

**LEGISLATIVE ASSEMBLY
OF THE
FALKLAND ISLANDS**



**RECORD OF THE
SELECT COMMITTEE ON THE COMMUNICATIONS BILL
IN THE COURT & ASSEMBLY CHAMBERS
STANLEY**

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**Select Committee of Elected Members on the Communications Bill 2016
Court & Council Chambers**

24 November 2016

Attendance:

Elected Members

The Honourable Roger Edwards (Chair)
The Honourable Jan Cheek
The Honourable Dr Barry Elsby
The Honourable Ian Hansen
The Honourable Michael Poole
The Honourable Phyl Rendell MBE
The Honourable Gavin Short
The Honourable Mike Summers OBE

Officers

Mr Peter Judge, Attorney General

Mr Matt Bassford, Director Central Services

Witnesses

Ms Nikki Buxton, Managing Director, Synergy Information Systems Ltd

Mr Stacy Bragger, Executive Secretary, Chamber of Commerce

Mr Dick Sawle, Private Consumer

Mrs Pippa Christie, Deputy Country Manager, Premier Oil

Dr Haseeb S. Randhawa, PhD, FIG Fisheries Department, Scientific Section

Miss Felicity Sawle, Private Consumer

Mr Andrew Newman, Private Consumer

Mr Jason Lewis, JayTec Ltd

Dr Megan Tierney, South Atlantic Environmental Research Institute (SAERI)

Mr Roger Spink, Private Consumer

SELECT COMMITTEE ON THE COMMUNICATIONS BILL

THURSDAY 24 NOVEMBER 2016

IN THE COURT & ASSEMBLY CHAMBERS

Introduction

The Honourable Roger Edwards

Welcome to the Select Committee on the Communications Bill. Ten people this afternoon who wish to give oral evidence, we have 5 written pieces of evidence, I will not read out the written submissions, they are on the seats if you wish to have them in front of you. There are seven emailed responses to the Chamber of Commerce campaign to delay discussions, they have not been circulated to members of the public but they will be available should members of the public wish to see them from Cherie afterwards. In addition we have had two telephone responses, which makes an awful lot altogether.

Oral evidence will be limited to five minutes and the Clerk will ring a warning bell at 4½ minutes. Similarly questions will be limited to 5 minutes. As I have already said we have a list of ten names who wish to give evidence, so we will have to stick very strictly to those times.

Once the ten people will have given their evidence, you will have a five minute comfort break before reconvening; it is planned that I will call a halt to proceedings this afternoon at 16.30. If necessary, we will reconvene tomorrow morning at 10.00hrs on Friday 25th November.

This is a Select Committee of the Legislative Assembly, Matt Bassford (Director Central Services) is not a member of the Assembly but I have asked that he attends as an expert witness/advisor.

The addition of the Bill we will be discussing is the one that was attached to the Legislative Assembly Order Paper as discussed earlier today. Copies of the Bill are on the seats for members of the public.

When we get to the Bill itself we will go through the Bill clause by clause for comment, some amendments suggested by the Attorney General, Members have in front of them and they will be taken into account as we continue the process.

Persons giving oral evidence you have the list and we will go through in order as given in that list.

Oral Evidence

Ms Nikki Buxton, Managing Director, Synergy Information Systems

Good afternoon Honourable Members, Ladies and Gentlemen.

I am Nikki Buxton, the Managing Director of Synergy Information Systems, here to speak on behalf of my company, my customers, and the wider business community. Thank you for the unprecedented opportunity to speak to you today, on what is likely to be the most important piece of legislation during the life of this Assembly.

I am here today to ask you to:

1. Delay the decision on the Bill until an appropriate public consultation can take place.
2. To ask you to require a step-change in satellite bandwidth from the licence holder, rather than the microscopic changes we have experienced so far.
3. To oblige the licence holder to significantly develop the local network to relieve some of the pressure on the satellite bandwidth and to remove local usage from allocated bandwidth.
4. And finally, to urge you to allow the Falkland Islands to develop technologically, and not be held back by constraints against self-provision.

I see from the list of speakers who will follow me today that there are representatives of business, the oil industry, science and private consumers.

Each of them will present their views on this subject, but I am confident that they will all agree that more work needs to be done before the Bill is passed and will urge you to delay your decision.

In various forums over the past few weeks, The Honourable Mike Summers has advised us all not to 'conflate' details of the Bill with the Licence. While I am pleased to have learned a new vocabulary word (thank you Mr Summers), as you are all aware, the Communications Bill does not and cannot stand alone. It is intimately tied to the Licence, the Price Cap Mechanism, the powers of the Telecoms Regulator and other associated legislation.

A strong Telecoms Regulator is the key to this whole process – we have all seen the results of the lack of telecoms regulation during the past decade. The post of Telecoms Regulator has been denied funding for the past five years, and is now only proposed to be funded at £25-28,000 per year. The Falkland Islands needs an experienced, technologically competent telecoms regulator, and I can guarantee we will not get one for this salary.

Without a strong regulator in place, all of the work of the Telecoms Working Group, and the Attorney General over the past two years on this issue will have been in vain, and we will be no further forward. The Bill and Licence are both overflowing with obligations which FIG are required to fulfil. I have to ask myself, are there personnel in place to carry out these obligations? Are there technical and legal consultants in place ready to help? Until now, very low standards in telecoms provision have been accepted by FIG, and this cannot be allowed to continue.

Next, we need a step-change in satellite bandwidth provision, but I fear that this current process will not even allow us onto the first rung of the ladder. There is frankly no point in rolling out 4G without first significantly increasing the available bandwidth, as otherwise it will only serve to congest the network more and will grind the already almost unusable mobile data system to a halt.

There are new and improved satellite technologies being introduced on an almost continuous basis. While the footprint of many of these technologies currently misses the higher latitudes where the Falklands are located, not all do, and not all will in the near future. I'm afraid that waiting four years to review the satellite provision and associated technologies is not the best way forward.

A strong, technologically competent Regulator should be reviewing technologies on a much more regular basis, and the Bill and Licence should oblige the licence holder to invest in improved technologies on a more regular basis.

Without major investment in increased bandwidth, among other issues, we are in danger of our young people not returning to the Falklands when they complete their education, and FIG and businesses could have increasing difficulty in recruiting qualified personnel. Use of the internet in the wider world has become so integral to business, education and lifestyle, that our internet provision could become a deciding factor for these groups.

In recent years, SURE has improved both the speed and accessibility of the local network, but this needs to be continuously developed, and local usage should be unlinked from satellite usage.

Local 'cloud storage' and a locally hosted software Update Server at SURE would go a long way to relieving bandwidth constraints, and would allow the local transfer of data where required. As far as I can see, improvement of the local network was not addressed in either the Bill or the Licence.

I urge you to be bold, Honourable Members. Delay the decision on the Bill and allow the public their voice in this matter. Take the time to examine all the elements both individually and holistically. For if you do not, I fear that you will be condemning the Falkland Islands to remain in the internet Dark Ages for the next decade.

Thank you.

The Honourable Roger Edwards

Thank you very much Nikki for your intervention, I thought it was very clear and precise; do Members have any questions for Nikki please?

The Honourable Mike Summers OBE

Nikki, could you give us some figures on what you described as step change in satellite band width, what sort of magnitude are you talking about compared to what is currently being proposed – 10 times, 50 times or 100 times.

Ms Nikki Buxton

I would say 10 times would easy, 50 times would be better, 100 times would catch us up to where we would then be able to move forward reasonably and I know we are not a part of the wider world, it's all through the satellite but at the same time without taking that big step at the start we are never going to catch up, we are never going to be near catching up.

The Honourable Mike Summers OBE

So, somewhere between 10 and 100 times is your response.

Ms Nikki Buxton

I would go 10 times easy, 50 times, doable, 100 times would be better.

The Honourable Mike Summers OBE

Thank you

The Honourable Dr Barry Elsby

Nikki, this is something we have talked about in the past, but I wonder if you could just expand on taking out the local usage of bandwidth, what effect do you think that would have.

Ms Nikki Buxton

I think it would be very, very good. Right now, everybody that has any kind of update of their operating system of their phones of anything has to use their allocated bandwidth to go up to the Internet to get it and we are all getting the same thing, so why not have a local update server that we can subscribe too (I'm not saying that it would be free) that we can get those updates directly on island without having to go through the satellite, so for instance, the data would come down once then we can all access that data. That would make a huge difference to the bandwidth constraints now. Cloud storage is one of the things that the rest of the

world is now able to do, we don't have cloud storage, many, many companies want to be able to do offsite backups, we can't do that because offsite backup right now means Europe. That is ridiculous why can't we do local cloud where we could have offsite backup at SURE. Businesses are willing to pay for that but those are services that don't appear to even be considered.

The Honourable Roger Edwards

Nikki you mentioned alternative sources for the downloading from satellites and things presumably you were referring to O3B and the likes.

Ms Nikki Buxton

O3B is obviously one of the options, the Nero satellites are coming online around the world at higher latitudes like ours. O3B have committed to increasing their net, there are other systems that are coming on, that are of a similar sort of vein. O3B right now that are the ones that are the industry leading because they had the funding before anybody else. There are other options; there are high throughput geo-stationary satellites that we currently use, but much higher throughput because of the design platform, the technology platform they are going to use. Those aren't rolled out yet but they are coming – Intelsat APax is coming, it isn't out yet, but that is why I say, some of these things aren't there yet but they are definitely on track to be available and before that four year review period, so that is where I am saying review continuously. If you have a regulator that is technically capable, have them continuously review. To be able to take advantage of these kinds of technologies, otherwise the gap gets bigger and bigger and bigger.

The Honourable Mike Summers OBE

Can I just check something, in terms of local hosting you were talking about, is that different from transparent caching that was recommended in the Cartesian Report?

Ms Nikki Buxton

To be honest with you, I have no idea what they were talking about.

The Honourable Mike Summers OBE

My understanding was that it was something like that, they would host certain services and people locally could access that service for here rather than having to go online.

Ms Nikki Buxton

I would assume so but "transparent caching" was a terminology that I had not heard before.

The Honourable Gavin Short

Just one question Nikki, I think it is a jolly good idea doing your updates locally, would we run into any licencing problems.

Ms Nikki Buxton

Not at all.

The Honourable Roger Edwards

Does anyone else have any questions for Nikki please? No. Nikki, thank you very much indeed.

Mr Stacy Bragger, Executive Secretary, Chamber of Commerce

Honourable Members, Ladies and Gentlemen,

Good afternoon and thank you for this opportunity to address you today on the important issue of the future telecommunications provision for the Falklands.

I am addressing you today in my role as Executive Secretary for the Chamber of Commerce. Whilst it is the Communications Bill that is here on the table today, it is the conditions in this Bill which gives force and effect to the new 12 year licence. This Bill cannot be dealt with in isolation from the agreement and the licence.

As you will be aware, the Chamber has frequently engaged with MLAs and FIG regarding telecommunications since late 2013.

The Chamber has detailed our position on what we believe the approach should be on future telecommunications to FIG in a number of different ways. The issue has been raised continually by the Chamber with MLAs at our bi-monthly meetings with the Trade and Industry portfolio holders MLAs Cheek and Poole and at our quarterly meetings with all MLAs. At the start of the process we provided FIG with a position paper on our stance. A presentation on its key messages was delivered to the FIG Telecommunications Working Group by Chamber representatives. Numerous letters outlining our concerns have been sent to FIG over the last three years. We have done this work because the outcome of the licence negotiations is so important to the business and wider community.

The Chamber is greatly disappointed with where we find ourselves today with the Communications Bill and the proposed licence.

The provision of telecommunications is absolutely key to the development of our business community and the Islands as a whole. The remoteness of the Islands means that great emphasis is placed on telecommunications. The need to make use of technological developments is vital. As the Islands continue to develop the lag

behind available technology keeps increasing. There will always be a demand for more internet access. The amount of data available now is insufficient to bridge the current gap and the proposed increases will do little to increase the situation by 2019.

The Chamber believes that the drip feeding of megabytes that has been agreed will be totally inadequate as we move towards 2019. The business community needs to be able to effectively utilise cloud-based services, video-conferencing, modern sales and marketing platforms, mobile data and other data heavy services. The current data caps impede the ability to do so.

The 2012 Falkland Islands Census showed that 72% of households had internet access, representing a 17% increase in connected households since 2006. I would expect that the results of the recently conducted 2016 Census will show an increase in this figure. The 2012 report's authors stated that this represented 'the increased importance, reliance and availability of external communication for Falkland Islanders.' This is recognised in the Islands Plan 2014-2018, Transport and Communications section, which states that the vision of this Assembly is 'to secure further improvements in the Islands' transport systems and integration with the rest of the world - both physical and virtual.' It goes on to say that 'We will unlock the potential for tourism, business growth and investment by improving the Islands' connectivity internationally, and ensure that the Islands' utilities are reliable, cost-effective and affordable.'

We do not believe that the fulfilment of the next exclusive licence period will achieve any of these aims.

The Falkland Islands enjoys competitive and innovative shopping and procurement; therefore, new technologies (equipment and operating systems) are readily available but are poorly utilised by businesses because of the internet service levels they require. Likewise, Falkland Islands businesses have become so accustomed, over the last decade, to such limited internet services that their strategies and plans no longer include anything that has a dependence on internet above that which is currently available. This holds back most businesses and curtails development. In each of the FIDC Business Climate Surveys conducted during the past decade, telecommunications was listed as one of the key barriers to growth by Falkland businesses.

Chamber of Commerce members already report that rather than having important large documents emailed to them they have to have the documents put on a memory stick and sent by DHL to them as to download them would wipe out their monthly data allowance. This is just one example of how businesses have to work their way around the current data limits.

For the business community, the fundamental requirement of the licence is that the Islands telecommunications provision develops over its life to a position where

telecommunications are no longer a barrier to business. We do not believe that the proposed licence will achieve this and we will see yet another opportunity missed.

The Chamber of Commerce urges Honourable Members to delay the Bill and carefully reconsider and fully review the proposed 'deal' to make sure they are satisfied that it is the best possible deal for the Falkland Islands that this Assembly can achieve.

The Honourable Michael Poole

Just one question Stacy, you are absolutely right in terms of the Chamber have corresponded very clearly with Members continuously on this, with Matt and MLAs directly too. I think we have taken all of the key points in the letters from last December and since into account in the negotiations and you lay out the importance and the fact that telecoms is a utility and I don't think any of us would dispute that. Am I right in saying that the Chamber's preferred response to this issue is to allow greater self-provision that is the solution they see?

Mr Stacy Bragger

I think it is part of the solution perhaps; I am only here to address you as the Executive Secretary, I'm not a director, but I think we definitely see self-provision as a way of providing an element of competition and perhaps a benchmark to the provider. I think others would address you more on telecoms coming up, but we see it as a way of introducing competition.

The Honourable Mike Summers OBE

Stacy, you mentioned that a number of businesses, you may even have said most businesses, I'm not sure are already working in a way that sort of works around restricted access to broadband and you gave one example of people using memory sticks, but would you in due course, not necessarily now but in due course, be able to provide to Members a series of examples in which businesses have had to work round the system.

Mr Stacy Bragger

Yes, the Chamber can certainly put together something like that. I think it all comes back to data limits, businesses are in such a mind-set as I'm sure most other people are in the community, that you don't want to go over the data limit, there is so much on your mind that you cannot look at other ways of doing things, but we can certainly go back to Members and get them to come back with specific ways that it is limiting them.

The Honourable Roger Edwards

That would be very useful point Stacy, if you could feed that back formally to the Chamber.

The Honourable Mike Summers OBE

Like the question I asked Nikki about quantification of what you regard as reasonable bandwidth. We have had lots of comments about its not enough, but actually nobody has said what is enough and could you try and put some figures on that for us.

Mr Stacy Bragger

I think the Chamber would like to have now what is being proposed for 2019 and then by 2019 have a clear strategy from FIG on how it's going to go about fulfilling the removal of data cap limits by the end of the licence.

The Honourable Mike Summers OBE

Thank you, that is helpful.

The Honourable Gavin Short

Sorry Stacy, you were saying that the Chamber would like the 2019 limits now, would you wish to see them stepped up over the years or just stay static.

Mr Stacy Bragger

I think any increase would be good. I think the current levels aren't held to be sufficient, so we definitely support increase.

The Honourable Roger Edwards

I personally would guess everyone would want unlimited broadband, but I'm afraid that is not going to be available to us so it is where you can go on that ladder between what we have got now and unlimited.

The Honourable Dr Barry Elsby

Just building up on comments you have made and also the Honourable Mike Summers has made, saying that businesses are constrained by the capacity issues and even in the new licence you are being constrained, within the Bill it is possible for people to be issued with an extraordinary licence by the Regulator, if they can prove (and I haven't got the exact words with me here) that the request is reasonable because the provider, SURE cannot provide the service that you need. How would you

convince the regulator if they were sitting here today that you couldn't continue your business without a VSAT or self-provision?

Mr Stacy Bragger

I think maybe, it would be best placed if I could come back to you in written format providing more detail.

The Honourable Dr Barry Elsby

That still gives people, VSATs and self-provisions hasn't been outlawed, it's just says that you have to have an extraordinary licence from the Regulator.

The Honourable Roger Edwards

At a very high level of licence fee.

The Honourable Dr Barry Elsby

I total disagree with this, I think if the regulator feels that you need an extraordinary licence because the provider can't provide then you shouldn't be penalised for that.

The Honourable Roger Edwards

To cover the point that you were asking about the effect on businesses it came out both at the public meeting we held the other evening and also during the phone in that businesses have expressed concern that they are being held back by lack

The Honourable Dr Barry Elsby

But if you can justify that Chair to the regulator you have to say what element of my business can I not conduct because of the service that is offered by SURE.

The Honourable Roger Edwards

Indeed. If you will feed that back Stacy in due course. Thank you very much indeed.

Mr Dick Sawle, Private Consumer

Good afternoon Honourable Members, Ladies and gentlemen.

Firstly I would like to thank you for extending me this opportunity to address you all on a subject which I believe is considered of vital interest to all of us who live here. There is only a handful here today to speak, but I believe our collective views will be shared by many who live here. There is only a handful here today to speak but I do believe that our collective views will be shared by many who live here. I believe that I am right that this is the first time that members of the public have been allowed to

speak to a select committee on the matter of a Bill. I believe this proves that Members see the importance of the matter under discussion. It should not simply be a tick-box exercise.

The Bill in front of the house today cannot be dealt with in isolation from other matters. Assent to this Bill, the deal with SURE is signed and then we are locked into a new telecommunications agreement with SURE for the next twelve years.

There are many aspects to this debate that I would make comment on, but instead of making points that no doubt you will hear from others today, I will concentrate on one important issue that this debate has sparked off.

We hear a lot these days about human rights. The sort of issues we read about are very clear cut – LGBT's, economic migrants, refugees and asylum seekers to name but a few. So why is it that we hear about these sorts of things but seldom hear about the right of freedom of expression? Freedom of expression is a fundamental right that allows people to freely communicate however they wish. We seldom hear of any problems arising from this basic right because the developed western world assumes and takes for granted that nobody in a modern democratic society feels that their freedom of expression is hindered in any way.

In the Falklands we travel the world speaking quite rightly with pride about our democracy, our self-government, our independence and our Constitutional rights. I see that recently we attended the Joint Ministerial Council and the Communique issued underlines the “resolve to continue to promote respect for human rights....to promote understanding of our shared international human rights obligations”

It all boils down to this today – in a nutshell, we must practice what we preach.

Our Constitution is our highest law and over-rides any other laws or policies that we may come up with. Our 2009 Constitution (Section 13) enshrines the right to Freedom of Expression based on the European Convention on Human Rights which itself is based on the 1948 Universal Declaration on Human Rights. This right is subject to restriction in very limited and narrowly defined circumstances, including telecommunications.

We would not be the first jurisdiction to have that particular condition placed on our right to freedom of expression. However, wherever governments have tried to impose this restriction, the courts have invariably overruled them. I am convinced this would also be the case here.

I therefore applaud the decision to allow for the licensing of personal Vsat systems and their exclusion from the Exclusive Licence.

I note that paragraph 14 of appendix B to this Bill states that “The Attorney General is aware of Queen’s Counsel’s opinion that suggests that a failure to recognise this

possibility [i.e. an alternative to the exclusive provider] in legislation may be unconstitutional”.

I believe therefore that our Government has recognised that to prohibit self-provision by means of an exclusive licence is unconstitutional.

However, the policy as agreed by Executive Council is that the fees for obtaining a Vsat licence will be set so high and the application made so difficult, that effectively a licence becomes unobtainable.

Freedom of Expression is non-negotiable and vitally important for a variety of reasons.

I do not believe that the agreed policy (Appendix B to this Bill) is a proportionate response to what is a fundamental human rights issue. The response itself is unconstitutional – it is not simply a hindrance, but designed to be a show-stopper. The licence fee is unreasonable and designed to be prohibitively expensive. To conduct business or pleasure these days we are not talking in megabytes, but in gigabytes or – in the near future – in terabytes. The bundles on offer to ordinary individuals are too low and impede social interaction, education and development. The internet nowadays is simply another utility like water and power.

Why does SURE not simply provide what people want? Why not provide people either with a Vsat or a similar package to a Vsat at a reasonable price? This has nothing whatsoever to do with the Universal Service Obligation. It has nothing whatsoever to do with collective purchasing power and it has nothing whatsoever to do with contributing to costs. Let’s not get stuck in the dark ages of technology for the next twelve years. With a little more effort we can solve this to everyone’s benefit.

Honourable Members – if you do pass this Bill today, then I urge you to pause and take stock before agreeing to any new deal.

The Honourable Roger Edwards

Thank you very much indeed Dick, does anyone have any questions for Dick?

The Honourable Gavin Short

I wonder if you could help me please, it is something I would like to get my head around and I think you may have the answer to it. What is the cost of a VSat?

Mr Dick Sawle

It entirely depends what sort of VSat you want, what speed you want and the gigabytes per month you want.

The Honourable Gavin Short

Supposing I wanted 30GBs.

Mr Dick Sawle

It would probably be, I don't wish you to hold me to this because I don't have the figures in my head, but I would expect that would cost you around £300 per month. But, bear in mind as well that you would not be charged for going over your quota, you would simply be slowed down, you would be throttled back.

The Honourable Gavin Short

How much would the equipment be?

Mr Dick Sawle

There are two ways, the capital cost of the equipment will probably be about £2000, but most VSAT providers will actually factor in the capital cost into your rental agreement, so they supply you with the equipment for that price.

The Honourable Gavin Short

That is lovely, thank you Dick, it is some information that I couldn't or hadn't had the chance to find, it is quite illuminating.

Mr Dick Sawle

It does all depend, I have seen systems quoted for \$1000 per month, but they are far faster and have much larger, I think the one I looked at recently was \$900+ per month and that was 5MB down speed and 2or 3 up and I think was 100GB package per month.

The Honourable Ian Hansen

Assuming Dick, I know nothing at all about this but, a VSat, is that fast moving technology as well?

Mr Dick Sawle

No, VSats have been around for quite a long time, dare I say it, I have had my VSat dish which I have never made any secret of, I think since 2004, I think for the last twelve years.

The Honourable Ian Hansen

But, the actually technology of that hasn't moved on?

Mr Dick Sawle

No, I think you could argue that the system that I have had for the last twelve years, that system is almost on the point of being replaced by packages that are being offered by SURE, but it has taken twelve years to get there.

The Honourable Dr Barry Elsby

It is an interesting slant the discretion on freedom of expression being hindered by that. I wonder if I can ask the Attorney General to give his views on this. Whether the proposed service offered by SURE and the restrictions placed on people and the ability to communicate using large data packages, would you see that as a limit on freedom of expression as covered by the Constitution?

Attorney General

The answer to the question is simply no. What is it that you are wanting to express that you are not being allowed to express? I don't understand what is being said in any way prevents the expression.

The Honourable Dr Barry Elsby

I raise this purely because that is what you are saying, weren't you Dick?

Attorney General

The logical conclusion of the debate is that everyone should be given the ability to communicate with the World for nothing, if that were true. Clearly that can't be true, because nowhere in the World is it possible.

The Honourable Dr Barry Elsby

I agree but it is your opportunity Dick to ask the Attorney General for his legal opinion on what you are saying.

Mr Dick Sawle

I think on the legal opinion, I have expressed clearly in what I have said earlier on that I think the Attorney General has realised in line with one of your predecessors back in 2004/5 that the right to self-provide is a fundamental human right as expressed in our constitution.

Attorney General

Forgive me, the matter arose because of a prosecution decision about a person who has their own VSat, it was felt that in circumstance prosecution should not be brought in the public interest because there was no opportunity for alternatives.

This is not the issue here because there are the opportunities for alternatives such as the ability to obtain an exclusive licence.

The Honourable Roger Edwards

Dick, you said that your VSat that you got in 2004 is now probably only producing the same as what package you can get from SURE today, but it has taken twelve years for SURE to get there. Have you been able to upgrade your VSat so that you are now twelve years ahead of what SURE can be offering in 2019 or not.

Mr Dick Sawle

Chair, you will be delighted to know and I'm sure the Attorney General will be delighted to know that yesterday I actually asked SURE for a package from here, probably to replace my VSat system.

The Honourable Roger Edwards

But, my question is have you been able to find self provision through a VSat system that could once again take you twelve years ahead of where we are today. You said you provision in 2004 gave you a twelve year advantage, is there now a similar thing that could give you again the twelve year advantage.

Mr Dick Sawle

I haven't looked simply because I have been entirely happy with my VSAT system listening to the BBC radio all day, which is what I use it for.

The Honourable Roger Edwards

Ok, thank you very much.

Mrs Pippa Christie, Deputy Country Manager, Premier Oil

Honourable Members, Ladies and Gentlemen.

I am addressing you today in my role as Deputy Country Manager for Premier Oil. My colleagues at Premier in London will be happy to provide further detail and information on the points I raise today on their behalf as necessary.

Whilst it is the Bill under consideration today, it is difficult to separate discussion on the Bill from the proposed exclusive licence enabled by it. I'll start by summarising Premier's understanding of the Bill and the exclusive licence enabled under it and how this applies to Premier's operations before discussing Premier's future communications requirements and the effect the Bill and proposed licence may have in relation to these.

Premier understands that the Communications Bill and in turn the exclusive licence will apply to Falkland Islands territory – i.e. the Colony of the Falkland Islands and its territorial waters. As such it;

- (a) will apply to Premier’s operations in the Falkland Islands (e.g. offices, bases and docks)
but
- (b) will not apply to moveable operations in the Exclusive Economic Zone (EEZ) (e.g. drilling rigs, installation vessels and supply boats), most of which would be used at times outside of the EEZ and have intermittent, short-term or mid-term use in the EEZ.

The treatment of production facilities in the EEZ is not clear. Through discussion we understand that a possible interpretation is that a production facility which is "fixed" or tethered to the seabed could be considered an island and part of Falkland Islands territory, and consequently that an exclusive licence may be considered to apply to production facilities in the EEZ.

The potential lack of consistency in the treatment of moveable and fixed operations in the EEZ is unhelpful.

Clarification of the treatment of offshore oil and gas production facilities is required, and consistency with other offshore oil and gas operations is highly desirable.

We request that FIG consider addressing this matter in the Communications Bill by clarifying the status of oil and gas production facilities, which by their nature could be fixed to the seabed (such as a fixed platform) or could be a moveable vessel with a dis-connectable sub-sea link to the seabed (such as an FPSO vessel).

Premier’s communications requirements for Sea Lion are distinct and will far exceed those of other users. At this stage, we expect that these requirements will require additional investment in communications capabilities.

Premier is currently investigating communications options for the Sea Lion development and has not selected a preferred solution.

Whether subject to the exclusive licence or not Premier will be looking for a preferred solution for all activities, locations, infrastructure and contractors.

There is a risk that the exclusive licence would prevent Premier from investigating the preferred solutions in the usual manner.

Typically Premier would look to the market to supply the safest, most secure, most efficient and competitive solution.

To include Premier’s communication requirements in the exclusive licence at a stage when these requirements and possible solutions are not fully known may preclude

Premier from pursuing the safest, most secure, most efficient and competitive solution for the Sea Lion development.

It is possible that Premier's requirements could enable a step-change in infrastructure for the benefit of the Falkland Islands.

Premier believes it is in FIG's interest to reserve for itself the power to issue new licences for oil and gas communication requirements which can be exercised as necessary at the time at which those requirements are known and technical solutions and providers can be identified.

This would allow FIG to make informed decisions at the time of Sea Lion Field Development Plan approval to ensure that maximum benefit is achieved for all relevant stakeholders.

The exclusivity provided under the proposed SURE licence may preclude FIG from doing this, despite it seeming apparent that FIG's decision to award an exclusive licence to SURE and SURE's decision to accept that licence are not founded or reliant upon contingent revenues from potential oil and gas developments, such as Sea Lion.

To be clear, Premier believes that an exclusive licensing position should not be applied to oil and gas developments prematurely and that FIG should reserve the power to issue licences for oil and gas development communications.

This could be achieved in a number of ways:

(i) **Outright Non-Exclusivity:**

Non-exclusive application of SURE licence to oil and gas businesses, allowing for additional communications licences to be awarded by FIG to third party providers in the right circumstances (for example alongside Field Development Plan approvals); and/or

(ii) **Optional Non-Exclusivity:**

FIG Amendment of SURE licence to allow for an FIG right to treat the provision of services to oil and gas businesses as non-exclusive under the licence (for example alongside Field Development Plan approvals);

If FIG do not consider non-exclusivity to be viable, then we believe at the very least the licence terms proposed should be amended to require the exclusive licence holder to support oil and gas businesses to identify and adopt preferred technical solutions in a commercially prudent manner and at a reasonable cost.

This would require some form of FIG sanction to dis-incentivise commercially damaging monopolistic practices (such as an FIG right to apply non-exclusivity).

We request FIG consider these options further. If FIG were to be minded to pursue any of these possible alternatives then Premier would be pleased to provide further detail these possible alternatives in writing.

The Honourable Roger Edwards

Before we open it up to questions we know that ships and aircrafts are outside the terms of this particular licence and Bill, but what about things are tied to the seabed, but are considered to ships or operating in a maritime environment?

Attorney General

The position is quite an interesting one Chair, it relates to legislative competence of this Assembly, at the moment we only have legislative competence in relation to those areas where we can exercise and the limits of that exercise, so for example, we know that we have the exclusive ability to legislate in relation to land and internal waters and there territorial sea which amounts to an area of 12 miles starting at the relevant baseline which I can explore which basically are the high tide level (low tide level? Can't remember – anyway one of the tide levels) - 12 miles from there. Inevitable an artificial island is capable of being an island once it is an island your legislative competence extends to the Island potentially. In an EEZ normally your legislative competence is under the International Law limited only to matters effectively of environmental and pollution control nature, so your legislative competence in the EEZ is primarily associated with legislating for the EEZ, the EEZ being the column of water containing fish and water and therefore it relates to things like navigation, shipping, avoiding pollution, of those nature. Obviously legislating for telecoms would ordinarily fall outside what is necessarily for dealing with the legislation in the EEZ therefore legislative competence changes, if and when (and it is an if and when despite the evidence you have received) of whether or not you are going to get any artificial islands or not. Once you do have artificial islands there are of course two solutions, you may either at that stage chose to exercise your legislative competence to extend to those artificial islands and/or having extended your legislative competence to those artificial islands decide whether or not to issue and extraordinary licence. But at the moment you can't exercise that competence because there are no artificial islands.

The Honourable Roger Edwards

Thank you, Attorney General

The Honourable Jan Cheek

Just a couple of quick questions, the first one, is it Premier policy to refer to the Islands as a colony?

Mrs Pippa Christie

No, I think that was taken from some other legislation which enables them to provide that definition.

Attorney General

Unfortunately it appears in the Interpretations and General Clauses under the definition of the Falkland Islands.

Mrs Pippa Christie

That is the one.

The Honourable Jan Cheek

Thank you that is unfortunate. The other thing, would Premier not be in a position to apply for an extraordinary licence because of their circumstances.

Mrs Pippa Christie

I listened to what MLA Elsby said earlier and I imagine that may be one of the opportunities, I think, without referring back to my Premier colleagues that we would like more clarity in this regard and whether our case would be considered in that vein.

The Honourable Jan Cheek

Thank you.

The Honourable Mike Summers

Does Premier Oil understand that oil and gas companies using the licence system is highly likely to be of major benefit to the rest of the community?

Mrs Pippa Christie

Yes, without referring back to my colleagues, I'm sure we do and indeed our corporate responsibility policy and community investment policy that sits under that supporting the development goals and value creation in host communities, we would certainly look to opportunities to harness social economic benefits arising from our footprint here, but we also need to be assured that our communications are integrated across all of our infrastructure, works appropriately particularly for an emergency response arrangement I would imagine. Certainly my colleague could explore that in more detail with you.

The Honourable Mike Summers

So, if there were a general provision in the Bill that allowed self-provision you would expect that Premier would go through that route.

Mrs Pippa Christie

I'm not certain that that would be the case, indeed I imagine the existing provider for telecommunications in the Islands would actually submit a competitive tender to us with the provision of the services we would require and those would need to be considered on their merit alongside the open competition and the quality of opportunity with other tenderers.

The Honourable Dr Barry Elsby

Could you just clarify how you handle matters of communication during the exploration rounds?

Mrs Pippa Christie

I believe and I probably not the right person to answer this question fully, I believe the consortium entered into an arrangement with SURE in order to provide additional infrastructure to supply our requirements.

The Honourable Michael Poole

Just a quick thing Chair, Pippa, I know you have made this offer, I'm not entirely sure I have followed some of the specifics of that, so can you send your notes through to the office, that would be helpful. I guess the same message for anybody else that have not sent things in writing that have already spoken today, it would be good to have it because the verbatim record will take a little while to produce.

The Honourable Roger Edwards

We have asked that speaking notes are left with the Deputy Clerk so that we do have copies of them. Perhaps that should apply also to further detail. You started off by saying that Premier could provide additional details. If you could ask them to provide those additional details if you would.

Mrs Pippa Christie

Indeed, I'm speaking on behalf of people who know a lot more about this than I.

The Honourable Roger Edwards

If you could ask for those specific details that would be good.
Anyone else have any comment or question? No.

Dr Haseeb Randhawa, PhD, FIG Fisheries Department – Scientific Section

Good afternoon Honourable Members, ladies and gentlemen, thank you for the opportunity to be able to present some evidence and I'm doing so on behalf of my colleagues at the Fisheries Department, the scientific section. My specific role in Fisheries is as a fisheries biologist, but there is about half a dozen of us who comprise of the scientific section.

I am aware that some of the points I raise here have been covered in previous public meetings, phone ins or by previous witnesses today. However, I wish to reiterate them to demonstrate the relative importance to our scientists.

Falkland based scientists have contributed not only to the greater scientific community by publishing a large number of internationally peer-reviewed scientific articles over the past several decades, but also have contributed significantly to the economy and prosperity of the Islands by providing the knowledge base and support required for commercial development and sustainable exploitation of resources in various industries including fishing, agriculture and farming. Decision makers must ensure that any agreement we enter with a provider provides Falkland based scientists with the tools necessary to continue providing essential services to industries so that as a community, we can continue to prosper.

I will raise three main concerns:

- Despite technological advances worldwide, the Falkland Islands lag behind regarding communication infrastructure and access, I don't think that is a secret to anyone. Already isolated geographically, this lag exacerbates our isolation from the rest of the world. Seeing that provider contracts are targeted for approximately 10 year duration, we encourage FIG to look into processes to ensure investment in infrastructure and technology by the provider so that the Falklands do not lag behind any further than we are.
- The Falkland Islands are a small community in relative terms. As such, many Government Depts operate with small teams without abilities to realise economies of scale, including with respect to individual workloads. This is mirrored in many industries and business that are central to the Falklands' prosperity. As such, it is imperative that the Falklands be provided with the tools to develop network resources and access to become as efficient as possible. One of the main impediments identified to achieving this efficiency is slow connection speeds, bandwidth restrictions, and reliability of the network, not just on the FIG network but throughout it all. We encourage FIG to work with the provider to ensure increased reliability, increase bandwidth, and increase speed for the entire Falkland network.
- We encourage FIG to look into ways of decreasing the strain on the network to improve performance. Such as way would be to develop local networks or

clouds for government, specific industries or businesses or some form of intranet that can allow for efficient communication and exchange of information without relying on a satellite connection. This would effectively reduce the bandwidth use by specific sectors and improve network efficiency as a whole.

- Specific examples:
 - **Usage of external data sources for scientific analyses, i.e. oceanography, meteorology.** These are generally free to download, e.g. NASA, National Oceanic & Atmospheric Administration (USA), we are not talking about megabytes, we are talking about gigabytes of data every time and just to be clear, we are not interested in the images that we can get from the satellites we are actually interested in the metadata that are associated with each of these images. These can generally be downloaded fairly easily except when you have certain restrictions to the network. Due to network limitations it is sometimes difficult to access these during normal business hours because of bandwidth traffic at particular time and it is not really fair to ask employees to spend hours at their desk after hours or on weekends to be downloading this data when we should be able to do so when we need them during business hours. Additionally, in the event that there is a corrupt file, the entire download may be cancelled, so we need to be present when this happens. Data are generally required for either routine or specific analyses of fisheries data any delay in accessing these freely available data decreases our overall efficiency.
 - **Usage of scientific electronic libraries (downloading pdfs of scientific papers for research purposes).**
We also need to be able to download scientific papers, we are already isolated as it is but we don't need to isolate ourselves further from the scientific community. Many scientific papers are now 20/30MB in size and it is not uncommon due to bandwidth restrictions that connections time out before the paper can be download.
 - **Webinars – Professional development.**
Webinars are a way moving forward for many business, education, academic institution offer these can be relating to new technological advances, interactive educational one on one help with specialist in the field or also for career development such as how to mentor early career scientists which is quite important for line managers in the sciences. There are also organisations that offer seminar freely available if you view them online and that is a way for us to keep in touch with what is going on in our field. Conferences now offer remote access to conference attendance, these is not really feasible with current network structure so we need to ensure that these things are thought about. These types of webinars or other learning

opportunities are really critical to reducing costs when it comes to training.

The Honourable Roger Edwards

I will have to call a halt, you have had more than your five minutes and you are actually telling us what you need the internet for rather than telling us what you find is wrong with the Bill or the Licence. I think we all understand that we need internet and broadband to download all sorts of documents, pictures and as I said this morning entertainment and everything else.

Dr Haseeb Randhawa, PhD

If I could just have three lines of summary perhaps to address some of these issues, I guess it is important from our perspective as scientist that FIG look at protecting our ability to communicate with the outside world would mean better scientist and also to ensure that we can remain abreast of what is going on technology not just in our field but in terms of communication so that opportunities for career development and such are maintained and available to us. Basically we need to be able to provide these essential services that we provide to industry and businesses to ensure prosperity in the future as we move forward.

I thank the Assembly for hearing us and apologies for going over time.

The Honourable Roger Edwards

Thank you, questions?

The Honourable Gavin Short

Good afternoon, just somethings I would like to clear up please. Are you accessing this data from your office?

Dr Haseeb Randhawa, PhD

Yes

The Honourable Gavin Short

Do the Fisheries have their own access to the Internet or do they run over the Government system.

Dr Haseeb Randhawa, PhD

It is FIG system.

The Honourable Gavin Short

So, the Government system is a loose circuit is it not? There is a certain size of pipeline, the lack or trouble getting data could be cause by what is in that pipeline as oppose to what is out there?

Dr Haseeb Randhawa, PhD

I think the issue is with the bandwidth available to FIG. This is not my area of expertise, but the way I understand it, the more traffic there is in Government, the more restricted the flow will be our specific downloads that we have.

The Honourable Gavin Short

That is exactly what I was trying to get at. I think your problem is being caused by what is happening internally by Government, the pipeline may not be big enough for doing stuff rather than what is going on or off island. You are being choked before you get there.

Dr Haseeb Randhawa, PhD

Can I ask Nikki Buxton to address that specific issue please.

Ms Nikki Buxton

The issue MLA Short is the data that the Fisheries Department and other FIG departments are trying to access are directly through the satellite. All of this data is not a network problem; it is a satellite bandwidth problem. The same satellite bandwidth that you have at home, obviously it is on a dedicated line, which is a very, very expensive dedicated line, that FIG pay for, but it still has that same kind of constraints of latency in bandwidth that every other connection has and that is what Dr Randhawa is addressing, that restriction.

The Honourable Gavin Short

Certainly some amount of latency you just can't get away from.

Ms Nikki Buxton

Absolutely, so the issue is not the FIG network but the connection.

The Honourable Gavin Short

So there is plenty in the FIG network for what they are trying to do.

Ms Nikki Buxton

Yes, absolutely.

The Honourable Roger Edwards

Thank you Nikki. Anyone else?

The Honourable Phyl Rendell MBE

I'd just like to ask a question? I'm technically competent in this area, but I understand and there have been two people giving evidence have said that there are issues with very large files or very large documents that they haven't been able to access and have had to end up using memory sticks and there are obviously problems with the Fisheries. I thought that there were things called FTP sites that could be set up by the originator of the data which you could access and that is one way of getting around downloading very large files. Does anybody know about that? I know it has been done in Government but you have to get the approval to set up a FTP site to get around that. Perhaps Nikki can answer?

Ms Nikki Buxton

FTP site, absolutely those are currently in use and was one of the things that Fisheries and SAERI and all the other departments use. The problem is the size of those files in themselves are huge, to the orders of magnitude of not just the size of a video file, these are gigabytes and gigabytes or metadata and they come as a packet. To try to download a packet of 3GBs of data at once is just not feasible under the current satellite connection.

The Honourable Phyl Rendell MBE

So, even if we increased the bandwidth 100 times as was being suggested it still wouldn't be big enough?

Ms Nikki Buxton

It would, you would be able to do that.

The Honourable Phyl Rendell MBE

I'm just wondering if we are talking about things that we cannot.....

Ms Nikki Buxton

No, that would allow that, because part of increasing the band pipe is not just the amount of data, but also the speed of the data and the latency. Latency we obviously cannot do anything about but we can work on the other two.

The Honourable Roger Edwards

Thank you very much Nikki. Anybody else has any questions.

The Honourable Dr Barry Elsby

You are the only person working for Government who is giving any evidence, are you representing yourself, the scientists or have you been asked to speak on behalf of the Fisheries Department.

Dr Haseeb Randhawa, PhD

I have been asked to speak on behalf of the Fisheries Department on certain aspects to Natural Resources.

The Honourable Dr Barry Elsby

Thank you.

The Honourable Roger Edwards

Thank you very much indeed.

