) adopted UK law was "frozen"; ie automatic updating was largely halted. Some automatic updating of the law continues (for example in merchant shipping law).

9.3 Halting the automatic updating of UK law was intended to be a temporary step to allow the then Law Commissioner to complete the updating of the Revised Edition of the laws. That work was never completed, so the "freeze" was never lifted; pending a new law revision and publication project.

9.4 Whilst the Legislative Assembly always had the ability to "dissapply" an adopted UK law at any time, as part of the law revision project in 1992 a new mechanism was introduced to allow adopted UK law to be "disapplied" by secondary legislation, thus providing more flexibility in the adoption (and disapplication) of UK law. Disapplication statutes would sometimes be drafted so that the relevant adopted UK law was deemed never to have had effect in the Falkland Islands.

9.5 In short, automatic updating was previously in place for at least 27 years, and appeared to work satisfactorily.

10.0 Why is "automatic updating" of UK law recommended?

10.1 Automatic updating of adopted UK law is recommended for two main reasons:

(a) it secures the best accessibility, clarity, certainty, and coherence for our laws; and

(b) it is the most effective way to take advantage of adopted UK law; with the alternatives being resource heavy.

Accessibility, clarity, certainty, and coherence

10.2 A policy starting point of reliance on the current versions of adopted UK law will make accessibility to the law much simpler and will make our laws clearer, more certain, and more coherent. If it is determined that adopted UK law is not updated automatically, then our adopted UK law will always be a certain degree (likely 3- 6 months, or more) behind the law as it applies in UK.

10.3 This means that having identified that some UK laws have been adopted by the Falkland Islands, users of the law will need understand that it is not the same version that applies in UK. This introduces an inherent complexity in our law; making it less clear, less certain, and less coherent. The user will have to ask themselves, if it is not the same version as UK, what version is it? They will similarly have to bear in mind that if the UK law applying in the Falkland Islands is different from UK, the changes already made in UK may be applied in the Falkland Islands in the future, although they won't know if that will happen, nor when.

10.4 Maintaining adopted UK law behind current UK law also has real and significant implications for accessibility. Whilst it *may* be possible to provide direct access to the relevant old version of the adopted UK law as it applies in the Falkland Islands, initial investigations of the technical solution for the project web-site suggest that this may not be an affordable nor realistic option.

10.5 Accessibility is a very significant driver behind the project recommendations, and the importance of accessibility was set out in detail in the project initiation document, ie; more effective legislature, more effective access to justice, fairer government, and more efficient economy. To reject the proposal for automatic updating is to introduce a potentially very significant level of compromise in terms of the objective of achieving excellent accessibility for our laws.

10.6 It may be argued that adopted UK laws only being a few months behind should not be that significant to accessibility, clarity, certainty, or coherence, but that misses the point that one of the main benefits of adopting UK law is the alignment of FI and UK systems - all users of the law can understand and benefit from the law being the same as in UK. This is in terms of; accessibility, familiarity, relevance of UK public guidance, text books, and legal advice etc. The adopted UK law being a few months behind in its application to the Falkland Islands immediately makes it something different and unfamiliar, and the advantages of borrowing from UK, at least in terms of accessibility, clarity and certainty, begin to fall away sharply.

10.7 This is not to argue that all our law should be more like that in UK; of course we must have our own laws to suit our own unique circumstances. But if we do choose to fill gaps with something else, ie where we *don't* have our own bespoke laws, the best way doing this is generally with current UK law, not with old UK law.

10.8 The recommendation is only that automatic updating be the policy starting assumption, and does recognise that exceptions may need to be made to it in some exceptional cases where there is good reason to stick with an old version of UK law.

Effectiveness

10.9 The reason that we adopt UK law is two fold: (a) we want to take advantage of the work of the UK authorities in developing a policy and law which we believe would also be suitable for the Falkland Islands; and (b) we do not have the policy nor law making resources to formulate our own policies and laws in all relevant areas; nor to maintain a rate of change of policy and law akin to the UK.