Attorney General

I should of course point Members attention to proposed clause 24 of the new Bill which will of course mean that the Government could make alternative provisions. So in relation to this witness' evidence this maybe a matter for the Chief Executive to consider.

24 Crown and Government

- (1) The licence requirement does not apply to anything done by or on behalf of—
 - (a) the Government, or
 - (b) any other public body.

- (2) The licence requirement does not apply to anything done by or on behalf of—
 - (a) Her Majesty's Government;
 - (b) Her Majesty's armed forces for operational purposes;
 - (c) the providers of the British Forces Broadcasting Services;
 - (d) the British Antarctic Survey.

An exemption under this section does not apply to the provision of electronic communications services to the public at a time when services of that kind are provided by a licensee.

Miss Felicity Sawle, Private Consumer

Honourable Members, Ladies and Gentlemen;

Thank you for granting me permission to speak to you today regarding the new Communication Bill and subsequent 12 year renewal of the 'SURE' exclusive licence. Firstly, as I am sure that you are aware that I work for FIG, I would like to publicly state that any views or opinions I express here are mine alone as a private individual and do not necessarily reflect the views or opinions of my colleagues, my Department, or FIG as a whole.

Telecommunications are essential in modern life. With instantaneous transmission of data from anywhere in the world to anywhere else, I believe it is fair to say that everyone living in Developed Nations expects to be able to tap into a high quality telecommunication network, for private and for business use.

Not that long ago the only way to watch a movie at home was to buy a video cassette tape. Then in 1995 the technology companies Philips, Sony, Toshiba and Panasonic invented the digital versatile disc. That was only twenty one years ago, but the DVD made cassette tapes obsolete. I doubt young children today have ever seen a video cassette tape let alone watched a movie on one. How many stores still sell video cassette players? I would say none; because technology moved on and the old was replaced with the new.

With the modern world moving away from hard drives, CDs and DVDs and moving towards cloud-based storage and digital downloads, the Falklands are in danger of being left behind. What do we do when the technology companies stop selling computers with in-built hard drives because they offer a free cloud-based storage option? What do we do when companies stop manufacturing DVDs and CDs and move towards digital downloads? It took less than twenty years for the cassette, invented in the early 1950s, to become obsolete. The Apple iPod itself is only fifteen years old. Just imagine where we could be technologically in the next 12 years. With continued restricted MB usage the Falklands are in danger of following the fate of the cassette and becoming obsolete as well.

My internet package is what used to be residential silver and is now known as the 'lite' package. While my package quota has increased since November 2015, when I first connected with 'SURE', the quota is still far too restrictive for my needs. I live alone, the only person on the internet is me yet I still managed to get to 97% of my quota last month. I was forced to switch my router off for fear of going over my quota and incurring extra charges.

I cannot move onto the higher package because I still can't afford it. I already have a full time and a part time job. I recently built a house which means I have a mortgage to pay. I don't say this to garner sympathy, I am very proud of my financial independence, I make this statement to showcase how the public, or the 'little people' as I believe we are referred to these days, are being backed into financial corners over our internet. And even if I could afford the 'bronze' package, I refuse on moral grounds to pay nearly a £1,000 a year for restricted internet.

The constant worrying over quota limits is exhausting. Apart from my parents, all of my family live outside of the Falklands. Even my brother is away right now learning to fly helicopters in Portland, America. If I want to communicate with my family I can only do so through the internet. At a pound per minute, I'm certainly not going to call them using my landline. Three of my cousins had children in recent years but I can't join their WhatsApp groups or see pictures of their children because I can't afford the MB usage.

Additionally, I am currently studying a HNC in waste management with the Northampton University via distance learning. I am very fortunate in that my manager gave me permission to use the internet at work to download course materials as the course is directly linked to my day job. I have on occasion gone into the office on the weekends to do research because my private internet package won't allow for the kind of intensive research I need to do. Let me give you an example, my tutors' recommend that I spend at least 102 hours of independent study per module. Distance learning is very internet heavy, particularly since none of the published works recommended for reading are available in print in the Falklands. I am quite fed up of paying extortionate fees for woefully inadequate quotas to one company who take all the profits and give very little in return.

If Government approaches telecommunications with the view that only 'SURE' can provide these services, then what bargaining power do we have? How can we get a better deal if we rely on one provider for these services? How do we know that 'SURE' is offering the best deal when we have nothing to compare it to?

I realise that this committee, like the public meeting, is essentially a tick-box exercise as the Bill is all but passed. But, hopefully, Members will rethink this Bill and subsequent 12 years exclusive licence, and note the frustrations expressed by all of us against this Bill and, perhaps, take our views on board and expend a little more effort in securing the best deal for the future of the Falklands and all who live here. Thank you very much.

The Honourable Roger Edwards

Thank you Felicity, may I say that the Bill is not all but passed, the Bill was put into the political process by Executive Council deciding that they should put it into the Gazette which is effectively the first reading. If we were now to cancel or stop this Bill, it would mean that we could not bring it back during the life of this Assembly so that whole thing without any work being done would have to be delayed by over a

year. We have gone into Select Committee, a Select Committee can sit as often as it likes and as long as it likes and take as much evidence as it likes until it is satisfied that we have covered all the ground necessary before we pass this Bill. So, that is why we are having this Select Committee and believe you me, I do not intend to treat this Select Committee as a tick box situation. We really are trying the best we can to get the information and to change and alter and adjust things until we meet the majority of requirements of the people.

The Honourable Mike Summers OBE

Can I ask a question in relation to cloud based storage, I don't know whether you are technically competent in this area or not and I have heard a few comments about the development of cloud based storage. Are you aware of any potential solutions to that in the Falklands other than expanding the amount of bandwidth?

Miss Felicity Sawle

As you suggest, MLA Summers I'm not technically competent, certainly not in cloud based storage, I feel that with systems moving to cloud based storage we will need greater bandwidth in order to download things onto these systems and back off again. For example, if I wanted to download an iTunes movie, that is several gigabytes of data if I could store that somewhere off my hard drive so as not to clutter up my computer it would be very useful but then I would have to re-download it or reconnect to that system again and that would be where the issues would be.

The Honourable Mike Summers OBE

Thank you.

The Honourable Dr Barry Elsby

You summarised the progress from cassettes (which you are too young to remember) but we thought they were state of the art and the rapid progress that you have seen and I hadn't actually given it the same thought that you have which is people might start to sell computers without hard drives in the not to distance future.

They do

Well I rest my case. I think that is a very important point to raise and I thank you for putting that into the public domain.

Miss Felicity Sawle

I do remember cassettes we still own some.

The Honourable Roger Edwards

I remember reel to reel. Anyone else for questions. No. Thank you very much indeed Felicity for your submission.

Mr Andrew Newman, Private Consumer

Honourable Members of Legislative Assembly, Ladies and Gentlemen. Thank you for this opportunity to provide evidence in this Select Committee on the Telecommunications Bill.

I provide this as a private consumer with the added benefit of working for FIG for 23 years, 12 in Regulation of which 3 were regulating Telecoms. For your benefit, I have I have outlined my evidence in the traditional Executive Council paper format. Any comments within are not intended in any way to cause offense to MLA's, FIG, Consultants or SURE South Atlantic Ltd.

My recommendations are:

- That you the Members of Legislative Assembly take advantage of the fact that notice has not been served on the current exclusive licence holder SURE South Atlantic, and that the licence has 3 years to run.
- That the Members of Legislative Assembly do not move this draft Bill to a further reading.
- That you the Members of Legislative Assembly recommend that the Executive Council and the Government examine the entire issue with full scrutiny and take full account of all information before considering issuing a 10 year plus licence.

There would be additional budgetary implications, this may well require additional funding to achieve this. However, this cost is worth it to hear what your electorate has to say on the matter, and the advice they can offer. Considering the sums involved the additional costs are minimal.

As a country, we have for more than two decades failed to plan and manage our telecommunications needs. This has been due to several factors, which are still relevant today. Our geographic location, our small remote population, lack of interested providers, lack of Government knowledge and therefore ambition for strategy and lack of understanding to influence the operator to provide the best service possible.

Each time the exclusive licence requires renewal we have the absurd situation where an operator being afforded the (until now) free privileges of an exclusive license, must be begged to provide a minimum needs service, through a method of their choice, for a long period of time. This situation should be totally reversed. Any business which has exclusive market position, for providing a fundamental utility, should never be in a position of making excessive profit and refusing to invest in our

country or the actual service provided. It is shocking that the current offered improvements are an enhancement of the initial offer, how poor was that original offer.

From experience, I would assume that you are under pressure to move matters forward to the satisfaction of the licence holder, improvements will not continue, agreements will not be signed etc. Please do not give in to this pressure at the expense of listening, debating and properly consulting your electorate. The consultation undertaken by your consultants does not replace the requirement to consult on what you have achieved and what you intend to do next.

You have already heard that telecommunications, according to your approved plans and strategies, enforced by various surveys and opinions, are critical to our country's development and our populations' standard of living. One must then ask why are you the Members of Legislative Assembly content to the extent that you agreed to put this draft Bill straight to gazette, your previous amendments were consulted on for 4 weeks.

This draft bill has many improvements from the 1988 Ordinance as amended. I would draw your attention to the key area with regard to making any new regime work. Regulation.

The last telecoms licence required a regulator, I could not fund or fill the post appropriately. My successor has had similar difficulties and in fact the establishment (post notes here until your recent Executive Council meeting) no longer in the budget. This should concern you greatly. You have set establishments and the associated funding and failed, at the cost of the protection of the public's service and any real chance of maintaining a proper licencing regime. Recruiting for the regulator you envisage will be extremely hard, in a climate where the Falkland Islands struggles to recruit at all.

The powers were already in the amended 1988 Ordinance, parts 2A to 2G, 11A to 11I and 45 to 46H. They did not work. How do you have any confidence at all that this new bill and the regulator post system will work now? Nothing has changed.

Much is being made of the amount of content in this bill to prohibit self-provision. I should like to make clear to you that when I was regulator I progressed an amendment to the 1988 ordinance that dealt with this and many other matters, nothing was done, nothing has changed now that was in place then.

The draft Bill can be amended to suite a revised position on the Licence and all other matters. The current legislation allows for the Government to issue a licence and regulate. Consideration should be given to creating a Regulatory Authority to remove it from FIG, enabling Aviation, Fisheries, Mineral and Telecommunications to be effectively regulated, funded by the licencing fees levied which should be commensurate to the regulatory effort required.

The Honourable Roger Edwards

Thank you Andrew.

The Honourable Mike Summers OBE

Can I ask you, is it your view then, do I understand it to be your view that the principal reason that regulation did not work previously when you were trying to do it was because there simple wasn't enough money or is there some other structural issue that hasn't been addressed by the new Bill.

Mr Andrew Newman

I think that a position of a regulator for telecoms is insufficient for what we want to achieve, you want to achieve, what we want you to achieve. It was probably thought appropriate at the time, but it was impossible to find a person of the quality that is going to be required in the sort of regime that we have, that is a one or two year contract to come here to do that. I just cannot see you finding that person.

The Honourable Mike Summers OBE

As the Bill is currently written it is my understanding that the Regulator doesn't have to be a single person, they can be a group of people.

Mr Andrew Newman

Yes, it would need to be.

The Honourable Mike Summers OBE

That is really the point you are making, that the reason that we didn't make progress under the previous regime was simply that that wasn't available.

Mr Andrew Newman

We didn't fund enough, we didn't recruit hard enough and worst of all we never kept up the effort.

The Honourable Roger Edwards

If you have an entirely independent regulator for just telecoms and so on, or you call it a regulatory authority which is independent of the Government and independent of the provider, how does he actually report back to us? He'll be doing his own thing will he not or will he have to work to our directions?

Mr Andrew Newman

I will give you an example; you would recall some of you have been MLAs for some time. When there was a great shift in aviation and ASSI appeared etc, etc. a number of overseas territories which you've probably visited created aviation authorities to remove that regulatory element out of their Government. It is done for aviation, it's done for other things, it can be done here.

The Honourable Roger Edwards

Any other questions for Andrew? No, Thank you very much.

Mr Jason Lewis, technical Director Jaytec Ltd

Honourable Members, many thanks for allowing me to present the following to this meeting. I feel that a lot of things have already been said, I'm going to try and not repeat too much, but I want you to try and consider a couple of things when you go and start considering the Bill and the licence in the future.

Innovation: to me that is very important as a business, at present our provider doesn't allow us enough innovation for businesses here locally to develop on the internet, for instance as it has been talked about, cloud storage, our own email servers maybe, our own web servers, our own data centre even. Currently that all comes under SURE, though it may not necessarily be under their licence they have a de-facto monopoly on those items.

The world is moving forward and we need to follow and the provision of the internet service and we should look at the business community as a whole to generate this content. To use this service whether it is online media business facilities, remote working in Islands or home automation. I would suggest the following to help with these ideas:

Free local internet – it has already been mentioned but without free local internet we are restricting what we can be done locally by businesses. Remote working, just mentioned, we could actually have people working for different companies not just in Stanley out of the office but around the Islands.

I would like to see a separation of content and services from the supplier, when I talk content I'm talking about the value added services such as cloud storage, webhosting and maybe even email service, this was we can encourage local businesses to take on some of these to provide competition and to improve services.

Finally improved local speeds, this is to encourage more local content particularly for media for instance, radio or TV could be broadcasting on the Internet especially if it is linked to free local internet. An increase connection is required and is technically possible.

Also consider protection, when I'm looking at protection I'm looking for mechanism that will protect the consumer both business and domestic. I know I feel that there could be more protection for the standard user, the business users have little or no protection for the more unusual services. I propose that you expand the function of the online broadband usage to give more information.

- This will allow you to examine and collate their usage from the various locations that you can access your internet including the hot spots.
- Give the regulator access to all relevant information to access complaints, the biggest complaint I hear is to do with usage and not believing what they have been told from SURE is true.
- Give the regulator the power to investigate and arbitrate on business services offered by SURE to ensure those services are fair.
- Allow self-provisioning of VSat and other services without the additional cost, this I feel is an easy way to regulate pricing for businesses and service levels from the monopoly. It has to be remembered that businesses don't necessarily look at VSat services to bypass the monopoly but more to provide redundancy to their mission critical networks or to provide services that are currently not available from the monopoly.
- Ensure that there is continually investment in services throughout the licence including the notice period. At present as I understand it there is no mechanism to ensure that the licence holder carries on investing in the company to improve services and prices.

I thank you.

The Honourable Mike Summers OBE

Jason, you talk about free local internet, I guess we are all aware that nothing in life is free, so that must presume that it is somehow crossed subsidised.

Mr Jason Lewis

I would say that you would expect your connection fee to actually cover the cost of the supplying of a service locally; unfortunately I don't have those figures to hand to know how much it does supply so I can't tell you how much a cross subsidy it might need from elsewhere.

The Honourable Mike Summers OBE

At connection fee as a one off payment, there would be no further cost involved?

Mr Jason Lewis

A connection fee as in your monthly fee.

The Honourable Mike Summers OBE

So, it wouldn't be free you would be paying a monthly fee, it doesn't affect your usage.

The Honourable Roger Edwards

It would be free from the point of view that you are not using your internet broadband package, you are using on island intranet rather than any broadband download, so from that point of view it would be free, you are not drawing out of your package.

Mr Jason Lewis

Yes

The Honourable Dr Barry Elsby

Chair, I think that works already very well with the Education Department, we use Intranet on the Islands to link the camp schools together and the camp schools to Stanley. That works very well, I gather that is at the generosity of SURE. Again it is a question I asked Nikki, how big an element do you think that would help, I suppose it depends on whether you have cloud based stuff here, the download , you can go as big as you want to.

Mr Jason Lewis

I think it would encourage my company to look at ways to provide additional services which are specifically for local usage. Whether that is having an update server available, whether that is providing webhosting or whether that is going as far as having my own data centre somewhere on island.

The Honourable Mike Summers OBE

Chair, can I ask Jason if he could just expand on that, you talked about removing storage from the exclusive licence, how does that work?

Mr Jason Lewis

What I was trying to get at there was to try and separate, maybe they need to look at separating SURE as a company, the part of the SURE company which provides the service under the monopoly and there might be a sub company which actually provides the value added services which other companies may compete against.

The Honourable Mike Summers OBE

So, the sort of thing Nikki was talking about before that was referred to in the Cartesian report as transparent caching, so that sort of thing could be providing by other companies you are suggesting, so you could make a deal with Apple for downloading of their updates.

Mr Jason Lewis

Yes or someone else.

The Honourable Gavin Short

You mentioned protection, I didn't quite follow that bit.

Mr Jason Lewis

Protection, I'm saying protecting the user whether it is business or domestic, so ensuring that there is regulation around to ensure that if someone has a dispute they have that protection of going to someone and also they have all the information they need.

The Honourable Gavin Short

Thank you Jason, understood.

The Honourable Roger Edwards

Anyone else? No, thank you Jason.

Dr Megan Tierney, SAERI

Honourable Members, Ladies and Gentlemen. Thank you for opportunity to speak today. I'm Megan Tierney and am here representing the view of the South Atlantic Environmental Research Institute (SAERI).

The new draft Communications Bill has many positive aspects but wish to emphasize number points that are integral to the continued development of SAERI and the services it provides both on a local and international scale.

SAERI aims to achieve the following:

- Conducting and facilitating world class research in collaboration with local and international partners
- Building capacity within the Falklands, across the other SAOTs and beyond.

- Development of an Information Management System and GIS data centre which provides data documentation, discovery, accessibility and storage service for people working in the Falklands (so called local users and including for example FIG, SAERI, FC and public/private sector entities), as well as people outside the islands (so called external users and including other researchers and public/private sector entities).

Achieving these aims is strongly reliant on having access to high quality communication tools and infrastructure, and we would like to appeal to the Select Committee that the following points are considered in the final iteration of the Communications Bill and if they are not currently incorporated then a decision on the Bill is delayed.

I'd like to cover three main points:

1. There is a need for a step-change in terms of available bandwidth and speed, and review of associated costs.

- i.e. It is requested that a larger bandwidth, with higher speed and an increased amount of Gigabytes at a reasonable price is provided
- This will enable access to resources essential to the type of research that SAERI, departments and other organisations within the Falklands undertake and outputs the produce – for example:
 - Large, external datasets – some of this I apologise has been mentioned throughout this afternoon, but I feel it is important to reiterate the points. For example, we also need access to some of these large databases such as provided by NOAA, NASA to name a few. Currently, gaining access/downloading data is prohibited by internet speeds and stability; downloads are made overnight, but often they fall over and have to be started again. This impact on quality and quantity of work produced, and costs time and money.
 - We need access to electronic journals and papers – again current speed and stability impacts on how easily these are accessed currently.
 - We also need access to training courses and/or searching for solutions to problems – many of these are now provided online. Access to these streamlined videos requires a stable internet connection, large bandwidth and capacity to download them without major costs. If we cannot access them, it limits how we progress both as an organisation and as individuals.

- Provision of data or work done by colleagues outside the Falklands – for example: recently SAERI contracted a data analyst specialist or a specialist in spatial data analysis to undertake a whole range of analyses for us. This generated in excess of 100 GB of data and results which needed to be transferred to the Islands. However, due to limited bandwidth capacity and the prohibitive costs of requesting additional bandwidth to enable such a transfer, the only cost-effective way to obtain the data was to have it sent by post on an external hard-drive. This obviously takes substantially more time and impacted on delivery of results.
 - Central to the Information Management System (IMS) and GIS Centre is the capacity to both store and provide access to data. This requires the ability to both receive (download) data from external organisations (both within and outside the Islands) in order to store them on the data repository, and to be able to upload files to a cloud server so that data is available to external users.

Without the provision of adequate bandwidth and download/upload speeds at reasonable costs, it prohibits the IMS fulfilling its role.

2. Development of a modern telecommunication system which separates the infrastructure and costs of accessing data on a network by local users from the infrastructure and costs of accessing data/tools via satellite

- This can and has been done as already proved by the establishment of a local network between the Camp Schools and the Infant Junior School, we just heard MLA Elsby explaining some of that.
- With much of the infrastructure already in place, costs would be minimal to roll this out across the Islands and the benefits would be astounding.
 - For example, separating local traffic would make access to tools and research results affordable for local users.
 - This would then serve to help increase capacity and uptake of such outputs within the Islands.
 - SAERI has already been involved with developing a number of web-based tools (e.g. for Marine Spatial Planning and Renewable Energies), which can be used to help enhance land and resource management.

- However, these tools won't be used if locals can't access them at a reasonable cost – hence the need for the separation of local vs. satellite traffic.

3. Access to improved IP telephony and Voice Conference tools

- Considering the remote and isolated nature of the Falklands, using such facilities is essential to an organisation such as SAERI for building international collaborations and partnerships
 - For example they enable us to have virtual face-to-face meetings.

The collective capacity of people within the Islands, and in conjunction with international partners to conduct world class research necessary to continue rich, sustained and responsible economic growth and environmental management is already being proved. However, if the opportunity to enhance and improve the communication tools and infrastructure that is essential to this development is not taken, we will stagnate and fall helplessly behind the rest the connected world.

Thank you.

The Honourable Mike Summers OBE

Can you quantify what you mean by larger bandwidth, same question as I asked to others.

Dr Megan Tierney

Yes, and it's along the same answers, that the answers have given as well, we would be looking, increasing in 10s of folds of capacity, the one example I used there was just from one project that we were working on that was generating 100 GBs of data that needs to be transferred likewise with the IMS, the amount of data that is already being put onto the repository and that needs to be accessed both internally and externally is only going to grow, so we just need to have the capacity for people to access that in time and cost efficient manner.

The Honourable Mike Summers OBE

You are talking in terms of 10s, the answer from Stacy at the Chamber was that January 2019 allocation should be brought forward, that is just a doubling, you're not talking about that amount.

Dr Megan Tierney

No, I'm talking more along the lines of what Dr Hasseeb and Nikki Buxton were intimating in terms of 50 to 100 times capacity.

The Honourable Mike Summers OBE

Thank you.

The Honourable Michael Poole

Thank you Chair, you mentioned stability issues, we are all conscious of bandwidth constraints, I hadn't heard of stability as being a particular problem recently. Is that quite a common concern?

Dr Megan Tierney

Yes, particularly if you take the example of trying to download and participate or join a virtual meeting, things drop out you have fuzzy lines, it impacts on the work that you are doing, likewise if you are looking at online training tools, etc. you can watch for a minute then it goes on a buffer for a bit long, that type of thing, it all adds up in terms of stability.

The Honourable Michael Poole

I was thinking more in terms of downloads, is that an issue when you are downloading large files, dropping out and having to restart?

Dr Megan Tierney

Along the lines of what Dr Haseeb was talking about before even when we have been using FTP sites and I go back the one example I have there with the 100GB data transfer I was trying to get that downloaded over periods of weeks to try and get that and we had the trouble of doing it overnight, big packets of data trying to come down, they get half way through and fall over and the system tries to start it again, so you do have those stability issues.

The Honourable Roger Edwards

Anyone else? No, thank you very much indeed Megan that was excellent.

Mr Roger Spink, Private Consumer

Honourable Members, ladies and gentleman, in making my submission to the select committee I would re-iterate the statement made by the Chamber of Commerce to FIG in their 2015 position paper- *"That the licence be exclusive only to resale of telecoms services, thereby allowing businesses and individuals to self supply but not*

sell services. This will allow choice and testing of technology, and should impart an element of competition in that the licence holder should be able to install/provide the service cheaper than any business/individual. If a business needs a robust, reliable, balanced, and economical telecommunications system and cannot get that through the existing exclusive licence holder, why should their economic development be constrained by the deficiencies of the available licensed system? There can be no denying that the handful of VSAT installations in the Falklands outside of the control of C&W (now SURE SA) was the catalyst for investment and progress by the licence holder for the rest of the Falklands."

My belief that this freedom for self-provision should be incorporated into this bill when enacted is based on personal experience when we moved to Moody Brook and we were told only VHF internet services were available. On advising the General Manager of Cable and Wireless (C&W) at the time that if they failed to provide Broadband we would obtain our own satellite dish almost immediately lines were run by C&W so that we could enjoy the network supplied in the rest of Stanley. I have no doubt that without this ability to self-provide we would have been left with a substandard service for many years. Further I believe the threat of self-provision by other businesses and individuals has moderated the behaviour of the licensee.

I am not convinced a regulator would protect individual's interests as can be seen from some local instances such as the appalling and potentially damaging dust some residents and their children at Mink Park have to put up with. Despite individual members of the Government working hard for the community having been informed of this issue The Falkland Islands Government as an organisation has failed to address or respond to this matter for a number of years. Given the lack of action on such an issue why should consumers have any faith that a regulator would protect their interests on telecoms?

The Bill excludes the British Antarctic Survey (BAS) from licence requirements. Whilst it is appreciated the sentiment behind this may be to encourage BAS to use the Falklands why should their requirements be favoured and discriminate over resident individuals, organisations such as SAERI and businesses who all contribute to the economic growth of the Falklands?

It is unclear to me what status the negotiations with SURE have reached or whether any commitments have been entered into by FIG but I would urge MLA's before passing this legislation to review the representations received from all sectors of our community and given the importance of modern communications for our development and social interactions with the rest of the world revisit the deal that has been reached.

Thank you very much.

The Honourable Roger Edwards

Thank you very much Roger, well under your 5 minutes. Questions?

The Honourable Mike Summers OBE

Can I clarify when you say that the exclusive licence should be for telecoms only would that include mobile data?

Mr Roger Spink

I would have thought so, yes, I would have to go back to the original Chamber position paper but I can come back to you on that.

The Honourable Mike Summers OBE

If I can ask a second question Chair, if the Communications Bill were to make a possibility of self provision how do you prevent ever potential future large operator in the Falklands just disappearing through that loop hole to the dis-benefit to the rest of the community. It is the same question I put to the representative of the Chamber.

Mr Roger Spink

The monopoly provider, provides them with a service at a price which is competitive and I think that is something that has been missing. If they provide a competitive price for instance, the VSat service that we were going to get at Moody Brook was going to be far more expensive than us plugging into a proper C&W system, we didn't want to do it but it was the only way we could get SURE to actually provide the service that we wished to have and I think the same would happen for most organisations. You don't want to have a satellite service which doesn't have the advantage of having engineers backing it up. So, even if SURE provided something that is slightly more expensive than a VSat system I'm sure almost 100% of people would prefer to use the monopoly provider, but they are not going to be put over a barrel, which is what has happened in the past.

The Honourable Dr Barry Elsby

I suppose I must declare an interest, Chair I was one of the people at Moody Brook, we couldn't get any form of internet and C&W said no, no, no, no until Roger said we will get in a VSat and literally within days they changed their minds from it can't be done to yes its happened.

The Honourable Roger Edwards

A good example of where you have used pressure to get a service.

Mr Roger Spink

Yes, we didn't want to do it.

The Honourable Roger Edwards

Anyone else for questions. No, thank you very much indeed Roger. Before we go into our 5 minute comfort break, I think what I have taken from all the presentations so far, there are the odd points outside this but it all boils down to:

- Broadband package size, speed of download and upload at an affordable price.
- The worry that we are not going to be innovative on the investment so that we keep abreast of technology advancements/changes we are going to be left behind. I think there is a fear on that.
- I think the majority of the ten people spoke of the requirement for a local intranet that is outside the broadband package available to folk today.
- Finally, there is deep concern shown by several people who submitted both written and verbal submissions to this committee is their doubt that the regulator be he an FIG employee or an employee of an independent of FIG would be able to properly regulate and ensure that the provider sticks to the terms of the licence and the Bill.

Have I summed it up in general terms, or is there anything outside that, that members of the public think I have missed?

Those are the sort of four bullet points that I think everybody put across in some way or another.

Mr Andrew Newman

I think you have got a number of them but I would just bear in mind that that five minutes rattled away quickly, we did try and talk to the Bill which is the purpose your committee here, but they are linked as one is enabling a number of other things and we could have probably bored you for days with additional points to the four that you have put, so please don't limit yourself to those summaries.

The Honourable Roger Edwards

We certainly won't, we will look at all the submissions but I think in broad terms that is what everybody has brought before this Select Committee.

Mr Andrew Newman

Yes, a very good starting point.

The Honourable Jan Cheek

I just wanted to make the point that there seems to be a misunderstanding that we could actually pass the Bill here today, which of course we can't we will work on it through Select Committee when it may be ready to go back to another Legislative

Assembly but we are not in the position to pass it here and now so people shouldn't be alarmed about that, we are willing to spend the time on it and we need to.

The Honourable Roger Edwards

I thought I had made that point when I answered Felicity who thought we were going to.

Ms Nikki Buxton

I just wanted to clarify the bandwidth, it's not just drip fed bandwidth its big bandwidth, so not just a little bit of data, and it's a lot of data. I think everybody has said that.

The Honourable Mike Summers OBE

I think we got that.

The Honourable Gavin Short

Am I allowed to ask a question of the people here if I may, or indeed recall one of the witnesses.

I was thinking of, if the bandwidth today was at 2019 size it may not go far enough, I was wondering from the Chamber perspective, how many of your members would still want to be outside. You obviously don't have that answer with you, but I wonder if it is something you might be able to ask them. How many folk would want to be outside of the system completely?

Mr Stacy Bragger

You are right we haven't asked that question, I think I would back what Mr Spink said, most people wouldn't want to, they would want the local back up of engineers if they felt the deal they were getting was competitive, they wouldn't require the need to have VSat. It is not a point we have asked members but hopefully what I have said and what other people have said that there is a deep frustration in where we find ourselves today but I can certainly go back and ask.

The Honourable Gavin Short

You think if it was 2019 rates today at the price as quoted there folk would be quite happy?

Mr Stacy Bragger

I can certainly go back to members and get a view.

The Honourable Gavin Short

Could you, I would find it quite useful.

The Honourable Roger Edwards

We have asked Stacy and others to come back with some detail. On that basis I will remind you all that this is a public meeting, the Select Committee is open, it is being recorded for the radio, its being televised as well so you are welcome to stay but I am now going to declare a 5 minute comfort break so everyone can stretch their legs and please can you be back and seated by half past.

-----BREAK-----

The Honourable Roger Edwards

Thank you very much everyone for getting back for 15.30. before we start going through the Bill clause by clause I summed up with my sort of four major bullet points which I thought had some out of the presentations and written evidence, but as a the Director Central Services is our advisor and expert at the table, would you like to give us a five minute presentation, not trying to defend Government, where we are or what have you but on the points that you have picked up on the presentations that we have had today.

Mr Matt Bassford, Director Central Services

I probably won't speak for five minutes, but I will make a few points. I agree with your summary of the points that folk made over the past hour or so. There is a lot that I have agreed with in what people have put forward in terms of evidence, thank you to those that have spoken and have put those things forward, it is an important issue, people that have spoken gave a lot of thought to what they have said.

I think a few reflections from me, I think with many of the issues people have raised, there are trade-offs between things, the obvious one is data and speed, with a fixed pipe a certain international capacity, there is a trade-off between the more data we put through that pipe the slower the speeds are for people and I think clearly there is the balance there with the size of international capacity that it is feasible setting the data limits and the way that it delivers the speed that people need to download things and the volume of data that is required to do that. I think moving forwards it is clearly important that those data limits and speeds increases and I suppose we need to think as Nikki and other have said about the fact that technology doesn't stand still. We listened carefully to proposals from potential satellite providers of different technologies back a year and a half ago along with SURE and evaluate those carefully and we understand that SURE will be switching to the APPAX satellite when that is launched, it is clearly not launched yet to deliver some of the benefits that will do and as we have said before it is really important to begin looking ahead now

about what we are going to need both at the end of the price cap review period assuming that the licence and the Bill proceed and that will happen formally two years from now, but that process needs to start really quickly. I would agree the same thing about cloud based applications and other things that are changing globally that we need to ensure that we don't fall behind. It can enable business and local residents to continue to use the internet and take advantage of that.

There are other trade-offs in terms of the priorities that we set and discussed with SURE, I was talking outside just now with a colleague about the mix of priorities that were set and one of the areas of focus we had was expanding the mobile network across parts of the Camp. That requires significant capital costs and had we not prioritised that, that money could have been used in a different part of the agreement with SURE, but we have in the negotiation to try and balance the priorities that came up on behalf of the whole Islands rather than perhaps just the needs of very high data users, which is most people who have been talking today have been people who are at the high end of that.

I think the other thing I would say and it was another trade-off which was in my head when probably Andrew was talking is about the length of time we set a price cap versus the pace of technology, we didn't want to tie ourselves into a new arrangement for 10-12 years' worth of agreements that are set in stone, which is why we elected to go for four years with a very early review period to take account of both technology developments and new demands from business and other people in the community here.

Two final points, then I will stop talking and try not to repeat the stuff I have said before. Clearly when we started this process we took a lot of advice both from external consultants and listened to what priorities were from the community and business and thought very carefully about our negotiating strategy with SURE. Whether to compete, whether to serve notice, we got technical advice on a whole range of things, transparent caching, delivery of local content, a number of other things and some of those things are still on the table, video on demand, TV on demand would be one of those things which we have talked about with Members before, but certainly it is fair to say that we went into this with a wealth of information at the start of the process and took that into account, it is not something we have done in an afternoon or over the course of a week. I think part of the interesting thing now is that more or less concluded about a year ago and we have clearly moved on a lot in that past year and I guess it is important that this part of the consultation is to look at that again and consider the Bill and Members I guess will discuss that and decide what to do next. But, just to say it wasn't something we went into quickly or without taking a lot of advice from both local community and externally.

Thank you for the opportunity to speak.

The Honourable Roger Edwards

Does any member of the Committee wish to say anything at this stage or are you happy to carry on with the Bill itself?

The Honourable Mike Summers OBE

Can I ask a question please Chair of Matt? One of the key issues about this that comes out time and time again either today or in other conversations elsewhere is the believability of the proposals to regulate and I think I asked you a week or so ago for a public piece of work to members to demonstrate how we would move from the order of 40% return profit loss on turnover to a more recognisable and acceptable rate of 15 and 20%. How are you getting on with that?

Mr Matt Bassford, Director Central Services

It will be ready in time for our meeting on Tuesday next week and is a piece of work that we like to inform our negotiations on price cap.

The Honourable Jan Cheek

Following on from Mike's question I could ask the Attorney General, how we would enforce that regulation.

Attorney General

First of all we moved forward quite a lot, there is a penalty regime and one of the issues connected to the debate we are going to have about the independence of the regulator is the ability of that regulator to impose financial penalties. The financial penalty threshold is set out in the Bill which we will talk about when we get there, if they don't meet certain agreed KPIs then financial penalties can follow. One of the things that SURE have asked for which as yet we haven't got is effectively a penalty guideline so how will the regulator arrive at that penalty and the methodology we were proposing to use is one that is very commonly used in relation to sentencing guidelines, so you would say, that the penalty would be considered more severe in those circumstances and less severe in those circumstances so when considering a penalty or setting an amount you are being informed by aggravating factors and mitigating factors. Obviously you will want the penalty to penalise any activity that doesn't get delivered on time. That is part of the answer, because that deals with the improvements of the service on the day they were going to improve it.

The second point is about what visibility and enforceability we have around the price cap regime itself and again when we look at the Bill, one of the things we will see is that we have asked for a lot more information and to allow the regulator to see what is going on and if there is a breach also to impose penalties for breach in a similar way so we have both, a failure to do what they said they were going to deal with on the day they were going to do it, to which there could be a financial penalty and also

a failure to comply with price cap and the greater information that allows us to identify whether that has been achieved.

The third element is financial penalties also apply in relation to the failure or otherwise to deal appropriately with consumer complaints so the regulator gets quite a lot of power in relation to ability to put a financial penalty to something.

I also think, if I may Chair, that another issue is and I think this comes back to a lot of things that have been said in the room and effective regulator properly managing the public assets and making information available in itself becomes a disincentive and becomes a regulatory measure, because the more exclusive provider known that the information will be known by all the customers and is publicly available they are very aware of the commercial consequences for doing something which would be seen as being unpopular. So I think those are all of the methods.

The Honourable Mike Summers OBE

It is really important that the penalty is levied at such a level that it's not worth the licensee simply accepting and saying actually it is cheaper to carry on incurring the penalty than it is to fix the problem.

Attorney General

Absolutely and when we look at the level of penalty, we can debate the level of penalty proposed, it is at that higher level, I need to find the exact one but it is at the higher level of the penalty regime, I think it is either 10 or 12 on the standard scale, but I would need to check.

The Honourable Dr Barry Elsby

What does that transfer into real money?

Attorney General

Level 12 is £625,000, if I recall or thereabouts, I would need to get my fee schedule.

The Honourable Gavin Short

I would just like to come back on something Matt said and he is quite correct, the people we have heard from today in general are businesses, high users, but I would like to say that certainly in the strata of society in which I move which is ordinary folk, we also find the packages as proposed even though I'm straying into the other side, woefully inadequate for what we are paying and for what we use in today's circumstances where everything right down to almost your fridge nowadays is wanting to do updates. We smile about it but it is not funny, it does cause real problems. I believe we are not in the right place yet.

The Honourable Roger Edwards

I personally believe you can put down all the regulation you want, you can appoint all the regulators you want but if there is not a will to impose on the supplier it will not happen so I think we have to back up the regulator with a will to ensure that it is done.

If I can bring you back, the Communications Bill that we are looking at is the one that was attached to your order paper this morning.

The Honourable Mike Summers OBE

Chair, please can I check with the Attorney General, is that significantly different from the one that was attached EXCO paper 163/16 as that is where all my notes are?

The Honourable Roger Edwards

It is not very much very different but I believe that there are some typos that have been corrected. Is that correct?

Attorney General

If I can, the paper is exactly similar except for typographical type amendments, one of them is fairly substantial, which we have included an arrangements provision in the section right at the front, affectively, the index which appears at the first three or four pages are not in your version, the version that EXCO saw begins on page 60, but in order to adopt the style of all Falklands legislation we have inserted the arrangements of provisions clause.

The Honourable Mike Summers OBE

Okay, thank you.

The Honourable Roger Edwards

Arrangement of Provisions – I take it that there are no amendments on those.

Attorney General

Arrangements of provisions - I make no proposals to amend.

The Honourable Roger Edwards

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY

1 Title

This Ordinance is the Communications Ordinance 2016. – No amendment

2 Commencement - No amendment

- (1) This Ordinance comes into force on such date as may be specified by the Governor by notice published in the Gazette.
- (2) Different dates may be specified for different purposes.

3 Overview - Delete

~~This Act deals with the following matters—~~

~~(a) Part 2 sets objectives and principles for the exercise of functions under this Ordinance;~~

~~(b) Part 3 establishes, and makes general provision about, the Communications Regulator (“the Regulator”);~~

~~(c) Part 4 requires, and makes provision about, electronic communications licences;~~

~~(d) Part 5 requires, and makes provision about, broadcasting station licences;~~

~~(e) Part 6 makes provision about radio spectrum management (including provision about licensing);~~

~~(f) Part 7 makes provision about the grant of an exclusive licence for the provision of telecommunications services;~~

~~(g) Part 8 makes general provision about fees;~~

~~(h) Part 9 makes provision about consumer standards and protection in relation to services provided in accordance with this Ordinance;~~

~~(i) Part 10 makes provision about the public control of electronic communications services;~~

~~(j) Part 11 creates offences in connection with provisions of this Ordinance, and makes general provision about offences created by other Parts;~~

~~(k) Part 12 makes provision about the use of land in connection with electronic communications services;~~

~~(l) Part 13 makes provision about public interest retention and interception of data and surveillance;~~

~~(m) Part 14 establishes, and makes provision about the functions of, the Telecommunications Appeals Panel.~~

4 Interpretation - No amendment

In this Ordinance—

“apparatus” includes any equipment, machinery or device (including, in particular, wire and cable and the casing or coating of wire or cable);

“audiovisual media service” means a service for the communication of material to be displayed as a combination of sounds and pictures;

“broadcasting station” means an installation for making broadcasts;

“carriage service” means a service consisting wholly or partly of transmitting signals by means of a network; and the expression—

(a) does not include a content service, and

(b) does include the provision of services ancillary to the conveyance of signals and conditional access or other services to enable customers to access a content service;

“class licence” has the meaning given by section 34;

“content service” means a service either for the provision of material with a view to its being comprised in signals conveyed by means of a network or that is an audiovisual media service;

“domain name” has the meaning given by section 88;

“electronic communications objectives” means the objectives set out in section 5;

“electronic communications” means the conveyance of signals by the use of electrical, magnetic or electromagnetic energy;

“electronic communications data” means data relating to electronic communications;

“electronic communications equipment” means equipment designed or intended to be used in connection with electronic communications;

“electronic communications network” means a network of electronic communications services;

“electronic communications services” includes the provision of a carriage service or a content service, including both public and private, mobile and fixed (unless otherwise stated) voice telephony, data and internet services;

“Falkland Islands territory” means the Falkland Islands (within the meaning of the Interpretation and General Clauses Ordinance);

“individual licence” has the meaning given by section 34;

“interfere”, in relation to a communication, includes fail to deliver, delay delivery, intercept, divert, monitor, and make personal use of the communication;

“the licence requirement” has the meaning given by section 21(2);

“licensee” includes any subsidiary undertaking included within the scope of a licence in accordance with section 38(1);

“message” means any communication, whether oral, written, printed or displayed or conveyed by any means;

“network” means a system used or designed to be used to send signals of any kind, including anything (including data) required to make the system operate;

“numbering plan” means the plan made by the Regulator under section 83;

“programme” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by an audiovisual media service provider and whose form and content is comparable to the form and content of television broadcasting;

“radio” means the transmission or reception over any distance without connecting wires of images and other visual matter and of sounds, signs or signals by electrical means;

“the Regulator” means the Communications Regulator appointed under section 7;

“the regulatory principles” means the principles specified in section 6;

“signal” includes—

(a) anything comprising speech, music, sounds, visual images or communications or data of any description; and

(b) signals serving for the communication of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus;

“spectrum licence” means a licence issued under the terms of section 56;

“spectrum plan” means the spectrum plan published pursuant to section 55;

“state assets” means any radio spectrum, national telephone numbers and domain names;

“television broadcast” means an audiovisual media service provided by an audiovisual media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

“universal service” means those services specified pursuant to section 65; and

“wireless telegraphy” means the emission or receipt of signals over a path of electromagnetic energy of a frequency not exceeding 3000 gigahertz where that path—

(a) serves for the conveyance of messages, sound or visual images (whether or not the messages, sound or images are actually received by anyone), or for operating or controlling machinery or apparatus; or

(b) is used in connection with determining position, bearing or distance, or for gaining information as to the presence, absence, position or motion of an object or of a class of object; and

“with lawful authority” means in accordance with a provision of this Ordinance or any other enactment, in accordance with a provision of a licence issued under this Ordinance, in connection with or in the course of activities licensed under this Ordinance, in accordance with a warrant, notice or requirement issued under this Ordinance, or in accordance with an order of a court.

PART 2

OBJECTIVES AND PRINCIPLES

5 **Electronic communications objectives – agreed with suggested amendments**

The electronic communications objectives for the purposes of this Ordinance are—

- (a) to promote the public interest generally in relation to electronic communications;

The Honourable Mike Summers OBE

(b) to facilitate effective communication between the people of the Falkland Islands and the rest of the world;

I have mentioned this before, but it struck me that that should be “to facilitate effective communication internally and between the people of the Falkland Islands and the rest of the world;” A lot of what we have heard today and what we have talked about in the past is to do with internal communications. It might be a small point but it is fundamental.

The Honourable Roger Edwards

I believe you are absolutely right and I have purposely made in my introduction in the Legislative Assembly this morning national and international, I referred to. So it is internally and externally.

Attorney General

It might be an opportunity to confirm the actual amendment to you in the morning but I think if we added after “communication” the words “in the Falkland Islands and” that would address the concern raised

The Honourable Mike Summers OBE

So long as it addresses the issue, yes.

- (c) to ensure effective regulation of the supply and operation of electronic communications services;
- (d) to enhance the efficiency of the Falkland Islands’ commercial electronic communications sector;
- (e) to support the growth and development of the Falkland Islands’ economy;

- (f) to promote investment and innovation in electronic communications networks and services;
- (g) to promote optimal use of radio spectrum;
- (h) to provide affordable access to high quality networks and carriage services in all regions of the Falkland Islands so far as reasonably practicable;
- (i) to maintain public safety and security;
- (j) to contribute to the protection of personal privacy;
- (k) to avoid public nuisance through electronic communications so far as reasonably practicable;
- (l) to limit adverse impact of networks and carriage services on the environment so far as reasonably practicable;
- (m) to ensure access to all key electronic communications services;
- (n) to encourage infrastructure investment into the Falkland Islands;
- (o) to provide continued growth in international capacity to support increasing usage levels, so far as economically feasible;
- (p) to support the delivery of public sector services (including education and healthcare);
- (q) to strengthening the regulatory environment that supports development of the Falkland Islands' electronic communications sector; and
- (r) to promote innovative services to support the needs of the people of the Falkland Islands.

6 Regulatory principles – agreed with suggested amendments

Attorney General

If I may Chair just for the benefit of the Committee, because of the way it is structured I would like to particularly highlight the objective and principles because these are the things which will guide a regulators decision making and Executive Council's decision making when making regulations. So, in addition to taking any individual comments which just have done, I would also invite members to read them in a whole to make sure, these are things which must be taken into

consideration in any decision making therefore there are things that are missing, I don't think there are, but if there are things that people feel are missing in the context of the fact that it is guiding our hand from this point forward. I would encourage us to consider that.

The regulatory principles for the purposes of this Ordinance are—

- (a) that public policy in relation to electronic communications should aim to pursue the electronic communications objectives;

Honourable Mike Summers OBE

In 6(b) it says:

- (b) that the needs of the people of the Falkland Islands are the paramount consideration in operating the licensing regimes under this Ordinance;*

I would suggest adding "Falkland Islands collectively" there because one of the key issues we have had to address is the universality of provision and what we will need to judge as Members is that we have satisfied everybody in the community collectively, and not just the loudest groups as it were.

The Honourable Roger Edwards

You're suggesting that we add the word "collectively" after Falkland Islands.

Honourable Mike Summers OBE

Yes.

The Honourable Roger Edwards

We will leave that to the Attorney General to look at in due course and come back.

Attorney General

I agree absolutely with the point but I'm just not convinced that the drafting needs to be change because I take the people of the Falkland Islands to be collective anyway. But I will happily reflect on it and come back tomorrow with a view.

Honourable Mike Summers OBE

We don't specifically mention in this section or in these two sections 5 and 6 the role of the regulator in requiring the introduction of new technology. You may tell me that it is dealt with elsewhere, I'm not sure, but I would have thought that it should be in the core principles. Surely, one of the core responsibilities of the regulator is going to be to keep up to date with current technology and to require the provider

to implement that technology so long as it is reasonable to do. Should that not form part of these two sections somehow.

Attorney General

Again, Chair, if I may, absolutely agree, I suspect it needs to be in section 5, if we don't think that section 5(r) is sufficient "to promote innovative services to support the needs of the people of the Falkland Islands." in that then we might want to mention technology specifically, but I would need to refer as by virtue of changing section 5 we would catch it by virtue of 6(a) "that public policy in relation to electronic communications should aim to pursue the electronic communications objectives" so if we were to put it in the objectives then it would bring it into the principles.

What I would suggest is that we review section 5 to see if technological innovation can be included.

The Honourable Mike Summers OBE

The point is and it has been made a number of times and it is kind of self-evident that we would always want the licensee to be providing the most up to date and modern technology providing it is feasible so to do. There is always that proviso. But, we don't want to be in that position that many people have complained that we might be in but being sort of 4, 5 and 6 years behind because we didn't have a mechanism of requiring the licensee to keep updating technology.

Attorney General

Thank you I shall review 5 with a view to adding another provision or amending the existing one.

The Honourable Roger Edwards

Some of that may be required to be added into the next clause.

- (c) that additional regulatory or administrative measures should be introduced only—
 - (i) where the Regulator is satisfied that the existing licensing regimes are insufficient for the efficient and effective pursuit of the electronic communications objectives;
 - (ii) having regard to the costs and impact of those measures on affected parties (including consumers, licensees and other undertakings);
 - (iii) if the Regulator is satisfied that the measures are proportionate, transparent, accountable, fair and non-discriminatory.

PART 3

THE COMMUNICATIONS REGULATOR

Nature and status

The Honourable Roger Edwards

There has been an amendment issued by the Attorney General, delete subsection 2.

Attorney General

I'll explain Chair, we are satisfied that a person is in any event an individual or body corporate is the provision is not necessary. Therefore delete (2)

7 Appointment

(1) The Governor shall appoint a person as the Communications Regulator ("the Regulator") to perform functions conferred by this Ordinance and any other enactment.

~~(2) The Regulator may be an individual or a body corporate.~~

The Honourable Roger Edwards

Clause 8 – Independence, this has been renamed and has been replace by 5 paragraphs

8 Independence

~~(1) No public authority may give general or specific directions to the Regulator.~~

~~(2) Subsection (1) is subject to section 54(2).~~

CLAUSE 8 - Exercise of certain powers and annual report

(1) In the exercise of the powers conferred on it under section 11(a), (c) and (e) and under section 12(2) the Regulator ~~must~~ "is" not ~~be~~ subject to the direction or control of any other person or authority.

~~(2) Subsection (1) is subject to section 54(2)~~

(3) The Regulator must submit an annual written report to the Governor and to the Legislative Assembly about the exercise of the Regulator's functions during each calendar year.

(4) An annual report must be made as soon as reasonably practicable after the end of the year to which it relates.

(5) The Regulator must include in the report information of any attempts by any person or authority to improperly direct or control the Regulator in the exercise of the powers specified in subsection (1)."

Attorney General

Subsection (2) of the amendment is no longer required, this addresses Members concern raised in EXCO about the question of the independence of the regulator so it may be a wider debate, so the proposed amendment, I'll explain the purpose, but Members may not like it at all.

The issue relates to the activities of the regulator and to what extent they should be independent. The international recognised recommendation that regulators should have a degree of independence, and I will happily refer you to various things, having said that in the Falkland Islands of course, we expected that that person would nonetheless be a Government employee but it doesn't need to be because of the drafting, we could choose to have an independent body either immediately or at a later date.

What the amendment proposes to do is to be very clear about where the independence applies, so as you see, the amendment I suggest would mean that in exercising certain of the functions only they would do so independently, therefore not under the direction or control of any person and those are the ones in 11. In 11(a) the activity of regulating and exercising powers, (c) which is administering of licence fee system and (e) exercising other functions specifically given to the regulator. The effect of the amendment would mean that in relation to the management of state assets, be that spectrum, number planning etc. It stands to reason the point made, that would have to be subject to a policy direction and this now makes it clear that policy from EXCO about how you want state assets to be managed would effectively be something you could probably direct. Similarly, in relation to representing the Falkland Islands in international context, again, you may want to do that in accordance with the political ambition expressed by EXCO.

The first thing the clause seeks to do is to be very clear about when the regulator is or is not acting independently without anyone else's direction, the second part of it and again a point raised to me earlier was that it could usefully provide an annual report on the activities. Again, because when we look further through the Bill we would need to make sure that there was absolute clarity about the obligations around publication and not publicising information, so that which is held confidential.

An annual report would mean that in the whole the activities of the regulator could be monitored and be available for the public each year and so that is what the proposal is bringing forward. Limits expressly when the regulator is acting independently and also adds an obligation to produce and publish an annual report. That is brought forward because of the matter that was raised at Executive Council, it may or may not have Members' support.

The Honourable Mike Summers OBE

It doesn't address my fundamental concern which is and was that if the population at large remains deeply unhappy that the regulator is not being effective and not doing his job properly, the Government is powerless to give instructions to the regulator to do his job properly because he doesn't have to take any instruction from anybody on the issue of regulation of telecoms, it sort of disempowers the Government in a way and in this kind of community I can't quite see the benefit of that. I can see the benefit of an independent regulator in other sets of circumstances but I just don't quite see it here.

Attorney General

This is about determining whether a person should or should not be granted a licence based on criteria published by the regulator or deciding whether or not to impose a fee. Do we really think that Executive Council should be able to influence, effectively the delivery of which is per functionary function in that regard or rather it's not per functionary, its important function, but it is a function that should be equally applied to every member of the population on same terms, similarly how enforceable is our penalty regime in the event that it is seems to be a penalty regime motivated for reasons other than regulation of the telecommunication industry. I am not saying that it would be nor am I saying that decisions would be any less just or any less reasonable, but in terms of preserving the decision making is it better to be able to say that decision is influence. Is that position not exactly the same as my decisions to prosecute or withdraw prosecutions can't be influenced by anybody.

The Honourable Mike Summers OBE

I can foresee some areas in which that need to be protected but I think, to satisfy my concerns I think we would have to go into more depth in 11(a), (c) and (e) and the other section. It just seems bizarre to be that the Government should go to all this trouble to regulate an important provision and then give away all its authority to someone else, who is no longer under the influence of the Government.

I accept what you say about Executive Council and that sort of thing, but the Government in Executive Council has a duty and a responsibility to act fairly and in accordance with the law and impartially and all of those sorts of things and to justify it by possibly imputing improper motivates to members of Executive Council, I'm not quite sure is the right direction for us.

Attorney General

I think it is important for the record, I'm not imputing in anyway, nor did I say that I thought the decision may be any less justified or reasonable as I recall. I am happy to take from the Honourable Member if he is kind enough to explain in more detail precisely what he would like the amendment to come back and look at, and I will

happily bring back further alternatives. As I have said this was my attempt to be very clear about what we are saying the regulator should be directed or controlled.

The Honourable Mike Summers OBE

Let me give you an example then, I am very happy to go back and do some more work on this and do some more thinking, but let's take an example, there is a new piece of technology available, it would make a big difference, but it is quite expensive and the regulator thinks, I don't think I can force the licensee to do that but the Government more generally thinks actually you probably should. Then what happens?

Attorney General

That is quite helpful, because I think your ability to change the deal, or call it that once made with the exclusive provider is very much different from what the general provision is trying to address. In relation to the Government's approach on a price cap renegotiation point, I think that is entirely different, this is about a regulator for the entire communication activity; this is about the general principle that there will be a regulating service. So, in my mind the first thing is to talk about everyone except for the exclusive provider when one considers this, because this is about ordinary decision making. One of the questions you may have for example and applying the same point in that context is for example over a class licence, so if there regulator were to issue a class licence, there for some particular reason decide that we can't issue a class licence for a piece of technology on spurious grounds now again, a regulator's decision is challengeable just as EXCO's decisions are, but again using the same methods you would use to challenge EXCO being judicial review.

I can't imagine that a regulator wouldn't be influenced but they just can't be directed or controlled. I suppose the only question you might have is, do you want to put something in that says "shall not operate in a manner that is inconsistent with Government policy" or something like that. However, that opens up a question about if the Government policy changes into something which the regulator doesn't agree with it is that important or not and how does that impact on the exercise of their decision making capacity.

The Honourable Gavin Short

I just wanted to comment, I'm the same as MLA Summers on this one, it left me wondering everybody has to answer to someone, somewhere. While I think it is right and proper that individual members or even collectively should not perhaps be trying to influence this person, what would happen if he turned up and for a year did nothing. We can't influence them, we can't touch them.

Attorney General

You would fire them. The Governor which is EXCO, can appoint and dismiss subject of course to the provisions in relation to the dismissal of public officers in the constitution. If they turn up and they are useless, just like everybody else, you can appoint someone else or fire them.

The Honourable Roger Edwards

This comes also into a question of who decides that they are not doing anything, they might think they are working jolly hard, but if they are not imposing the will of the Government on the licensee or the licensee as they are independent, so they are looking after the licensee as well as Government, the other party might think they are working jolly hard.

Attorney General

There are (and I will happily circulate) references, and again this doesn't come out of anywhere and is probably best described in things like the LECD report and the UN commission report on better regulation, which very clearly set out the advantages of having a degree of independence.

Let's use the Attorney General's post as an example, I am in an even stronger position, because I am appointed by the Governor alone in discretion and can't be removed, but what happens if I for example or somebody decide that I don't want to prosecute VSat users despite the fact that it is in the legislation and says that I must. It is clearly in the accordance with the Nolan Principles which this House prescribes to through the "Code of Practice" that I wouldn't be operating properly as a public officer and indeed you could prosecute me potentially for malpractices in public office but ultimately I'm in an even stronger position in that context I could choose to do a whole range of things which people thought were politically unpopular. But, actually the integrity of the system demands that you can't just get rid of me because I'm unpopular, I have to be manifestly wrong and then the Governor has to get rid of me.

The Honourable Mike Summers OBE

That is because in that role you are operating in the justice system and it is part of the separation of the Executive and the judicial part of Government. But the regulator is not operating in the judicial system.

Attorney General

But they are imposing financial penalties.

The Honourable Phyl Rendell MBE

Could we not in your amendment 8 (1) clarify that that is the role in which they would be independent on the evaluation of penalties on an exclusive licence holder.

The Honourable Mike Summers OBE

Are there any regulations in this section that provide further clarification or would there be any regulation to provide further guidance?

Attorney General

If I take you to the next paragraph 9, this is important, it says:

9 Supplemental

The Governor may by regulations make provision about—

(a) the appointment of staff of the Regulator;

this demonstrates that the regulator might be a corporation soul and they might have staff and in those circumstances, the regulation can say that it can be constructed either as a body corporate to as an individual with staff.

(b) remuneration and allowances;

If it was an independent body, nonetheless, EXCO controls the remunerations so that we don't end up with them falling significantly outside the Government scheme for remuneration

(c) the conduct of the Regulator's proceedings (which may include provision for delegation).

And also how they carry out their work again, I considered that that would allow you to produce the framework under which the exercise of the delegation was appropriate or the exercise of the independence was appropriate. As I have said I am happy to go back and think can I do any better and being more specific and I look rather desperately over to my legislative drafter to see whether that is possible, but we will come to that over the course of the next couple of days.

The Honourable Mike Summers OBE

I'm happy to do the same and look at those areas where I feel fundamentally that the Government needs to be able to keep a thumb on this thing. It is so fundamentally important to the whole of the subject that we are talking about that we have to be certain in our minds.

Attorney General

I'm sure the regulator would be delighted to have this level of support.

The Honourable Roger Edwards

Could I ask that you make the note to report back to us in due course.

The Honourable Michael Poole

We have seen two different versions of this and considered it at some length, I am absolutely happy to see a third version but, I'm with Phyl on this that that section could be amended in that the regulator is independent in terms of the imposition and levying of fines. Beyond that they shouldn't be.

Attorney General

I think they should be in relation to decision making about licences and the withdrawing of licences because they have significant economic impact and they are also judicially reviewable.

The Honourable Michael Poole

There are any number of areas in the Government that issues licences at the moment that EXCO could give direction, they choose not, they are always going to delegate that, it's just not a concern, but ultimately it should be the Government's responsibility. We can go around this circle as many times as we want but I'm not entirely convinced that you will change members' mind on this but would suggest you don't spend too much time on redrafting of something that should be quite simply fixed.

The Honourable Roger Edwards

We are already into the fourth draft, because we have had one that has been amended and now we have an addendum to the amendment. Can we ask the Attorney General to look at it and come back with further advice.

Attorney General

May I take the Committee's view that deals with 8(1).

The Honourable Roger Edwards

We will move onto the rest of section 8, does anyone have any further comments on (2)?

Attorney General

8(2) I am proposing to remove entire and renumber.

CLAUSE 8 - Exercise of certain powers and annual report

- (1) In the exercise of the powers conferred on it under section 11(a), (c) and (e) and under section 12(2) the Regulator ~~must~~ "is" not be subject to the direction or control of any other person or authority.
- ~~(2) Subsection (1) is subject to section 54(2)~~
- (3) The Regulator must submit an annual written report to the Governor and to the Legislative Assembly about the exercise of the Regulator's functions during each calendar year.
- (4) An annual report must be made as soon as reasonably practicable after the end of the year to which it relates.
- (5) The Regulator must include in the report information of any attempts by any person or authority to improperly direct or control the Regulator in the exercise of the powers specified in subsection (1).

The Honourable Roger Edwards

8 (3)-(5) agreed.

For the sake of clarity all things in the Bill when it refers to the Governor it is "Governor in Executive Council" unless otherwise stated.

9 Supplemental - No amendments

The Governor may by regulations make provision about—

- (a) the appointment of staff of the Regulator;
- (b) remuneration and allowances;
- (c) the conduct of the Regulator's proceedings (which may include provision for delegation).

Functions

10 General duties - - No amendments

- (1) In carrying out its functions the Regulator must—
 - (a) aim to pursue the electronic communications objectives,
 - (b) have regard to the regulatory principles. and
 - (c) have regard to any other principles which appear to the Regulator to represent best practice (having regard to all the circumstances of the Falkland Islands).
- (2) Where two or more electronic communications objectives or other principles conflict in relation to a matter or class of matters, the Regulator must aim to strike an appropriate balance.

(3) In introducing or developing a regulatory or administrative measure the Regulator must publish a document—

(a) specifying the electronic communications objectives that are advanced by the measure; and

(b) demonstrating how the regulatory principles have been complied with.

11 Specific duties - agreed with further consideration to the clarification of “Government”

The Regulator has the following functions—

(a) to regulate the electronic communications sector by exercising powers under this Ordinance (in particular, to issue licences and exemption determinations);

(b) to manage state assets in accordance with this Ordinance;

(c) to administer the licence fee system under this Ordinance;

We refer her to the Governor or the Government – can we specify who is the Government, for the purpose of this Bill? Should it not appear in the list of interpretations.

Attorney General

I’ll take that away as I don’t think it adds to anything as the Governor when operating in accordance with the Constitution is arguable the Government anyway. I presume it was intended to preserve direction, but I don’t think it adds anything for the purpose of drafting.

The Honourable Mike Summers OBE

It is referred in (d) and (f).

The Honourable Roger Edwards

It comes up elsewhere in the Bill, but is not specified.

(d) if requested by the Governor or the Government, to represent the Falkland Islands in relation to international organisations or obligations connected with electronic communications;

- (e) to exercise functions conferred on it by this Ordinance or any other enactment; and
- (f) to undertake other functions connected with electronic communications at the request of the Government (but this paragraph is subject to section 8(1)).

12 General powers – agreed with amendments

- (1) The Regulator may do anything it considers necessary or desirable for the purpose of pursuing the electronic communications objectives in accordance with the regulatory principles.
- (2) In particular, the Regulator may—
 - (a) exercise the powers under this Ordinance;
 - (b) issue or approve codes of practice, directions, decisions, statements, instructions, notifications and technical rules and standards;
 - (c) publish and maintain registers or lists;

The Honourable Roger Edwards

We do have a correction in 12(2) (d) – delete “or criminal”

Attorney General

The reason for that is, it goes beyond the policy instruction issued by EXCO, the regulator only has power to institute civil proceedings.

The Honourable Mike Summers OBE

Criminal proceedings would be referred to the Attorney General in the normal way.

Attorney General

Technically anyone can issue criminal proceedings even private citizens but in this instance we would expect them to be referred to the Attorney General, this is because in Appendix A of the paper December 15, it didn't extend to criminal proceedings so wrong to include it in the Bill as it does not form part of EXCO's instructions.

- (d) institute civil ~~or criminal~~ proceedings;
- (e) conduct inquiries, investigations under section 13 and hearings;

- (f) conduct market investigations and reviews;
 - (g) require the provision of documents and information;
 - (h) publish the results of action taken under paragraph (e) or documents or information provided under paragraph (f); and
 - (i) make awards of compensation (in accordance with any relevant law) in respect of loss or damage suffered by consumers, and make provision for the enforcement of awards.
- (3) Failure to have regard to or comply with codes of practice, directions, decisions, statements, instructions, notifications and technical rules and standards issued or approved by the Regulator does not of itself give rise to civil or criminal liability; but—
- (a) a court or tribunal (including an arbitral tribunal) may have regard to any of those instruments issued or approved by the Regulator that appears to the court or tribunal to be relevant to a matter before it; and
 - (b) licences and other instruments under this Ordinance may require parties to have regard to, or comply with, a specified instrument or class of instrument issued or approved by the Regulator (which may include instruments issued or approved after the grant of the licence).
- (4) Failure to comply with a requirement of the Regulator under subsection (3) does not of itself give rise to civil or criminal liability; but—
- (a) a court or tribunal (including an arbitral tribunal) may have regard to a failure that appears relevant to a matter before it; and
 - (b) licences and other instruments under this Ordinance may require parties to comply with requirements of the Regulator.

The Honourable Roger Edwards

Delete subsections 5 and 6

Attorney General

Yes, we don't think we need them so we are going to take them out.

- ~~(5) The Regulator may delegate a function under this Ordinance to a public body.~~
- ~~(6) Subsection (5) does not apply to a power to issue licences.~~

Enforcement powers

13 Compliance investigations – No amendments

- (1) The Regulator may investigate an actual, alleged or suspected contravention of—
 - (a) a provision made by or by virtue of this Ordinance, or
 - (b) a licence under this Ordinance.
- (2) For the purposes of an investigation the Regulator may—
 - (a) require the provision of information or documents;
 - (b) enter premises and inspect, copy and retain documents, in accordance with a warrant under section 96.
- (3) The Regulator may, with the approval of the Governor, appoint an agent—
 - (a) to conduct an investigation, and
 - (b) to exercise the Regulator’s powers under this section in respect of that investigation.
- (4) The Governor may not approve the appointment of an agent under subsection (3) unless satisfied that—
 - (a) the agent has appropriate qualifications, experience and competence, and
 - (b) all necessary safeguards and mechanisms for transparency and accountability are in place.

Attorney General

We are not proposing the amendment Chair so the clause remains as is.

14 Enforcement orders - No amendments

- (1) This section applies where the Regulator thinks that a person (whether a licensee or not) has failed to comply with a provision of—
 - (a) this Ordinance, or
 - (b) a licence or other instrument under this Ordinance.
- (2) The Regulator may by order in writing require the person to—

- (a) take specified action, or
 - (b) refrain from taking specified action.
- (3) The Regulator may by order in writing require the person to pay a penalty.
- (4) The Governor shall make regulations about penalties under this section; and the regulations must, in particular, make provision—
- (a) for notice to be given of intent to impose a penalty;
 - (b) for an opportunity to make representations to be given before the imposition of a penalty;
 - (c) about the form and content of orders;
 - (d) setting a maximum penalty (or different maximums for different classes of case);
 - (e) about the calculation of the amount of penalty to be paid (which may include provision for the exercise of a discretion by reference to criteria specified in regulations, and may include provision for calculation by reference to a percentage of a business' turnover or in any other manner specified in the regulations);
 - (f) requiring notice of orders to be given to specified persons;
 - (g) about the publication of orders.
- (5) An order is enforceable as if it were an order of the Supreme Court.
- (6) If an order is made under this section otherwise than as a result of an investigation under section 13—
- (a) it shall be made only if the Regulator considers it necessary by reason of urgency;
 - (b) it shall be expressed to last only until an investigation has been concluded; and
 - (c) as soon as reasonably practicable the Regulator shall commence an investigation.
- (7) Failure to comply with an order under this section—
- (a) is an offence; and

(b) may result in revocation of a licence in accordance with section 43.

15 Determinations of licence and other obligations - No amendments

- (1) The Regulator may make a determination about—
 - (a) the nature and extent of an obligation imposed on a person by or by virtue of a provision of this Ordinance or of a licence or other instrument under this Ordinance;
 - (b) the effect of any other provision of or by virtue of this Ordinance or of a licence or other instrument under this Ordinance.
- (2) A determination may be made—
 - (a) on an application by a person who appears to the Regulator to have a sufficient interest in the matter to be determined, or
 - (b) on the Regulator’s own motion.
- (3) Before making a determination in respect of an obligation imposed on a person, the Regulator must consult that person and any other person who appears to the Regulator to have a legitimate interest.
- (4) Before making any other determination the Regulator must consult such persons as appear to the Regulator to have a legitimate interest.
- (5) The Regulator must issue a determination in writing giving its reasons.
- (6) The Regulator must publish a determination on its website (unless the Regulator is satisfied that public interest in publication is outweighed by commercial or other reasons for confidentiality).
- (7) Where the matter is urgent, the Regulator may issue an interim determination on such terms as it considers appropriate.
- (8) The Governor may make regulations about the procedure to be followed in relation to the making of determinations.
- (9) A determination shall be conclusive for all purpose as to the matters stated in it (subject to appeal under Part 14).

General procedure

16 Consultation - - No amendments

- (1) Before taking regulatory or administrative action under this Ordinance the Regulator must consult any person directly affected by the action and any other person who appears to the Regulator to have a legitimate interest.
- (2) This section is without prejudice to any specific procedures provided by or under a provision of this Ordinance.
- (3) This section—
 - (a) does not apply in relation to determinations under section 15; and
 - (b) is subject to section 18.

17 Publication - No amendments

- (1) The Regulator must make arrangements for the publication of regulatory or other action taken under this Ordinance if the Regulator believes that—
 - (a) the action is of public significance, and
 - (b) publication is in accordance with the regulatory principles.
- (2) In particular, the Regulator must—
 - (a) publish regulatory and other action on its website as soon as reasonably practicable;
 - (b) provide arrangements for persons to register through the website to receive notice of new action;
 - (c) maintain its website; and
 - (d) ensure that copies of documents are made available at its principal office for inspection by the public on request during normal business hours without charge.
- (3) The Regulator must also consider whether to publish notice of action taken or to be taken in a newspaper.
- (4) This section is subject to section 18.
- (5) Action is of public significance for the purposes of this section if it is likely—
 - (a) to have a significant impact on the public;
 - (b) to have a significant impact on persons or activities in respect of which the Regulator exercises functions; or

(c) to result in a significant change in the Regulator's activities.

18 Confidentiality – further work required

- (1) The Regulator must not publish or disclose information acquired in the course of the exercise of the Regulator's functions which it considers—
 - (a) is commercially confidential, or
 - (b) is or includes personal data.
- (2) Subsection (1) does not apply to publication or disclosure to, or in accordance with an order of, a court.
- (3) Information which is provided to the Regulator on the express understanding that it is to be treated as commercially confidential or as being or including personal data, must be treated by the Regulator accordingly for the purposes of subsection (1).
- (4) Subsection (1) is subject to the preceding provisions of this Part; but the Regulator may not make a disclosure to which subsection (1) applies in accordance with a provision of this Part unless the Regulator is satisfied that the provision cannot be properly complied with unless the disclosure is made.

The Honourable Mike Summers OBE

Chair, we have had a discussion about this previously and I had a concern that the regulator would be constrained in providing information to public bodies and Standing Finance Committee in particular about certain things. Attorney General, you may have assured me at the time but I can't recall.

Attorney General

I think it is important and that is why has moved the amendment that there are specific obligations to consult because when one is looking at the confidentiality points and again this comes to the independence of the regulator.

If you look at 18 below, in order demonstrate robustness I would encourage us to say that it is the regulator's decision but I appreciate Members' views on my point on independence, so the restriction is only where the information is commercially confidential or where it includes personal data. The reason why I am persuaded that it is a good idea to have this is because we want the regulator to get more information. For information to be able to pass between licence holders and the regulator, knowing that it isn't going beyond that because the regulator in exercising his functions will have more information in which to inform their decision, confident

that it has real information but that it is not going to go any further. For example it may have confidential information relating to SURE in this case or it may be given the actual names and actual data use information more to prove a point, but it wouldn't go beyond the regulator in that what would go beyond the regulator would be a redacted report of that. But the regulator would nonetheless be able to verify that it was real, accurate, and believable all those things because the information flows between the regulator and the regulated will be protected and regulated by this clause.

I like the idea that information can go to the regulator and the regulator can commit to the person providing that information that they would not allow that information to go any further because it is either commercial in confidence or including personal data.

The Honourable Mike Summers OBE

I think my issue here was that – personal data I have no issue with, clearly that is confidential, but what is commercial confidence can be a matter of opinion and so only the regulator has the authority to decide whether it is commercially confidential or not. What about the licensee what if he says I'll give you this information, but I will only give it to you if you never disclose it because I think it is commercially confidential?

Attorney General

Again, this comes down to whether or not we can trust the regulator, so the regulator is independent, the regulator is able to exercise their judgement they are going to have to make a decision, do I want this information or not. The problem that currently happens is that we don't get the information because the regulated are not prepared to give the information either because they say they are holding information subject to data protection legislation in other jurisdictions for example and we know this because some of data is apparently to be transferred outside our jurisdiction, in which case we can never get access to it, because they say I can't disclose it because it's not in a confidential environment, or I can't give it to you because you will tell people and they will publicise it. So, I'm not going to give it to you in the first place in which place the ability of the regulator to regulate is limited by the fact that you can't actually get that information. We can demand it, we inevitably end up in an argument about what we can demand and apply to a Court and say I can't disclose this information to a regulator without a court order because I'm constrained. This removes that because the regulator can't onward transmit if it contains this information. As we explained before, it is the regulator's decision, whilst inevitably they will be influenced to an extent by the representation of the person giving the data to them, nonetheless it isn't the person giving the data to them decision, it is the regulator's decision and if the person giving the data doesn't like it then they can challenge that decision through the normal judicial process if they choose to. The regulator will have to make a decision based on all the information.

Again I quite like this because it allows the regulator to operate in an environment where they have the information and able to give assurance that it can be informed by that information. My worry is that without this control you won't get the information at all.

The Honourable Gavin Short

Could you not put some sort of enforcement in that any data or information generate by the business in the Falklands is retained in the Falklands or a copy is retained in the Falklands and that would get rid of the extra judicial concerns in other territories or wherever they keep the stuff.

Attorney General

Short answer is you could whether or not that fits commercially with models etc, I would have to discuss this with anyone we were proposing to give an exclusive licence to. We don't know what data we are talking about, this is a framework, so whilst we could make an obligation to keep certain data, you then get into a lot of detail, what we are keeping or not, etc. From a framework perspective, I thought this would work quite well mechanically.

The Honourable Mike Summers OBE

The phrase "must not publish or disclose information" does that include providing information to other parts of the Government even Executive Council?

Attorney General

Yes, they can still provide reports informed by that information, it only relates to that bit of the information that is commercially confidential, but they can process the data and provide the information, they just can't provide that information.

For example, there are 14 households, 4 are male and 10 are female, you can process the data and provide that.

The Honourable Mike Summers OBE

I'm concerned about the ability of the licensee to dictate to the regulator about what is commercial in confidential and what is not. So, if the regulator goes to the licensee and says I want your Falklands business unit accounts, I want them tomorrow and the licensee says I can give them to you today, here they are, but I regard them as commercially confidential, so you can't do anything with it.

Attorney General

You can't honourably disclose them, you can still analyse them, you can still help them to inform your decision making, you just can't disclose them and you can't published them as for example they might be management accounts.

The Honourable Mike Summers OBE

I can see why you can't publish them but I think there is a difference between publishing something which then goes to whole of the world and providing them in confidence to Executive Council or Standing Finance Committee or somebody like that who is ultimately responsible for the governance of the Falklands. That is my concern about it. You may regard it as.... That is what I'm worried about.

Attorney General

Again, I would asked the Committee to look at it in terms of the obligations to publish as well, so when looking at also look at what the obligation on the regulator to publish under section 17. I would be repeating myself if I tried to explain again.

The Honourable Roger Edwards

Would you like to see that changed in anyway Mike that might come back to satisfy you so, it is publishing or disclosing to the world in general or selected parts of the Government that may need the information to properly conduct its business.

The Honourable Mike Summers OBE

I will think about it in conjunction with the other things.

The Honourable Roger Edwards

Anything else on section 18?

The Honourable Michael Poole

Can I just say Chair, and we will probably come back to it but I share the same concern and I don't think it is an issue of trust in the regulator it is fundamental policy concern as Mike has described. You may tell me Peter that this is already the case but ultimately this is probably alright apart from subsection (3) for the vast majority of the regulator's work it is not acceptable from a policy perspective to the exclusive licence holder under this Bill. Clearly you would want differential provisions and it has to be the Government making the choice in terms of what is published and disclosed you can't leave that in the hands of the regulated licence holder. That is the same with everything the Government does, Executive Council has rules and restrictions around this and this follows it and is entirely appropriate

about it, so I can't see why any regulated monopoly would have a concern in that regard.

Attorney General

I think it needs to be taken together with the decision you have to make about the independence of the regulator. I have genuine and serious concerns but in the event that you create an environment where the regulator is not operating independently in relation to the delivery of its services and is not able to receive data from the regulated in an environment they can control, it will affect the ability of the regulator to carry out the functions. I think it is something that I would encourage us to consider when we take it in the round. I am very concerned that if these assurances cannot be given we just won't get the information.

The Honourable Phyl Rendell MBE

I would suggest Chair, that there are other examples of that in the Government where that information is shared, you take the oil industry and the regulator there. I think there is some very sensitive commercial information that is held by the regulator, but it is always shared with Executive Council.

Attorney General

The regulator is Executive Council in the context of the oil and gas industry, because the decision maker is the Governor in Council and the Secretary of State in relation to certain licensing conditions, so information inevitably needs to get to the decision making in those circumstances. Similarly, we are not suggesting here that this information relates to decision making about the price cap renegotiation or information that informs the granting of an exclusive licence because those are clearly Governor decisions. This is about those powers which fall to the regulator.

The Honourable Phyl Rendell MBE

I'm just concerned about that step which you imposing in this legislation; there is a step there that we have not ever really experienced in the Falkland Islands Government.

The Honourable Roger Edwards

We will get Mike to come back with some detail with the Attorney General and see where we can go on that.

19 Alternative Dispute Resolution – No amendments

(1) The Regulator may—

- (a) establish one or more alternative dispute resolution schemes (“ADR schemes”) for resolving disputes between licensees, and between licensees and consumers, or
 - (b) approve one or more ADR schemes proposed by licensees.
- (2) Before establishing an ADR scheme the Regulator must consult licensees.
- (3) An ADR scheme may involve—
 - (a) mediation (which may be conducted by the Regulator, a person appointed by the Regulator or a person appointed by the parties to a dispute or by a third party);
 - (b) arbitration of specified matters by an expert appointed by the Regulator, the parties or a third party;
 - (c) any other method of alternative dispute resolution which the Regulator is satisfied conforms to best practice in dispute resolution.
- (4) The Regulator may approve an ADR scheme proposed by licensees only if satisfied that it is—
 - (a) fair (including non-discriminatory) and transparent;
 - (b) to be administered by persons who are independent of any licensee to which it will apply;
 - (c) to be administered in accordance with the electronic communications objectives; and
 - (d) designed to ensure that individuals exercising functions under the scheme have appropriate qualifications and experience.
- (5) Where the Regulator approves an ADR scheme—
 - (a) the Regulator must require persons responsible for the management of the scheme to report to the Regulator at specified intervals (of not more than a year) about its operation; and
 - (b) if the Regulator is not satisfied that the scheme satisfies the conditions in subsection (4) it must withdraw its approval; and a withdrawal may include incidental and transitional provision.
- (6) An ADR scheme established or approved under this section—

- (a) may provide for decisions (including interim and ancillary decisions) to be binding on the parties; and
- (b) must specify whether participation in the scheme prejudices rights under any other provision of this Ordinance or any other enactment or law.

20 Procedural regulations – No amendments

- (1) The Governor may make regulations about the procedure to be followed by the Regulator in connection with the performance of its functions.
- (2) The regulations may, in particular, make provision—
 - (a) about the preparation and promulgation of instruments under section 12(2)(b);
 - (b) about the preparation of lists under section 12(2)(c);
 - (c) for the conduct of inquiries, investigations, hearings and reviews under section 12(2)(e) and (f);
 - (d) about the calculation and payment of compensation under section 12(2)(i).
- (3) Before making regulations under this section the Governor shall consult—
 - (a) any licensee affected, and
 - (b) such other persons as the Governor thinks appropriate.

The Honourable Roger Edwards

As it is 16.30, we will draw a line there before we go onto Part 4, Electronic Communications Licences.

We will reconvene here tomorrow, 25 November at 10am.

**Select Committee of Elected Members on the Communications Bill 2016
25 November 2016, Court & Assembly Chambers**

Attendance:

Elected Members

The Honourable Roger Edwards (Chair)

The Honourable Jan Cheek

The Honourable Dr Barry Elsby

The Honourable Ian Hansen

The Honourable Michael Poole

The Honourable Phyl Rendell MBE

The Honourable Gavin Short

The Honourable Mike Summers OBE

Officers

Mr Peter Judge, Attorney General

Mr Matt Bassford, Director Central Services

The Honourable Roger Edwards

Good morning, welcome back everybody. Before we go back to the actual Bill itself and go through the clauses one by one we asked the Attorney General to report back on several small items from yesterday's meeting, so perhaps he could update us on where we are with those.

Attorney General

Yes of course. It may assist us if we deal with it in about ten minutes time, by which time Members will have in front of them a set of proposed amendments Chair. So if you would prefer to do it like that, then of course we can. Or I can take you through the amendments that I propose. I have one copy here. I'm just not sure whether Members would prefer to follow them or not?

The Honourable Roger Edwards

I think we would prefer to follow them through as we go. We will then come back to it once we have copies delivered to us.

PART 4

ELECTRONIC COMMUNICATIONS LICENCES

Requirement for licence

The Honourable Gavin Short

Just a general query, I think it is covered further on, (but I'd like just for the interest of the public more than anything) It says that the following activities require a licence under this part.

Clause 21 (d) Importing electronic communications apparatus.

This mobile phone, it's electronic and it communicates and the public is going to immediately ask: Do you mean I'm going to have to have a licence to get my mobile from Argos, or Amazon or wherever.

Attorney General

Chair if I may. The starting point is to understand the scope of the purpose of this regulation. The short answer to the question is yes.

The more complicated question is how? So, the purpose of the regulation is to regulate. It's meant to be technology neutral and to cover the entire communications section, including the importation of telecommunications equipment. So yes, a mobile phone would be covered and the way that we would propose to deal with it is through a class licensing regime.

So, one of the types of licence that you can have is either individual or a type of licence by class.

The idea being- the example that I gave, but it is not intended to be limited before, was we may issue a class licence for any mobile phone or apparatus which carries with it a British Standard Kite mark.

That class licence would automatically permit the importation of any electronic apparatus that already meets an approved international standard, such as, British Standard Kite Mark for that type of apparatus. I'm not an expert in telecommunications but the expert advice I got was: it's very helpful in the first instance to set the parameters. When you are trying to regulate the sector it's useful to set the parameters and then you can always alter them as they go.

One of the practical issues in relation to this is: What other jurisdictions would you seek to authorise imports from automatically? Does there when the regulator is fully conversant, any concern about importing something, (for example South American jurisdiction or North America jurisdiction) how does that impact on the ability for it to operate. Because, obviously we are talking about how it operates within the radio spectrum.

North and South America operate within a band 2 radio spectrum and the UK operates within a band 1 radio spectrum, therefore, things imported to operate in the UK radio spectrum area may not work in area 2, or vice versa ,and so, specifically how it would propose to work.

First of all is to mis-import then as we become more sophisticated we should be able to decide and give advice to the public about where it is best to get your kit if you want it to work within the Falkland Islands now we understand how they are meant to be ensured operable etc.

Yes a mobile phone would require an import licence and yes we would propose to deal with it using a class licensing regime which can be done in general terms, as I've just explained, until we can become more specific.

The Honourable Gavin Short

Could I just come back on that? Yes there are basically two, or used to be two different sorts of operating systems for mobile phones, GSM and another one.

When this law is passed and until you can fetch in your class licence it will become illegal to import a mobile telephone.

We will have a space of time, where, I cannot import a mobile telephone without coming a long and looking for a licence. Or are the two going to come in simultaneously.

Attorney General

So as with any Bill we sought to deal with implementation at the same time. You will know that we asked for authority. The perfect answer we would have had an implementation plan which Members agreed before now in accordance with policy instructions settled some time ago. Those came forward at the same time, there will therefore, inevitably be a gap. What one does is in these instances we confirm that we will not be prosecuting. The simplest thing to do is pending the appointment of a regulator; you simply try and persuade the Attorney General that to issue a notice to indicate that no action will be taken to enforce the absence of a licence until the appointment of a regulator.

If you can persuade the Attorney General to issue that moratorium then you don't have a problem, pending the appointment and getting up to speed of the regulator. Which is how we anticipated it would work in practise.

The Honourable Mike Summers OBE

Can I just be clear about a class licence? A class licence is not issued to anybody in particular; it's a general licence to whole population.

Attorney General

It's a licence that permits an activity of a class. The simplest example is a television licence regime in the UK (if you are familiar with it). It operates on the basis that anybody with a television is entitled to a licence. They don't need to be eligible; they just have to have a television to be eligible. In that case there is a charge associated with obtaining a television licence (which is set by the Government). However, a charge doesn't need to apply to a licence.

The principle is that anyone is entitled to have one providing it fits certain criteria. The way we envisaged it would work is that we would be able to give both information and permission for types of equipment that we knew didn't interfere. Similarly we can identify those things that we wanted to stop because they did interfere for example.