10.10 The alternative option would be a considered process for every change that is made in the UK to our adopted laws; in terms of whether or not to accept a change in the Falkland Islands. However, there is a real risk that a considered process, rather than an assumption that we wish to rely on current UK law, would mean that we would become bogged down in the detail (but without the resources to underpin that exercise) and would increasingly slip behind with the task. In short, our adopted UK law would quickly become out of date; and the advantages to be had of adopting UK law would, again, quickly begin to recede.

10.11 By way of example, in 2014, the United Kingdom passed 30 general Acts (ie discounting local Acts), and made 3,486 statutory instruments. Whilst only a very small proportion of that legislation is likely to automatically apply to the Falkland Islands under an automatic updating regime, detailed consideration of even a small proportion of that volume of law would potentially involve a significant amount of Legislative Assembly and officer time. If the starting point is that new UK law will not be enacted in the Falkland Islands until specifically considered by the Assembly, the Assembly is bound to wish to consider the law in more detail than if it accepts the general principles of automatic updating. A brief analysis of the UK laws passed in 2014 is included in Annex 2 to this paper by way of example year.

10.12 When considering the analysis in Annex 2 to this paper, however, it should be noted that after the exercise has been conducted to bring the current application of our adopted UK law up to date, there is likely to be slightly more automatic updating than can be seen in the example year. That is because our reliance on adopted UK law is now so very far out of date, that changes made in UK in 2014 could often not be linked back to our adopted UK law purely because of developments of the law in UK over time, rather than because the laws are in areas where we have no adopted UK law (for

example, although the Data Retention and Investigatory Powers Act would not apply through automatic updating as our law currently stands, the subject does reveal a gap in our regulation in telecommunications and security, which *may* be recommended be addressed by adopting earlier relevant UK legislation).

Disadvantages of automatic updating

10.13 Automatic updating of UK law *does* mean that there will be occasions when an adopted UK law may have come into force in the Falkland Islands which is not appropriate for the Falkland Islands. However, it is worth examining what would happen in those instances.

10.14 On some occasions, such a law would simply "beat the air" - for example through the introduction in the UK of an administrative mechanism which does not exist in the Falkland Islands - meaning that the law could not work, and would most likely do no harm in its ineffectiveness.

10.15 If, on the other hand, the relevant law was determined to be effective but contrary to Falkland Islands Government policy, it could be disapplied - on an urgent basis if considered necessary. But real urgency is likely to be extremely rare when, in most cases, a policy of non-enforcement could be sensibly put in place pending disapplication of the relevant law during the ordinary process.

10.16 It is also noted that in many cases laws are introduced in UK with delayed commencement; giving the Falkland Islands time to choose to disapply a relevant law before it were to come into force in any event (this is especially likely to be the case in relation to laws involving significant policy change; where the UK recognises the need for planned processes before commencement). The monitoring role of the Law Commissioner should also enable an early warning process for controversial/significant issues addressed in bills under consideration in the UK; allowing planned action to be taken in the Falkland Islands before a relevant law comes into force.

10.17 In summary, it is believed that the disadvantages of automatic updating can be much more readily mitigated than the disadvantages of the alternative.

11.0 The argument against automatic updating - legislative control

11.1 An argument made against the reintroduction of automatic updating of adopted United Kingdom law is that the concept does not involve Legislative Assembly taking full ownership of and responsibility for the law which has effect in the Falkland Islands. But what does that actually mean?

11.2 The argument suggests that the Assembly should consider every proposed law before it is enacted in the Falkland Islands; clause by clause. But the mere fact that we must borrow laws from another jurisdiction illustrates that

is simply not possible - if we had the time and resources to formulate the detailed policy underpinning every law and to consider every single law, clause by clause, we would presumably do so.

11.3 Instead the Legislative Assembly, by adopting United Kingdom law, is adopting broad policy concepts in the relevant areas of law. We adopt those broad concepts from the UK as having clear relevance to and synergy with our own British society. To say that those broad concepts are only right for our society at a fixed point in time, after which any change to them must be specifically approved by the Assembly before they can have effect, does not follow through with the overarching principles of adoption of UK law.