The Honourable Dr Barry Elsbey

I understand what you are saying about class licence and it's clear about the mobile phone. There are so many, we have heard about this you know, computers can talk to each other, the fridge can whatever. They are all communicating devices.

Is the Legislation going to be futureproofed? In other words things might become more common over the next few years that we don't really appreciate at the moment, but they contain an element of electronic communication.

Attorney General

Inevitably this would be caught because it is intended to cover and be technology neutral.

The Honourable Dr Barry Elsby

It would be anything.

Attorney General

It would be anything, the question would be whether in this instance you would simply issue something that said “if you source it from the following jurisdictions and it meets their standards, (until we develop our own) it’s lawful. Full stop, job done.

Alternatively the second alternative is we say until the regulator can make those decisions or the policy, (whatever decision is made) that ExCo can make the policy decision. Because we haven’t got enough information yet to make that decision then we just make sure that in relation to these activities we would just say that we wouldn’t enforce them for a period pending the ability to develop the regulatory regime.

Honourable Roger Edwards

I am concerned that the Regulator is going to be the issuer of the licence.

Attorney General

Most of them yes.

Honourable Roger Edwards

That puts an onus up on anyone who is importing or presumably purchasing locally any communications device and rather looking forward to future devices. What about retrospectively to old things. There was a two meter – everyone had to have a two meter licence. That was then done away with and the licences were extended for the life of the person. So they do not need a licence to purchase, bring in or operate a two meter set.

Attorney General

They do ,.....

Honourable Roger Edwards

No they've got a licence. They've got a licence that lasts all their life. So they don't need anything additional to bring in or use a two meter set, because they've got one, they've got a licence for their life.

Does this Bill go back on that then and say; for any future imports of even, and it puts an onus on every single individual who brings I, goes abroad, buys a thing. Is that not a little onerous? Could we not say to the Regulator, if it matches the Kite standard or what have you then its fine?

Attorney General

Isn't that what I just said? Didn't I just say that.

Honourable Roger Edwards

So, I go to the States I buy and phone, I come back. It may not operate here, but so what. Do I really have to go and seek a licence for the import? And declare it at Customs (presumably) coming in over the border, is that where we are going with this Bill?

Attorney General

Right, so; currently the short answer is, yes that's the shape of the Bill. Though if this is not what we want, and it is in accordance with the Policy Principles agreed last December.

The shape of the Bill is to regulate the entire sector and in terms of how you fill the post, my expectation would be that the current diverse responsibility across Government for all things should be coordinated into your regulatory functions.

So, for example in relation to the responsibilities that currently fall to the superintendent post in telecoms (which is a post currently constituted in the Treasury) you would expect a coordinated approach, so I'd expect that to be there. Similarly in relation to broadcasting stations; again my expectation would be that broadcasting and broadcasting stations activities would sensibly be put under the purview of the regulatory post, because then you've got an overview.

The idea we had in mind, or the concept we had in mind was that; you have an ability to regulate the entire sector. Importantly for my point of view so that we don't automatically assume that the exclusive licence holder is operating everywhere.

So the idea is that the Bill operates to regulate an entire communications market, and we give away an exclusive right to operate in part of that market. If the technology changes we haven't exclusively licenced that. We have a different

licensing regime for the remainder and again my expectation would be that; in the immediate term we would simply rely upon (as we do in a number of pieces of Legislation) pending the localisation of a regulatory control. We do this, for example, in the current telecoms ordinance, which is why on the current immigration form we are asked if we have any decoders on us (on the bottom of the current immigration visitors form) because that's effectively that exercise. So, it's just an extension of the exercise that we currently do.

It is really fundamental what we are proposing to do is in a technology neutral way allow licensing and management over the entire sector. If that's not what we want then again we need to think again.

The Honourable Mike Summers OBE

I think it's a sensible way of doing it. The devil is always in the detail and the devil will be in how the regulator implements the rules.

It avoids us getting into the situation that we are in now where a huge part of what the current licensee does is only regulated by agreement because the law doesn't cover it. We must not get ourselves back into that position. We must always have the ability I think to regulate things in this area. The regulator will have to be fairly clear, fairly early on with the whole of the population about things are only regulated in principle like televisions and fridges and telephones and so and so on.

I don't think we'd expect to see him with a great long que of people outside his office everyday wanting to procure a licence to buy a new telephone. That would be stupid wouldn't it?

Attorney General

That would be nonsense. How I would see it operating is much more proactive, (whether Members do or not), the concept of the Bill is the regulator is much more proactive in their relationship with the user. They are saying things like if you buy one of those, it will work in the Falkland Islands.

We will also permit you to use one of those but they have difficulties. It's like this, you know. It can get down to individual phones because we do know that galaxy note 7's apparently produce an issue and so you'd expect in a similar situation (I think is what they thought) there might be circumstances where the regulator becomes aware that certain types of technology are demonstrating faults.

Honourable Gavin Short

I don't think the Note 7 does anything to the spectrum, it just bursts into flames.

Attorney General

Well, that's fine, but it might be quite useful for things like, you know if you buy one of these that it is likely to burst into flames and you won't be able to use it again, exactly. Again, we are hoping that they will be plugged into (if you excuse the pun) lots of information from places like Ofcom and others, who can tell us the latest information.

Honourable Phyl Rendell MBE

So may I ask, just to get this straight, you are talking about a class licence, so we are not talking about an individual who turns up at Mount Pleasant with a Galaxy phone having to have a licence?

Attorney General

There will be information on the website that says "you can permit the import of all the following things" There may be certain things where they say; because it's a particular sort of something we'd quite like to inspect it. For example they might say; The Government might decide that they want to impose a fee for bringing in certain sorts of things. I can't think of what those might be. None the less it allows you to design a regulatory regime around those things, as we become more informed about the nature of what we are doing.

It's probably also worthwhile in policy terms to explain why it's framed in this way, from the point of a point in time. The idea in this is to move away from the position in which we currently find ourselves into a position where at the end of the new licence (if we grant one) the Government owns the information about its telecommunications and communications systems. At the moment we have relied very, very heavily on an exclusive provider to manage public assets.

If you ask somebody to buy a domain name, which belongs to the people of the Falkland Islands (something dot FK) at the moment the person you pay for that domain name is in fact Sure, but, it's a public asset. That's how it operates.

Ditto the numbering plan. Can I genuinely tell you the Falkland Islands Government owns and understands the numbering plan (the telephone numbers) at the moment I don't think we can say hand on heart that we do. I can say when the regulator owns and operates that similarly we will.

Ditto with spectrum. We know the spectrum is not a big issue because we don't have lots of stuff that interferes with lots of stuff because of the nature of our sparse population. We are very, very, rich in spectrum terms.

Again, by managing it over the course of the licence period we are in a much better position to manage it (take over management if you like) over this period. That's again part of the nature of the Bill.

The Honourable Dr Barry Elsby

I follow what you are saying there (Gavin started this discussion talking about mobile phones) but, if we move onto Section 25 Private Facilities. That talks about Private Facilities are exempt. Would anything you owned individually, would that need a licence?

25 Private facilities

- (1) Private electronic communications facilities are excluded from the licence requirement (but not from a radio spectrum requirement by virtue of section 56(1)(a)).
- (2) For the purposes of this section “private electronic communications facilities” means electronic communications services which—
 - (a) are provided by a person by means of local land-based network facilities or local transport-based network facilities;
 - (b) are accessible only on that person’s property;
 - (c) are operated independently (in every sense) of electronic communications networks operated by any other person; and
 - (d) are not operated in the course of an electronic communications service business or otherwise for commercial gain (except as an indirect and incidental part of a person’s business that does not involve the provision of electronic communications services).
- (3) In subsection (2)(a)—
 - (a) “local land-based network facilities” means network facilities which are situated on, and operated in, a single area of land in the Falkland Islands occupied by the person who is providing the electronic communications services; and
 - (b) “local transport-based network facilities” means network facilities which are situated on and operated in one or more vehicles, vessels, aircraft or hovercraft.

Attorney General

This is private facilities: For example; we know that some of the properties in the Falkland Islands are quite extensive so you might want to be able to have a walkie talkie to speak to people when they are on the Quad bike or you might want to be able to run a cable so that someone in the shearing shed can pick up a phone to somebody in the house. Whatever it happens to be

The Honourable Dr Barry Elsby

That exception on 25 then, would it not cover a mobile phone that is owned by an individual, and thus not need a licence.

Attorney General

It would work if it worked like a walkie talkie, but not if it actually used the public network.

The Honourable Dr Barry Elsby

So, your definition of private means it can't be broadcast further than your own area

The Honourable Jan Cheek

2B says accessible only on that person's property, which does limit it.

(2) For the purposes of this section "private electronic communications facilities" means electronic communications services which—

- (a) are provided by a person by means of local land-based network facilities or local transport-based network facilities;
- (b) are accessible only on that person's property;

The Honourable Dr Barry Elsby

Well done Jan, well spotted. Sorry. A walkie talkie might work way off your property.

The Honourable Phyl Rendell MBE

This might be the time to bring up the matter of satellite telephones. A lot of people have rung up and spoken us about this. A lot of people do have IMAR satellite phones. They go to remote parts of the Falklands, on vessels, in Land Rovers driving tourists to remote places, and, they want the security if somebody has an injury they can get in touch and they can access a satellite.

There is concern about those phones having to be licenced and a charge attached to that. We need to be clear what we are doing and that we are not making it onerous for people that are dutifully keeping in touch in remote parts of the Falklands.

The Honourable Jan Cheek

Can I just make the point that practically those phones (or calls on those phones) are so expensive that couldn't be seen as serious competition.

Attorney General

So again if I can explain: We did touch upon it in the draft policy document (which I shall call the Port Howard Lodge Strategy, which is where I drafted it) because again sitting within the idea is that anything that can connect directly to satellite is something that the Government may be interested to know about. Obviously as technology changes it may impact on the economics of the public policy things you are trying to control.

Again, and I don't think there is a right answer. What we put in the document which members may or may not approve is that it seems sensible to track who'd got them and a way of doing that is to attach a small registration fee to them. Then if they don't have a phone they won't pay the fee etc in theory at least.

You wouldn't want to make that fee significant because you don't want people to try and avoid paying the fee. What you want is the information, not the fee. The concept was that you wanted information about how your market was operating and that your licensing regime would give you an opportunity to gather that information. It wasn't intended in the policy as a revenue raising measure it was an information measuring measure.

The Honourable Phyl Rendell MBE

We have had this conversation before Peter and there is a lot of concern about this particular issue.

Attorney General

These regulations are a matter for EXCO.

The Honourable Phyl Rendell

Yes, there is a lot of concern about this particular area. It won't be a level playing field. You have cruise ships coming in, people landing on beaches. They will be operating Satellite phone and you won't have a level playing field. They won't have had to pay a fee and have a licence to operate that phone.

Attorney General

No, but, presumably they pay..... It's a matter of policy so if you don't agree with it, it's fine.

The Honourable Phyl Rendell

Currently the way it's described I don't agree with it

Attorney General

Fair enough

The Honourable Mike Summers OBE

There is no reason why satellite phones shouldn't be covered by a class licence is there?

Attorney General

Exactly and it's just a matter of whether or not you want the information or not. If you don't want the information at this stage then we don't charge a fee, we just produce a class licence.

You may change your mind in due course. The advantage of the regime is you can.

The Honourable Mike Summers OBE

Yes

The Honourable Phyl Rendell MBE

Yes

Attorney General

So you might just go, any of the following satellite phones with a (whatever it is) are fine.

The Honourable Mike Summers OBE

Satellite phones are issued by the phone provider are they?

Attorney General

I'm getting to the edge of my knowledge

The Honourable Phyl Rendell MBE

Yeah, through Cable and Wireless – I mean SURE sorry.

The Honourable Mike Summers OBE

So they are not issued by the provider then they are issued by.....

The Honourable Roger Edwards

They can be issued through SURE, there are hundreds across the world that you can just buy.

The Honourable Jan Cheek

If they buy then through SURE?

The Honourable Phyl Rendell MBE

People normally buy them through SURE

The Honourable Roger Edwards

SURE's exclusive licence covered fixed line, mobile and broadband. It does not cover you going to talk to a satellite does it?

Attorney General

Yes it does but it doesn't do so exclusively.

The Honourable Roger Edwards

Not exclusively and that's the point.

Attorney General

Shall we touch upon it because I think it's quite probably again a useful point whilst we dealing with it. The non-exclusivity at the moment is phrased in terms of personal use of VSAT SOS and satellite phones.

The Honourable Mike Summers OBE

Which section is that in Peter?

Attorney General

It's not in the Bill. So in terms of the.... I need to explain it to you. It is in the public document.

Personal use is the use of the service otherwise than in the course of an electronic communication service business. So, In relation to the things that we are making non-exclusive (or propose to make non-exclusive) in the licence it isn't personal in the sense of only for me in a personal capacity. It is any service otherwise and in accordance of the communications service business.

In terms of what we are non-exclusively providing (as long as your activities are not providing a communications service business) then it is something that we could separately licence.

But we are not giving away exclusivity to the exclusive provider for everything except for very minor, it's probably worth debating it, it's just I wanted to explain the extent of what we are proposing to provide the exclusivity on.

There is however, non-exclusive provision in relation to But it does cover satellite phones specifically as an item that is covered on this personal use (its non-exclusive)

Mr Matt Bassford

I just want to clarify, in my own mind. If one were to buy a satellite phone through Sure they would have a licence to do that, so an individual wouldn't then need a licence for that phone.

Attorney General

That's right.

Mr Matt Bassford

If I were to go direct to IMARSAT for a satellite phone, I can do that because it's not an exclusive thing within SURE's licence, but, I would then need to get a licence from the regulator or covered under a class licence. So people that currently have a licence through Sure.....

Attorney General

Again, without being an expert. The way we envisaged it would work is that; if you acquire one from Sure or indeed another re-seller. It could be another re-seller who could get a licence for satellite phones.

Without wishing to ask them to expand their business, Saddle Direct for example. If Saddle Direct had a licence to provide satellite phones; the way you would expect it to work is they had a licence and on behalf of the Government they would keep a list to who they had sold them to, and produce it to the regulator. That would therefore, give us the confirmation of who had got a licence through that provider. So the Regulator would have a list of the phones.

If you brought one in separately from that (say you got one on Amazon) and got it posted in then you would want to apply for a licence separately or be permitted under a class licence. Depending on whether or not simply class licence: anything of these are fine don't worry about it. Or whether we wanted to keep a record of who got them.

The Honourable Phyl Rendell MBE

I think the latter, just the class licence quite frankly.

Attorney General

I think that's probably where we are at the moment

The Honourable Roger Edwards

I'm still not sure on this class licence. Whether it covers the whole class of mobile phone; whether it covers an individual mobile phone or whether it covers multiple ownership of mobile phones. How does a class licence apply to the individual?

Attorney General

In terms of who is licenced, the individual or the business (if it's a corporate entity) needs a licence. How do you get one? You get one because it says you automatically have a licence if you import any of the following things.

In the short term what we would say is. We are going to rely on (as we do with medical practitioners) a regime that we trust. For the sake of argument, it's British Standard Kite mark (or whatever it happens to be) if it has one of those things on it you automatically have a licence. That's how it works.

With the advantage of the class licence regime is we can choose to be different and more sophisticated, if that's what we choose. I accept though, at the moment we are not. If we are going for an area where we don't do it to an area where we are going to do something we want to make it as light touch as possible.

The Honourable Mike Summers OBE

So things like computers would be covered by a class licence. The very blurred lines between telephones and computers would all be covered somehow or other.

Attorney General

Fridges and kettles I understand and all sorts of things. If we felt that we needed to do more (because something emerges in the future, and this is the idea about it being technology neutral) if we felt we needed to regulate in a different way in the future we have the flexibility to do so.

The Honourable Mike Summers OBE

I think that makes sense. If somebody's fridge starts interfering with my television I would want the Government to have recourse.

Attorney General

And at the moment you don't

The Honourable Mike Summers OBE

At the moment you don't. No.

Attorney General

The recourse at the moment would be a private action for nuisance act.

The Honourable Dr Barry Elsby

Presumably if somebody wants to bring in a device of whatever, say a SAT phone from overseas, because it was cheaper and they don't want you to know about it. Presumably you are going to have to introduce some penalties, if they don't have a licence.

Attorney General

Yes

The Honourable Dr Barry Elsby

Is that included as we go along?

Attorney General

Yes, and if it isn't we definitely missed it. No, it is definitely in here

The Honourable Dr Barry Elsby

Okay. The question about whether we need to charge for a licence. If we are looking for people to register their devices so we can know about them (if you wish) I'm not sure why we would want to charge for a licence. You will just discourage people.

Attorney General

As I say it's just a tool and if we don't want to do it that way that's fine. There may even be much more sophisticated ways of doing it that I just don't know about.

The Honourable Dr Barry Elsby

I understand that. I just wanted to make the point that we don't have to charge.

Attorney General

I agree

The Honourable Gavin Short

I was just thinking about SAT phones. It's probably a small thing, but this relates back to my previous life. This could almost become meaningless as time goes on. You get the on sale of goods. So, in other words, I fetch one, or Barry fetches one in. He will flog it to me after a few years if he doesn't need it anymore. Do I then have to apply for a licence or does that just disappear from the system? (if you see what I mean) That's what was happening with mobiles.

There was an attempt to track mobiles when they first came in. It just got meaningless because folks just passed SIM cards on.

The Honourable Phyl Rendell MBE

That's why a class licence is the best way to go isn't it, and not have to have individual licences at this stage.

The Honourable Mike Summers OBE

Under a class licence yeah, it wouldn't make any difference. If it was a piece of equipment that required a licence (but we don't have many of them) because we are not doing that.

The Honourable Gavin Short

It was said that you wanted to know what was coming in.

The Honourable Phyl Rendell MBE

Well, that's for us to decide.

The Honourable Mike Summers OBE

Yes, it's a policy issue.

The Honourable Gavin Short

I may be being pedantic on my part. You were saying about a class licence for – say it was mobile phones specific. You were saying we really don't know so we would have a class licence and if it's got a kite mark its good, if it hasn't then probably have to go. Would that not be open to challenge? If we said we don't really know, we are just going to pluck this out of the air. If I got one in India I'd come along and say "excuse me but as you have already said you don't know what's good and not good,

why are you stopping me, or wanting to know if I'm fetching one in that hasn't got a kite mark".

Attorney General

For the record, I don't know, but I am hoping your regulator would know.

The Honourable Mike Summers OBE

The fundamental point I think from this is that if people start to import pieces of electronic equipment that interfere with other bits of electronic equipment and have an effect of other people's right to do things. You need the ability to somehow to deal with it. That's what this provides to us.

The Honourable Gavin Short

Whilst I understand that Mike surely....

The Honourable Mike Summers OBE

You can bring your phone from India, but if it turns out in due course that phones from India interfere with my fridge then I would want to go to the regulator and say "there is a problem here".

The Honourable Gavin Short

Whilst I understand that Mike, I just don't want to interfere with peoples, what I see as right and freedom to fetch in.

The Honourable Mike Summers OBE

Absolutely, but, what about my right and my freedom to operate my fridge properly because I bought it. If you telephone interferes.

The Honourable Gavin Short

Maybe it's your fridge that's dodgy

The Honourable Mike Summers OBE

Well that's for the regulator to determine.

Attorney General

Exactly

The Honourable Roger Edwards

I certainly believe that if we have class licensing covering all these different things. And it's not down to the individual to rock up on a Monday morning at the Secretariat to the regulator to get a licence. I am content.

If it means that for every mobile phone imported or every satellite phone imported. Or for anything else from a communications point of view, (as your rightly point out, these days computers, fridges and goodness knows what else) even your own home the power supply in your own home, I think it would overwhelm our small regulatory service any way.

Attorney General

If we have to start producing a piece of paper for every mobile phone we are in deep trouble.

The Honourable Roger Edwards

Absolutely. Surely there will be a case where the regulator has a right to licence but, as we have done in the past with two meter sets, he decides not to do it. Is he going to be able to have that, like under the post office previously? Already we have a right to licence two meter sets but we don't.

The Honourable Mike Summers OBE

He issues a class licence.

The Honourable Roger Edwards

Well, that's my point.

Attorney General

Under the Wireless Telegraphy Ordinance you have an obligation to have a licence, but, the question is do you only have it once and do you have it last forever because it was felt that, that was sufficient. There is a licensing regime it's just that you have one licence for everything.

21 Activities requiring licence – No amendments

- (1) The following activities require a licence under this Part—
 - (a) owning an electronic communications network;
 - (b) operating an electronic communications network;

- (c) providing electronic communications services;
- (d) importing electronic communications apparatus.

(2) In this Ordinance “the licence requirement” means the requirement under subsection (1).

The Honourable Roger Edwards

Yes, indeed. Anybody else have anything else on this.
We move on.

Exemptions

22 Exclusive licence - No amendments

The licence requirement does not apply to anything—

- (a) done in reliance on and in accordance with an exclusive telecommunications licence granted under Part 7, or
- (b) exempted from a requirement for a licence under that Part.

23 Broadcasting - No amendments

The licence requirement does not apply to anything—

- (a) done in reliance on and in accordance with a broadcasting station licence granted under Part 5, or
- (b) exempted from a requirement for a licence under that Part.

24 Crown and Government

The Honourable Dr Barry Elsby

Why are we exempting the Crown?

Attorney General

Because you might want to communicate directly with organisations in the UK because of national security and there may be circumstances where you feel it’s in the public interest to operate an alternative system.

The Honourable Dr Barry Elsby

I can see there being exemptions but they are going to be rare. I'm not sure that we need to exempt Government and the Crown and all the others on general usage.

Attorney General

Ok, you did before, and I would encourage you to do it again.
The Crown has the ability to exempt itself and I would always encourage you to do so.

The Honourable Dr Barry Elsby

We have that in the way of Building and Planning regulations but we as a government have chosen to say that we would abide by the Building and Planning regulations, even though under the Ordinance we do not need to. We seem to be good practise for the Government to set their own standards (if you like) that we will abide by the laws.

Attorney General

Absolutely commendable and entirely what I would recommend. As a matter of historic public policy the Crown is usually has immunity. The Crown, in any event, could be civilly liable; you can never be criminally liable because the Crown never can be. As a matter of policy the Crown will ordinarily exempt itself because the crown is technically the founder of the courts system the Crown shouldn't be brought before the Courts.

The usual policy is that the Crown exempts itself in order to... But, I agree with the Honourable Member that it is, of course, best practise that when sets a standard for someone else one always seeks to comply with it ourselves. As a matter of Law (there is some Latin, which I have forgotten about the King not being subject to the Court) I would encourage you to do that.

The Honourable Mike Summers OBE

Is a public body a defined term elsewhere in the Law? Is there any fuzziness between the Crown and Statutory Corporations (or the like?)

Attorney General

This is intended to cover Statutory Corporations as well. I will check, I think there is a definition of Public Body, but I will check and come back to you.

The Honourable Roger Edwards

I did ask yesterday for an interpretation of Government. I think throughout the Bill it's a bit like the Governor sometimes, mostly, it's the Governor in Council, sometimes it's the Governor. This refers here to the Government is it only the Government who gets these exemptions. In fact probably not, it's across the whole spectrum of Government.

The Honourable Mike Summers OBE

The problem with this, and without it being a defined term, is that, any commercial company owned by FIDC, FLH or the Tourist Board would be exempt.

Attorney General

Ok

The Honourable Mike Summers OBE

So, you might not want that.

Attorney General

In terms of Government, yes, Government is defined. Government is defined in section 100 of the Constitution. Unfortunately they have chosen to have a circular definition that says the Government means the Falkland Islands Government.

I believe that that was to avoid the words "the Government means the Governor when acting in accordance with this constitution" Which in legal terms unpacking it is unpopular, but, none the less probably what it means.

In this instance I would take it to mean; anything that either ExCo does or the Public Service does. Yes, it would extend to Government Departments.

The Honourable Mike Summers OBE

So, to be clear from a policy perspective, and my perspective, I would doubt we would want this to extend to Statutory Corporations or their subsidiary bodies.

Attorney General

Ok, let me take that away

The Honourable Mike Summers OBE

Do other members concur with that?

The Honourable Jan Cheek

No, that's right.

The Honourable Phyl Rendell MBE

I wouldn't expect it to extend.

The Honourable Gavin Short

Under Section 24 Crown and the Government

(2) The licence requirement does not apply to anything done by or on behalf of

—

(d) the British Antarctic Survey.

A point which was raised by one of the people giving evidence yesterday.

The Honourable Roger Edwards

It was yes. Why are they in particular being picked out?

Attorney General

Two reasons, first of all because historically it's been an emanation of the UK Government, and two: we were keen to keep them here and to expand their operations. It seemed like a useful continuation. But, if you wish to remove it, it is of course a matter.

I think it would make it attractive for them to operate in the Falkland Islands, which was the idea.

It's always within an emanation of the United Kingdom Government, albeit called various things.

The Honourable Mike Summers OBE

Just going back to the Public body, just to be clear, so, any Body that was set up under the Media Trust would be a Public Body or not?

Attorney General

I am going to have to come back to you. My view is no. I think the Media Trust itself, because it's a Statutory Corporation would be covered, but anything subsequently (so it doesn't extend to the Penguin News, set up and operated by the Media Trust) I fairness I need to come back specifically.

The Honourable Mike Summers OBE

I'd be for deleting British Antarctic Survey because I think that takes you into quite a big can of worms.

The Honourable Roger Edwards

I wasn't thinking about deleting it, but adding other Bodies (if we can think of any)

The Honourable Mike Summers OBE

We can add exemptions at any time we wish. From a policy perspective

Attorney General

Well, no you'd need an amending Bill.

The Honourable Michael Poole

I tend to agree. I'd delete it because it doesn't send the right message if we are telling Businesses who have the same wish to grown and operate here.

The Honourable Jan Cheek

Unless you accept that it's part of the National Environmental Research Council (which is a branch of the UK Government)

Attorney General

It has been used in the past in terms of demonstrating the UK Government Sovereignty over British Antarctic. Therefore, it's something which is slightly different from a privately operating Government.

The Honourable Jan Cheek

I'd be a bit sensitive with that.

Attorney General

Again it's not something the British Antarctic Survey has asked for; it's a matter of my inclusion. If you don't like it I'll take it out.

The Honourable Roger Edwards

Should the South Georgia Government be included in this section? We do have the Commissioner for the South Georgia Government here and we have the

The Honourable Mike Summers OBE

Or any other Foreign Government

The Honourable Roger Edwards

I asked that, but that one is actually based here and we have their offices here.

Attorney General

I think that is a remarkable oversight given I am the Attorney General for South Georgia Government. So if I could have that added in, I'd be grateful.

The Honourable Roger Edwards

It would be sensible wouldn't it?

Attorney General

So we will put it in as (c) Government of South Georgia and South Sandwich Islands.

The Honourable Roger Edwards

Anyone got any other points on **Section 24 Crown and Government**.

Clerk of the Assembly

Are we removing BAS?

The Honourable Roger Edwards

No. No we are not removing BAS we are leaving BAS in.

The Honourable Mike Summers OBE

Whose decision was that?

The Honourable Dr Barry Elsby

We haven't decided that I don't think

The Honourable Roger Edwards

We haven't decided. We haven't voted on any of the previous things. Let's have a vote.

Do we want to delete BAS from this section or not?

Hands up those who want to delete BAS. The vote is 5. Ok, we delete BAS.

What about adding the Government of South Georgia then, that's another proposal.

Should we add that?

The Honourable Mike Summers OBE

I'm content with that.

The Honourable Roger Edwards

We didn't put it to the vote though. All agreed.

25 Crown and Government – Agreed with suggested amendments

- (1) The licence requirement does not apply to anything done by or on behalf of—
 - (a) the Government, or
 - (b) any other public body.

- (2) The licence requirement does not apply to anything done by or on behalf of—
 - (a) Her Majesty's Government;
 - (b) Her Majesty's armed forces for operational purposes;
 - (c) **Government of South Georgia and South Sandwich Islands**
 - (d) the providers of the British Forces Broadcasting Services;
 - (e) ~~the British Antarctic Survey~~.

- (3) An exemption under this section does not apply to the provision of electronic communications services to the public at a time when services of that kind are provided by a licensee.

Attorney General

This is saved from the current Ordinance

25 Private facilities - No amendments

- (1) Private electronic communications facilities are excluded from the licence requirement (but not from a radio spectrum requirement by virtue of section 56(1)(a)).
- (2) For the purposes of this section “private electronic communications facilities” means electronic communications services which—
 - (a) are provided by a person by means of local land-based network facilities or local transport-based network facilities;
 - (b) are accessible only on that person’s property;
 - (c) are operated independently (in every sense) of electronic communications networks operated by any other person; and
 - (d) are not operated in the course of an electronic communications service business or otherwise for commercial gain (except as an indirect and incidental part of a person’s business that does not involve the provision of electronic communications services).
- (3) In subsection (2)(a)—
 - (a) “local land-based network facilities” means network facilities which are situated on, and operated in, a single area of land in the Falkland Islands occupied by the person who is providing the electronic communications services; and
 - (b) “local transport-based network facilities” means network facilities which are situated on and operated in one or more vehicles, vessels, aircraft or hovercraft.

26 Transmission stations - No amendments

Networks are exempt from the licence requirement if they are used to receive sounds or visual images transmitted by wireless telegraphy—

- (a) from a transmitting station for general reception direct from that station, or
- (b) through the medium of a relay service licensed under this Ordinance.

27 Foreign transport

Attorney General

I should point out this was a point raised in relation to FIFCA. FIFCA raised it in one of their written submissions; it might be worthwhile highlighting that.

They take the point that it only relates to: what in International Law terms of the innocent passage of foreign vessels, It should be seen in the context of also the exemption: In relation to Maritime and Aviation Satellite systems.

FIFCA did mention **Section 27: Foreign Transport**, but I didn't know whether they considered it in the context of **Section 30: Maritime and Aviation satellite systems**. The intention was (I believe from the policy instructions) that Maritime and Aviation licensing in the normal way would not be effected by this.

If you are operating something in accordance with Maritime licensing regime.

At the moment it cannot cover, and my advice is that it cannot cover Oil Rigs, because, we have no Legislative competence in relation to Oil Rigs, unless they become fixed. It's only at that point we are able to legislate it.

Effectively it becomes a point of negotiation between the Government, the Exclusive provider and the Oil companies at that time. As yet we don't have any fixed rigs in the Falkland Islands so we are not legislatively competent.

We can of course legislate in relation to access to our sea bed and we can in relation to the column of water, but only in relation to those types of things.

The Honourable Jan Cheek

Without wanting to prolong the discussion; how was it dealt with in previous oil rounds? Were they allowed to operate their own systems without problems, because we have had both an anchored rig and a globally positioned one.

Attorney General

My understanding is (and I stand to be corrected by those with greater knowledge who worked in the minerals department) in any event they did a deal with the provider.

27 Foreign transport – No amendments

- (1) Networks and carriage services are exempt from the licence requirement if they are operated on a foreign vessel or aircraft—

- (a) passing through Falkland Islands territorial waters or skies, or
 - (b) berthing or landing in a Falkland Islands port or airport.
- (2) But subsection (1) does not permit the making of a broadcast while in Falkland Islands territorial waters or skies or while at a Falkland Islands port or airport.
- (3) In subsection (1) “foreign” means not registered in the Falkland Islands.

28 Emergency services

The Honourable Mike Summers OBE

Can I just raise a couple of issues here; whilst it seems intuitively right of the Emergency Services wouldn't be covered.

What happens in the event that the Emergency Services procure systems that interfere with other people's systems? The Regulator surely must have an ability to make them change.

Attorney General

The assumption would be that the Government would change it.

The Honourable Mike Summers OBE

The Government might take that view that; well, we are the Government and we provide Emergency Services and you lot can change.

Attorney General

That's right. They might

The Honourable Mike Summers OBE

That isn't right is it? In my view.

Attorney General

It is right that they might say that. My hope is they wouldn't and would follow what MLA Elsby said.

The Honourable Dr Barry Elsby

That is the point I was making. Why should we be exempting the Crown in all matters. Again, it comes on to this. What happens, (as Mike says) if we bring in

something? We are exempt, we don't need to worry about it. We hope we will act sensibly.

The Honourable Mike Summers OBE

We haven't been specific in this section about the Defence Force. Is that deliberate or not?

Attorney General

No, it wasn't.

The Honourable Mike Summers OBE

It makes sense to include the FIDF in that list

Attorney General

I believe it would.

The Honourable Roger Edwards

Would they not come under Government?

Attorney General

In reality the structure of the Falkland Islands means that in fact they will be exempt anyway under Section 24: It will allow them to set up new stuff to deliver Emergency Services. They would be exempted anyway.

The Honourable Dr Barry Elsby

The Licence exemption for Government is for the Government and anything done by, or on behalf of (so it's a very sweeping exemption)

Attorney General

It would cover it anyway. I think it's useful to have them listed.

The Honourable Roger Edwards

So we will add FIDF to that list there.

28 Emergency services – Agreed with suggested amendment

(1) The licence requirement does not apply to network facilities which are designed and used only for the provision of any of the following services in accordance with an enactment—

- (a) police services;
- (b) ambulance services;
- (c) fire and rescue services;
- (d) other emergency services; and
- (e) helplines designated by the Governor by Order.

(f) Falkland Islands Defence Force

(2) Before making an Order under subsection (1)(e) the Governor must consult—

- (a) any licensee affected, and
- (b) such other persons as the Governor thinks appropriate.

29 Radio spectrum use – No amendments

(1) The licence requirement does not apply to anything—

- (a) done in reliance on and in accordance with Part 6, or
- (b) exempted from a requirement for a licence under that Part.

(2) The use of radio spectrum is also exempt from the licence requirement if the Regulator notifies the user in writing that the Regulator is satisfied that—

- (a) the equipment used does not, and is not likely to, cause significant interference to networks or carriage services operated or provided by a licensee;
- (b) the risk of harm or inconvenience to other users is outweighed by the benefits to the public from permitting usage on an unlicensed basis; and
- (c) the exemption is compatible with any relevant international recommendations and standards.

- (3) A notice—
 - (a) must be published by the Regulator;
 - (b) must specify the period for which it applies;
 - (c) may be varied or revoked by the Regulator.

The Honourable Roger Edwards

We've had queries on that you have already answered those. Phyl had questions on that in particular.

30 Maritime and aviation satellite systems – No amendments

- (1) The licence requirement does not apply to anything done in the territorial sea in accordance with the provisions of any international convention or agreement relating to maritime satellite communications.
- (2) The licence requirement does not apply to anything done on an aircraft in accordance with an enactment of the State in which it is registered relating to aviation satellite communications.

31 Broadcasting licensees – No amendments

The licence requirement does not apply to anything done—

- (a) by a person licensed to provide services under the Wireless Telegraphy Ordinance 1994 or the Broadcasting Ordinance 2004, and
- (b) in accordance with that licence.

32 Power to confer additional exemptions – No amendments

- (1) The Governor may by regulations confer exemptions from the licence requirement.
- (2) Regulations may confer exemption—
 - (a) on a specified person or class of persons;
 - (b) in relation to specified activities or classes of activity;
 - (c) in relation to specified equipment or classes of equipment.
- (3) Before conferring an exemption in accordance with this section the Governor must give the Regulator an opportunity to make representations.

(4) Before making representations the Regulator must consult as the Regulator thinks appropriate.

Grant of licences

33 Power to grant licences

Attorney General

So again this is, from the point of view of our role of the independent. This is where the regulator is acting, effectively to grant any licences here, except exclusive licences.

So, the decision to grant or not grant a licence under this provision which is relevant to our earlier discussion about how the Regulator is constituted.

The Honourable Phyl Rendell MBE

Throughout this we have got the reference to the importation of electronic communications apparatus. I understand the network (I appreciate that) but I think we are minded to go down the route that we are only looking at class licences for communications apparatus. That this is possibly defunct.

Attorney General

No, it isn't. If you forgive me, with respect the Regulator has to have the ability to grant a class licence.

The Honourable Phyl Rendell MBE

Ok, as long as you are clear that is what we are moving towards

Attorney General

In relation to how the Government wants it to be done, (we accept that it wants to be done by class licensing) we still need to empower the Regulator to issue them.

The Honourable Mike Summers OBE

If you go to **Section 34: Individual class licence**

The licence may be either an individual or a class licence.

The Honourable Jan Cheek

I just had a query. I thought I heard you say “he or she would have a power to grant licences, except exclusive” but then, in 2 (b) it refers to a licence that may be exclusive or non-exclusive.

Section 33, 2 (b)

Attorney General

Shall we take out 2 (b) or well, maybe non-exclusive.

The Honourable Phyl Rendell MBE

Yes, just as long as it’s clear.

The Honourable Jan Cheek

I was just slightly confused by that

Attorney General

I think we changed our mind half way through. That’s right, I think 2 (b) does need to change.

The Honourable Roger Edwards

Can you look at it and come back to us on that please?

33 Power to grant licences – agreed subject to amendment of 2(b)

(1) The Regulator may grant licences permitting persons to—

- (a) own an electronic communications network;
- (b) operate an electronic communications network;
- (c) provide electronic communications services;
- (d) import electronic communications apparatus.

(2) A licence may—

- (a) apply in relation to all or any specified part of Falkland Islands territory;
- (b) be exclusive or non-exclusive; and

(c) be granted on terms and conditions.

(3) The Regulator may vary the conditions attached to a licence.

(4) In attaching or varying conditions the Regulator must have regard to the electronic communications objectives.

(5) A licence may be granted under this section only in so far as compatible with any exclusive licence granted under Part 7.

34 Individual and class licences

Attorney General

In relation to 3, for clarity (now that it has been raised) I think the Regulator's powers to vary must only relate to licences granted by them.

The Honourable Roger Edwards

Adopted by the Regulator.

Attorney General

Yes. I don't want any suggestion they can vary the conditions if they go onto an exclusive licence. MLA Cheeks' point, so I will look at 2 (b) and 3 together on that point to ensure that we are satisfied.

The Honourable Roger Edwards

Yes

The Honourable Phyl Rendell MBE

Sorry to belabour the point but, in 34 where it clarifies whether it's an individual licence or a class licence. The inference is: at the beginning of Section 33: That the Regulator may grant a licence. I know it says "may" we want to be pretty clear that we are not then expecting to be issuing an individual licence under a class licence to people that import mobile phones.

Attorney General

Absolutely, I would encourage us to deal with that through policy direction. We don't want to affect the powers because it may be that over time we want to take a different approach in policy terms.

For example; you class licence all of these and you individually licence a particularly difficult one of those.

I wouldn't change the legislation, I'd change the policy.

The Honourable Phyl Rendell MBE

Change the policy yes and make it clear for the Regulator's, absolutely clear.

34 Individual and class licences – review

A licence issued under section 33 must state that it is either—

- (a) an individual licence, or
- (b) a class licence.

Individual licences

35 Nature of individual licence – No amendments

- (1) An individual licence is issued to a specified licensee.
- (2) An individual licence comes into force in accordance with its terms.

36 Conditions – No amendments

- (1) The Regulator may attach conditions to an individual licence.
- (2) The Regulator may add to, remove or vary conditions attached to an individual licence.
- (3) When attaching, adding, removing or varying a condition the Regulator must—
 - (a) have regard to the electronic communications objectives,
 - (b) have regard to the regulatory principles, and
 - (c) in particular, ensure that conditions do not unfairly discriminate between licensees in respect of the same or similar networks or services.
- (4) Before attaching, adding, removing or varying a condition the Regulator must—
 - (a) consult the licensee, and

(b) allow a period of at least 28 days for the licensee to respond to the consultation.

37 Licensee's installations – No amendments

- (1) Each individual licence contains an implied provision requiring the licensee to permit any person authorised by the Regulator to enter any premises occupied or controlled by the licensee to inspect any apparatus used by the licensee in the carrying on of activities in reliance on the licence.
- (2) A person acquiring information in the course of an inspection under this section may not disclose the information without the consent of the licensee.
- (3) If the Regulator thinks that apparatus used by the licensee in the carrying on of activities in reliance on the licence is causing interference with any other apparatus, the Regulator may by notice require the licensee to take steps to prevent the interference.
- (4) Each individual licence includes implied provision requiring the licensee to comply with a requirement under subsection (3) as soon as is reasonably practicable.

38 Subsidiary undertakings – No amendments

- (1) The licensee under an individual licence is—
 - (a) the person who applies for the licence (“the principal licensee”), and
 - (b) any subsidiary undertaking of the applicant listed in the application.
- (2) The principal licensee may apply in writing to the Regulator—
 - (a) to add a subsidiary undertaking to the licence, or
 - (b) to remove a subsidiary undertaking from the licence.
- (3) The Regulator must as soon as is reasonably practicable—
 - (a) determine an application under subsection (2);
 - (b) notify the principal licensee of the Regulator’s determination; and
 - (c) take any action necessary as a result.

- (4) The Regulator may remove a subsidiary undertaking from an individual licence without an application under subsection (2) if the subsidiary undertaking applies for an individual licence.

Class licences

39 Nature of class licence

The Honourable Mike Summers OBE

May I ask the purpose of;

Section 39

(2) The determination must specify -

(b) any qualification criteria required to be satisfied by a person relying on the licence.

That takes you into a different direction. If you issue a class licence for fridges you are then going to determine.

What's the thinking behind this? The thinking that there might be things that a licence that shouldn't be available to children.

Attorney General

This is about saying that if you are one of these types of people you can have a licence.

For example: you own a television, you don't need a licence unless you have one of those. So it would be a condition.

Similarly you could say that you are only allowed to have one of these over a class licence if you are over 18 or you don't have a conviction for certain sort of offences. You could do all those sort of things where you might want to say. If you can't get one of the class licences ones then you might be able to get an individual one.

We are going to narrow out certain people where. For example, where special care is required.

The Honourable Mike Summers OBE

Thank you that is helpful.

The Honourable Roger Edwards

Anything more on **Section 39: Nature of Class licence**

We will move on

39 Nature of class licence – No amendments

- (1) A class licence is issued by means of a determination of the Regulator.
- (2) The determination must specify—
 - (a) the terms and conditions of the licence, and
 - (b) any qualification criteria required to be satisfied by a person relying on the licence.
- (3) A class licence may be relied upon by any person who—
 - (a) satisfies the qualification criteria (if any), and
 - (b) complies with the specified terms and conditions.
- (4) A class licence comes into force with respect to a person at whichever is the later of—
 - (a) the time when the person registers in accordance with section 39 (if registration is required),
 - (b) the time when the person satisfies any terms or conditions specified as requiring to be satisfied before reliance on the licence, and
 - (c) any commencement time specified in the licence.

40 Registration

The Honourable Roger Edwards

If you are not under a class licence mobile phones are covered under a class licence. Does this mean here, in

Section 40: Registration

- (1) When using a class licence the Regulator must specify whether-
 - (a) it requires persons to register for it ('a registration licence') or,

You still need to register it? You are not asking for a licence but, are you going to have to register your phone?

Attorney General

Will it need to be registered or not? So, the example I gave where: satellite phones sold by another business or by SURE, we could make it a requirement that, in response to buying one from SURE, it's a class licence, but SURE must keep a list of

you. And ditto the alternative provider I mentioned. When they issue you one you would go on a list. That would be an example of registration. If that is what was felt appropriate for monitoring the sales of those sorts of things.

In some circumstances we might have the power of registration in other circumstances we might not.

In relation to general provisions for mobile phones we don't care, but in relation to VSAT we might care.

It just gives you that flexibility if you feel that it's in the public interest to have a register.

The Honourable Roger Edwards

Understood. Anything more on section 40?

40 Registration – No amendments

- (1) When issuing a class licence the Regulator must specify whether—
 - (a) it requires persons to register for it (a “registration licence”), or
 - (b) it does not require persons to register for it (a “non-registration licence).
- (2) A person who satisfies the specified qualification criteria for a non-registration licence may rely on the licence to provide the services specified in it, in accordance with its specified terms and conditions.
- (3) The Regulator must publish—
 - (a) a standard registration form for registration licences, and
 - (b) guidance on registration and deregistration for registration licenses.
- (4) A person (“the registration applicant”) who satisfies the specified qualification criteria for a registration licence may send to the Regulator—
 - (a) a completed registration form, and
 - (b) any prescribed registration fee.
- (5) A registration applicant becomes a registered person in respect of the registration licence at the end of the period of 45 days beginning with the

date on which the Regulator receives the registration form (subject to subsection (6)).

(6) But a registration applicant does not become a registered person if during the period specified in subsection (5) the Regulator notifies the registration applicant in writing that—

(a) the person does not satisfy relevant qualification criteria,

(b) the registration form is incomplete, incorrect or unsigned, or

(c) the prescribed fee has not been paid.

(7) The Regulator may not restrict the number of persons that may register for a class licence.

(8) A registered person remains registered for a registration licence unless and until the Regulator notifies the person in writing that—

(a) the person has ceased to satisfy the specified qualification criteria, or

(b) any prescribed requirements for annual or other fees have not been complied with.

Implied condition

41 Licensee's installations – No amendments

(1) A class licence is subject to an implied provision requiring each person relying on it (“the licensee”) to permit any person authorised by the Regulator to enter any premises occupied or controlled by the licensee to inspect any apparatus used by the licensee in the carrying on of activities in reliance on the licence.

(2) A person acquiring information in the course of an inspection under this section may not disclose the information without the consent of the licensee.

(3) If the Regulator thinks that apparatus used by the licensee in the carrying on of activities in reliance on the licence is causing interference with any other apparatus, the Regulator may by notice require the licensee to take steps to prevent the interference.

(4) A class licence includes implied provision requiring the licensee to comply with a requirement under subsection (3) as soon as is reasonably practicable.

Duration

42 Duration of licence

The Honourable Roger Edwards

There is just a typo on that one. You have replaced at last with at least.

Attorney General

Yes, 42 (c)

This may be a good point as we are back on this table; for me to take you through the proposals in relation to the (I think members may well have the updated version from last night)

The Honourable Roger Edwards

Do we have all the bits in that one? I thought we were going to have some other bits today?

Attorney General

No we haven't got I think, Clauses 7 or 8. Mike was going to consider and we were going to discuss again.

There are some sections where we don't have proposals yet. In the next version of this report I will highlight those where we don't currently have a proposal.

Clause 8 in relation to regulatory independence – we were going to consider again, and also the position of the confidentiality clause in 18.

So Clauses 8 and 18 should be flagged in here as not yet agreed and I'll make sure it does in the next version.

In relation to this one: I hope Members have gone one beginning Clause 5.

That was picking up the point around communications, both within the Falkland Islands and Internationally. Adding in a new paragraph after (r) dealing with the point on technological innovation.

This was the Regulatory objectives and adding a new one to strengthen our (which currently says to promote innovative services to support the needs of the people of the Falkland Islands). We have added an additional one to promote and support the use of up to date technology as well. So we have services and technology covered. If Members are content with that, that's what I would propose.

5 Electronic communications objectives

The electronic communications objectives for the purposes of this Ordinance are—

- (a) to promote the public interest generally in relation to electronic communications;
- (b) to facilitate effective communication **in the Falkland Islands and** between the people of the Falkland Islands and the rest of the world;
- (c) to ensure effective regulation of the supply and operation of electronic communications services;
- (d) to enhance the efficiency of the Falkland Islands' commercial electronic communications sector;
- (e) to support the growth and development of the Falkland Islands' economy;
- (f) to promote investment and innovation in electronic communications networks and services;
- (g) to promote optimal use of radio spectrum;
- (h) to provide affordable access to high quality networks and carriage services in all regions of the Falkland Islands so far as reasonably practicable;
- (i) to maintain public safety and security;
- (j) to contribute to the protection of personal privacy;
- (k) to avoid public nuisance through electronic communications so far as reasonably practicable;
- (l) to limit adverse impact of networks and carriage services on the environment so far as reasonably practicable;
- (m) to ensure access to all key electronic communications services;
- (n) to encourage infrastructure investment into the Falkland Islands;
- (o) to provide continued growth in international capacity to support increasing usage levels, so far as economically feasible;

- (p) to support the delivery of public sector services (including education and healthcare);
 - (q) to strengthening the regulatory environment that supports development of the Falkland Islands' electronic communications sector; and
 - (r) to promote innovative services to support the needs of the people of the Falkland Islands.
- (s) to promote and support the use of up to date technologies in providing electronic telecommunication services.**

Unless it's marked in Red we have already discussed it as we have gone through. I have flagged 8 and of course it should be square bracketed.

I can't recall Chair, I think we agreed from sub paragraph 3, but not the earlier points. I will take Members direction on that.

5 is a slight amendment I made on the previous draft mark.

In relation to 11 this picks up the point around Governor, again I square bracketed it. I don't think Governor or Government is wrong but you may prefer not to have it. Technically because Government is defined as the Falkland Islands Government it's not technically wrong to have 11 (8) say the Governor or the Government. If you want it out we'll take it out.

The Honourable Roger Edwards

On that particular point about Government, when it comes to Governor or Government, who is specified in this particular Government? Because, later on in the Bill when we were looking at the Government Exemption it was the whole raft of Government from; Departments of Government and the rest, and that's why I had the query because, Government is not the same all the way through.

Attorney General

I can see an advantage in picking up on your point Chair on just saying that it should be Governor in Clause 11 (d) meaning that the instruction must come from ExCo. Whereas if it doesn't say that then technically it could come from any arm of Government. It could technically come from Chief Executive. Whereas here we would have to say it would come from ExCo and it would then be an ExCo delegation.

That point is addressed, if that is your point Chair, by taking out the "or Government".

The Honourable Roger Edwards

I don't mind if it's taken out or not, it's just the different interpretation of what Government means in this particular clause and in other clauses as we go through.

The Honourable Mike Summers OBE

I think taking it out is clearer isn't it?

Attorney General

Yes, and again in relation to where the request comes under Clause 11 (f)

I also prefer it coming from ExCo, either directly or by delegation. So I would change Government in that context to Governor. So I'd change both of those by removing Government in 11 (d) and changing Government to Governor in (f), if Members are content.

11 Specific duties

The Regulator has the following functions—

- (a) to regulate the electronic communications sector by exercising powers under this Ordinance (in particular, to issue licences and exemption determinations);
- (b) to manage state assets in accordance with this Ordinance;
- (c) to administer the licence fee system under this Ordinance;
- (d) if requested by the Governor ~~or the Government~~, to represent the Falkland Islands in relation to international organisations or obligations connected with electronic communications;
- (e) to exercise functions conferred on it by this Ordinance or any other enactment; and
- (f) to undertake other functions connected with electronic communications at the request ~~of the Government~~ (but this paragraph is subject to section 8(1)).

The Honourable Roger Edwards

How do Members feel, any other comments? No ok, fine.

Attorney General

Then 5 is just for transparency I proposed and amendment which I think now we don't need to make, so I have just crossed it out. That gets us to our point in these proceedings chair.

The Honourable Mike Summers OBE

Can I clarify Section 42 Duration Licence

I got confused by this. Did the drafter have two options? (a) and (b) or just (c) and then put them both in?

It seems to me to say you can issue a licence for up to ten years and then it goes on to say you can issue a licence for up to twenty years. I couldn't see a difference between one or the other.

The Honourable Roger Edwards

Are we not confusing the exclusive licence and ordinary licences here?

Attorney General

No, so this is about how we operate the licensing regime. If we issue a class licence, what we are saying is we can't change a class licence without giving additional notice.

For example: If we have licenced kite marked phones it will say that it will remain in force until the regulator gives two years notice.

So if you have got a phone, he/she can issue a licence for different types of technology, but your old technology can't become outlawed for a period of less than two years. You get at least two years notice that your phone is about to become illegal or you need a different sort of licence.

It certainly gives certainty. All that can be done for a fixed period or it can become... so it's about enabling one thing or another or another.

The Honourable Mike Summers OBE

What's the difference between:

(b) To continue in force for a specified period of not more than 10 years'

And

(c) To continue in force for a specified period of not more than 20 years' and to continue after that unless and until the Regulator gives at least 2 years' written notice of its termination (and the notice cannot be given during the initial fixed period)

Attorney General

Ones fixed terms and one's continuing. Your question then is, what's the difference between (a) and (c)

(a) to continue in force unless and until the Regulator gives at least 2 years' written notice of its termination

And

(c) To continue in force for a specified period of not more than 20 years' and to continue after that unless and until the Regulator gives at least 2 years' written notice of its termination (and the notice cannot be given during the initial fixed period)

The Honourable Mike Summers OBE

So a licence can be issued for not more than 10 years', but not more than 20 years'

Attorney General

No for 5 years'. So, it can be a fixed term of 10 years' or 5 years'.

The Honourable Mike Summers OBE

But you have to give 2 years' notice

Attorney General

No. It can either be an un ended licence subject to two years' notice or it can be a period of years. Which will say; the following things; this licence remains in force until the 31st December 2022 and that becomes a different type of licence.

It's not terminable on notice it's terminable by fixed date.

3 – is effectively covering the flexibilities as to what we are actually doing under exclusive power.

The Honourable Mike Summers OBE

So he may either issue a licence;

(a) in perpetuity subject to 2 years' notice

(b) for 10 years' fixed

(c) for 20 years with 2 years' notice.

Attorney General

I agree with you on the point and I will look at it again. I do take the point.

The Honourable Mike Summers OBE

(c) maybe superfluous if you've got (a)

Attorney General

I entirely understand that and I'll have a look at it and just check.

The Honourable Roger Edwards

Any further points on point 42

42 Duration of licence – review (c) as proposed.

An individual or class licence may be expressed—

- (a) to continue in force unless and until the Regulator gives at least 2 years' written notice of its termination;
- (b) to continue in force for a specified period of not more than 10 years; or
- (c) to continue in force for a specified period of not more than 20 years and to continue after that unless and until the Regulator gives at ~~last~~ **least** 2 years' written notice of its termination (and the notice cannot be given during the initial fixed term).

Procedure

43 Licensing procedure

The Honourable Roger Edwards

There is an amendment to (g) where the word Regulator is replaced by Governor.

Attorney General

And again the Regulator should be able to make regulations. It's an error

43 Licensing procedure

The Regulator may by regulations—

- (a) prescribe procedures to be followed in relation to applications for individual licences;
- (b) prescribe information to be provided in connection with applications for individual licences;
- (c) prescribe procedures to be followed in relation to registration for class licences;
- (d) prescribe information to be provided in connection with registration for class licences;
- (e) specify factors to be considered in determining whether a person satisfies specified qualification criteria;
- (f) in particular, specify factors to be considered in determining whether a person is fit and proper where that is a specified qualification criterion; and
- (g) prescribe periods within which the ~~Regulator~~ **Governor** must aim to determine applications in connection with individual or class licences.

Remedies for non-compliance

44 Penalty

Attorney General

This is the operative allows the regulator to make penalties. You will see that it's expressed as a maximum of 10 on the scale. 10 on the scale is currently £125,000.00

The Honourable Mike Summers OBE

For an individual the scale doesn't apply to businesses' is that correct?
So in the case of an individual the standard scale applies, in any other case i.e a business or an organisation (or something else)

Attorney General

It's unlimited subject to a maximum turnover.

The Honourable Mike Summers OBE

"Unlimited subject to". So there is a very wide discretion there.

Attorney General

Yes. Which is why (5) exists they have to publish their sentencing guidelines.

The Honourable Mike Summers OBE

Just in terms of expectation then: you've got a company that has a turnover of £6million, so the maximum you can fine anybody is £600,000 but the likelihood of that is pretty slim. The sentencing guidelines will refer to the standard scale will they? Or is it likely that they will.

Attorney General

Yes. It'll say things like; The way it's restructured is; these aggravating factors, these are mitigating factors; something of this nature will attract a fine sitting within this scale. Something of this nature is likely to be in that scale.

In terms of where you pick on the scale will depend on the aggravating and mitigating factors. Effectively the scale becomes a maximum.

The Honourable Mike Summers OBE

If a business has committed an offence 10 times and the fine is a fine at level 10 on the scale. Can that be multiplied by 10?

Attorney General

Each offence will get the same penalty but it'll also be an aggravating factor. So when you are not of good character anymore (because you have got previous offending) your previous offending history is taken into account an aggravating factor, therefore, it gets higher up the scale.

The Honourable Mike Summers OBE

Ok. Good

The Honourable Dr Barry Elsbey

Monies raised from penalties will into general Government coffers I presume?

Attorney General

Of course.

The Honourable Dr Barry Elsbey

What is the appeals process.

Attorney General

The Appeals process in the Bill is to Appeal to the Telecoms Appeals Panel in the first instance, which is envisaged to be, probably international experts on retainer. Because they are technical experts it means they will be able to correct an error from a technical expertise. They will be able to understand what the implications of a certain sort of technical outage is.

So the Telecoms Appeal Panel will do that. The reason why I recommended a Telecoms Appeal Panel is it should make any further judicial review much safer from the Governments prospective if a technical group has already looked at it.

The Honourable Mike Summers OBE

So I can see how that works in effect of the exclusive licence. In respect of a class licence or and individual licence. If somebody things that the Regulator has just made a bad decision you wouldn't want to have to go to independent panel would you? Is there no other internal process.

Attorney General

You would obviously ask them to reconsider you make representations or you go to the panel. I think that's the only route.

Again it should be a paperwork exercise. It won't be hearings in procedural terms, although, ExCo will set the procedure for the panel when we get to it.

The likelihood is that you would want in policy terms for it to be done on the basis of written representation because it is going to be an international panel.

The Honourable Dr Barry Elsby

That is the question I was going to ask.

Mr Matt Bassford

I just wanted to go back to **Section 44 Penalty (4)** again to make sure I understand. So it says the (4) penalty may not exceed 10% of the licensee's annual turnover and then it says (4) (b) in respect of the licensee's business carried on in the reliance of the licence.

My interpretation of this (and I may have got this wrong Peter) in the case of SURE, what we would say is: It's 10% of your regulated revenues rather than 10% if your total revenues, because that's the bit that's the licence.

That's quite straight forward when we think about SURE. Now I am trying to think about an Individual or a Company and how one would determine what proportion of their revenues were associated in reliance to the licence.

Attorney General

I think it's a good point. Whether or not it is better to separate it out only in relation to a limit in relation to the exclusive licence holder, then I think we should be explicit. So I think it's going to be very difficult to establish whether a legally imported mobile phone should have any impact on somebody's business. So perhaps there is an advantage in looking at that clause again.

The Honourable Roger Edwards

So, could we please ask you to look at that.

The Honourable Mike Summers OBE

So (3) would apply to everybody except the exclusive licensee and (4) would apply to the exclusive licensee. Is that what you were thinking Matt?

Mr Matt Bassford

That was my interpretation when I read it initially.

Attorney General

Now when you raise the point I agree with you, I think we need to look at it.

The Honourable Roger Edwards

Ok, we will ask you to reflect on it and report back. Anything further on Section 44, we will move on then to;

44 Penalty – review clauses (3) and (4)

- (1) This section applies where a licensee fails to comply with the terms and conditions of the licence.
- (2) The Regulator may require the licensee to pay a penalty.
- (3) In the case of an individual the amount of the penalty may not exceed an amount equivalent to level 10 on the Standard Scale.

- (4) In any other case the amount of the penalty may not exceed 10% of the licensee's annual turnover; and annual turnover is calculated as the licensee's annual turnover—
 - (a) for the year preceding that in which the penalty is imposed, and
 - (b) in respect of the licensee's business carried on in reliance on the licence.
- (5) The Regulator must publish criteria to be applied in determining the amount of a penalty.
- (6) Before imposing a requirement under this section the Regulator must—
 - (a) give the licensee written notice that the Regulator is considering imposing a requirement (including reasons), and
 - (b) give the licensee an opportunity to make representations.
- (7) Before imposing a requirement under this section the Regulator must give the licensee an opportunity to avoid the imposition of a requirement by remedying the failure to comply with the terms and conditions of the licence (subject to subsection (8)).
- (8) The Regulator may impose a requirement without complying with subsection (7) if—
 - (a) the Regulator gave notice to the licensee of intention of impose a requirement under this section in respect of one or more previous failures to comply with the terms and conditions of the licence, and
 - (b) the Regulator is satisfied that the licensee should not be given an opportunity to avoid the imposition of a requirement, having regard to the previous failure or failures.
- (9) A requirement under this section must—
 - (a) be imposed in writing;
 - (b) specify the failure of compliance in respect of which it is imposed;
 - (c) give the Regulator's reasons for imposing the requirement;
 - (d) give details of the application of the criteria for determination of the level of penalty;

(e) be published on the Regulator's website (unless the Regulator is satisfied that public interest in publication is outweighed by commercial or other reasons for confidentiality).

(10) A penalty imposed under this section—

(a) is enforceable as a debt due to the Regulator, and

(b) carries interest at such rate as the Governor may specify by notice in the Gazette.

45 Variation or revocation of licence – no Amendments

(1) This section applies where a licensee fails to comply with the terms and conditions of the licence.

(2) The Regulator may—

(a) vary the terms or conditions of the licence (which may include adding or removing a term or condition);

(b) suspend the licence for a specified period; or

(c) revoke the licence.

(3) Before taking action under this section the Regulator must—

(a) give the licensee written notice that the Regulator is considering taking action, and

(b) give the licensee an opportunity to make representations (including a period of at least 28 days for the making of written representations).

(4) Before taking action under this section the Regulator must give the licensee an opportunity to avoid action under this section by remedying the failure to comply with the terms and conditions of the licence (subject to subsection (5)).

(5) The Regulator may take action under this section without complying with subsection (4) if—

(a) the Regulator gave notice to the licensee of intention to take action under this section in respect of one or more previous failures to comply with the terms and conditions of the licence, and

- (b) the Regulator is satisfied that the licensee should not be given an opportunity to avoid action under this section, having regard to the previous failure or failures.
- (6) Action under this section must—
- (a) be taken by giving notice in writing to the licensee (at the address specified in the licence, if any);
 - (b) specify the failure of compliance in respect of which it is imposed;
 - (c) specify the date on which the action takes effect (which the regulator shall set having regard to all the circumstances, including the seriousness and urgency of the results of the failure to comply with the terms and conditions of the licence);
 - (d) give the Regulator’s reasons for imposing the requirement; and
 - (e) be published on the Regulator’s website (unless the Regulator is satisfied that public interest in publication is outweighed by commercial or other reasons for confidentiality).
- (7) The application of this section to an exclusive licence under Part 7 is subject to the provisions of section 74.

PART 5

BROADCASTING STATION LICENCES

Licences

46 Requirement for licence

Attorney General

So this is a reproduction of the saving of the existing broadcasting licence.

46 Requirement for licence - No amendments

It is unlawful to operate a broadcasting station except in accordance with a licence granted under—

- (a) this Part;
- (b) the Wireless Telegraphy Ordinance 1994; or

(c) the Broadcasting Ordinance 2004.

47 Grant of licence - No amendments

- (1) The Governor may grant a broadcasting station licence to a person.
- (2) A licence may be granted on conditions.
- (3) The provisions of Part 4 apply to broadcasting station licences as they apply to licences under that Part—
 - (a) subject to any provision of this Part, and
 - (b) with any necessary modifications.

Exemptions

48 Crown and Government

The Honourable Roger Edwards

There is already an existing amendment.

Attorney General

This is just a slight change to the Crown and Government exemption wording, to make it clearer.

The Honourable Mike Summers OBE

Clearer than the bit that is already there under **48 Crown and Government**

Attorney General

Instead of yes.

The Honourable Mike Summers OBE

Instead of.

Attorney General

Instead of **48 Crown and Government** we are proposing a new 48. A different heading to make it clear that it's about Crown exemptions not just about the Government and then just simplify the wording because it's better than being circular (in drafting terms)

48 ~~Crown and Government~~

~~Section 24 applies in relation to section 46 as in relation to section 21.~~

48. Exemption of Crown and Government

The Crown and the Government are exempted from the requirements of the provisions of this Part.”

49 Amateurs

The Honourable Roger Edwards

Again there is a suggested amendment for subsection 2

Attorney General

Thank you Chair and if I may this is just to re-insert the definition of amateur that appeared in the existing telecoms ordinance because we thought it was clearer.

49 Amateurs

(1) Section 46 does not apply to anything done by an amateur.

~~(2) In this section “amateur” means a person who has no commercial or financial interest or motive.~~

(2) In this section “amateur” means a person who is interested in radio techniques solely for a personal aim, without any commercial or financial interest or motive

Implied condition

50 Licensee’s installations

Attorney General

Again that’s a similar power to the one that applies in the previous section. So enforcement can be carried out.

The Honourable Roger Edwards

Enforcement?

The Honourable Dr Barry Elsby

Are BFBS exempt from this?

Attorney General

Yes

50 Licensee's installations - no amendments

(1) Each broadcasting station licence contains an implied provision requiring the licensee to permit any person authorised by the Regulator to enter any premises occupied or controlled by the licensee to inspect any apparatus used by the licensee in the carrying on of activities in reliance on the licence.

(2) A person acquiring information in the course of an inspection under this section may not disclose the information without the consent of the licensee.

(3) If the Regulator thinks that apparatus used by the licensee in the carrying on of activities in reliance on the licence is causing interference with any other apparatus, the Regulator may by notice require the licensee to take steps to prevent the interference.

(4) Each broadcasting station licence includes implied provision requiring the licensee to comply with a requirement under subsection (3) as soon as is reasonably practicable.

Enforcement

51 Offence - no amendments

(1) It is an offence to carry on an activity which requires a licence in accordance with section 44 otherwise than in accordance with a licence.

(2) A person who is guilty of an offence under subsection (1) is liable on conviction to a fine not exceeding level 8 on the Standard Scale.

52 Forfeiture - no amendments

(1) Where a person is convicted of an offence under section 51 the court may order the forfeiture of any equipment which appears to the court likely to have been used in connection with the commission of the offence.

(2) A forfeiture order may include provision about the treatment and disposal of the equipment forfeited.

53 Penalties for non-compliance with licence - no amendments

Sections 44 and 45 apply in relation to a licence under this Part as they apply in relation to a licence under Part 4.

PART 6

RADIO SPECTRUM MANAGEMENT

54 Management of the radio spectrum - no amendments

(1) The Regulator shall—

(a) have general responsibility for the management of the radio spectrum in the Falkland Islands, and

(b) in particular, be responsible for allocation of frequencies in the radio spectrum in the Falkland Islands by way of licence under this Part.

(2) The Regulator shall carry out functions under this section in accordance with any general or specific directions given to it by the Governor.

55 Spectrum plan - no amendments

(1) The Regulator must publish a plan for the use of the radio spectrum within the Falkland Islands (“the spectrum plan”).

(2) The first spectrum plan must be published during the period of 2 years beginning with the date of the commencement of this section.

(3) In preparing and maintaining the spectrum plan the Regulator must aim—

(a) to ensure consistency with any applicable international obligations or standards (including those of the International Telecommunications Union), and

(b) to take into account any relevant international recommendations.

(4) The spectrum plan must—

(a) specify frequency bands that are premium spectrum bands; and

(b) specify the consequences, for licensees and others, of specification as a premium band.

(5) The Regulator must revise and re-publish the spectrum plan—

- (a) before the end of the period of 3 years beginning with the date of publication of the initial plan; and
- (b) before the end of the period of 3 years beginning with the date of each re-publication.

56 Radio spectrum licence - - no amendments

- (1) The Regulator may—
 - (a) impose a requirement for a licence for the use of frequencies on the spectrum;
 - (b) assign a specified frequency to a person by granting a licence to that person to use that frequency.
- (2) A licence may be granted on conditions.
- (3) Conditions may relate, in particular, to authorisation of and standards or specifications for radio equipment.
- (4) A licence must require licensee to comply with any directions given by the Regulator in relation to use of the frequency.
- (5) A direction under subsection (4) may, in particular, be designed to avoid or reduce interference.
- (6) The Regulator must have regard to the spectrum plan before determining an application for a licence under this section.
- (7) The Governor may by regulations make provision about the procedures to be followed in connection with licences and applications for licences.

57 Licensee's installations - - no amendments

- (1) Each radio spectrum licence contains an implied provision requiring the licensee to permit any person authorised by the Regulator to enter any premises occupied or controlled by the licensee to inspect any apparatus used by the licensee in the carrying on of activities in reliance on the licence.
- (2) A person acquiring information in the course of an inspection under this section may not disclose the information without the consent of the licensee.
- (3) If the Regulator thinks that apparatus used by the licensee in the carrying on of activities in reliance on the licence is causing interference with any

other apparatus, the Regulator may by notice require the licensee to take steps to prevent the interference.

- (4) Each radio spectrum licence includes implied provision requiring the licensee to comply with a requirement under subsection (3) as soon as is reasonably practicable.

58 Exemptions - no amendments

The Governor may by regulations provide for exemptions from the requirement for a licence under this Part.

59 Vacation of radio spectrum

The Honourable Michael Poole

Can I ask a quick question on this? Section 1 (b) about paying compensation about radio spectrum is assigned to somebody. Can you just describe the circumstances where you would need to pay compensation?

Attorney General

You may have assigned spectrum for somebody to carry out a business by communicating over that spectrum and then if you suddenly take it off them you may say to them; well, because I've taken it off you and assigned a different spectrum to you.

For Example: you assigned a spectrum to someone and they set up a business in reliance of upon their spectrum license and then we found out that it was interfering with an MOD activity. We would want to move them because their activities might be accidentally setting off shells or something. We would want to move them from that piece of spectrum to another piece of spectrum. In those circumstances the Government might compensate them for the fact that costs have been associated with the fact we have given them the wrong spectrum.

The Honourable Michael Poole

It would only be based on clear evidence that they had incurred additional costs or lost revenue from that change having been made I guess.

Attorney General

Absolutely

The Honourable Michael Poole

Thanks

The Honourable Roger Edwards

Any other points on 59 Vacation of radio spectrum?

59 Vacation of radio spectrum - no amendments

- (1) If the Regulator is satisfied that a radio spectrum that has been assigned by licence to a person under section 56 should be un-assigned, the Regulator may—
 - (a) declare the spectrum vacant;
 - (b) pay such compensation (if any) as it thinks should be paid to the previous assignee, or any other person who is affected by the declaration;
 - (c) make any other arrangements it thinks necessary or desirable.
- (2) In taking action under subsection (1), or determining whether to take action, the Regulator must have regard to the electronic communications objectives.
- (3) A declaration under subsection (1)(a) must specify that the Regulator believes the radio spectrum should no longer be assigned to the previous assignee either—
 - (a) because the previous assignee has made insufficient use of the radio spectrum, or
 - (b) for another specified reason.

60 Spectrum trading - no amendments

- (1) The Governor may make regulations about the transfer of radio spectrum rights by a licensee to another person.
- (2) The regulations may make provision about permanent or temporary transfers (or both).
- (3) Subject to regulations under this section, a licensee may not assign the use of the licensed radio spectrum to another person (and any purported assignment is of no effect).

61 Saving for existing licences

Attorney General

If I may, a point has been raised about the current constitution of the Falkland Island Maritime Authority has capital lines, so I'd just like to take away whether or not I need that.

This was meant to cover the Authority crate under legislation hasn't yet been presented and as we've beaten that legislation I think I need to visit 61 (1) (a)

61 Saving for existing licences

(1) In this section "pre-commencement licence" means a licence for the operation of radio spectrum issued before the commencement of this section by—

- (a) The Falkland Islands Maritime Authority;

The Honourable Jan Cheek

It could be solved by just taking away capital M and capital A.

Attorney General

I suspect it might be, yes.

The Honourable Roger Edwards

Would you have a look Peter and then reflect on it and bring it back to us. Thank you

61 Saving for existing licences – review (1) (a) capitalisation of Maritime Authority

(1) In this section "pre-commencement licence" means a licence for the operation of radio spectrum issued before the commencement of this section by—

- (a) the Falkland Islands Maritime Authority, or
- (b) the Civil Aviation Department.

(2) A pre-commencement licence continues to have effect until it—

- (a) is cancelled by the authority that issued it, or
- (b) lapses or expires in accordance with its terms.

(3) Nothing in this Ordinance renders unlawful activity carried on in reliance on and in accordance with a pre-commencement licence.

Enforcement

62 Penalties for non-compliance with licence - no amendments

Sections 44 and 45 (penalty, variation and revocation) apply in relation to a licence under this Part as they apply in relation to a licence under Part 4.

PART 7

EXCLUSIVE TELECOMMUNICATIONS LICENCE

Nature of licence

63 Grant of licence - no amendments

- (1) The Governor may grant an exclusive licence to a telecommunications operator (“the exclusive licensee”) to—
 - (a) operate an electronic communications network in the Falkland Islands,
 - (b) provide electronic communications services in the Falkland Islands, and
 - (c) do anything else for which a licence is required under section 21(1).
- (2) The Governor may enter into an agreement in writing with the exclusive licensee providing obligations to be observed by it in connection with the provision of telecommunications services; and the provisions of an agreement under this subsection (whenever concluded) shall be treated as terms of the exclusive licence.
- (3) No more than one licence under this section may have effect at any time; and a reference in this Part to the exclusive licence is to a licence granted under this section.
- (4) Section 74 makes provision for revocation of the exclusive license, and other remedies, for non-compliance.
- (5) Before taking action under this section the Governor shall have regard to the electronic communications objectives and the regulatory principles.
- (6) A licence under this section—

- (a) may provide for specified activities to be capable of being licensed under other provisions of this Ordinance, subject to any conditions or modifications specified in the licence;
- (b) may be combined with one or more licences under this Ordinance (and provisions of this Ordinance referring to the exclusive licence do not refer to the non-exclusive components of the licence).

64 Terms and conditions

The Honourable Mike Summers OBE

A couple of issues here Chair that I have raised in previous discussions'. Unless I missed it, section 2 doesn't seem to stipulate that accounts must be produced for the Falkland Islands Business unit only. Which is our real interest.

The Honourable Jan Cheek

Though they are in respect of the licence activities, which would be the activities of the Business Unit.

Attorney General

That's right, but it's meant to cover (what is referred to sometimes as) regulated accounts. It doesn't affect the obligation to file accounts with the Registrar. This is additional obligations and it does relate only to the regulated activities.

The Honourable Mike Summers OBE

Ok, so they would have to produce accounts specifically for regulated activity. That would work would it, in terms of balance sheets and all, they are very complicated.

Attorney General

Yes, if you recall one of the issues we've had some resistance on in the discussions is the granularity of that information. As you are aware under the current telecoms ordinance an obligation to provide information is contained. It's currently contained at an extremely high level.

One of the things that we have been very keen to ensure is that; (2) (b) for example and also (2) (c) are specifically covered.

(2) The accounts specified in subsection (1) (a) are the following in respect of the licenced activities –

- (b) a revenue breakdown for principle lines of business (including, for domestic services, line access, fixed international, mobile, broadband, enterprise data and other matters);

(c) a balance sheet showing the book value of capital assets used in the delivery of the licensed activities and the level of depreciation applied.

The reason for this is to identify; first of all, a greater amount of information to the Regulator and others about how the business is operating and also the infrastructure over which the business is operating.

Effectively later on in the Bill, we see that the Government have the ability to nationalise. Again I'd like the Regulator to be informed about the nature of the national infrastructure because it is so important to the Falkland Islands.

The Honourable Mike Summers OBE

When we had a discussion before, I suggested in;

2) The accounts specified in subsection (1) (a) are the following in respect of the licenced activities –

(b) a revenue breakdown for principle lines of business (including, for domestic services, line access, fixed international, mobile, broadband, enterprise data and other matters);

That after revenue breakdown we should insert “and operating costs”, have you had time to reflect on that, because the revenue is one thing, but, actually the operating cost is pretty crucial as well isn't it?

Attorney General

Yes

The Honourable Mike Summers OBE

So it would say “the revenue breakdown and operating costs for principle lines of business”

The Honourable Roger Edwards

Where are you Mike? Sorry.

The Honourable Mike Summers OBE

I am in 64 (2) (b)

The Honourable Roger Edwards

64(2) (b) right

Attorney General

I think the way I need to deal with this Chair is to ask you for opportunities to consider it with Mike outside the meeting and bring back when we have had a chance to consider it together. Rather than to agree the amendment now.

The Honourable Roger Edwards

I think that's very sensible, yes, I agree with that. Thank you, if you will make it as a note to bring back.

The Honourable Michael Poole

Can I also add to that Chair? I think again it had been mentioned previously, but looking to include breakdown of revenue and cost by Geographic location within the Islands as well.

We had general agreement that there is potential policy interest in understanding the split between, Stanley, MPA and Camp.

The Honourable Roger Edwards

We'd have to ensure that the exclusive licence holder is able to produce those figures I suppose. I am sure they can if asked.

Anything else on **64 Terms and conditions**

The Honourable Mike Summers OBE

I have a couple of other comments for consideration. Again, I did raise this when we discussed before but I thought we should make it specifically clear that the licensee should not be allowed to depreciate equipment provided by the Government in its accounts.

The Honourable Phyl Rendell MBE

Or where the Government has funded that equipment. Yes, we did bring that up.

Attorney General

Yes, you did and I think the concern we had was; how smart the Government had been in the past in relation to how we'd identify that equipment.

I think what will probably help us in policy terms is; those that have longer information about what we funded. It would be quite useful to try and dig that out. I'm not entirely sure how we did it in the past.

The Honourable Mike Summers OBE

Well, we have previously funded roads and power facilities to Mountain top sites. It may be that the Licensee doesn't depreciate those items in its accounts, but they must have a value. I don't even know if they reflect a value it's just sort of covering the bases.

Attorney General

And, at that point it might be worthwhile for Members to look at the compensation regulations, just while I mention it, because they don't come up until later Chair. Either way flag it and talk about it when we get to it.

What we sought to do in the Draft compensation regulations is to effectively fix transfer values and various points so that the government doesn't pay twice for things.

If perhaps I can just suggest that when we come to it we come to MLA Summers point about depreciation of assets paid for by the Government. And I'll make a note

The Honourable Roger Edwards

Yes.

The Honourable Phyl Rendell MBE

That whole issue of understanding what government owns, what the national asset is. That's the role of the Regulator going forward I guess. I don't see how that is going to be easily captured. If we came to the situation where we wanted to nationalise the assets how we've got a record.

Attorney General

Seeing this over time, at the moment my belief the current tradition is we would have difficulty determining that. We'd have difficulty determining what we paid for and what is now currently used.

Part of the idea behind the obligation in this section of the Bill, is that we will become more informed about that due the course of the licence arrangement by virtue of both being proactive in regulation and also by having the information necessary to back that up.

One of the big conversations that we had once or twice with Sure was about "this is national infrastructure" It is quite appropriate that in the public interest the Government is aware, not only of what it is (and obviously through technical

expertise to an extent) why it is necessary and how it operates. Also, what value we think it has.

It's fair to say that a lot of this provision is of great interest to Sure and to ourselves and something about which we have debated quite a lot.

The Honourable Roger Edwards

We have actually paid for infrastructure, provided infrastructure and also government has provided services in the effect that it's used its powers to claim land on which to put the infrastructure.

So we have provided more than just straight infrastructure, we have provided services too.

The Honourable Mike Summers OBE

And it's not only historical because we've had a discussion already about the possibility of the Government paying for the extension of the mobile telephone network up to areas that the licensee is currently intending it to go to. So, there is a potential in the future that the Government will be paying for something, whether it's providing assets or whether paying for somebody's time, it will have a value.

Attorney General

I agree, and I think one of the things that we need to be mindful of is whether or not we also need to (in Regulation, here or elsewhere) look at the mechanism of that.

One of the things that we find ourselves in weakness in now is we've been let down by the mechanisms by which we've done that. So, if we can use this to strengthen that mechanically when we get to a point in the future we know that we've got something determined in a particular way.

The Honourable Gavin Short

Just something if you could clarify for me. I'm probably missing the point completely. If we get to a stage where we may want to nationalise a telecommunications company the Regulator would have had access to all sorts of very interesting information, profit and loss and such like. Does he not have to keep that to himself and not share it to anyone?

So if we wanted to nationalise it how could we get access to the information we really wanted if he's not allowed to share it?

Attorney General

I tried to make the point before. We can process the data, we just can't give the actual, so the. It's perfectly possible for the Regulator to write a report on things and for that to be published. What they can't do is transfer certain sorts of things.

Now, there's no way I can imagine, that for example, national infrastructure to telecoms for it to be considered either personal data or commercial in confidence. There might be some suggestion that the way to particular Boards inside Sure is a particularly proprietary way. Which a little tiny bit of how they connect to communications board inside a terminal or whatever, I'm at the end of my knowledge your probably better at this.

There may be some proprietary confidential information about the way make part of it operate. In terms of things like, what do we own and what's it worth. Whilst they might argue that certain levels of granularity certain parts of the kit, you might want to bring the figure together in joint in order to not identify one bit and another bit in terms of value. None the less the total price and how's it divided could all be provided. I don't see any particular difficulty in providing the processed information. There may be need to combine two figures to hide the nature of the figures, or we might need to say there's proprietary bit of kit which we'd need to replace because it's their IT, therefore there is a costs associated with that. It's those sort of issues. The exemption is not to prevent the information coming out at all, it's about getting access to information which can then be processed and re-presented.

The Honourable Roger Edwards

Mike, you had other points.

The Honourable Mike Summers OBE

Yes. In **section 64 Terms and Conditions** – The exclusive licence
Should that not make reference back to sections 5 & 6 of the Bill specifically?

Attorney General

In all of the So, whenever the Governor has to do something. For example in 5 it must always be read in the context of 5&6. So anything that we do, as always, must be compliant. We don't repeat it in case. In Legislative drafting terms we don't repeat the reference back because in case we miss it at a different date. Then it looks like we are trying not to apply it in certain circumstances because we miss it

The Honourable Mike Summers OBE

So it's not necessary to refer back

Attorney General

Because we already are doing.

The Honourable Mike Summers OBE

And so my final point in this section was going to be about a restatement of obligation to develop and adopt new technology. So now we've included that in section 5 or 6 (whichever one it was)

Attorney General

In exercising powers they must always do it.

The Honourable Mike Summers OBE

So there is no need to repeat it again

Attorney General

No

The Honourable Mike Summers OBE

Thank you

The Honourable Michael Poole

That's only the Government exercising powers and making that judgement Peter isn't it. Is it not worth investigating looking to impose that same obligation directly on the exclusive licensee?

Attorney General

So, yes, so for example; if the Government (I believe) when entering into the exclusive licence is obliged to satisfy itself granting that exclusive licence covers the objectives including the new one you've just put in.

So, when making a decision whether or not to grant you would need to be satisfied that it need meet the objectives, including the new one.

The Honourable Michael Poole

Thanks

The Honourable Mike Summers OBE

We'll go back. We'll have a look at the exclusive licence at some point, but you would expect that it made reference to some of these issues.

Attorney General

It's absolutely important we shouldn't grant a licence unless it meets the objectives. It's consistent with the objectives.

The Honourable Mike Summers OBE

Yes

The Honourable Roger Edwards

So the objective must be particularly clear on that point because it has been raised time and time and time again.

Attorney General

Absolutely. So Members have got the proposed amendment. Reflect on it in those terms. I think we are happy with it, but.

The Honourable Roger Edwards

So could I ask you Peter in fact for all the points raised on Section 64, that you take Section 64 away and look at it and reflect and come back in due course.

Attorney General

Thank you Chair, I have that instruction.

The Honourable Roger Edwards

Thank you. Anything else. Anybody else have anything else on 64?