11.4 The point being that there has been no examination by this Assembly (nor by former Legislative Councils) of each element of each UK law when they were adopted. So the concept of automatic updating is consistent with the Assembly taking a positive and proactive choice that it wishes to rely on a swathe of United Kingdom laws for good broad policy and efficiency reasons.

11.5 It is, of course, recognised that any one of those laws may be found not to be suitable for the Falkland Islands in due course. But that will not be the case purely because the adopted law been subject to change in the UK in a way that no longer reflects the requirements of the Falkland Islands. It is just as likely to be that whilst there been no change to the relevant adopted United Kingdom law, the requirements of the Falkland Islands have moved away from the law which we previously adopted. In either case, we have mechanisms to disapply the relevant law.

11.6 The law needs to constantly evolve to reflect the needs of an ever changing and developing society. Lurking within the law at any time will be elements which are impracticable, unenforceable, or do not reflect current policy; the law is always trying to catch up with the society it serves. We cannot pretend that at any particular date the law is perfect. But it is the concept of identifiable perfection at a certain point which underpins the argument against automatic updating, ie we would be saying that we can only move away from perfection with the explicit and detailed consideration of the Assembly.

11.7 The pragmatic approach, on the other hand, is to recognise that the best chance we have of making the concepts underpinning adoption of UK law work for us is to apply changes to any adopted UK law automatically, and then to disapply anything which is subsequently determined by the Assembly as unsuitable for the Falkland Islands. To do it the other way around - to only bring in any change to UK law after it has been specifically approved by the Assembly is to bring the disadvantages of inaccessibility, uncertainty, lack of clarity, lack of coherence, and inefficiency, on the false premise that the Legislative Assembly must take that route to demonstrate its effective control. The Assembly is perfectly entitled to take the positive and proactive step of re-introducing the concept of automatic updating,

which served us well for decades, and to demonstrate its effective control by disapplying, at whatever time, and for whatever reason, adopted laws which are subsequently determined not to be suitable for the Falkland Islands.

12.0 Proposed role of the Law Commissioner in the process of updating adopted UK laws

12.1 This final paragraph is included to give further context to the issues surrounding the updating of our law after 2017, and in particular to address misconceptions about the role of the Law Commissioner which have become apparent during discussions about the ongoing project for updating our maritime legislation.

12.2 It is currently proposed that, following publication of our laws in 2017, as a minimum, an officer with a part time role as Law Commissioner is required to monitor development in UK laws and to report to the Legislative Assembly.

12.3 The Law Commissioner's quarterly reports to the Legislative Assembly will list every new UK statute made in the previous quarter and make a recommendation:

(a) if the statute *does not* already apply to the Falkland Islands through the effect of automatic updating;

(i) that the statute *should* be applied to the Falkland Islands; or

(ii) that the statute *should not* be applied to the Falkland Islands;

(b) if the statute *does* already apply to the Falkland Islands through the effect of automatic updating;

(i) that the statute *should continue to apply* to the Falkland Islands; or

(ii) that the statute *should be disapplied* in respect of the Falkland Islands.

12.4 That is not to say that the existence of a Law Commissioner will keep all Falkland Islands laws up to date. The Law Commissioner can only ever be a part (arguably a small part) of the process for the Falkland Islands government in developing and updating its policies over time and reflecting them in updated law.

12.5 It is anticipated that the Law Commissioner will only be in a position to recommend that a small proportion of new or amending UK laws be adopted by the Falkland Islands as a simple solution to keeping our laws up to date. Most change in UK law will have to be the subject of detailed

policy development and legislative drafting work in the Falkland Islands in the normal way. The most common scenario will be that a change in UK law reflects a policy which requires substantive modification before it can be applied to the Falkland Islands. The Law Commissioner will not have the capacity nor technical expertise for that policy development work, which must fall to the relevant department, where the subject knowledge lies.

12.6 The proposed part time provision of a Law Commissioner continuing from 2017 will provide a broad monitoring role only; the officer would not have a substantive policy formulation nor legislative drafting role.