64 Terms and conditions - subject to further consideration and amendment

- (1) The exclusive licence must include terms and conditions—
 - (a) requiring the submission of accounts in accordance with subsection (2);
 - (b) about duration of the licence;
 - (c) providing for cost recovery by the exclusive licensee;
 - (d) imposing, or providing for the imposition of, price controls;
 - (e) imposing universal service obligations in accordance with section 61;

- (f) for the transfer of data on termination of the licence.
- (2) The accounts specified in subsection (1)(a) are the following in respect of the licensed activities—
- (a) a profit and loss statement;
 - (b) a revenue breakdown for principal lines of business (including, for domestic services, line access, fixed international, mobile, broadband, enterprise data and other matters);
 - (c) a balance sheet showing the book value of capital assets used in the delivery of the licensed activities and the level of depreciation applied.
- (3) The exclusive licence may include terms and conditions—
- (a) requiring or allowing the licensee to share infrastructure, facilities and networks for the provision of electronic communications services on specified terms or conditions;
 - (b) specifying criteria for technical compatibility of and access to conditional access networks used in the provision of content;
 - (c) dealing with any other matters that the Governor thinks necessary or desirable.
- (4) Before setting the terms and conditions of the exclusive licence the Governor must—
- (a) review the market in which the licensee operates or proposes to operate;
 - (b) consider the electronic communications objectives; and
 - (c) consider the regulatory principles.
- (5) In particular, the Governor—
- (a) must ensure that any cost recovery mechanism or pricing methodology imposed by way of terms or conditions is designed to promote efficiency and to maximise consumer benefits;
 - (b) must take account of the investment made by the licensee and aim to allow the licensee a reasonable rate of return on capital efficiently

employed, having regard to the risks involved and to the desirability of sharing the benefits of efficiency;

- (c) must ensure that, where implementation of a cost accounting system is required by terms or conditions in order to support price controls, a determination of the cost accounting system is published, showing at least the main categories under which costs are grouped and, where appropriate having regard to the scale of services provided, the rules used for the allocation of costs; and
 - (d) may take account of prices available in comparable markets where the Governor is satisfied, having consulted the prospective exclusive licensee, that comparison is relevant.
- (6) The exclusive licence must include provision requiring the exclusive licensee—
- (a) not to discriminate against any person or classes of person in the provision of or in connection with electronic communications services offered by the licensee;
 - (b) to provide technical specifications or other technical information on request by a person who reasonably requires the information for the purpose of the lawful provision of electronic communications and who cannot reasonably easily obtain the information from other sources; and
 - (c) to ensure that the technical specifications of any network operated by the licensee is not incompatible with networks operated by other persons licensed under, or operating in accordance with the provisions of, this Ordinance.
- (7) The provisions of the exclusive licence relating to price control (whether by price cap or otherwise)—
- (a) may include provision allowing the Regulator to direct the exclusive licensee to employ specific cost accounting methods, or to apply the Regulator's preferred cost accounting methods;
 - (b) must include provision allowing the Regulator to require the exclusive licensee to provide justification for its prices in accordance with criteria specified by the Regulator (but where the price control provisions take the form of a price cap, the justification for prices required in accordance with this paragraph is limited to demonstrating compliance with the cap);

- (c) may include provision allowing the Regulator to direct a price adjustment for the purpose of compliance with the price control provisions of the licence, at such times and intervals as may be specified in the exclusive licence;
 - (d) may operate by imposing a ceiling on the average change in prices for regulated services over a specified period of time;
 - (e) may include provision for a review of the operation of any price cap from time to time, with the results of the review determining the continuing operation of the price control by reference to specified criteria; and
 - (f) may include provision limiting a weighted average of the changes in retail prices for services to which any price cap applies by reference to a specified controlling percentage.
- (8) In determining the provisions of the exclusive licence about price control the Governor must aim (without prejudice to the generality of subsection (4))—
- (a) to protect consumers from monopoly excess;
 - (b) to encourage the exclusive licensee to invest in services that benefit consumers;
 - (c) to allow the exclusive licensee a reasonable rate of return on capital efficiently employed, having regard to the risks involved; and
 - (d) to share the benefits of innovation and efficiency.

Performance

65 Universal service obligation – no amendment

- (1) The exclusive licence must include provision requiring the exclusive licensee to comply with any obligations under regulations made by the Governor under this section (“Universal Service Regulations”).
- (2) Universal Service Regulations must—
 - (a) specify services which are to be provided;
 - (b) specify the classes of user by whom the services must be accessible (and classes may be specified by reference to geographical area, possession of equipment, or otherwise).

- (3) The Regulator must—
- (a) publish on its website a description of services to be provided under Universal Service Regulations;
 - (b) monitor the provision of services in accordance with the Universal Service Regulations; and
 - (c) publish information on its website about the results of monitoring under paragraph (b).
- (4) In making and amending Universal Service Regulations the Governor must have regard to—
- (a) the electronic communications objectives;
 - (b) the regulatory principles;
 - (c) any representations made by a person who is, or may become, an exclusive licensee.

66 Obligations to subscribers - – no amendment

- (1) The exclusive licence must include provision setting out the obligations of the licensee to persons who use or wish to use the services provided in accordance with the licence.
- (2) In particular, the licence must make provision—
- (a) about applications for the provision of a service under the licence;
 - (b) permitting the licensee to require the provision of information and undertakings in connection with the provision of a service under the licence;
 - (c) prohibiting the licensee from refusing to provide a service except in specified circumstances or on specified grounds;
 - (d) about the payment of specified costs by persons applying for the provision of a service;
 - (e) imposing obligations on the licensee in respect of service provision;
 - (f) imposing obligations on the licensee in respect of the maintenance of equipment;

- (g) about liability of the licensee to persons in respect of loss or damage incurred in connection with the provision of services under the licence or otherwise (which may include provision dealing with failures in service, and provision limiting liability or permitting the licensee to limit its liability);
- (h) requiring the licensee to offer equipment for sale, hire or use;
- (i) requiring the licensee to permit service-users to use specified classes of equipment provided by the service-users in specified circumstances or subject to specified conditions;
- (j) allowing the licensee to require service-users to provide power and other installations and facilities;
- (k) allowing the licensee to impose obligations on service users in respect of the protection or use of equipment or otherwise;
- (l) allowing the licensee to discontinue, or impose conditions on, the provision of services in specified circumstances;
- (m) about notice periods for discontinuance of service at the option of the service-user;
- (n) about assignment or transfer of service contracts;
- (o) allowing the licensee to require service-users to accept liability for use made irrespective of the identity of the user, or in other specified circumstances;
- (p) allowing the licensee to require or permit service-users to pay deposits, to pay charges in instalments, to make payments in advance or on account, and to accept the installation of metering or charging apparatus;
- (q) about access to service-users' premises;
- (r) about user directories;
- (s) excluding liability in cases of force majeure (as defined by the licence).

67 Key performance indicators

The Honourable Phyl Rendell MBE

Could I ask the Attorney General at what point (I know you highlighted it in the ExCo paper, but I couldn't find it in the Bill exactly which clause) where do we address the requirement for a list of telephone numbers.

What clause does that come under, The Directory?

Attorney General

The Directory point is a condition of the licence.

The Honourable Phyl Rendell MBE

It's purely just a condition of the licence. As I couldn't find it anywhere, but you did refer to it in your covering ExCo paper.

Attorney General

Yes, I did. I don't believe it is in here but if we come across it I apologise

The Honourable Phyl Rendell MBE

No, I couldn't find it anywhere.

Attorney General

I believe it's only in the licence.

The Honourable Phyl Rendell MBE

So we need to address it there.

Attorney General

The other related point about help lines is covered here. In fact we've gone past it because.

The Honourable Phyl Rendell MBE

Yes we've gone past it yes.

Attorney General

And there are a set of proposed regulations in relation to those.

The Honourable Roger Edwards

The key performance indicators will inevitably change from time to time. Do we have to agree those changes? I assume we have to agree those changes with the exclusive licence holder at every change.

Attorney General

Yes. The time it's going to change is when you re-negotiate the price cap. So when you come price cap re-negotiation point you will also change your KPI's.

The Honourable Roger Edwards

Because they are specific to the licence?

Attorney General

That's right yes. In terms of enforcement (it's probably worthwhile pointing out) they are of course a condition of the licence and therefore, the provisions we've come back before, in terms of penalties apply to non-compliance of the KPI's.

67 Key performance indicators – No amendments

- (1) The exclusive licence must include provision requiring the exclusive licensee to monitor its performance in the provision of services in accordance with the licence against—
 - (a) any key performance indicators specified in the licence, and
 - (b) any key performance indicators specified by the Regulator.
- (2) The exclusive licence must include provision requiring the exclusive licensee to comply with any request by the Regulator to—
 - (a) publish its performance against any the key performance indicators referred to in subsection (1) in the manner required by the Regulator;
 - (b) provide details of its performance against those key performance indicators in the manner required by the Regulator.

68 Complaint handling and dispute resolution – No amendments

- (1) The exclusive licence must include provision requiring the licensee to—
 - (a) establish and maintain a Code of Practice about complaint handling and dispute resolution;
 - (b) obtain the Regulator's approval of the form and content of the Code (and if necessary vary the Code until the Regulator approves); and
 - (c) include in all contracts for the provision of services in accordance with the licence a provision requiring customers to follow any applicable procedures set out in the Code before taking legal proceedings.

- (2) A court must enforce subsection (1)(c) by staying or dismissing proceedings, except if and in so far as the court thinks that the proceedings should not be stayed or dismissed having regard to special circumstances of the case.

69 Interception and data retention capability

The Honourable Dr Barry Elsbey

Chair. I think you've probably got it covered here Peter, but I'll just raise it.

- (1) The exclusive licensee must maintain capability to retain subscriber details and call and data records (including records for mobile services and fixed line services, broadband user authentication records and mobile short message content).

The time that data has to be retained, I presume that's covered by; (5) (b) where it say's timing.

- (5) A requirement imposed under this Ordinance (by warrant, notice or otherwise) to do anything in reliance on the capability mentioned in subsection (1) is subject to agreement between the exclusive licensee and the Governor as to –
(b) timing.

Attorney General

Yes. I thought we had a Government draft order but I may or may not. Again, in terms of the length of time you keep it. It's quite contentious in national terms. The real constraint is when you've got high volumes of data it's actually quite expensive to keep it here because the size of the market is relatively smaller amount of data, therefore we can reasonably ask the provider to keep it for longer.

The Honourable Dr Barry Elsbey

What sort of timings are we talking about though? Are we talking months' or years'? Or is that still to be determined.

Attorney General

It's a matter for ExCo because it primarily relates to detection of crime you are going to have to balance how long you require them to keep it and the cost of that, with the fact that it could be useful in criminal investigations, and therefore you'll just need to... So I would have thought around a year is what you're thinking, you're not talking multiple years'. You don't want to go a great deal shorter than 6-9 months' for example so you are probably looking at about a year I'd have thought, in terms of retention.

We did have quite a debate on it, but I can't remember the entire debate my advisors have I know it's something that's a matter but it's a matter internationally and people overseas do it.

The Honourable Roger Edwards

Anything else on Section 69?

69 Interception and data retention capability – No amendment

(2) The exclusive licensee must maintain capability to retain subscriber details and call and data records (including records for mobile services and fixed line services, broadband user authentication records and mobile short message content).

(3) The Governor may by Order amend subsection (1) to require the exclusive licensee to maintain specified capability to intercept, retain or otherwise interfere with electronic communications data.

(4) Before making an Order under subsection (2) the Governor must consult the exclusive licensee.

(4) Anything done in reliance on capability maintained in accordance with subsection (1) is done with lawful authority for the purposes of this Ordinance.

(5) A requirement imposed under this Ordinance (by warrant, notice or otherwise) to do anything in reliance on the capability mentioned in subsection (1) is subject to agreement between the exclusive licensee and the Governor as to—

(a) costs, and

(b) timing.

(6) Any question arising in relation to the effect of subsections (1), (4) or (5) may be referred by the Governor or the exclusive licensee to the Magistrates' Court, whose decision shall be final; and the Regulator has no jurisdiction to determine a question to which this subsection applies.

(7) The exclusive licence must include provision requiring the licensee to take all reasonable steps to ensure that its staff are aware of the rules of secrecy relating to telecommunications set out in the International Convention of Nairobi 1982 and any later Convention amending or replacing the same to which the United Kingdom or the Falkland Islands is a party (including any General and Administrative Regulations from time to time in force under the Convention that extend to the Falkland Islands).

(8) Nothing done under Part 13 may (explicitly or impliedly) require the exclusive licensee to maintain a capability not required by this section.

Information and inspections

70 Regulator's requests for information – No Amendment

- (1) The exclusive licence must include provision requiring the exclusive licensee to comply with any request of the Regulator for the provision of information or documents reasonably required by the Regulator in connection with the performance of its functions, subject to any exemptions or qualifications specified in the licence.
- (2) A request under this section must specify—
 - (a) the information or documents required;
 - (b) that the request is made in accordance with this section;
 - (c) the purpose for which the information or documents are required;
 - (d) the time by which the information or documents are to be provided;
 - (e) specify the consequences of failure to comply.
- (3) If the exclusive licensee considers that the burden of complying with a request in accordance with this section would be disproportionate to the public benefit of compliance—
 - (a) the licensee may, during the period of 20 working days beginning with the date of receipt of the request, send a notice to the Regulator explaining the reasons for, and extent of, the licensee's wish not to comply with the request;
 - (b) the Regulator must respond to the notice during the period of 20 working days beginning with receipt;
 - (c) the request is suspended until the Regulator responds;
 - (d) the Regulator must modify the request if and to the extent that the Regulator accepts the licensee's representations, in which case the Regulator must issue a new request under this section (and the preceding provisions of this section apply).

71 Failure to provide information

The Honourable Mike Summers OBE

Section 71 Failure to provide information

(2) The Regulator may –

- (a) Require the licensee to pay a penalty not exceeding an amount equivalent to level 10 on the Standard Scale;

Does that conflict with the discussion we were having earlier about 10% of turnover?

Attorney General

If I can just for a moment, the answer to 71 (2) (a) is it doesn't conflict at all, it's a different penalty.

The Honourable Mike Summers OBE

So this is a failure to provide information.

Attorney General

A failure to provide information penalty, previous penalty was breach of a licence condition. So the 10% strangle limitation doesn't apply in relation to this penalty. In relation to the other one I think there was something quite important I needed to mention I am just trying to remind myself what it was.

The Honourable Roger Edwards

Are we going back to clause 70? Maybe I can ask you again to reflect on that.

Attorney General

Section 70 Regulator's requests for information. I don't think I have anything to mention. I thought it contained a provision but it doesn't so that's fine, but I will refer to it.

The Honourable Mike Summers OBE

Can I just ask Chair please?

Section 71 (5) Any request made by the Governor for information about an event specified in subsection (3) or any other event likely to result in a change of control must be complied with –

Why is there a need to put that there? Isn't that kind of automatic, or is it not?

Attorney General

In every other case it goes to the Telecomm appeal panel in this case it is automatic but it's there to differentiate between the roots. Because this is a criminal penalty we treat the Regulator in this case effectively as your minor court for this issue because they are determining and therefore Supreme Court appears appropriate rather than (Because it's not a technical matter I don't think it's a matter that appropriately goes to the Telecom's appeal panel) because it's simply a criminal matter then it correctly goes to the Supreme Court.

There is an argument about whether or not you want it to go to the Supreme Court on the very basis that it's quite expensive to have a Supreme Court here. I think on balance we recommend that it's right because we are effectively using the Regulator as a Summary Court jurisdiction for these purposes.

I stand by it, but I can understand there is a question about why you wouldn't allow them to appeal to the Magistrates Court.

If you would like me to look at this I'll look at this again. I think when we discussed it it's because we were considering that Summary Court Jurisdiction was the equivalent the Regulator had which is why I put it in, but If you'd like me to reflect on it because it's cheaper to appeal to the Magistrates Court then for pragmatic reasons I'll have to look at it.

I may come back to you and say I still think it's the Supreme Court.

The Honourable Mike Summers OBE

I'm content to take your advice either way.

The Honourable Roger Edwards

You will offer advice on that particular point when you can.

Attorney General

I'm making a job for myself I think, but yes, Excellent.

71 Failure to provide information – No amendment

(1) This section applies if an exclusive licensee fails without reasonable excuse to comply with the condition required by section 70.

(2) The Regulator may—

(a) require the licensee to pay a penalty not exceeding an amount equivalent to level 10 on the Standard Scale;

- (b) revoke the exclusive licence in accordance with section 74; or
 - (c) take action under both paragraph (a) and paragraph (b).
- (3) Before taking action under subsection (2) the Regulator must—
- (a) serve a warning notice on the licensee; and
 - (b) give the licensee a reasonable opportunity to make representations.
- (4) A penalty under this section may be enforced as a debt due to the Regulator.
- (5) The licensee may appeal to the Supreme Court against a requirement imposed by the Regulator to pay a penalty under this section; and the Supreme Court may make any order it thinks appropriate (including increasing the amount of a penalty and making ancillary provision as to costs or otherwise).

72 Licensee's installations – No amendment

- (1) The exclusive licence must include provision requiring the exclusive licensee to permit any person authorised by the Regulator to enter any premises occupied or controlled by the licensee to inspect any apparatus used by the licensee in the provision of services in accordance with the licence.
- (2) A person acquiring information in the course of an inspection under this section may not disclose the information without the consent of the licensee.
- (3) If the Regulator thinks that apparatus used by the licensee in the provision of services in accordance with the licence is causing interference with any other apparatus, the Regulator may by notice require the licensee to take steps to prevent the interference.
- (4) The exclusive licence must include provision requiring the exclusive licensee to comply with a requirement under subsection (3) as soon as is reasonably practicable.

Change of control of licensee

73 Approval for change of control

Attorney General

I think there are some change of control draft regulations which Members may want to read alongside the Change of control. They are relatively short.

This is the 73 (3) because they are draft they have been re-numbered so I think it's.... These are the regulations.

It's seen in the context of (and I think the point was previously made when we discussed this) about the relevant level of control and it's about trying to find the right balance about when we should be properly informed and when the Government should be able to prevent a change of control.

You will see that in the Regulations we've sought to keep an absolute bar on foreign control in certain circumstance which I think is appropriate in the context of the Falkland Islands and security concerns.

The Honourable Mike Summers OBE

I've just noticed that you've got. Yes, you've got (3) you have (a) twice. You've got (a) at the bottom and then (a) over the page. That should be (b)

Attorney General

Oh gosh we have. That's excellent, and also the opposite provision is wrong at the top. It was just to give us an idea of what we had in mind for the regulations.

73 Approval for change of control – No Amendments

- (1) The exclusive licence must include provision requiring the exclusive licensee to comply with the provisions of this section.
- (2) A change of control may not be implemented without prior written approval of the Governor.
- (3) The Governor may by regulations make provision about procedure in connection with applications for approval for change of control; and the regulations may include, in particular—
 - (a) information to be provided;
 - (b) timing;

- (c) the conduct of an investigation into a proposed change of control.
- (4) The Governor must be notified in writing before the end of the period of 7 days beginning with—
 - (a) the licensee’s entering into an agreement that would result in a change of control, or
 - (b) the announcement of a public bid for control of the licensee.
- (5) Any request made by the Governor for information about an event specified in subsection (3) or any other event likely to result in a change of control must be complied with—
 - (a) in the manner specified by the Governor, and
 - (b) in accordance with any requirements as to timing specified by the Governor.
- (6) For the purposes of this section a reference to change in control includes a reference to any person—
 - (a) acquiring control over the affairs of the licensee;
 - (b) acquiring control of more than 30% of the voting shares in the licensee; or
 - (c) taking other action of a kind specified by the Governor by regulations.

Enforcement

The Honourable Roger Edwards

Following on from that is;

74 Penalties for non-compliance with licence

The Honourable Mike Summers

I just want to raise a question about;

74 Penalties for non-compliance with licence

(2) But an exclusive licence under this Part may not be revoked unless the Regulator has obtained the leave of the Supreme Court to revoke the licence.

Why? I’ve just written why? Exclusive licence may not be revoked unless that has been referred to the Supreme Court.

Attorney General

In terms of the policy advice we had, because of the. Effectively it's because of the value of what you are granting is so significant that an arbitrary measure is likely to be automatically be challenged by judicial review. If we are going to end up in that situation we may as well have gone there first.

The effect of this would mean that having got Supreme Court review your judicial review would end up in a court of appeal which is probably exactly where we'd want it. Which I thought was quite a smart move for the purposes of ensuring that we are acting in accordance with a proper mechanism where both sides can be heard.

74 Penalties for non-compliance with licence – No Amendment

- (1) Sections 44 and 45 apply in relation to an exclusive licence under this Part as they apply in relation to a licence under Part 4.
- (2) But an exclusive licence under this Part may not be revoked unless the Regulator has obtained the leave of the Supreme Court to revoke the licence.
- (3) Before applying to the Supreme Court for permission the Regulator must give at least 6 weeks' notice of the intention to apply for permission.
- (4) The decision of the Supreme Court on an application for permission is final.

PART 8

FEES

General fees

75 Fees Regulations

The Honourable Roger Edwards

There is a suggested amendment to that.

Attorney General

Again, just to be more specific rather than the general wording which we thought was helpful. This points out that in relation to any fees charged, picking up points already made around the table, that this is a matter for ExCo. Whether we charge a fee or don't charge a fee.

The Honourable Mike Summers OBE

Would it on an annual basis end up with the Budget Select Committee as other fees do?

Attorney General

My expectation is it would just sit alongside it in the normal cycle yes.

The Honourable Mike Summers OBE

I can't remember if it's in this section or elsewhere. There is an issue about the level at which the fee is set. I know it's got a figure in it somewhere.

Attorney General

The schedule at the back, when we come to that yes.

The Honourable Mike Summers OBE

There are also provisions aren't there about cost recovery and in respect of our discussions about regulation and the amount of resource and the cost of regulation we might want to consider what we think the fee ought to be.

Attorney General

What we could do is in order to be transparent about the fee we have put it in as a schedule. Therefore, the figure of £10,000 (which has been often debated) appears in a schedule to this legislation. There is no reason why it needs technically to appear in a schedule. It could appear in fees regulations, but again one of the things that the exclusive provider is obviously keen to have is certainty that the fees won't change on an annual basis. Whether or not you are minded to give that certainty is a matter for Members.

The Honourable Mike Summers OBE

I'm not sure that either we are or should be. We reserve the right to change other fees. We changed the banking licence fee for instance relatively recently. I'm not sure we'd want to fetter ourselves or fetter future members in that way.

Attorney General

So it may be a matter that's covered by amendment 75 and the removal of 76 to put the exclusive licence fee simply within the fees regulation's, but there may be a policy matter that you want to discuss with Matt and I outside the room.

The Honourable Mike Summers OBE

I think that's right, I think we'd want to be further along the road of understanding the cost of regulation before we got anywhere near setting a fee.

Attorney General

So if I may Chair, I'll take 75 & 76 away on that basis

The Honourable Roger Edwards

Indeed yes. We haven't begun 76. We will assume 76 is covered under 75 and we will discuss and bring back to report to the Select Committee in due course.

Attorney General

That will obviously have an impact on 75 for amendment on my list.

The Honourable Roger Edwards

Yes

The Honourable Mike Summers OBE

And it runs of Chair into 77 (5) it says in setting the amounts of fees the regulator must apply estimated cost recovery approaches. So it all forms part of the same discussion.

The Honourable Roger Edwards

Well it does because we have stated previously that the licence fee is not a cost recovery operation, it is a cost of the licence. So (5) I had put that point down. In fact 75, 76 and 77 needs looking at discussing and being brought back to the Select Committee.

Attorney General

Okay

The Honourable Roger Edwards

So if we can take that as being reported on;

75 Fees Regulations – Review and Revert to Select Committee

(1) The Governor may by regulations (“Fees Regulations”)—

- (a) require the payment of fees in respect of the application for, or the issue, renewal or maintenance of, or otherwise in connection with, a licence under this Ordinance;
 - (b) specify the amount of a fee;
 - (c) make provision about timing, manner of payment and other ancillary matters in connection with fees.
- (2) Fees Regulations must, in particular, make provision—
- (a) for fees to be charged for or in connection with licences under Parts 4 to 6;
 - (b) for fees to be charged in respect of the performance of the Governor’s functions in relation to change of control of an exclusive licensee under Part 7.
- (3) Fees Regulations may—
- (a) make provision for exemptions, waivers and reductions;
 - (b) confer a discretion on the Governor, the Regulator or another specified person;
 - (c) make provision that applies generally or only for specified purposes;
 - (d) make different provision for different purposes.
- (4) This section does not apply to anything in respect of which a fee is chargeable under ~~a later provision of this Part~~ **“section 76”**.

Specific fees

76 Exclusive licence fee - – Review and Revert to Select Committee

The Schedule makes provision about fees to be paid for and in connection with an exclusive licence under Part 7.

77 Services by Regulator - – Review and Revert to Select Committee

- (1) The Regulator may charge fees for or in connection with—
- (a) the performance of a function under this Ordinance or under a licence issued under this Ordinance;

- (b) the performance of any service offered by the Regulator (including the supply of information or documents).
- (2) This section is subject to any express provision of a licence under this Ordinance.
- (3) A fee charged under this section may be expressed to be calculated—
 - (a) as an annual amount,
 - (b) as a proportion of a business' turnover in respect of activities provided in accordance with a licence, or
 - (c) in any other specified way (which may involve conferring a function on a specified person).
- (4) In determining and charging fees under this section the Regulator—
 - (a) must have regard to the regulatory principles; and
 - (b) in particular, must ensure transparency, objectivity, proportionality and non-discrimination.
- (5) In setting the amounts of fees under this section the Regulator must apply an estimated cost-recovery approach so that—
 - (a) they are designed to cover the annual costs of performance by the Regulator of its functions in relation to the regulation of the electronic communications sector;
 - (b) deficits from one year are recovered over one or more years as appears to the Regulator to be appropriate having regard to the impact on the electronic communications sector;
 - (c) surpluses from one year are returned over one or more years as appears to Regulator to be appropriate; and
 - (d) each licensee or other fee-payer is contributing a proportionate share of the Regulator's costs having regard to all the circumstances (including the nature of the relevant function, the benefits to the fee-payer and the resources and other circumstances of the fee-payer).
- (6) Fees to be charged by the Regulator, together with any criteria for determining their amounts and any rules as to timing of payment, must be published—
 - (a) on the Regulator's website, and

(b) in other ways that the Regulator considers appropriate.

Enforcement and administration

78 Collection and destination – No Amendments

Fees under this Part—

(a) shall be collected and administered by the Regulator, and

(b) shall be paid into the Consolidated Fund.

79 Recovery - No Amendments

A fee under this Part which is due and unpaid is recoverable as a debt due to the Regulator.

80 Interest - No Amendments

(1) Interest accrues on overdue fees and is to be calculated by the Regulator on a daily basis.

(2) Interest is recoverable in the same manner as the principal.

(3) The rate of interest is the Bank of England base rate from time to time plus 2%.

81 Offences - No Amendments

(1) It is an offence to do anything in respect of which a fee is payable under this Ordinance without paying the fee.

(2) The offence in subsection (1) may be charged in addition to any other offence committed by the same activity.

(3) A person who takes any action for the purpose of evading all or part of a fee under this Part, or who assists another for that purpose, commits an offence.

(4) A person who is guilty of an offence under this section is liable on conviction—

(a) to imprisonment for a term not exceeding 6 months,

(b) to a fine not exceeding the level 10 on the Standard Scale, or

(c) to both.

PART 9

CONSUMER STANDARDS AND PROTECTION

Consumer protection

82 Regulator to enforce consumer protection provisions - No Amendments

The Regulator must monitor compliance with any provision of a licence under this Ordinance—

- (a) which is described in the licence as a consumer protection provision, or
- (b) which in the Regulator's opinion is designed (wholly or partly) to protect interests of the users or potential users of electronic communications services.

83 Consumer Protection Regulations - No Amendments

- (1) The Governor may make regulations for the purposes of protecting users and potential users of electronic communications services ("Consumer Protection Regulations").
- (2) Consumer Protection Regulations may include provision about, in particular—
 - (a) standards of service;
 - (b) quality of service;
 - (c) safety;
 - (d) handling of complaints;
 - (e) the use of a network or service to make unsolicited communications;
 - (f) confidentiality of user information;
 - (g) telephone directories and similar publications (which may include provision requiring the publication of directories, and provision about the disclosure or use of information for the purpose of directories).
- (3) A licence under this Ordinance may make provision by reference to Consumer Protection Regulations, including references to those Regulations as they may have effect from time to time.

(4) Consumer Protection Regulations may not, except in accordance with subsection (3)—

(a) impose obligations on licensees, or

(b) change the effect of a provision of a licence.

(5) Before making Consumer Protection Regulations the Governor must consult—

(a) all relevant licensees, and

(b) such other persons as the Governor thinks appropriate.

84 Programme content

The Honourable Mike Summers OBE

We did have some discussions about this previously didn't we? On the grounds that under 84 (3) nudity is not strictly illegal and the use of alcohol is not illegal in most circumstances, same with tobacco. I'm not quite sure about their inclusion here. I think I had previously suggested that something like incitement to assist with the commission of crimes was more important than some of those issues.

The Honourable Phyl Rendell MBE

It does say "may" doesn't it?

Attorney General

Incitement to commit a crime is already a crime so I don't think you need to regulate it because if someone's doing it we are going to arrest them for it anyway.

The Honourable Mike Summers OBE

So is physical and psychological violence isn't it?

Attorney General

Yes, good point.

The Honourable Mike Summers OBE

This is about an ability to regulate content.

The Honourable Jan Cheek

A bit like the watershed on TV isn't it. These are the items we shouldn't be showing people.

Attorney General

But of course, violence appears in Television programmes so this is about things (effectively in the future) being broadcast over the network, which as points raised in evidence, we had in evolution it could be done and again there are circumstances where, like the watershed there maybe circumstances where around a sports programme you don't also want to be advertising tobacco. You want to impose a watershed type conditions in relation to things when broadcast goes over those media networks.

The Honourable Roger Edwards

So are we content to leave those in as is.

The Honourable Phyl Rendell MBE

I think so because it is a "may"

The Honourable Mike Summers OBE

It's discretionary you can have the argument at the time if somebody wants to implement them.

The Honourable Roger Edwards

Okay, we will leave that in for now. Thank you. Anything else on 84?

84 Programme content – No Amendments

- (1) The Regulator may issue codes of practice about the content of media services under the control of licensees under this Ordinance.
- (2) A code may, in particular, include provision designed—
 - (a) to protect young persons from exposure to harmful material;
 - (b) to protect users from offensive material;
 - (c) to promote accuracy and impartiality in news and current affairs material;
 - (d) to avoid misleading or alarming service users.

- (3) Provision made in pursuance of subsection (2)(a) or (b) may, in particular, include provision about material which includes—
- (a) physical or psychological violence;
 - (b) sexual activity or nudity;
 - (c) the use of alcohol, tobacco and drugs;
 - (d) anything likely to incite hatred or discrimination on grounds of race, religion, disability, age, gender or sexual orientation;
 - (e) offensive language;
 - (f) anything of an indecent, obscene, offensive or defamatory nature.
- (4) A code may include provision about procedure to be followed in making, handling and determining complaints about matters in subsection (2) and (3).
- (5) A code relating to broadcasting services may, in particular, include provision about—
- (a) the amount of time devoted to advertising;
 - (b) the presentation of advertising material;
 - (c) sponsorship announcements;
 - (d) the use of captions and sub-titles;
 - (e) teletext and other ancillary services;
 - (f) party political broadcasts;
 - (g) broadcasting of sporting and national events;
 - (h) broadcasting in relation to national emergencies; and
 - (i) public service announcements.
- (6) A licence under this Ordinance may make provision by reference to codes under this section, including references to those codes as they may have effect from time to time.
- (7) A code of practice may not, except in accordance with subsection (6)—

- (a) impose obligations on licensees, or
 - (b) change the effect of a provision of a licence.
- (8) Nothing in this Ordinance or in a licence under this Ordinance obliges a licensee to accept for transmission material of a kind described in subsection (3)(d) to (f).

Equipment on service users' premises

85 Service users' premises

Attorney General

I probably ought to mention that Service users' premise is a matter that has arisen in practise where we have come across. It's specifically mentioned at sometimes. Someone can try and mend something on someone's premises and they won't allow them on to do it, and then say "but you are not providing me with a service". So without this provision it becomes a bit circular. I just thought I'd mention it as it's been raised.

The Honourable Roger Edwards

Thank you.

85 Service users' premises – No Amendments

- (1) A licence under this Ordinance must include provision that applies where the licensee has sited equipment on property belonging to a user or prospective user of the licensee's services.
- (2) The licence must include provision requiring the licensee to maintain the equipment (subject to subsection (4)).
- (3) The licence must (subject to subsection (4)) include provision allowing the licensee to authorise persons to enter the property for the purpose of monitoring or maintaining the equipment—
 - (a) at reasonable times,
 - (b) after giving reasonable notice, and
 - (c) on presentation of appropriate identification.
- (4) Subsections (2) and (3) may be varied by any specific provision of—

- (a) the licence;
 - (b) any agreement between the licensee and the owner of the property.
- (5) A licensee who is refused access under a provision specified in subsection (3) or (4)(a) or (b) may apply to a court for a warrant authorising access; and the court may grant a warrant on such terms and conditions as it thinks appropriate.
- (6) A licence under this Ordinance must include provision enabling the licensee, so far as reasonable, to make the provision of any service under the licence conditional on the provision of power, in such form and to such specifications as the licence may specify, by an actual or prospective user of the service.

86 Equipment standards

The Honourable Roger Edwards

This goes back into class licence and so on.

86 Equipment standards – No amendments

- (1) The Regulator may publish—
- (a) standards for equipment to be used for the purposes of electronic communications;
 - (b) conditions to be satisfied in using equipment for the purposes of electronic communications;
 - (c) conditions or standards for the manufacture or import of equipment designed to be used for the purposes of electronic communications.
- (2) The Regulator may require its approval to be obtained for equipment before it is used for the purposes of electronic communications; and—
- (a) a requirement must be published in a manner designed to ensure that it comes to the attention of persons using equipment for those purposes, and
 - (b) a licence under this Ordinance may identify a class of equipment in respect of which a requirement under this subsection may or may not be imposed on or in respect of the licensee.

- (3) The Regulator may set standards and conditions, and impose requirements, under this section only if satisfied that they are necessary or desirable for the purposes of—
- (a) preventing or limiting damage to networks or services provided in accordance with this Ordinance;
 - (b) protecting public health and safety;
 - (c) protecting the environment.
- (4) Conditions under this section may include provision as to testing of equipment.
- (5) In setting standards or conditions under this section the Regulator may make provision by reference to standards or conditions having effect outside the Falkland Islands (including such standards and conditions as they may have effect from time to time).
- (6) A licence under this Ordinance must include provision requiring the licensee to comply with any standards, conditions and requirements under this section.
- (7) It is an offence to—
- (a) use equipment which does not comply with any relevant standards under this section;
 - (b) use equipment without complying with any relevant conditions under this section;
 - (c) manufacture equipment which does not comply with any relevant standards or conditions under this section;
 - (d) import equipment which does not comply with any relevant standards or conditions under this section;
 - (e) use equipment without obtaining approval required under this section.
- (8) A person who is guilty of an offence under subsection (7) is liable on conviction to a fine not exceeding level 7 on the Standard Scale.
- (9) Before issuing standards or conditions under this section the Regulator must consult—
- (a) any relevant licensee, and

- (b) such other persons as the Regulator thinks appropriate.

Telephone numbers and domain names

87 Numbering plan

Attorney General

Again we are practically moving responsibility for this asset to the Regulator.

87 Numbering plan – No amendments

- (1) The Regulator must publish a numbering plan for telephone numbers or other similar designations.
- (2) The numbering plan must set out rules for the—
 - (a) allocation of numbers or series of numbers to licensee;
 - (b) assignment of numbers to service users.
- (3) A licence under this Ordinance must include a requirement to comply with any relevant requirements of the numbering plan.
- (4) In preparing the numbering plan the Regulator shall aim—
 - (a) to comply with any relevant international standards;
 - (b) to ensure a sufficient supply of numbers for expected usage; and
 - (c) to promote the efficient use of numbering.
- (5) The numbering plan may require licensees to provide specified kinds of number for emergency purposes.

88 Domain names

Attorney General

I should also point out that when we were discussing 75 (I think) which was around the fee's regime to be chargeable by the Regulator (which I'm taking away to look at) these are sort of things that would be covered by that fee regime, potentially.

The Honourable Roger Edwards

What is the split between the exclusive licence holder, the sole provider and the Regulator when it comes to domain names and the like? Because, currently you get your names and things from them, you can suggest names, they approve it and put it into their system. Are we going to have to just add another level to it.

Attorney General

Well again this comes from my earlier point. Actually the Regulatory services department currently approves the name and allocates it and could charge a fee but doesn't. Because in fact the customer gets the customer experience (as you rightly point out Chair) in that they go to SURE, request it from SURE and SURE make the change. That's because the Government doesn't have the competence to do that currently. (other than to allocate the names).

The question then will be, in future (and quite correctly this is a public asset) as we get competence, it maybe the Government imposes/undertakes that activity rather than relying on SURE. Therefore, any fee chargeable goes to consolidated funds and not to SURE.

The Honourable Roger Edwards

Okay, thank you for that explanation.

88 Domain names – No amendments

- (1) It is the responsibility of the Regulator to manage, allocate and assign domain names.
- (2) A licence under this Ordinance must include provision requiring the licensee to comply with any rules or direction made or given by the Regulator in respect of the use of domain names.
- (3) In this Ordinance “domain name”—
 - (a) means a name allocated under the global name system assigned to the Falkland Islands according to the two-letter code in the International Standard ISO 3166-1 (Codes for Representation of Names of Countries and their Subdivision), and
 - (b) includes any second or subsequent level domain name.

Public bodies

89 Access by public bodies – No amendments

Nothing in this Ordinance, Consumer Protection Regulations or a licence under this Ordinance affects any right of a public body to access information.

PART 10

PUBLIC CONTROL OF SERVICES

90 Interception – No amendments

- (1) A licence under this Ordinance must include provision requiring the licensee to maintain the capability required by section 69 (to be used in accordance with an authorisation issued by the Governor under Part 13).
- (2) The Governor may issue a written exemption from the requirements of subsection (1) to a specified licensee in respect of a specified network, subject to any specified terms and conditions.
- (3) Before issuing an exemption the Governor must consult—
 - (a) the Attorney General, and
 - (b) the Chief Police Officer.

91 War and emergencies

The Honourable Mike Summers OBE

I think I did raise this but it isn't that the Governor acting in his discretion but it's covered by the Constitution anyway. It's not the Governor in Council is it?

Attorney General

No, it's definitely the Governor in discretion. So it should say after the words "it's the Governor acting in his or her discretion" is the formal words we use.

91 War and emergencies – No amendments

- (1) If the Governor considers it necessary in the interests of defence, public safety or public order, the Governor may—
 - (a) take any steps the Governor considers appropriate to assume control over any network or services provided under or in accordance with this Ordinance (by licence or otherwise);

- (b) issue directions to a licensee or any other person who controls a network or services for the provision of electronic communications for the purposes of steps under paragraph (a);
 - (c) appoint staff to act for the purposes of paragraph (a).
- (2) The Governor may pay compensation in respect of action taken under subsection (1).

92 Other public service acquisition of control

Attorney General

92 (4) we are proposing to delete Chair.

The Honourable Roger Edwards

92 (4) we already have that suggestion is delete and re-number.
So we take out (4) re-number (5) as (4)

92 Other public service acquisition of control

- (1) This section applies where—
- (a) an exclusive licence under Part 7 has been revoked and another exclusive licence for the same services has not yet been granted;
 - (b) an exclusive licensee ceases to operate or in the opinion of the Governor is about to cease to operate; or
 - (c) for any other reason the Governor considers that it is necessary in the public interest to acquire control of the provision of telecommunications services.
- (2) The Governor may—
- (a) take any steps the Governor considers appropriate to assume control over any network or services provided under or in accordance with this Ordinance (by licence or otherwise);
 - (b) by order provide for specified assets to vest in the Governor for the purposes of use in pursuance of paragraph (a);
 - (c) appoint staff to act for the purposes of paragraph (a).

(3) Compensation is payable in respect of assets to which an order under subsection (2)(b) applies; and the Governor shall make regulations about the determination of compensation under this subsection.

~~(4) Regulations under subsection (3) shall be made in accordance with the advice of the Regulator.~~

(5) Compensation due and payable under this section shall be charged on the Consolidated Fund.

I think that's a good point there to stop for the morning. Thank you everybody.

We have an opportunity to reconvene on the 29th in the afternoon. If we could start at 1 o'clock please because we have another meeting at three (and we have to be at that)

If we have two hours dedicated in the afternoon of the 29th November, between One and Three.

**Select Committee of Elected Members on the Communications Bill 2016
29 November 2016, Court & Assembly Chambers**

Attendance:

Elected Members

The Honourable Roger Edwards (Chair)
The Honourable Jan Cheek
The Honourable Dr Barry Elsby
The Honourable Ian Hansen
The Honourable Gavin Short
The Honourable Mike Summers OBE

Officers

Mr Peter Judge, Attorney General

Mr Matt Bassford, Director Central Services

Apologies – Overseas

The Honourable Michael Poole
The Honourable Phyl Rendell MBE

The Honourable Roger Edwards

Good afternoon Ladies and Gentlemen we are just waiting for one Member to arrive. So we are presently in-quate. Please can I point out that this is Select Committee of the Legislative Assembly, It's a Select Committee of the whole House.

As such the same rules apply. Please could I ask from the start that all mobile phones are turned off.

Secondly, I have had word back from the Clerk. The Clerk is having problems hearing the recordings for the verbatim transcription. If she has problems then I believe listeners may also be having a problem to hear exactly what is being said.

Please can I ask that the Committee speak clearly into their microphones and please speak one at a time, because, if the second person starts speaking it cuts out what the first person is saying and so no one hears anything.

Please if we can have a little microphone control. Thank you.

We commence this afternoons session where we left off last time which is; page 108 if you are following us through the Bill.

PART 11

OFFENCES

Specific offences

93 False statements, &c. – No amendments

- (1) A person who makes a statement or provides information or documents to the Regulator or any other public body in pursuance of a provision of this Ordinance commits an offence if—
 - (a) the person knows that the statement, information or documents are false in a material respect;
 - (b) is reckless as to whether the statement, information or documents are false in a material respect.
- (2) A person who is guilty of an offence under this section is liable on conviction to a fine not exceeding level 12 on the Standard Scale.

94 Obstructing Regulator – No amendments

- (1) It is an offence to obstruct the Regulator or a person authorised by the Regulator in the exercise of a function under this Ordinance or under a licence issued under this Ordinance.
- (2) A person who is guilty of an offence under this section is liable on conviction to a fine not exceeding level 7 on the Standard Scale.

95 Misleading messages – No amendments

- (1) It is an offence to use electronic communications to send or attempt to send a message which is false or misleading and is likely to threaten the efficiency or safety of any person, vehicle, vessel or aircraft (whether by issuing a false distress call or otherwise).
- (2) A person who is guilty of an offence under this section is liable on conviction to a fine not exceeding level 10 on the Standard Scale.

96 Other improper communications

Attorney General

Chair there is a request that we remove the offence in 96 because it's already in almost exactly similar terms in the New Crimes Bill.

The Honourable Roger Edwards

Which part of 96 to delete?

Attorney General

The entire offence, so the entirety of 96 and re-number.

The Honourable Roger Edwards

Thank you. As is written in the book we will continue with the numbering, but, it will be re-numbered for the true copy.

96 Other improper communications

- ~~(1) It is an offence to use electronic communications to send or attempt to send material that is—~~
- ~~(a) grossly offensive,~~

~~(b) indecent or obscene,~~

~~(c) threatening, or~~

~~(d) designed to cause distress or inconvenience without reasonable excuse.~~

~~(2) A person providing electronic communications in accordance with a licence under this Ordinance may—~~

~~(a) refuse to transmit a message containing material of a kind described in subsection (1);~~

~~(b) terminate provision of services to a person on the grounds of habitual use to send or attempt to send messages containing material of a kind described in subsection (1).~~

~~(3) A person who is guilty of an offence under this section is liable on conviction to—~~

~~(a) imprisonment for a term not exceeding 6 months,~~

~~(b) a fine not exceeding level 5 on the Standard Scale, or~~

~~(c) both.~~

97 Interfering with communications

Attorney General

97 (5) Where the Falkland Islands is party to an international agreement relating to the provision of mutual assistance in relation to interference with electronic communications, a request for assistance may not be made by any person in or on behalf of the Falkland Islands except with the authority of the Attorney General.

A proposal that after the words Attorney General, right at the end of that clause we add, “or the Governor acting in his or her discretion” to extend that power.

The Honourable Roger Edwards

Thank you. So that’s sub para 5, the end of that.

Attorney General

Thank you Chair.

97 Interfering with communications

- (1) It is an offence to—
 - (a) do anything designed to obtain from the operator of a network information about the content, sender or addressee of an electronic communication, or
 - (b) disclose that information.
- (2) It is an offence for the operator of a network, or a person employed by or otherwise working for the operator of a network, to—
 - (a) interfere with an electronic communication; or
 - (b) disclose the existence, nature or content (including sender or addressee) of an electronic communication.
- (3) Subsections (1) and (2) do not apply to anything done—
 - (a) with the consent of the persons sending and receiving the communication; or
 - (b) with lawful authority.
- (4) A person who is guilty of an offence under this section is liable on conviction to—
 - (a) imprisonment for a term not exceeding 2 years,
 - (b) a fine not exceeding level 12 on the Standard Scale, or
 - (c) both.
- (5) Where the Falkland Islands is party to an international agreement relating to the provision of mutual assistance in relation to interference with electronic communications, a request for assistance may not be made by any person in or on behalf of the Falkland Islands except with the authority of the Attorney General “or the Governor acting in his or her discretion”.

98 Deliberate interference – No amendments

- (1) A person who uses any apparatus for the purpose of interfering with electronic communications commits an offence.
- (2) Subsection (2) does not apply to anything done—

- (a) with the consent of the persons sending and receiving the communication; or
 - (b) with lawful authority.
- (3) A person who is guilty of an offence under subsection (1) is liable on conviction to—
- (a) imprisonment for a term not exceeding 3 months,
 - (b) a fine not exceeding level 3 on the standard scale, or
 - (c) both.

99 Damage to infrastructure – No amendments

- (1) A person who damages any part of the infrastructure of an electronic communications network must report the damage to a police officer as soon as is reasonably practicable.
- (2) Failure to comply with subsection (1) is an offence.
- (3) A person who is guilty of an offence under subsection (2) is liable on conviction to a fine not exceeding level 3 on the Standard Scale.

Enforcement powers

100 Power of entry – No amendments

- (1) If a court is satisfied that there are reasonable grounds to suspect that evidence of the commission of an offence under this Ordinance is to be found on premises, the court may issue a warrant authorising a person authorised by the Regulator—
- (a) to enter the premises;
 - (b) to require the provision of a copy of any information or documents stored on the premises (including information stored electronically);
 - (c) to test equipment;
 - (d) to remove any article that may be or provide evidence of the commission of the offence.
- (2) Subsection (1) applies to a vehicle, vessel or aircraft as it applies to premises.
- (3) It is an offence—

- (a) to obstruct a person exercising powers under a warrant under this section, or
 - (b) to fail to provide reasonable assistance on request to a person exercising powers under a warrant under this section.
- (4) A person who is guilty of an offence under subsection (3) is liable on conviction to—
- (a) imprisonment for a term not exceeding 3 months,
 - (b) a fine not exceeding level 3 on the standard scale, or
 - (c) both.

Supplementary

101 Jurisdiction – No amendments

The Magistrates' Court has jurisdiction for the purposes of this Ordinance (subject to any provision to the contrary).

102 Maritime and Aviation

The Honourable Mike Summers

Chair can I just ask for clarification for the purpose of this section. I think we already established elsewhere that there is a hierarchy of Legislation, so, the provisions of the Maritime Bill will allow for Communications by ships and aircraft that are not subject to licence. How does this interact with that?

Attorney General

Chair, I think it's an important question and needs to be reviewed.

The Honourable Roger Edwards

Okay, so you will review that and bring it back to the Committee. Thank you

The Honourable Jan Cheek

Now that Barry is here and we are quorate should we confirm the decision we made on the last alteration.

The Honourable Roger Edwards

Yes

The Honourable Dr Barry Elsby

My apologies Chair, I didn't realise we were so short of people.

The Honourable Roger Edwards

We require 6. The alterations made so far; we started at **PART 11 offences** there were no comments or alterations on:-

Clause 93 False Statements, & c.

Clause 94 Obstructing Regulator

Or

Clause 95 Misleading messages

Clause 96 Other improper communications was deleted in its entirety and we will re-number the remainder.

Clause 97 Interfering with communications on the last paragraph, paragraph 5. After Attorney General we added or Governor acting in his or her discretion. Do you have any comments on any of those things up to where we are?

The Honourable Dr Barry Elsby

No Chair.

The Honourable Roger Edwards

Thank you.

There was a question there as to whether this clause is actually necessary because it is covered elsewhere and in possibly maritime and aviation Bills, so the Attorney General has asked leave to look at this further and will report back to the Committee. That brings us up to date.

Please can I remind you, as I have just reminded others to turn your phone off please.

102 Maritime and Aviation – Review and revert to Select Committee

(1) This section applies where an offence under this Ordinance is committed—

(a) by, using or in relation to equipment on board a ship or aircraft, or

(b) by anything done on a ship or aircraft.

(2) The captain or other person for the time being in charge of the ship or aircraft is guilty of the offence (whether or not anyone else is also guilty of the offence).

(3) But subsection (2) does not apply where the captain or other person in charge can show that the offence was committed only by reason of action—

(a) which was taken by a passenger, and

(b) which the captain or other person in charge could not reasonably have been expected to take action to prevent.

PART 12

LAND

103 Compulsory purchase

The Honourable Gavin Short

If I may raise a query, if I can Mr Chairman. I believe we have some existing compulsory purchase legislation do we not? I was just wondering if we do, how this relates to that. Just for clarification for myself and those listening.

Attorney General

Yes of course Chair. The purpose of **103 Compulsory purchase** is a clarification clause. It simply confirms that if compulsory purchase powers were to be used then the functions of the exclusive licensee would be considered a public purpose.

In other words, the Government could chose to use any compulsory purchase powers to assist the exclusive licensee in the continuation of public purposes and also that those powers can be exercised by the licensee or the Governor.

Effectively it means that that any compulsory purchase law can be used for the purposes of supporting the exclusive licensee in the delivery of their functions.

The Honourable Gavin Short

That's wonderful. Thank you very much for the clarification.

The Honourable Roger Edwards

Anyone else got any comments on 103?

103 Compulsory purchase - No amendments

For the purposes of any law relating to compulsory acquisition of land for public purposes—

- (a) the functions of an exclusive licensee under the licence are public purposes; and
- (b) the licensee or the Governor may exercise powers under that law for a purpose in connection with the performance of those functions.

104 Entering land for construction and operational purposes - No amendments

(1) A person authorised by an exclusive licensee may enter land for the purposes of constructing, installing, operating, monitoring or removing apparatus required in connection with functions under the licence.

(2) The Governor shall by regulations make provision—

- (a) prescribing procedure to be followed in the exercise of the power under subsection (1);
- (b) specifying conditions to be satisfied in relation to the exercise of the power under subsection (1);
- (c) imposing limitations on the exercise of the power under subsection (1).

(3) The regulations may, in particular—

- (a) make different provision in respect of land owned and occupied by a public body and land owned or occupied by a private person;
- (b) require the service of notices;
- (c) require consultation;
- (d) make provision for the payment of compensation;
- (e) require the approval of a specified public body in specified circumstances;
- (f) confer a discretion on a specified person;
- (g) make exercise of a power under subsection (1) dependent on obtaining a court order in specified circumstances;

- (h) make provision about ancillary activities that may be carried out in the exercise of the power under subsection (1) (including, in particular, cutting down trees and similar activity);
 - (i) make provision about the laying of equipment underneath streets or other places;
 - (j) make provision about obtaining or creating a licence or easement in specified circumstances and for specified purposes in relation to maintenance of equipment or otherwise;
 - (k) make provision about varying or overriding a licence or easement in specified circumstances and for specified purposes;
 - (l) impose duties designed to protect the property or safety of persons, or to protect the environment;
 - (m) provide for a right of challenge or appeal to a court in specified circumstances.
- (4) The regulations must make separate provision in respect of works carried out on the shore or seabed.

PART 13

DATA

Interpretation

105 Public interest grounds

The Honourable Dr Barry Elsbey

Sorry Chair, if I may. I wonder if the Attorney General could just comment on;

(b) prevention or detection of crime

When we are talking about retaining data we will go on, for prevention or detection of crime. Prevention seems a very wide term that could apply to virtually any action a Government chose to do.

Attorney General

Yes indeed Chair. It maybe for example, let me try and think of an example, Sorry. First of all, this sets out the scope for which orders may be made. It's got to be seen in the context of it gives quite a wide power. Its intentions are wide in terms of what the public interest is.

I'm trying to think of an example for the prevention of crime. Clearly you might collect data in a CCTV camera not because you are trying to catch criminals but because you are collecting data people will be less inclined to act in a criminal way. That would be an example. You are on CCTV maybe enough reason to prevent somebody from doing something that could otherwise be a criminal act.

Ditto with disorder, the one underneath, again, we are filming this so if you are a rioter or if you chose to do something wrong we will have the evidence. Would be a reason why you might chose to collect data.

The Honourable Dr Barry Elsby

Chair, thank you.

The Honourable Roger Edwards

Thank you. Anyone else have any other points on **105 Public interest grounds**

105 Public interest grounds - No amendments

For the purposes of this Part the “public interest grounds” are—

- (a) the interests of national security;
- (b) prevention or detection of crime;
- (c) prevention of disorder;
- (d) national security in relation to economic well-being;
- (e) public safety;
- (f) public health;
- (g) collection or administration of taxes and other money payable to the Government;
- (h) preventing or reducing deaths or injuries as a result of a public emergency;
- (i) any other matter specified for the purposes of this section by the Governor by regulations.

106 Retention notices

The Honourable Gavin Short

Yes Chair, if I can just raise a point here. I suspect we are talking about different things here, but data is data.

There has been some concern expressed that if data collected by a telecoms provider is sent outside the Falklands to be either processed or held it would then move outside our jurisdiction into another jurisdiction which may have different laws and rules to what we do.

I'm not sure if this is, if there was a will of Members to insist that at least a copy if said data (of whatever it may be) is kept in the Falklands and whether this would be the section where you may want to make that change.

Attorney General

I think the wider point is a matter that we can explore. In relation to this part of the Bill this is requiring specific data to be retained. Technically a retention notice could be made for all the data within the Falkland Islands (if that made sense) it does depend on what is. You have got to consider decisions such as how long the data should be retained etc. It could be used to ask for a copy of data to be retained here. So the Honourable Member could request that the Governor make data retention under this provision. However, I think the intention would be wider and is something perhaps that might be better address in the telecoms licence if it related to operational purposes of the Licensee.

Of course this is potentially a retention notice applicable to all data holders, for example.

I'd prefer it if an order was not made under this, for these purposes but was instead would be something that we could put in the mechanics of the licence. (if that was something Members wanted to address). This is intended to be for specific data packet.

The Honourable Mike Summers OBE

Chair, can I just explore the wider context of that. It is an interesting issue isn't it? Has the Law already tested the status of cloud held data? Is it deemed to be held in the jurisdiction?

Attorney General

I'm afraid you've gone beyond the limit of my knowledge on the Data Protection Law. I am aware that in relation to matters undertaken by the United States. The

United States has encountered some challenges where, for example; Microsoft Data is held in Ireland. They did have cause to discuss this with the US Department of Justice at the Attorney Generals Conference held earlier this year. I cannot recall. I know it's caused some considerable challenges for the United States. I think they have found a way to resolve it but, it's quite a complicated work around as I recall. I believe it doesn't fall. I think it depends on the nature of the enforcement of domestic legislation and I think the way it has to be done (although I may be wrong on this) is that an order has to be made in the domestic courts of the host jurisdiction.

For example; If Microsoft (I'm sorry I might be talking to softly again I realise) hosts a lot of its data in Ireland I believe the Department of Justice in the United States has to make a request for mutual legal assistance to the Irish Authorities in order to obtain disclosure in that jurisdiction.

I think it's about International cooperation between International jurisdictions. Nothing is really in the cloud everything is actually on a server somewhere, so you have to find out where that server is and enforce it within the domestic jurisdiction of the host.

The Honourable Mike Summers OBE

So there may be some merit to what Gavin was suggesting, that if there was a requirement to hold a copy of the data here you avoid that problem. Anyway, we will see.

The Honourable Jan Cheek

Yes, I was just going to say if it's held in the domestic jurisdiction of the host of whatever machine it's being held on their law may not be compatible with the requirement of the person asking for the information.

Attorney General

And it may Chair come down to the definition of what data you are seeking to recover, to store. Because, whether it is data held, for example; Things like internet browsing history, or whether it's data in relation to the operational purposes of the operator. For example; billing information relating to local residents the decision may be different.

I wonder whether this is something (if Members are concerned about) we might specifically engage with Sure to discuss and perhaps Members could give an indication of the nature of data that they are particularly concerned about keeping a copy of.

The Honourable Roger Edwards

This particular clause The Governor in his discretion requests the retention of particular data. It's not all data is it. It is something that has given rise to The Governor in his discretion making a request for it to be retained but, it doesn't say anywhere where that retention is to be as in here, offshore or anywhere else.

Attorney General

Forgive me, the retention would have to be under control of the licensee obviously, otherwise they wouldn't be successfully retaining it.

I think that we can imply in 106, that the intention of the retention notice is that the operator must keep a copy of the data they are being ordered to retain.

The Honourable Jan Cheek

I was just going to point out that the wording is require, not request.

The Honourable Gavin Short

If I can come in Chair, I mean, this could perhaps be the wrong place for discussing it and if Members were so minded I'd like to explore this further. (perhaps under the licence).

We were I believe, (from your side of the table) you were, supposing the view that some of the data that a Regulator may need if it goes off Island, he may have trouble getting at it. I apologise for using the words off Island, If it goes out of the Falkland Islands.

The Honourable Roger Edwards

Maybe we could take note of this and raise it to go into detail elsewhere and then report back to the Committee.

I think it is of interest to all Members.

The Honourable Dr Barry Elsbey

Chair, if I may I think it is a very important point and discussions we have held elsewhere recently we've been told that perhaps data held on the Islands isn't as safe as being held in another jurisdiction with better (I don't know) computer facilities. But, once that data does leave the Islands I think it is more problematic, I think we must give very clear attention to making sure that we retain that under our full control. I would like to see the storage of data here being more secured, rather than sending it off to other jurisdictions.

The Honourable Roger Edwards

I take that point and as I say I think it's something that we should take away, discuss, discuss with Sure (even find out exactly how it can be covered) and report back to the Select Committee in due course.

Attorney General

If I understand correctly the Committee is not per se objecting to the drafting of Clause 106, it's a wide Policy issue about the nature of data stored and made available to the Regulator and others.

The Honourable Gavin Short

That would be my understanding Peter but of course we may have a problem if agreement cannot be reached with a sole provider (whoever they may be), we may then have to reinforce it somehow within the framework surely of this piece of Law.

Attorney General

Again Chair, absolutely agree. Conceptually 106 deals with any hold of data but potentially can deal with any licensee, not just the. Oh no forgive me it is just the exclusive licence holder it's not anyone else. So yes, we may need to address it either here in terms of no the mechanics of the clause but, orders made or alternatively by looking at regulatory powers.

The Honourable Gavin Short

Thanks

The Honourable Roger Edwards

Anyone else?

Attorney General

Just for completeness Chair, we would like to change the words "Governor in discretion" where it appears to "Governor acting in his or her discretion", which is the form of words ordinarily used in Falklands legislation.

The Honourable Roger Edwards

That's 106 (1) (2) and (4) (h)

Attorney General

(2) and (4) (h) yes Chair.

106 Retention notices

- (1) The ~~Governor in discretion~~ “Governor acting in his or her discretion” may by notice (a “retention notice”) require the exclusive licensee under an exclusive licence issued under Part 7 to retain electronic communications data.
- (2) The ~~Governor in discretion~~ “Governor acting in his or her discretion” may give a retention notice if satisfied that—
 - (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is required.
- (3) A retention notice—
 - (a) must specify the classes of data to be retained;
 - (b) must specify the period for which data is to be retained;
 - (c) may specify the form in which it is to be retained;
 - (d) may include other provision as to the retention of the data;
 - (e) may make provision for data whether or not in existence at the time when the notice is given;
 - (f) may make provision which applies generally or only for specified purposes;
 - (g) may make different provision for different purposes.
- (4) The Governor may by regulations make further provision about the retention of electronic communications data; and the regulations may, in particular, make provision about—
 - (a) the process to be followed before giving a retention notice;
 - (b) the maximum period for which data is to be retained under a retention notice;
 - (c) the content, giving, commencement, review, variation and revocation of a retention notice;
 - (d) the storage of data in accordance with a retention notice;

- (e) access to and disclosure of data retained in accordance with a retention notice;
 - (f) destruction of data retained in accordance with a retention notice;
 - (g) monitoring and enforcement of compliance with a retention notice;
 - (h) payments by the ~~Governor in discretion~~ “Governor acting in his or her discretion” in respect of expenses of complying with a retention notice.
- (5) A retention notice may not require data to be retained for more than 24 months.
- (6) The exclusive licensee may disclose data retained in accordance with a retention notice only—
- (a) in accordance with regulations under this section,
 - (b) in accordance with a provision of this Ordinance, or
 - (c) pursuant to, or in accordance with an order of, a court.
- (7) When an exclusive licence comes to an end (for whatever reason)—
- (a) a retention notice issued to the licensee continues to have effect in accordance with its terms; but
 - (b) if provision is made for the transfer of data to a new exclusive licensee, the Governor in discretion may vary or revoke the retention notice.

Disclosure

107 Disclosure requirements

The Honourable Mike Summers OBE

Chair, there is a slight error in 107 (3) The formulation will have to be, or should I think be; The Governor acting in his or her discretion.

The Honourable Roger Edwards

That is in 107 (1) and (2)

The Honourable Mike Summers OBE

No, I am talking about 107 (3). I don't think that was intended to be The Governor in Council was it? It would be kind of odd if it were.

Attorney General

It has to be. I agree with MLA Summers. It has to be. Given it cross refers to sub section 1 I think it has to be right. The intention was the Governor acting in his or discretion. So my proposed amendment (although I haven't mentioned it yet Chair) would be; where it is mentioned both in (1), (2) and (3) of that Clause

The Honourable Roger Edwards

We delete The Governor in discretion and insert The Governor acting in his or her direction in all three

Attorney General

And then (6) because it is a regulatory power is correctly Governor in Council.

The Honourable Roger Edwards

Thank you. Any other comments.

The Honourable Dr Barry Elsby

Is it a choice between The Governor or a Court. Why did you not choose to say a Court will act? You need to apply to the Court.

Attorney General

Because in most cases we would require them to apply to the Court but if it was a request made by the Secretary Of State, for example; because of security services concerns it would add as appropriate to save the Governors ability to ask directly.

The Honourable Dr Barry Elsby

Okay.

The Honourable Mike Summers OBE

If you go back to 105 (a) talks about the interests of National Security being one of the circumstances, that's why.

107 Disclosure requirements

- (1) The ~~Governor in discretion~~ “Governor acting in his or her discretion” or a court may grant an authorisation allowing a specified person or class of person to require the exclusive licensee to disclose electronic communications data.
- (2) The ~~Governor in discretion~~ “Governor acting in his or her discretion” or a court may require the exclusive licensee—
 - (a) to obtain electronic communications data;
 - (b) to disclose electronic communications data.
- (3) The Governor or a court may grant an authorisation under subsection (1) or impose a requirement under subsection (2) only if satisfied that—
 - (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is required.
- (4) The exclusive licensee must comply with a requirement imposed under or by virtue of this section.
- (5) A requirement imposed under or by virtue of this section is enforceable as if it were an order of the Supreme Court.
- (6) The Governor may make regulations about authorisations and requirements under this section; and the regulations may, in particular, make provision about—
 - (a) form;
 - (b) content;
 - (c) procedure;
 - (d) conditions and limitations;
 - (e) timing;
 - (f) variation and revocation;
 - (g) appeal; and
 - (h) other ancillary matters.

108 Interception warrants

The Honourable Dr Barry Elsbey

Why do you feel we need legislation such as this at the moment?

Attorney General

Thank you Chair. Two reasons, first of all if I may say 108 I also note that there must be a Governor acting in his or her discretion amendment in 108 (1), If I can deal with that first It must be an 108 (1) and (2).

In relation to the individual points the reason why we propose the introduction of these at the moment is because the purpose of the Bill is to address all matters relating to communication (because of its name) therefore, what we are seeking to do is to address access to that information. At the moment Chair the process is that simply a request from the Police for any of these things is sufficient there is just a general obligation on Sure to provide the Government with the information it requires.

There was a feeling from ExCo's policy considerations that now is the time to put these sorts of matters under the control of a very clear set of rules and that those rules should fall back to a Court in most cases, except in circumstances where there is a national security issue.

I believe this considerably improves the position for people in the Falkland Islands. In the United Kingdom under the Legislation (which I think today may have been replaced) it is simply a case that the police sign a warrant suggesting it is necessary. Here better protections are afforded than that other jurisdiction because a court order is always required, unless The Governor in discretion can be persuaded.

Why here, because here we need to deal with all forms of data collection, storage, disclosure and also interception being obtaining access to data effectively that you don't currently have because you have intercepted it on the way.

There are practical issues about the Falkland Islands ability of licensee holders to take those activities, which is also why there is in the provision an obligation to consult in the event that the Government wishes the exclusive provider to increase capacity in these areas.

I don't know if that addresses the Members question.

The Honourable Dr Barry Elsby

I think it does and I fully support this section with this clause. Data is a growing problem and the Falkland Islands has no data protection act at all, so although you are now regulating for the protection of data in this case.

Every other piece of data that's held by Government or other organisations in the Islands is that similarly protected, not just the telecommunications data but any other data.

Attorney General

So in relation to the extension of this, if we look to the clauses we will note that (for example in relation to disclosure where is) 106 Chair deals with the issue of the exclusive licensee retaining information because, it was felt that the exclusive licensee was the only one likely to be holding data relating to other people, except perhaps for family members in relation to a VSAT licence.

When we look at 107 the disclosure requirements and 108 those warrants are available to any person. So it can be any person holding the data or the capacity to disclose it. Potentially that could be of much wider application.

The Honourable Dr Barry Elsby

So not just related to telecommunications data.

Attorney General

Yes exactly. What it doesn't do is, it doesn't do what a data protection act would do, which is to say if you hold somebody else's personal data or you process it you then cannot automatically disclose it. It allows orders to be made requiring disclosure if you hold it and interception if you have the ability and those sorts of things, but they can be attributed to any person. Therefore, they are capable of general application but they do not operate in the same way as the UK Data Protection Act.

The Honourable Dr Barry Elsby

Yes, they don't protect the data in any meaningful way.

Attorney General

That's right.

The Honourable Dr Barry Elsby

Certainly I think that is a serious omission in our laws at the moment, that we don't have a way of guaranteeing people that their data will be protected and can't be accessed by people who have no reason to get it.

The Honourable Gavin Short

Sorry Mr Chair. I'm lagging behind, I guess it's the joys of having a Select Committee after lunch. I'm lagging behind everyone here.

I've just realised that a lot of what this section talks about is applicable to a sole provider or somebody who has an exclusive licence. Just hypothetically, in the future as the Falklands grows and we go for a form of deregulation would this whole section then become meaningless.

Attorney General

Clause 106, Chair does only deal with the exclusive licence holder and therefore, if we did chose a different way of regulating the sector then we would need to change 106 to have more general application.

Just trying to find. My understanding picking up the previous point was that granting access to data otherwise in accordance with this legislation would indeed be an offence and therefore, does to a certain point address MLA Elsby's point.

I just wanted to try and find the relevant provision because, if there isn't a mechanism that says you can't disclose unless there is an order then the mechanism doesn't work at all of course.

So, I just need to find the relevant provision which I perhaps will whilst we are talking on other matters Chair.

The Honourable Mike Summers OBE

Chair, can I also raise a question on this same issue? Is there not an argument when building on what he Attorney General was saying earlier on about better protection in the Falklands and elsewhere. Is there not an argument for being more specific about when The Governor might grant a warrant and when The Court might grant a warrant.

I can see that The Governor could grant a warrant in the interests of National Security. So if you go through the public interest grounds you can pick out one or two where you would think that must be for The Governor. There are some of them where you wouldn't want The Governor to be doing it, but all the way through the legislation leaves it to either The Governor or The Court.

Would The Court be in a position to make determinations on the grounds of National Security irrespective of The Governor?

Do you see what I'm getting at? We've given two bodies, if you like, the discretion to cover all of the areas. I am wondering whether we ought to have been more specific.

The Honourable Dr Barry Elsbey

That is very much a point I wanted to make as well earlier, because, the vast majority of these cases are going to be Court lead.

Attorney General

Instinctively I wouldn't want to limit it because, any decision is made and guided by the overriding principles and objectives at the beginning of the document and my experience is when you limit it. The moment for the first case you get is exactly on the point that you particularly wanted to do it and now you can't.

I am instinctively concerned about limiting an enabling power in case we trip over it, but, if Members are inclined to do that then I'll happily try and work an alternative set of words if that's what Members wish.

The Honourable Dr Barry Elsbey

I just think at this time in our history it would be normal to go to The Court first. I wouldn't want The Governor to be exercising his or her authority when The Court could equally well act. I think if we can come up with some form of words to enable that to be clear I would support that.

The Honourable Roger Edwards

I think you are saying, The Governor acting in his or her discretion there will be times when it is he who requests it rather than a Court. Who would raise it with the Court?

Attorney General

It would normally be in the originating application from the Police. So, what I'd envisage is if there is a disclosure obligation you'd expect the suitable officer leading the investigation to come to Court and apply for a warrant, which is the mechanism that's proposed.

The Honourable Jan Cheek

Can I just say that in every clause we are looking at I think there is a bit of a safeguard in the line that it has to be proportionate to the purpose for which it's required. Arguably that is a safeguarding for each of those sections.

Attorney General

And in many cases of course there are. If you look at each section there are Governor and Executive Council powers to make regulation and if Members were concerned about these sorts of issues then I believe that we could use the secondary legislation as a method of guiding our hand on these matters. So I think that may well be the place to add the finer detail.

The Honourable Roger Edwards

What detail would you like to add?

Attorney General

In the Regulations things like; circumstance in which a police officer would apply. I'm not suggesting any changes to the Bill Chair I'm suggesting that in the secondary legislation if Members are concerned about things like; the details of the process by which an application should be made for a warrant, the circumstances in which the public interest grounds would ordinarily be used or national interest grounds would ordinarily be used, those could naturally be put into the further detail of the secondary legislation.

We don't have set of those here today. Obviously they will need to be developed in due course Chair, but, that would probably be the area where we get into granularity Members are seeking.

The Honourable Mike Summers OBE

I agree

The Honourable Roger Edwards

Any other Members feel that they agree? Yes, thank you. Anything else... Barry?

The Honourable Dr Barry Elsby

Just that we need Data Protection Act.

108 Interception warrants

- (1) The ~~Governor in discretion~~ "Governor acting in his or her discretion" or a court may issue a warrant authorising or requiring a person to take specified steps to—
 - (a) intercept an electronic communication or class of communications;
 - (b) disclose the intercepted material.

- (2) The ~~Governor in discretion~~ “Governor acting in his or her discretion” or a court may grant a warrant only if satisfied that—
- (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is required.
- (3) The Governor may make regulations about—
- (a) the form and content of warrants;
 - (b) procedure for application for and issue of warrants;
 - (c) procedure to be followed in implementing a warrant;
 - (d) terms and conditions;
 - (e) duration, renewal, variation and revocation;
 - (f) any other ancillary matters.
- (4) A warrant under this section is enforceable as if it were an order of the Supreme Court.
- (5) It is an offence for a person to fail without reasonable excuse to comply with a provision of a warrant under this section.
- (6) A person who is guilty of an offence under this section is liable on conviction to—
- (a) imprisonment for a term not exceeding 2 years,
 - (b) a fine not exceeding level 12 on the Standard Scale, or
 - (c) both.

109 Directed surveillance

Attorney General

Again we have amendments to 109 (2) and (3) The Governor in his discretion is deleted and replaced with The Governor acting in his or her discretion.

109 Directed surveillance

- (1) In this section “directed surveillance” means electronic surveillance which—

- (a) is covert and non-intrusive, and
 - (b) is intended to support an investigation by obtaining private information about a person (whether or not one specifically identified for the purposes of the investigation or operation).
- (2) The ~~Governor in discretion~~ “Governor acting in his or her discretion” or a court may grant a warrant for directed surveillance.
- (3) The ~~Governor in discretion~~ “Governor acting in his or her discretion” or a court may grant a warrant only if satisfied that—
- (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is required.
- (4) The Governor may make regulations about—
- (a) the form and content of warrants;
 - (b) procedure for application for and issue of warrants;
 - (c) procedure to be followed in implementing a warrant;
 - (d) terms and conditions;
 - (e) duration, renewal, variation and revocation;
 - (f) any other ancillary matters.
- (5) A warrant under this section is enforceable as if it were an order of the Supreme Court.
- (6) It is an offence for a person to fail without reasonable excuse to comply with a provision of a warrant under this section.
- (7) A person who is guilty of an offence under this section is liable on conviction to—
- (a) imprisonment for a term not exceeding 2 years,
 - (b) a fine not exceeding level 12 on the Standard Scale, or
 - (c) both.

110 Intrusive surveillance

The Honourable Roger Edwards

And similar things there on Intrusive surveillance (2) and (3) The Governor acting in.

Attorney General

I just wanted to refer Members back to the offence set out in 97 addressing MLA Elsbey's point around an offence in relation to interference.

It may be that as it does relate to the disclosure information, it might be more helpful to change the title of that to more clearly point out the offence associated with Interfering with communications and then disclosing the data.

It may be that we change the heading of the offence to more clearly point out that it is an offence to seek to obtain and then disclose that data which is the fundamental point why you would then require an interception.

So if I may I'd consider changing the title with a view to addressing the point.

The Honourable Roger Edwards

Yes please for 97.

110 Intrusive surveillance

- (1) For the purposes of this section "intrusive surveillance" means covert electronic surveillance of activity on residential premises or in a private vehicle (and does not include the use of devices to provide information only about the location of a vehicle).
- (2) The ~~Governor in discretion~~ "Governor acting in his or her discretion" or a court may grant a warrant for intrusive surveillance.
- (3) The ~~Governor in discretion~~ "Governor acting in his or her discretion" or a court may grant a warrant only if satisfied that—
 - (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is required.
- (4) The Governor may make regulations about—
 - (a) the form and content of warrants;
 - (b) procedure for application for and issue of warrants;

- (c) procedure to be followed in implementing a warrant;
 - (d) terms and conditions;
 - (e) duration, renewal, variation and revocation;
 - (f) any other ancillary matters.
- (5) A warrant under this section is enforceable as if it were an order of the Supreme Court.
- (6) It is an offence for a person to fail without reasonable excuse to comply with a provision of a warrant under this section.
- (7) A person who is guilty of an offence under this section is liable on conviction to—
- (a) imprisonment for a term not exceeding 2 years,
 - (b) a fine not exceeding level 12 on the Standard Scale, or
 - (c) both.
- (8) In this section a reference to a vehicle includes a reference to a vessel, hovercraft or aircraft.

Encrypted data

111 Requirement to disclose

The Honourable Dr Barry Elsbey

If I may Chair, encryption of data is becoming, I gather, much more common, much more readily available to the average person, and I think we have all seen the difficulties faced in the United States when the provider of the telephone terrorist cases has not been able to access that data.

There is no way that any of this is anything but dependant on that person who is believed to hold the key to that encryption. It's nothing that the provider or the phone manufacturer or anything like that would know is it? I just don't know enough about it. Is it deemed to be a named or a clear one person who holds the key (literally the key) to unwrapping this.

Attorney General

The point is an important one because inevitably we effectively have to apply for warrants against everyone we can think of who might have the key. This is intended to cover the encryption of data.

The question I suppose I have for Members is whether or not there is a simpler situation which is. If the data is held behind a password is it the intention that we should be able to within this (and I wonder whether we ought) be able to ask somebody to produce their password in order to access the data. Which, I think, arguably is intended to be covered by this clause, but I wonder whether it could be clearer.

I mention that only because I was discussing telecoms regulation with the Channel Islands Regulator, and it occurred that actually that has turned out to be quite an important type of warrant. Whereby, you have to produce information in order to allow access that is effectively your personal data, that's even simpler to understand than a complex encryption key. The difficulty here is (rightly pointed out with encryption keys) you may not have all of the encryption keys as an individual; you may have some, not all. Also there is a question in practice about how, if the encryption key is held by somebody overseas, how we exercise that authority. Inevitably that's a difficulty that we have and we'd have and we would seek mutual legal assistance internationally as necessary (if that arose).

I wonder in relation to 111 whether I might have the opportunity to consider whether we can extend that specifically to cover matters protected by password, and bring that amendment back.

I don't think there is any ability to address the point made that we might be having to serve orders on anyone we can think of who might have the encryption key.

I think it is correct that an order is required and that we have the power to do it under our Legislation.

The Honourable Roger Edwards

I think that makes sense. Do Members agree? Yes. I'd ask you to do that please.

Attorney General

Thank you Chair

111 Requirement to disclose - Review and revert to Select Committee

- (1) This section applies where encrypted electronic data has come into the possession of a public body—

- (a) in the exercise of a function under this Ordinance, or
 - (b) in the exercise of a function under another enactment.
- (2) A public body who believes that a person is likely to possess the key to the encryption may require that person to disclose the key to the public body.
- (3) A requirement may be imposed only if the public body is satisfied that—
 - (a) it is necessary on public interest grounds, and
 - (b) it is proportionate to the purpose for which it is imposed.
- (4) The Governor may make regulations about—
 - (a) the form and content of requirements;
 - (b) procedure for application for and issue of requirements;
 - (c) terms and conditions;
 - (d) any other ancillary matters.
- (5) A requirement under this section is enforceable as if it were an order of the Supreme Court.
- (6) A requirement under this section may not require the disclosure of a key which is designed to be used, and has been used, only for generating electronic signatures.
- (7) A requirement under this section may include a provision prohibiting any person from communicating the fact or nature of the requirement to any other person (except for the purposes of complying with the requirement).
- (8) It is an offence for a person to fail without reasonable excuse to comply with a requirement under this section.
- (9) A person who is guilty of an offence under this section is liable on conviction to—
 - (a) imprisonment for a term not exceeding 2 years,
 - (b) a fine not exceeding level 12 on the Standard Scale, or
 - (c) both.

112 General – No Amendments

- (1) Nothing in this Part, or done under this Part, requires the exclusive licensee under Part 7 or any other person to do anything that is not practicable for the licensee or other person, having regard to all the circumstances.
- (2) Where a person on whom a warrant, notice or requirement under this Part is served or proposed to be served is of the opinion that the warrant, notice or requirement requires the person to do something that is not practicable—
 - (a) the person may refer the question to the Magistrates’ Court,
 - (b) the decision of the Magistrates’ Court shall be final to determine the question, and
 - (c) the Magistrates’ Court may make any ancillary order it thinks fit (including modifying or imposing a condition to or limitation on the warrant, notice or requirement).
- (3) In the case of a warrant, notice or requirement served on a person by the Governor—
 - (a) the person may not refer the question to the Magistrates’ Court without giving the Governor such notice as is reasonably practicable, and
 - (b) the warrant, notice or requirement has no effect until the question has been determined by (or withdrawn from) the Magistrates’ Court (and then has effect subject to the determination).
- (4) Nothing in this Ordinance prohibits the doing of anything in accordance with lawful authority.
- (5) Where a warrant, notice or requirement under this Part is served on a person—
 - (a) the person may comply with the warrant, notice or requirement wholly or partly by arranging for another person to take the required action; and
 - (b) the person may disclose the warrant, notice or requirement for that purpose.

PART 14

TELECOMMUNICATIONS APPEALS PANEL

113 The panel

The Honourable Ian Hansen

Chair, could I just ask please for clarification. I think we had the discussion or conversation at another meeting but, was this panel to be internal or external? In or out of the Islands?

Attorney General

Thank you Chair, the Policy idea behind the panel is as anticipated to be operating primarily outside the Island, with a view to obtaining suitable technical experts who would be able to bring their technical knowledge to the review of a decision or penalty made by The Regulator. So, The Regulators decision could not be challenged for lack of reasonableness because they didn't understand the problem.

We felt that there is no impediment to it being a local person. If we are satisfied they have the relevant level of technical skill.

There was an expectation that as least some of the panel would be made from external and the original proposal was we assumed the entire panel would have to be made up of external people. Effectively on retainer and then effectively them being paid when they sit.

The Honourable Ian Hansen

Thank you.

113 The panel – No amendments

- (1) There shall be a Telecommunications Appeals Panel (“the Panel”).
- (2) The Panel shall consist of 3 members, appointed by the Governor.
- (3) The Governor must appoint one member of the Panel as its Chair.
- (4) In making appointments under this section the Governor shall—
 - (a) have regard to the importance of members of the Panel having relevant experience and knowledge;
 - (b) have regard to the importance of members of the Panel being, and appearing to be, independent of the Government and of licensees;

- (c) consult, in respect of the appointment criteria, persons appearing to the Governor to represent the interests of users of electronic communications services, persons appearing to represent the interests of licensees, and such other persons as the Governor thinks appropriate.
- (5) Decisions of the Panel must be taken by a majority (subject to provision of regulations under section 114 allowing specified matters to be determined by one or two Panel-members).

114 Regulations – No amendments

- (1) The Governor shall make regulations about the constitution and proceedings of the Panel.
- (2) The Regulations may, in particular, include provision—
 - (a) about the qualification and disqualification of members of the Panel;
 - (b) for the tenure of members, and other terms and conditions of appointment;
 - (c) about the removal or retirement of members of the Panel;
 - (d) about conflicts of interest;
 - (e) about the functions of the Chair;
 - (f) for the provision of staff of the Panel;
 - (g) for the payment of remuneration and allowances to members of the Panel or staff;
 - (h) about the sittings of the Panel;
 - (i) for the service of notice;
 - (j) setting time limits within which specified action (including commencement of appeals) must be taken;
 - (k) about evidence;
 - (l) for specific classes of proceedings to be dealt with wholly or partly without a hearing;

- (m) allowing specific classes of proceedings to be dealt with wholly or partly by a single Panel-member sitting alone, or by two Panel-members;
 - (n) saving the validity of proceedings of the Panel in specified circumstances;
 - (o) conferring a discretion on a specified person.
- (3) Before making regulations under this section the Governor must consult—
- (a) persons appearing to represent the interests of users of electronic communications services,
 - (b) persons appearing to represent the interests of the electronic communications industry, and
 - (c) such other persons as the Governor thinks appropriate.

115 Functions

Attorney General

Sorry forgive me, **115 Functions** may need now to be changed, given the amendment to remove criminal proceedings from the earlier powers at the beginning of the Bill. So, it sees a limitation on the effectively judicial review power of the panel. You may need to consider this, so it may need to change wording to the effect of; 115 (2) “to initiate the panel may not determine an appeal against any decision of the Regulator to initial civil proceedings or a decision to commence Criminal proceedings.”

Because, of course the Criminal proceedings won't be commenced by The Regulator under the amendment Members previously agreed.

The Honourable Roger Edwards

So you will reconsider and report back on that

Attorney General

I will thank you Chair

The Honourable Roger Edwards

That Clause as well.

115 Functions - Review and revert to Select Committee

- (1) The Panel shall determine appeals against decisions of the Regulator under this Ordinance.
- (2) The Panel may not determine an appeal against a decision of the Regulator to initiate civil or criminal proceedings.

116 Annual report – No amendments

- (1) The Chair of the Panel must make a written report to the Governor about the exercise of the Panel’s functions during each calendar year.
- (2) A report must be made as soon as reasonably practicable after the end of the year to which it relates.
- (3) The Governor must—
 - (a) lay a copy of each report before the Legislative Assembly; and
 - (b) publish each report.

The Honourable Mike Summers OBE

There isn’t a section here dealing with this disapplication of existing laws.

Attorney General

Thank you Chair and I did mention this and the proposal is in Members pack which we will go through in a moment because there will be a next section after this.

So just if I may Chair, there is currently a schedule at the end of this paper. The previous decision of the Committee was that the fees would be set by regulation and therefore, reference the schedule has been deleted, therefore, the schedule needs to be deleted.

There is then a suggestion Chair that a new section after PART 14 is included and that’s entitled PART 15, which is at the back of the proposed amendments.

Would you like me to take Members through the proposal?

The Honourable Roger Edwards

Yes. Do all Members have a copy of the proposed amendments.

The Honourable Jan Cheek

This is the thing we were just given isn't it?

Attorney General

Yes.

The Honourable Roger Edwards

If we start off with the yellow highlighted panel on the front.

Attorney General

It's effectively two pages entitled PART 15.

"PART 15

REPEAL, SAVINGS, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

117. Repeal of Telecommunications Ordinance

(1) Subject to this Part, the Telecommunications Ordinance 1988 (in this Part referred to as the repealed Ordinance) is repealed.

(2) Section 61 of the repealed Ordinance continues to apply until a date determined by the Governor by Order in the Gazette.

(3) The Governor must provide for the disapplication in the Falkland Islands of the Marine, &c, Broadcasting (Offences) Act 1967 and the Mobile Telephones (Re-programming) Act 2002, in the Order under subsection (2).

(4) The Regulator and the Telecommunications Appeal Panel referred to in the repealed Ordinance cease to exist with effect from the date of commencement of this Ordinance.

118. Saving of licence

A licence issued in terms of Part II of the repealed Ordinance continues to exist on the same terms and conditions as provided in the repealed Ordinance until the date of expiry of the licence or until a new licence is issued under this Ordinance.

119. Amendment of Wireless Telegraphy Ordinance

Section 3 of the Wireless Telegraphy Ordinance 1994 is amended—

- (a) in subsection (1)(a) by replacing "Telecommunications Ordinance 1988" with "Communications Ordinance 2016";

(b) by replacing the heading with “Saving for Communications Ordinance 2016”.