12.7 One of the work streams of the Revised Laws Project is to formulate options for improved processes for modernising and localising our laws. A key option proposed is likely to be a full time Law Commissioner supplemented by additional legislative drafting capacity. However, it is difficult to perceive how even those additional proposals, if accepted, could relieve departments of the need for sufficient capacity to monitor policy developments in their own fields of technical expertise and to do the policy development work needed to keep our laws up to date.

13.0 Financial Implications

There are no immediately identifiable financial implications arising from the issues addressed in the paper. However, a decision whether or not to reintroduce automatic updating may impact on the best technical solution available for publication. The best technical solution is currently under investigation. As soon as any financial implications are identified, they will be brought back to Executive Council as part of the regular project monitoring and management processes.

14.0 Legal Implications

The legal implications arising from the issues are set out in the body of the paper.

15.0 Human Resources Implications

There are no immediate Human Resources implications arising from the issues addressed in the paper. However, if the recommendation of the paper, ie for a general policy of automatic updating, is not accepted, it is believed that the processes for maintaining the laws from 2017 will be less efficient, with the potential for impact on officers' time.

Policy principles underpinning the Project Initiation Document *(extracted from paper 164/15 for ease of reference)*

"5.6 For ease of reference, the policy principles on which the detailed project proposals are based, and which Members are asked to endorse, are summarised as follows:

(a) access to a statement of the laws of the Falkland Islands should be made available on-line, but with hard copy access also enabled

Reason: to maximise accessibility - whilst most people will find on-line access easy and convenient, some may not have access to a computer, so should be able to obtain hard copies (eg by printing them at the library);

(b) on-line access should be free of charge, and Falkland Islands residents should not be charged for printing hard copies (but it will be explored whether it will be possible and appropriate for charges to be made; for example, for reprinting multiple copies overseas under licence, and further recommendations will be made on this aspect in due course)

Reason: the fundamental importance of maximising accessibility to our laws within the Falkland Islands should be recognised by making that access free of charge. Requiring payment for viewing the laws on-line outside of the Falkland Islands is likely to require a system which would be disproportionately complex and expensive, so it is not recommended that there be any distinctions made in providing free on-line access. However, a licensing system for re-printing the laws overseas may not be too difficult to impose, so should be explored; on the basis that overseas professionals using copies of the laws as part of their business, for example, should pay for that use;

(c) the full text of local Ordinances and their secondary legislation should be published in updated form (ie incorporating amendments) but will be subject to minimal revision (although recommendations will be made for repeal of laws which are no longer of any practical utility)

Reason: publishing a law incorporating its amendments makes it easy to access and understand, and that will be achieved by this project. However, the opportunity will not be taken to fully consolidate (ie to merge laws dealing with similar subject matters) nor to re-write our laws. The policy aim is to achieve an appropriate balance of a good product delivered within a reasonable time representing good value for money (ie being realistic as to what can be achieved with a reasonable level of resource rather than aiming for the very highest standard - which is likely to be difficult or impossible to achieve within reasonable limits);

(d) recommendations will be made to the Legislative Assembly to update the application to the Falkland Islands of United Kingdom law which has been

adopted by the Falkland Islands (ie United Kingdom law which applies by decision of FI authorities, not the decision of UK authorities), based on the following assumptions -

(i) any United Kingdom law which has already been adopted by the Falkland Islands, should be such law as continues to apply in the United Kingdom at any time; *unless* there are exceptional reasons for the continued application in the Falkland Islands of a United Kingdom law which is no longer in force in the United Kingdom

Reason: reliance on laws which are no longer in force in the United Kingdom threatens the rule of law and the credibility of our laws; it is confusing for users, makes accessibility more difficult, and can act as a barrier to economic development because of the perceptions that situation creates. The starting point should be that whilst we wish to move to localisation of our laws over the longer term, borrowing from United Kingdom law in the mean time to fill some gaps in our own laws is the most efficient way to ensure that our statute book is adequate. However, if our statute book is to be coherent and practical, the United Kingdom law which is borrowed should ordinarily be that which continues to be in force in the United Kingdom. This means that there will be some work involved for departments in moving to the application of current United Kingdom law (although if that work were very significant, that might provide a reason to depart from the assumption on an exceptional basis);

(ii) because most law made or commenced in the United Kingdom since 31 July 2004 does not have effect in the Falkland Islands, that position should be reviewed - but on the basis of an assumption that new United Kingdom law should NOT apply to the Falkland Islands *unless* application of the law appears to be the most efficient way to address a clear and obvious need for regulation in the Falkland Islands, and the proposed application would be practicable (ie with only minimal amendments made to the law in its application to the Falkland Islands)

Reason: one aim of the project is to update the United Kingdom law which has been adopted by the Falkland Islands; to best suit the needs of the Falkland Islands. That does not mean that we need to try and replicate a similar level of regulation as can be found in the United Kingdom. Instead we should only seek to apply new United Kingdom laws as part of this project if there is both a clear and obvious need for the Falkland Islands, and the result would be practicable.

(iii) the Law Commissioner must take a disciplined and robust approach to the analysis of United Kingdom law so as not to get bogged down in policy or technical detail of those laws but instead to meet the ambitious timeframe for publication of the laws by 31 March 2017. Therefore, if it appears that there may be good reason for the Falklands

Islands to consider policy issues surrounding the potential application of a United Kingdom law to the Falkland Islands, or if it appears that it would be desirable for a law to apply but that technical work is required to adapt it to the requirements of the Falkland Islands - such work must simply be flagged and referred for consideration and progress outside the project (ie it will be referred for potential inclusion in the policy priorities work list, or in the legislative drafting priorities work list). This approach is fundamental to the process of bringing the application of United Kingdom laws in the Falkland Islands up to date efficiently; by allowing the Legislative Assembly to approve a list of laws for application to the Falkland Islands (rather than considering each law individually when presented with the list of laws scheduled to the Law Revision and Publication Bill).

Reason: It is right that the opportunity be taken as part of this project of publication of our laws to update the United Kingdom law which has been adopted by the Falkland Islands. However, that exercise should not become a distraction from the main goal of the project, which is the publication of our laws within a reasonable timeframe. In particular, the Legislative Assembly will need to have confidence that the Law Commissioner has followed these general principles to ensure that any law which should properly be the subject of any significant policy debate is separated out from this process of bringing the application of United Kingdom laws up to date, and can be considered by the Executive and Legislature in due course outside of this project;

(iv) the continued application of United Kingdom law as referred to in the paragraphs above will be automatically updated (ie if a United Kingdom law which applies to the Falkland Islands is amended or replaced in the United Kingdom, the amending or replacing law will automatically apply in the Falkland Islands). This automatic application will be balanced by a quarterly report to the Assembly from the Law Commissioner to enable the Assembly to address any concerns arising from the automatic application of a particular law (ie the Assembly may do that by amending the application of the particular law to the Falkland Islands, or by repealing it, or by repealing it and replacing it with a new local law);

Reason: as set out in paragraph (i) above, there is an assumption that the United Kingdom law which applies will be such law as continues to apply in the United Kingdom at any time, and an automatic process will ensure that this continues to be the case even as United Kingdom law changes in the future. However, this should be balanced with a control mechanism which ensures that the Legislative Assembly will regularly consider each new law that has been automatically applied to the Falkland Islands, and will consider whether that should continue to be the case, ie whilst the system incorporates a level of automatism for speed, convenience and consistency in updating the application of United Kingdom law

to the Falkland Islands, that will be balanced with regular Legislative Assembly oversight;

(e) the continued resourcing of the statutory function of Law Commissioner (whether as a distinct post, or carried out as part of another role within the Attorney General's Directorate), is critical to ensuring that the publication of the laws of the Falkland Islands continues to be kept up to date

Reason: an essential element of the process of keeping our laws up to date involves the regular reporting to the Legislative Assembly by the Commissioner on the question of what new United Kingdom laws have been made, and whether and how any new law should continue to apply, or should apply, to the Falkland Islands. The Law Commissioner also needs to report annually on the effectiveness of the publication methods. The efficiency and effectiveness of this role points to the ongoing statutory duty of an individual, rather than a collective duty of the Directorate - which would risk that the duty is subsumed in the face of other Directorate operational priorities (as has happened in the past). It is estimated that the ongoing role would be the equivalent of 1/3 to 1/2 of a senior lawyer."

Annex 2 - Brief analysis of UK legislation made in 2014 (as an example)

1. PRIMARY LEGISLATION:

- **Antisocial Behaviour, Crime and Policing Act**

The Act deals with a wide range of issues as follows; antisocial behaviour, harassment, dangerous dogs, firearms, protection from risk of sexual harm, prevention of child sexual exploitation, forced marriage, policing, and extradition. Most provisions would not apply to the Falkland Islands under a policy of automatic updating because:

- they develop areas of law where we have our own legislation (eg policing and firearms, and crimes and criminal evidence and procedure [when brought into force]);
- they do not update existing adopted law because our adoption of UK law is so out of date

Appears to have little or no effect through automatic updating. FIG should consider potential relevance of policy for development of local legislation on the basis of a policy of keeping criminal procedure, in particular, aligned with UK where possible.

- **Care Reform Act**

The Act contains provisions relating to adult care, support and health. Much of the provisions simply do not translate to the Falkland Islands in terms of references to the NHS and, in particular, to private sector care, neither of which exist in the Falkland Islands. However, the policy principles reflected in the new law could be relevant to FIG's vulnerable person's strategy.

Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Child Care Payments Act**

UK provision for financial support to help working families with the cost of child care.

Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Children and Families Act**

The Act deals principally with; adoption, family justice, children with special educational needs, regulation of childcare, welfare of children, the Children's Commissioner, statutory rights to leave and pay, time off for ante-natal care, and flexible working.

Appears not to be affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Citizenship (Armed Forces) Act**

Amends the British Citizenship Act, which has direct application to the Falkland Islands, so adoption is not necessary.

Not affected by automatic updating. Applies by its own terms.

- **Co-operative and Community Benefits Societies Act**

UK specific cooperative societies legislation (supplementing the Industrial and Provident Societies Act 1965, which has not been extended to the Falkland Islands).

Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Data Retention and Investigatory Powers Act**

The Act centres on amendment of the Regulation of Investigatory Powers Act, which does not apply to the Falkland Islands. However, the Act highlights that regulation of investigatory powers in connection with telecommunications in the Falkland Islands is sparse, leaving potential gaps. One such gap addressed by the Act involves ensuring that companies providing communications services are obliged to comply with requests for communications data and inception warrants irrespective of the location of the company providing the service.

Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Deep Sea Mining Act**

Amends the Deep Sea Mining (Temporary Provisions) Act 1981, which has not been extended to the Falkland Islands.

No direct application. Probably not relevant to FI.

- **Defence Reform Act**

Applies defence procurement reform which is not relevant or appropriate to the very minor defence procurement undertaken by the Falkland Islands Defence Force.

Not affected by automatic updating. Probably not relevant to FI.

- **European Union (Approvals) Act**

  EU administrative legislation.
  Not affected by automatic updating. Not relevant to FI.

- **Finance Act**

  UK specific budgetary legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Gambling (Licensing and Advertising) Act**

  Extends the scope of the regulatory regime governing remote gambling under the Gambling Act 2005, which has not been extended to the Falkland Islands.

  Not affected by automatic updating. Not currently relevant to FI.

- **House of Lords Reform Act**

  UK specific constitutional legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Immigration Act**

  The Falkland Islands has its own immigration legislation, and the Act would have no direct application. However, the Act raises important policy issues which merit consideration in conjunction with the ongoing review of immigration policy and law, eg removals and rights of appeal are clarified under the Act. Some areas of the Act, such as the regulation of sham marriages, however, appear to have no relevance to the circumstances of the Falkland Islands at present.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Inheritance and Trustees Powers Act**

  The Act implements recommendations made by the UK Law Commission in relation to intestacy, family provision, and trustees' powers. The Act implements the Commission's recommendations by amending existing legislation, principally the Administration of Estates Act 1925, the Trustee Act 1925 and the Inheritance (Provision for Family and Dependants) Act 1975. All those Acts have already been applied to the law of the Falkland Islands so the relevant provisions of this Act would apply in the Falkland Islands under a policy of automatic updating.

  Most of the Act would have direct application under automatic updating.

- **Intellectual Property Act**

  Makes amendments to Copyright, Designs and Patents Act 1998, Patents Act 1977, Registered Designs Act 1949, and Freedom of Information Act 2000, none of which apply in the Falkland Islands.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **International Development (Gender Equality) Act**

  Amends the UK specific international development legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Leasehold Reform (Amendment) Act**

  Amends the Leasehold Reform, Housing and Urban Development Act 1993, which have not been extended to the Falkland Islands.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Local Audit and Accountability Act**

  UK specific legislation concerning the abolishment of the Audit Commission, and new arrangements for the audit and accountability of local public bodies in England. The Falkland Islands have their own relevant audit arrangements under the Constitution and Finance and Audit Ordinance. The Act also regulates council tax referendums and meetings of local government bodies, neither of which are relevant to the Falkland Islands (in particular the Falkland Islands has its own legislation regulating committee meetings).

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Mesothelioma Act**

  Makes provision for payment of compensation for industrial disease which does not appear to have occurred in the Falkland Islands recently (or at all).

  Not affected by automatic updating. Probably not relevant to FI.

- **National Insurance Contributions Act**

  UK specific social security legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Northern Ireland (Miscellaneous Provisions) Act**

  UK specific constitutional legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Offender Rehabilitation Act**

  The Act contains provisions amending UK legislation on sentencing and release of offenders. The Falkland Islands has its own legislation in both these areas.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Pensions Act**

  UK specific pensions legislation.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Supply and Appropriation (Anticipation and Adjustments) Act**

  UK budget specific legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Supply and Appropriation (Main Estimates) Act**

  UK specific budgetary legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Taxation of Pensions Act**

  UK specific pensions legislation.

  Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act**

  The Act would have no automatic application as does not amend UK legislation in force in the Falklands Islands. The Act contains provisions regarding political lobbying and trade unions which are probably irrelevant to the Falkland Islands. The Act also contains provisions making change to the legal requirements for people or organisations who campaign in relation to elections but who are not standing as candidates.

Not affected by automatic updating. FIG may wish to consider potential relevance of policy for development of local legislation.

- **Wales Act**

  Wales specific legislation.

  Not affected by automatic updating. Not relevant to FI.

- **Water Act**

  Not relevant to FI where no private sector water industry.

  Not affected by automatic updating. Not currently relevant to FI.

2. SECONDARY LEGISLATION:

Out of the 3,486 statutory instruments made in UK in 2014, the vast majority can be discounted as of only relevance in the UK (for example relating to local areas in UK or dealing with subject matters where we are entirely legislatively self sufficient). It is estimated that only a very small proportion would be of potential relevance to the Falkland Islands (likely less than 100) - for example as follows:

- **Air Navigation (Overseas Territories)(Environmental Standards) Order** - applicable in the Falkland Islands by its own terms.

- **Inheritance and Trustees' Powers Act 2014 (Commencement) Order** - commences Act referred to above, which would apply by automatic updating

- **Misuse of Drugs (Amendment)(England, Wales and Scotland) Regulations** - applicable by virtue of the Misuse of Drugs Regulations Order 1989, which provides that any regulations made or in force under the Misuse of Drugs Act 1971 are adopted in the Falkland Islands except insofar as they are inconsistent with our own Misuse of Drugs Ordinance 1987 and any regulations made under it (ie these regulations would apply regardless of a general concept of automatic updating, because the Misuse of Drugs Ordinance effectively contains an automatic updating provision which is not subject to the "freeze" of automatic updating applicable through the Interpretation and General Clauses Ordinance).

- **Video Recordings Act 1984 (Exempted Video Works) Regulations** - applicable by automatic updating through the application to the Falkland Islands of the Video Recordings Act 1984

- **Weights and Measures (Food)(Amendment) Regulations** - applicable by automatic updating through the application to the Falkland Islands of the Weights and Measures Act 1985