This is quite a complicated repeal saving etc provision because of the nature of the current legislative priorities and expectations of things coming forward during the life of this Assembly.

Probably the easiest thing to do is do the easy bit first so, in relation to Maritime broadcasting offences will be addressed in the Maritime and Harbours legislation currently in preparation.

Therefore, sub 3 is intended to save that pending the new Legislation.

In relation to 4, clearly The Regulator has to remain in force as does the original telecoms ordinance telecom appeal panel, even though there is a Regulator and there isn't anybody appointed yet to the original telecoms appeal panel, but, nonetheless technically I need to save it because we can't get rid of the licence until such time as we replace it with a new licence.

Clause 118 deals with the continuation of the licence until one is granted under this ordinance. Effectively it proposes that the current operator will have a licence and it will be regulated under the terms of the repealed ordinance until such time. It's really quite difficult. For the purposes only of giving The Regulator power to police the existing licence it will remain in force.

Of course it will then cease to have effect once a new licence is issued. Again it's quite complicated so I thought it would be worthwhile explain that.

The Honourable Roger Edwards

The new licence is going to be back dated on signature as I understand.

Attorney General

It has the effect the licence would have a deemed commencement date from the 1st of January of this current year and the reason why that proposal is made is because it will record the obligations to make improvements on the KPI compliance in line with the originally agreed commercial terms.

And then 61 is the repealing, so it sorry. Then going back so then subject to things is doesn't quite repeal it then repeals the telecoms ordinance. Telecommunications Ordinance 88 and the final repeal which is 61 of that Ordinance will then be noticed in the gazette in order to take effect when the new Maritime Legislation comes in. Slightly complicated but that will deal appropriately with all the relevant transitional arrangement.

There is also a slight amendment, we are saving the Wireless Telegraphy Ordinance and accordingly to change the cross referencing to the new Ordinance.

The Honourable Roger Edwards

On the page you have given us, following on from PART 15 where does that spark page fit it? I'm at a loss.

Attorney General

When I go through with Members the proposed changes I'll be able to explore as far as we have got Chair.

The Honourable Roger Edwards

Yes. The objects and reasons obviously are as they are but there is some changes to that because we re-numbered.

Attorney General

There will be consequential changes yes Chair. Thank you.

The Honourable Roger Edwards

And the additional clauses will be added at the back to where the part fits in.

SCHEDULE

EXCLUSIVE LICENCE FEE

Fee to be paid for exclusive licence under Part 7 ~~£10,000.~~

Attorney General

Shall I take you through where we are on amendments to date then.

The Honourable Roger Edwards

Yes please

Attorney General

I'll just run through some of them quite quickly. In relation to;

OBJECTS AND REASONS

This Bill makes provision about the development, operation and regulation of telecommunications and electronic communication services in the Falkland Islands.

Clause 1 specifies the short title.

Clause 2 provides for the Ordinance to come into force in accordance with provision to be made by the Governor.

Clause 3 provides an overview of the content of the Ordinance.

Clause 4 defines expressions.

Clause 5 identifies key objectives to be known as the electronic communications objectives.

Clause 5 Communication Objectives we have inserted to deal with internal communications more clearly, as requested.

Paragraph (B)

And adding an additional paragraph “(s) to promote and support the use of up to date technologies in providing communication services.” being an extension of the Objectives.

Clause 6 identifies regulatory principles for the purposes of the Ordinance.

Clause 7 provides for the appointment of a Communications Regulator.

Clause 7 Appointment

We have removed the specific extension to it being a Corporate body on the basis we accept.

Clause 8 protects the Communications Regulator's independence by prohibiting a public authority from giving the Regulator directions.

Clause 8 Independence

We have, I think, agreement based on the inclusion of provisions dealing with an annual written report. Beginning at 8 (3) on the draft. Sub clauses (3), (4) and (5) where I think further policy discussion is appropriate in relation to how we describe the independence I don't think we are quite there yet Chair. I did look at some other examples on the Falklands Statute book for example the statistics Ordinance, (which we discussed at a meeting earlier today) and actually I don't think it takes us a great deal further because the form of words is very similar to the ones we propose and therefore, Members will want to discuss this with me further outside this meeting Chair.

Clause 9 allows the Governor to make regulations about supplementary matters relating to the Communications Regulator.

Clause 10 sets the Communications Regulator's general duties.

Clause 11 sets the Communications Regulator's specific duties.

Clause 11 - We replaced Government with Governor.

Clause 12 gives the Communications Regulator general powers.

Clause 12 (2) Deleted a power for Criminal sanctions/proceedings assuming that those proceedings would be commenced on regulators information by the Attorney General.

Clause 12 (5) and (6) Removed

Clause 13 allows the Communications Regulator to investigate compliance failures under the Ordinance.

Clause 14 allows the Communications Regulator to make orders to remedy compliance failures.

Clause 15 allows the Communications Regulator to make determinations about obligations under the Ordinance or licences and other instruments under it.

Clause 16 requires the Communications Regulator to consult before taking regulatory or administrative action.

Clause 17 requires the Communications Regulator to publish details of certain regulatory and other action under the Ordinance.

Clause 18 imposes duties of confidentiality on the Communications Regulator.

Clause 18 - Members will wish to discuss further the policy principals around confidentiality, and that Chair is what we started to try to draft in the document (which is right at the back of Members packs), based on the statistics ordinance provisions. As this Statistics Ordinance Provisions create official policy of a statistician a statistical service, which is intended to be independent from the Government, I don't think it takes us any further, so, I suspect we just ignore it for the time being and go back to 18 separately and then bring back proposals Chair.

Clause 19 allows the Communications regulator to set up alternative dispute resolution schemes to resolve disputes in relation to the Ordinance.

Clause 20 allows the Governor to make procedural regulations about the functions of the Communications Regulator.

Clause 21 sets out activities requiring an electronic communications licence.

Clause 22 exempts anything done under a Part 7 exclusive licence from the need for an electronic communications licence.

Clause 23 exempts anything done under a Part 5 broadcasting licence from the need for an electronic communications licence.

Clause 24 exempts Crown and Government activities from the need for an electronic communications licence.

Clause 24 - We have proposed the removal of British Antarctic Survey in accordance with the vote of this Committee and replaced with The Government of South Georgia and the South Sandwich Islands.

We have yet to determine the question around public bodies. At the moment I can confirm to the Committee that a statutory corporation would be covered. Which is not what this committee wanted and therefore, we can either remove it completely or we can put in the form of words that says not intended to be a Statutory Corporation.

My instinct is probably to remove (b) completely and so it simply exempts the Government in its operation. Therefore, a Statutory Corporation would not be so exempt.

The Honourable Roger Edwards

How to Members feel on that, to take them out because it was a specific point raised.

The Honourable Mike Summers OBE

I certainly think we should take out a Statutory Corporations I don't think there's a cogent argument for keeping them in. The question would be if you remove 24 (1) (b) who or what else is affected. You would have things like the Media Trust and Museum National Trust.

Attorney General

I think given the nature of the way that we tend to address this. Members absolutely correct Chair. So, I can't see any utility at the moment in keeping it. If we had reason in the future to necessitate and extension, for example; The Maritime and Harbours Authority, if independent, Once the Maritime legislation comes in perhaps that's the right time to do it.

I propose we remove

24 Crown and Government

- (1) The licence requirement does not apply to anything done by or on behalf of –
- (b) any other public body.

The Honourable Gavin Short

If I can just play devil's advocate here a second. We deleted British Antarctic Survey but included the Government of South Georgia and the South Sandwich Islands. What is the practical effect? So I suppose I am asking why?

Attorney General

The effect Chair would be that the Government of South Georgia and the South Sandwich Islands will be able to operate telecommunications activities without the requirement for a licence.

The Honourable Roger Edwards

The reason I raise the Government of South Georgia and the South Sandwich Islands is because the Government of South Georgia and the South Sandwich Islands is based here in the Falkland Islands.

The Governor is the officiator for South Georgia his Government as such sits in Government House effectively that is the case.

The Honourable Mike Summers OBE

Thinking Charles Street but maybe I'm mistaken.

The Honourable Roger Edwards

Governor is the Commissioner for South Georgia

The Honourable Mike Summers OBE

Yes

The Honourable Roger Edwards

The CEO for South Georgia and so on sits at Government House here, so, they are effectively within our own jurisdiction.

Attorney General

It's a matter of comity between nations Chair. I think just as this Legislative Assembly extends courtesy to Her Majesty's Government of the United Kingdom by exempting

them, perhaps I take the point that extending similar courtesies to the South Georgia seems appropriate.

The Honourable Gavin Short

I was just going to come back and say would we want them setting up a broadcasting station and being outside the controls. I'm just playing devil's advocate to try and tease out what we are really meaning behind it.

Attorney General

I think it becomes a moot point in the circumstances whether any independent national security infrastructure would be that of Her Majesty's Government of the United Kingdom or that of Her Majesty's Government of South Georgia and South Sandwich Islands.

There is also an argument as to whether or not this Assembly should extend comity to the Government of South Georgia and South Sandwich Islands and I'm slightly conflicted as an Officer of that Government.

I quite like it on an International comity basis but I can go no further than that. Are you content?

The Honourable Gavin Short

Absolutely Chair. Apart that the territory should still really be ours.

Attorney General

We wouldn't want to be a neighbouring Government seeking authority over someone else as sovereignty would.

The Honourable Roger Edwards

Are we all content with the alternations to **24 Crown and Government**? Or do we want to discuss further?

Clause 25 gives limited exemption from the need for an electronic communications licence to the use of certain private facilities.

Clause 26 gives limited exemption from the need for an electronic communications licence to the use of certain transmission stations.

Clause 27 gives exemption from the need for an electronic communications licence to certain foreign transport services.

Clause 28 exempts emergency services from the need for an electronic communications licence.

Our next amendment Chair, Clause 28, relates to the request of including the Falkland Islands Defence Force as an Emergency Service, given its mountain rescue and search and rescue type activities and therefore, we propose the addition of adding the wording in 28 as Emergency or other services provided by the Falkland Islands Defence force.

The Honourable Roger Edwards

Members happy? Yes

Clause 29 exempts radio spectrum use from the need for an electronic communications licence.

Clause 30 exempts certain maritime and aviation satellite systems from the need for an electronic communications licence.

Clause 31 exempts certain broadcasting activities from the need for an electronic communications licence.

Clause 32 allows the Governor to confer additional exemptions from the need for an electronic communications licence.

Clause 33 allows the Communications Regulator to grant electronic communications licences.

The next change Chair, to delete the words “exclusive” in order that The Regulator may only grant licences which are non-exclusive.

That does leave a hole in the legislation Chair, in that if there was a wish for the Government to provide an exclusive licence which was not under PART 7 there would be no ability to do that but again Legislation could be changed if it became a big issue. I can't imagine a specific set of circumstances where it might.

The Honourable Roger Edwards

So we are deleting the “exclusive or”

Attorney General

Yes, so it reads “non-exclusive”

The Honourable Mike Summers OBE

I think that's right Chair. So this is The Regulator it doesn't mean that Executive Council couldn't agree to another exclusive licence does it? This is the power of The Regulator to grant licences.

Attorney General

The Governor's powers under section 63 to grant and exclusive licence are only those in relation to the telecommunications operator. In the event you wish to issue; for example; an exclusive broadcasting station licence then The Regulator wouldn't be empowered to do it. I am wondering whether....

The Honourable Mike Summers OBE

The Governor wouldn't be empowered to do it. The Regulator is not going to be empowered anyway because he doesn't have the right to issue an exclusive licence. The question is whether The Governor in Council has the right to issue another exclusive licence in another area.

The Honourable Roger Edwards

He should be able to in another area because its'

Attorney General

As currently drafted I don't believe they do have that power therefore, if we are purporting, so if we wish to give The Governor in Council the ability to grant licences in addition to those licences that he Regulator may grant then we would need to replete section 33 and to add additional provision to give the power additionally to The Governor.

There may well be wisdom in doing so. I know we had a discussion about that originally.

The Honourable Roger Edwards

Clause 63 is specific about an exclusive licence to a telecommunications operator. You couldn't have a second exclusive licence issued to a telecommunications operator because it wouldn't be exclusive anymore.

The Honourable Mike Summers OBE

No clearly not. The question is whether anybody has the right to issue an exclusive licence to somebody who isn't a telecommunications operator.

One of the categories of classes of licences that sit outside telecommunications might there be an instance when you might want to make one of those exclusive. I can't think of one, but.

Attorney General

I can think of one. Obviously the use of spectrum may well be exclusive because otherwise you have spectrum interference so although it's not purporting to be.

I wonder if the issue is drawn together helpfully by #1 extending **33 Power to grant licences** (and I don't want to make this proposal in this Committee, but perhaps it's the shape of something which we might work up outside the Committee.

I wonder whether **33 Power to grant licences be** extended to powers to both The Regulator or The Governor and then adding in a power, (which might address Members concerned around independence point to make regulations) in relation to how the process by which the decision making will be made. Although, I thought we had actually addressed that.

If Members were minded to support that as a policy idea they will happily take away that and try and bring something back.

The Honourable Roger Edwards

I think that would be a good idea. How to Members feel?

All nod in agreement.

Attorney General

Looking at: **33 Power to grant licences** extended to The Governor as well as to The Regulator. Probably, therefore, making the power wide enough to be either exclusive or non-exclusive but controlling that by additionally giving The Governor in Council authority to make regulations into the methods by which the licence will be granted.

I know there are regulations above dealing with the purpose for application forms and things of that nature. Perhaps I will just explore whether we can include additional regulatory making powers.

The Honourable Roger Edwards

I think that would be very sensible.

Clause 34 distinguishes between individual licences and class licences.

Clause 35 explains the nature of an individual licence.

Clause 36 allows conditions to be attached to an individual licence.

Clause 37 sets an implied condition of individual licences giving the Communications Regulator certain rights of entry.

Clause 38 deals with the position of subsidiary undertakings in relation to individual licences.

Clause 39 explains the nature of a class licence.

Clause 40 distinguishes between licences that require registration and those that can be relied on automatically.

Clause 41 sets an implied condition of class licences giving the Communications Regulator certain rights of entry.

Clause 42 makes provision for the duration of individual and class licences.

I should for completeness say that we have discussed whether the right to vary tradition should apply only to licences granted in 33 (4).

To those granted by the appointing but I'll deal with that issue as a consequence of the amendments proposed.

The next issue Chair relates to MLA Summers point on Clause 42 (c). We reworded I think the Legislative intention is to say that we have additionally a power to do things but that I have now used the 20 years' as a fail-safe provision.

The way this would now work is the power to appoint for an initial fixed point of not more than 10 years' (in terms of the licence) after that fixed term it is subject to determination on 2 years' notice, but creating an automatic cut off at 20 years'. Which again we are not purporting we would ever use but it acts as a back stop. It does leave us in a peculiar situation if we ever got to it, but then we'd be in a peculiar situation if we ever go to it. I am hoping that addresses the concerns of the utility of that clause.

The Honourable Dr Barry Elsby

You are talking of a total of 30 years' there aren't you. 10 years' initially and a further period of not more than 20 years'.

Attorney General

I agree with you, I don't think that drafting is as I intended so it's a further 10 years'.

The Honourable Roger Edwards

That needs to come back to us because you are absolutely right Barry that doesn't read. It needs to be re-drafted. We know what you mean, but it needs to be re-drafted.

The Honourable Mike Summers OBE

I'm not sure what the intent is. 42 (a) says you can have a licence in perpetuity but subject to 2 years' written notice. (b) says it's a fixed term of 10 years'. Why do you need a (c)

Attorney General

Because the exclusive licence The Governor in council is being invited to draft isn't subject to 2 years' determination. It can't be determined on 2 years' notice because it can't be determined during the initial notice period. Nor is it for a fixed term of 2 years' therefore, for the exclusive licence you need additional powers.

The Honourable Mike Summers OBE

And this clause does apply to the exclusive licence.

Attorney General

Yes so all of these provisions relate to the exclusive part. So we will re-word (c) but along the idea.

The Honourable Roger Edwards

We understand what we are doing. It runs for 10 years' and then there is a notice period of 2 years' comes into (b) but it stops automatically at 20 years'.

Attorney General

It can't go on beyond perpetuity. If it's one of those licences that has an initial period.

The Honourable Roger Edwards

That needs to be re-drafted and come back.

Attorney General

Yes I also wonder, (sorry Chair I shouldn't be thinking aloud at this stage but) I know I previously explained to the Committee that there may be circumstances where we would want a 2 year written notice period to apply in order to give people an

opportunity; for example; to address the obsolescence of their equipment. I am wondering whether there might be circumstances where shorter notice was necessary.

The Honourable Mike Summers OBE

Sorry Chair this Clause 42 doesn't apply to the exclusive licence does it. Individual or class licence.

It can be either in perpetuity with 2 years' written notice or can be for 10 years fixed. You can have a whole series of clauses; 20 years fixed, or 30 years' fixed or it's just sort of.

Attorney General

I agree. I note the introductory wording.

If the intention is as I originally as I understood it then I agree the clause however its words, should be somewhere in 64, If the intention is to cover the exclusive licence for those purposes. I need more time Chair, I think on that one.

The Honourable Roger Edwards

As I say I think it needs to be re-drafted anyway so if you can bring that back to us.

Attorney General

Thank you chair.

Clause 43 allows the Communications Regulator to make provision about licensing procedure.

We suggested obviously a change to Governor from Regulator.

Clause 44 allows the Communications Regulator to impose non-compliance penalties on licensees.

We have proposed to extend that to any licensee not simply and individual, except for a person holding an exclusive licence under PART 7.

Then to make it clear that the exclusive licensee penalty is subject to a higher level but a cap at 10% as was intended by (4)

Clause 45 allows the Communications Regulator to vary or revoke licences for non-compliance.

Clause 46 sets the requirements for broadcasting station licences.

Clause 47 allows the Governor to grant broadcasting station licences.

Clause 48 exempts Crown and Government activities from the need for a broadcasting station licence.

Change of wording not substance just to deal with Crown and Government cross referencing.

Clause 49 exempts amateurs from the need for a broadcasting station licence.

The insertion of the amateurs definition from the current telecoms ordinance in order to slightly improve we felt the wording there.

Clause 50 imposes an implied condition in broadcasting station licences giving the Communications Regulator certain powers of entry.

Clause 51 creates an offence of breaching the requirement for a broadcasting station licence.

Clause 52 allows a court to order forfeiture of illegally used broadcasting equipment.

Clause 53 applies to broadcasting station licences enforcement provisions relating to electronic communications licences.

Clause 54 requires the Communications Regulator to manage the radio spectrum.

Clause 55 requires the Communications Regulator to publish a plan for the use of the radio spectrum.

Clause 56 allows the Communications Regulator to require licences for the use of radio frequencies.

Clause 57 imposes an implied condition in radio spectrum licences giving the Communications Regulator certain powers of entry.

Clause 58 allows the Governor to create exemptions from the need for a radio spectrum licence.

Clause 59 allows the Communications Regulator to declare vacant frequencies.

Clause 60 makes the provision about trading radio spectrum rights.

Clause 61 saves the effect of licences already granted before the Ordinance comes into force.

We've still got the proposed wording here referred to. My proposed amendment isn't quite right in 61 (1) but it is intended to reflect the fact that the Falkland Islands

Maritime authority does not come into existence. Therefore, we need it to say something along the lines of; the person in charge of discharging maritime authorities or similar in the Falkland Islands. At the moment that's not quite correct.

The Honourable Roger Edwards

Well that too needs to be brought back to us doesn't it?

Attorney General

61 (a) my 16th proposed amendment needs to be brought back to you.

Clause 62 applies to radio spectrum licences enforcement provisions relating to electronic communications licences.

Clause 63 allows the Governor to grant an exclusive telecommunications licence.

Clause 64 requires the exclusive telecommunications licence to include certain provision.

Clause 64 Terms and conditions (2) is just a place holder in that we need to have a further discussion in relation that. The points raised by MLA Summers in the previous meeting.

Clause 65 requires the exclusive licence to include a provision requiring compliance with Universal Service Regulations.

Clause 66 requires the exclusive licence to set out the licensee's obligations to actual and prospective service users.

Clause 67 requires the exclusive licence to set key performance indicators for the licensed services.

Clause 68 requires the exclusive licence to include provision for handling complaints and resolving disputes.

Clause 69 requires the exclusive licensee to maintain certain capability for the retention of records.

Clause 70 allows the Regulator to request information from the exclusive licensee.

Clause 71 provides for penalties and sanctions for non-compliance by the exclusive licensee with requirements under clause 70.

Clause 72 requires the exclusive licence to include provision allowing the Communications Regulator certain rights of entry.

Clause 73 imposes restrictions on change of control of the exclusive licensee.

Clause 74 applies to the exclusive licence certain enforcement provisions of other licences.

Clause 75 allows the Governor to make regulations for charging fees in connection with the Ordinance.

A slight amendment Chair to 75 (2) (a) it's consequential on the removal of 76, which was the cross reference to the schedule for the exclusive licence fee.

Therefore, we are proposing to allow regulation's to cover fees charged under any PART of this legislation. So it would be under PARTS 4 – 7

Subsection 4 in consequence is removed because we are now making fees regulations about all licences.

The Honourable Roger Edwards

So that means 76 is gone and re-numbered.

Clause 76 provides for exclusive licence fees to be set out in the Schedule.

Removed

Clause 77 allows the Regulator to charge fees for the performance of functions under the Ordinance.

77 Services by Regulator (5) we just have a place holder at the moment because wanted to have a policy discussion around cost recovery.

No drafting is currently proposed but we needed to discuss that.

Clause 78 makes provision for the collection and destination of fees.

Clause 79 makes provision for the recovery of unpaid fees.

Clause 80 makes provision for interest on unpaid fees.

Clause 81 creates an offence of failing to pay fees.

Clause 82 requires the Communications Regulator to monitor compliance with licence provisions.

Clause 83 allows the Governor to make Consumer Protection Regulations in relation to electronic communications.

Clause 84 allows the Communications Regulator to issue codes of practice about media content.

Clause 85 requires licences to include provision about the maintenance of and access to equipment on service users' premises.

Clause 86 allows the Communications Regulator to publish standards for electronic communications equipment.

Clause 87 requires the Communications Regulator to publish a plan for telephone numbers.

Clause 88 requires the Communications Regulator to control internet domain names.

Clause 89 preserves the rights of public bodies to access information.

Clause 90 requires licences to include provision for the maintenance of recording capabilities.

Clause 91 allows the Government to control networks in time of war or other emergencies.

Just acting Governor acting in his or her discretion in relation to war and emergency powers.

Clause 92 gives other rights to the Governor to take control of networks in certain circumstances.

The proposal being to; remove reference to the Regulator there by the removal of subparagraph 4 completely and re-numbering accordingly.

Clause 93 creates an offence of making false statements and so on in relation to provisions of the Ordinance.

Clause 94 creates an offence of obstructing the Communications Regulator.

Clause 95 creates an offence of sending certain misleading messages by electronic communication.

Clause 96 creates an offence of sending offensive and other improper messages by electronic communication.

The removal of section 96 Other improper communications because of its duplication with the Crimes Bill

Clause 97 creates an offence of certain kinds of interference with electronic communications.

Extending the power to the Governor acting in his or her discretion.

The Honourable Mike Summers OBE

97 Interfering with communications

You were going to change the title I think weren't you?

The Honourable Roger Edwards

Or you were going to add to the title

Attorney General

Thank you. Yes 97 we just needed to revisit to change the title.

The Honourable Roger Edwards

So we will revisit that in due course.

Attorney General

I will take away more widely Chair just to ensure MLA Elsby's point he's made about his address in terms of ensuring it does adequately deal with gathering and disclosing information in a manner that we discussed. I think it does, but we will just double check that.

That gets us as far as 97 (5)

Clause 98 creates an offence of using apparatus to interfere with electronic communications.

Clause 99 creates an offence of failing to report damage to electronic communications infrastructure.

Clause 100 allows courts to grant warrants with powers of entry for certain purposes.

Clause 101 gives the Magistrates' Court general jurisdiction under the Ordinance.

Clause 102 makes provision for cases where offences under the Ordinance are committed on vessels or in aircraft.

The points made about whether its' necessary and fits with the remainder of the Bill. We will need to bring back something on 102.

Clause 103 extends compulsory purchase provisions to the exclusive licensee for certain purposes.

Clause 104 gives the exclusive licensee certain powers of entry.

Clause 105 identifies "public interest grounds" for the purposes of data.

Clause 106 allows the Governor to require electronic communications data to be retained on public interest grounds.

The amendments we proposed there to 106 (1), (2) and (4) (h)

Clause 107 makes provision for compulsory disclosure of electronic communications data in certain cases.

Relating to the amendments again the Governor in discretion to Governor acting in his or her discretion and 107 (1), (2) and (3).

Clause 108 allows the issue of warrants for interception.

A similar amendment in 108 (1) Chair

The Honourable Roger Edwards

And (2)

Attorney General

And (2) thank you.

Clause 109 allows the issue of warrants for surveillance.

A similar amendment in (2) and (3) Chair.

Clause 110 allows the issue of warrants for intrusive surveillance, as defined.

A similar amendment in (2) and (3) Chair.

Clause 111 makes provision for requiring the disclosure of encryption keys in certain cases.

We were proposing to review the wording with a view to looking at information protected by passwords to see whether or not to extend it in policy terms to that.

The Honourable Roger Edwards

That will have to come back to us.

Clause 112 contains savings.

Clause 113 establishes a Telecommunications Appeals Panel.

Clause 114 requires the Governor to make regulations about the Panel.

Clause 115 sets the Panel's functions.

An amendment consequential from the removal of prosecution powers which we dealt with right at the start of the Bill. I will need to come back to you with wording on 115 (2)

We then propose the removal of the schedule at the end of the Bill and insertion at the end of the Bill, Chair, of the new drafted part.

As you rightly point out Chair consequential amendments to the objects and reasons clauses in due course.

The Honourable Dr Barry Elsby

Can I just go back to one point Chair? If I may?

The Honourable Roger Edwards

Yes

The Honourable Dr Barry Elsby

If we go onto Clause 71 (5), where we have replaced Supreme Court with Magistrates Court, can I just ask you to in general, it says “ the requirement imposed by the Regulator to pay a penalty the Magistrate Court may make any order it thinks appropriate including increasing the amounts of penalties and ancillary provisions” Is there a limit on that? Is the Magistrate confined by certain levels or is it just and open ended they can do whatever they want?

Attorney General

No. Sorry Chair, if I may. The maximum penalties are set out in sub paragraph (2)

The Honourable Dr Barry Elsby

So the Magistrate has to abide by those?

Attorney General

They can substitute a penalty. I think the original thinking behind the Supreme Court is because it ordinarily has substituting appellant powers that they would be consistent with their usual substituting appellant powers. On reflection, extending

those penalties, but subject to the maximum set out in 71 (2) is I think, appropriate for a Court acting as an appellant Court.

The Honourable Dr Barry Elsby

So you think it's covered still?

Attorney General

Yes

The Honourable Dr Barry Elsby

Okay, thank you.

Clause 116 requires the Panel to make an annual report.

The Schedule sets out the fee for the Exclusive Licence.

Removed

The Honourable Roger Edwards

Does any Member have anything else they wish to raise at this stage?

We will have to come back again to go through the addendums to the amendments, otherwise I think that concludes.

The Honourable Jan Cheek

Have we got a date to come back on?

The Honourable Roger Edwards

There is a date set aside of Monday December 5th at 1.30pm. So we will adjourn this Select Committee until 1.30pm on the 5th December 2016.

**Select Committee of Elected Members on the Communications Bill 2016
5 December 2016, Court & Assembly Chambers**

Attendance:

Elected Members

The Honourable Roger Edwards (Chair)

The Honourable Jan Cheek

The Honourable Dr Barry Elsby

The Honourable Ian Hansen

The Honourable Gavin Short

The Honourable Mike Summers OBE

Officers

Mr Peter Judge, Attorney General

Mr Matt Bassford, Director Central Services

Apologies – Overseas

The Honourable Michael Poole

The Honourable Phyl Rendell MBE

The Honourable Roger Edwards

Good afternoon everybody. It's 1.30 so we will start the Select Committee. May I remind you please to turn off your mobile phones. Please speak clearly and don't speak over one another because it blocks out the sound and we can't get a transcript of the meeting.

So, without further ado we have been provided with amendments. I think all the amendments were agreed, but we will go through them Clause by Clause to ensure that everything we wanted covered is, in fact, covered.

Attorney General

Thank you Chair

So, those items in track changes and marked on Members versions as red are matters which haven't been considered previously by Select Committee and so I will take you through those in particular. In fact, I will take you through all of them if that's okay. In order to make sure we are all agreed.

The first additional item is;

Section 3 I am proposing now we delete as we now have an arrangement of provisions section and therefore, 3 loses its utility and would have to have been changed quite considerably in light of the amendments. We are proposing simply to remove it on that basis.

The Honourable Roger Edwards

Clause 3

Attorney General

Yes Clause 3. Forgive me, sorry.

~~3~~ Overview

~~This Act deals with the following matters—~~

~~(n) Part 2 sets objectives and principles for the exercise of functions under this Ordinance;~~

~~(o) Part 3 establishes, and makes general provision about, the Communications Regulator (“the Regulator”);~~

~~(p) Part 4 requires, and makes provision about, electronic communications licences;~~

- ~~(q) Part 5 requires, and makes provision about, broadcasting station licences;~~
- ~~(r) Part 6 makes provision about radio spectrum management (including provision about licensing);~~
- ~~(s) Part 7 makes provision about the grant of an exclusive licence for the provision of telecommunications services;~~
- ~~(t) Part 8 makes general provision about fees;~~
- ~~(u) Part 9 makes provision about consumer standards and protection in relation to services provided in accordance with this Ordinance;~~
- ~~(v) Part 10 makes provision about the public control of electronic communications services;~~
- ~~(w) Part 11 creates offences in connection with provisions of this Ordinance, and makes general provision about offences created by other Parts;~~
- ~~(x) Part 12 makes provision about the use of land in connection with electronic communications services;~~
- ~~(y) Part 13 makes provision about public interest retention and interception of data and surveillance;~~
- ~~(z) Part 14 establishes, and makes provision about the functions of, the Telecommunications Appeals Panel.~~

The Next one is the extension of electronic communications objectives in the manner previously discussed.

Section 5 to include communication within the Falkland Islands and also the promotion of the use of up to date technologies.

CLAUSE 5 Electronic communications objectives

(a) In paragraph (b), after “communication”, insert “in the Falkland Islands and”

(b) Add after paragraph (r) the following paragraph:

“(s) to promote and support the use of up to date technologies in providing electronic telecommunication services.”

The next one clause 7 (2) relates to the appointment of the Regulator and again trying to address the point about concerns about there being a vacancy. So we have adopted the wording “effectively used in the administration of Justice Ordinance and in this context the Members may wish to discuss this purporting that the Attorney

General as a constitutional post would take over the responsibilities if there was a vacancy or incapacity. In the same manner as the Attorney General taking on responsibility as Coroner however, alternatively Members may want to put The Chief Executive in there. The reason I proposed the Attorney General is because of the sense of independence in that role. Members may wish to discuss it.

CLAUSE 7(2) Appointment

Replace subsection (2) with the following—

“(2) In the event that—

- (a) the office of the Regulator is vacant;
 - (b) the Regulator is incapacitated; or
 - (c) the person who is appointed as Regulator is not present in the Falkland Islands,
- the functions of the Regulator under this Ordinance will be performed by the Attorney General or another officer designated by the Governor.”
- (definition of person includes a corporate body)*

The Honourable Roger Edwards

Comments from Members

The Honourable Dr Barry Elsby

I'd be content with that Chair

The Honourable Mike Summers OBE

Can I just check Attorney General that there aren't any conflicts that might arise between that responsibility and prosecutorial responsibilities. I can't think of any, but just to raise the question.

Attorney General

It is not ideal but it's probably more ideal than the current situation with the Coroner. I think we are in no worse position than we are with the Coroners and actually I see no particular conflict, albeit that ideally you wouldn't want the Attorney General to be both, technically responsible for investigations and prosecutions but, this is basically a failsafe.

What we have also included in here is to obviously allow the Governor to designate another officer so my hope would be that in most cases a deputy to the Regulator could be identified at an ongoing basis. This just simply works as a failsafe provision.

The Honourable Mike Summers OBE

Okay

The Honourable Roger Edwards

Obviously if you found that you did have a conflict then you would ask the Governor to appoint someone else.

Attorney General

Indeed, or recommend that we change the law.

The Honourable Roger Edwards

Any other comment, thank you.

Attorney General

Clause 8 is also a matter which this Committee and other meetings have considered in some detail. Again I brought forward a proposal. The final 3 sections relate to the annual report. The ones listed 4, 5 and 6 deal with the annual report which has been previously considered.

CLAUSE 8 Independence (renamed)

Be replaced with the following:

“8. Exercise of certain powers and annual report

- (1) Except as provided in subsections (2) and (3), the Regulator, in the exercise of the powers conferred on it under this Ordinance must not be subject to the direction or control of any other person or authority.
- (2) The Regulator must have regard to the electronic communications objectives, the regulatory principles and any other policy objectives set by the Falkland Islands Government.
- (3) The Governor may give policy directions to the Regulator in the exercise by the Regulator of the functions under section 11(b), (d) and (f).
- (4) The Regulator must submit an annual written report to the Governor and to the Legislative Assembly about the exercise of the Regulator’s functions during each calendar year.
- (5) An annual report must be made as soon as reasonably practicable after the end of the year to which it relates.
- (6) The Regulator must include in the report information of any attempts by any person or authority to improperly direct or control the Regulator in the exercise of the powers specified in subsection (1).”

The bit that we haven’t previously considered is what was previously entitled the Independence of the Regulator.

What we have sought here to do is to be much clearer about when the Regulator is not acting independently (if I call it that) or any limits on independence.

We have been keen to preserve ordinary actions under the Ordinance as being independent, but subject to important controls. I may, or may not have got to where Members want to be, so, we have now said that the activities under the Ordinance will not be subject to direction or control of any person or authority save as specified in sections 2 & 3.

So first making it clear that the Regulator must have regard to the electronic communications objectives and the regulatory principles (which are set out in earlier in sections 5 & 6) and any other policy objectives set by the Falkland Islands Government.

Allowing us to come with specific objectives, particularly, for example; those around VSAT policy which effect licensing regime, and also specifying that of course, the Governor (and this meaning ExCo in this case) may give directions to the Regulator in the exercise of the Regulators functions. Under 11 (b) (d) & (f), which are those relating to Managing estate assets, Representation of the internationally organisations and any other functions that are suitably delegated.

I don't know whether that gets Members to where they wanted to be but it was just my next attempt to get you closer to where I think Members were hoping to be. I don't know if it addresses the point or not Chair?

The Honourable Roger Edwards

Any thoughts Members?

The Honourable Mike Summers OBE

Who is now responsible for setting of fees'?

Attorney General

Fees regulations come later and it's Executive council. I have extended the provision which I can discuss in detail. If you want we can deal with the rest and come back to this one? Chair, it's a matter for you.

The Honourable Roger Edwards

If necessary we can come back, but hopefully it will be covered in due course.

Attorney General

Thank you Chair.

The Honourable Mike Summers OBE

Well, if you are or not coming back to it Chair can I just ask a question about the Regulators responsibilities in respect of section 65 Universal service obligations. Is there a reason not to include section 65 in PART 2?

Attorney General

65 – I believe the issue is adequately addressed Chair.
65 is that the exclusive licence must contain provisions requiring that the exclusive licensee will comply with the obligations set out in The Governors regulations. That's just means that in the framing of the licence it must contain those provisions. Then, of course the Universal service regulations will be something that the Regulator would have to comply with, because they are a matter of Government policy, so, under the amendment I think clearly it's already covered.

The Honourable Mike Summers OBE

Okay, thank you.

The Honourable Roger Edwards

Any other comments?
We will move on then to Clause 11

Attorney General

Thank you Chair.
Clause 11 matters I think we have discussed. This is just deleting Government where it appeared and reverting to Governor. Then because of the change that we have made (in relation to paragraph 8) a consequential amendment just removing reference to paragraph 8 within paragraph (f)

CLAUSE 11 Specific duties

- (a) in paragraph (d) delete “or the Government”;
- (b) in paragraph (f) replace “the Government” with “the Governor” and after “Governor” delete “(but this paragraph is subject to section 8(1))”.

The Honourable Roger Edwards

Yes

Attorney General

Then in relation to clause 12 we have removed Criminal jurisdiction to reflect the fact that the Attorney General would ordinarily institute criminal proceedings in accordance with previously set policy instructions.

Then, to address the issue raised by Select Committee in relation to the making of further regulations we proposed an additional clause allowing further regulations to be made in this area, to allow this to be more clearly directed. If this is what Members wanted, which I think is what we discussed.

CLAUSE 12(2)(d), 12(4), (5) and (6) General Powers

- (a) In subsection (2)(d) delete “or criminal”;
- (b) Delete subsections (4), (5) and (6);
- (c) After subsection (3) add—
“(4) The Governor may make regulations regarding the exercise of powers by the Regulator under this section.”

The Honourable Roger Edwards

We agreed when we got through the Select committee on clause 12, to delete 5 & 6 so Clause 4 deletion is new.

Attorney General

That’s right, so we’ve simply removed this because again we didn’t feel that 4 had any utility in the light of 3 because it would already be covered by the requirements in 3. Instead replace 4 with a regulatory making power, which will allow again Governor in council to consider how the regulatory powers can be exercised. Which again I think would be helpful to you in the context of trying understand the scope in which the regulator will be operating. Which I know is a matter that has concerned Members.

The Honourable Mike Summers OBE

So these regulations will set out the processes and possible outcomes of regulators deliberation.

Attorney General

Exactly, it might, for example, set out the manner by which the duties are discharged.

Which again I think helps Members be confident that Executive Council can understand the overall shape without directing individual decisions.

Thank you Chair.

Clause 14 – We fairly significantly looked at number 14 to deal with a couple of issues. The first is, to incorporate within section 14 the provisions previously contained within section 44, which are the administrative penalties for failure to comply with the exclusive licence.

What I have sought to do is to combine 44 with 14 so that in one place all of the penalty regime can be established and it can be very clearly set out.

In the amendment, which Members may wish to take a few moments to read. What I have sought to do is first of all make it very, very, clear because I couldn't find anywhere which satisfied me that it was sufficiently clearly made out.

First of all to set out how awards for compensation (which are permitted under section 12 (2) (i)) can actually be implemented and also to make sure the penalty and compensation regime was clear.

What the new 14 does is it seeks to address in one place the powers of the Regulator to make awards, either of financial penalties or compensation for the benefit of a third party. This would include such matters as; failure to provide proper customer service.

Previously this clause would have been triggered, but it would have been triggered as a consequence of a breach in the licence i.e: a breach in the licence, a failure to provide customer service. Where are here it's a stand-alone power and I think it's much clearer. I believe that's what was intended with the policy instructions. I think we've clarified that.

Then what we have sought to do is to set out the penalties regime more clearly and also to give some Executive Council, I believe. Before I say this I thought we had sought. Sorry Chair, I won't be a moment.

So the regulatory making powers in section 4 of the original text so, 14 (4) means again that mindful of members wish to ensure that the regulatory environment had ExCo involvement) this would bring the penalty regime within ExCo's purview by virtue of regulatory making power in (4) which was not present in 44.

I believe the amendment benefits by both clarifying the provisions as to compensation and awards, clarifying that those issues come in the purview of the Governor by virtue of making regulations for penalties and compensation - nonetheless, saving the other provisions on the regulator, as to issuing general sentencing type guidance, and publishing the relevant things on the website.

Hopefully that is a neater way of bringing it all together, but I will just pause to allow Members to read.

CLAUSE 14 Enforcement orders (renamed)

(a) Replace subsection (1) with the following—

“(1) This section applies where the Regulator considers that a person (whether a licensee or not) has failed to comply with —

(a) the provisions of this Ordinance;

(b) the provisions of a licence or other instrument issued under this

Ordinance; or

- (c) in the case of a licensee, fails to comply with the terms and conditions of the licence.”;
- (b) Replace subsection (3) with the following—
“(3) The Regulator may by order in writing require the person to pay a penalty or compensation awarded under the powers in section 12(2)(i).”;
- (c) In subsection (4)—
(i) after penalties, insert “or compensation awards”;
(ii) in paragraphs (a) and (b) after “penalty” insert “or compensation award”
(iii) in paragraph (d), at the beginning insert “subject to subsections (5) and (6),”;
(iii) in paragraph (e), at the beginning, insert “subject to subsections (5) and (6),”;
- (d) Insert the following new subsections after subsection (4) and renumber
“(6) In the case of a licensee other than an exclusive licensee referred to in Part 7, the amount of the penalty may not exceed an amount equivalent to level 10 on the standard scale.
(7) In the case of an exclusive licensee, the amount of the penalty may not exceed level 12 on the standard scale or 10% of the licensee’s annual turnover, whichever is the lower, and annual turnover is calculated as the licensee’s annual turnover—
(a) for the year preceding that in which the penalty is imposed, and
(b) in respect of the licensee’s business carried on in reliance on the licence.”
“(8) The Regulator must publish criteria to be applied in determining the amount of a penalty or compensation award.”
- (e) Delete subsection (6) and renumber.
- (f) Insert the following new subsections after subsection (7) and renumber—
“(7A) A penalty imposed under this section is enforceable as a debt due to the Regulator.
(7B) A compensation award imposed under this section is a debt due to the person in whose favour it was made.
(7C) A penalty and a compensation award carry interest at such rate as the Governor may specify by notice in the Gazette.”
- (f) replace the heading with “**Enforcement orders, penalties and compensation awards**”

The Honourable Roger Edwards

I don't follow the numbering on this.

Attorney General

No you may not because of the nature of the report we've put, perhaps in this context unhelpfully, we've numbered the relevant paragraphs so amendment number 7 (a) which unfortunately then makes it.... So if I just read you through it. The proposal is to replace 14 (1) with that and then to retain (2) and replace subsection (3) and then in subsection (4) insert compensation award etc, etc throughout. Then (d)

The Honourable Roger Edwards

We have a 5?

Attorney General

After subsection (4) and re-number. Actually, you are quite right. I believe it should read;

A new subsection after subsection 5, so the one beginning (d) it's proposed that we keep subsection 5 so it will read;

(d) insert the following new subsections after subsection 5 and re-number. So that then becomes 6. That then preserves the fine levels for a non-exclusive licence holder or exclusive licensee under PART 7 and then maintains both the higher ultimate fine level and also the 10% turnover cap in relation to the exclusive licensee. Then including an obligation to publish the criteria, which effectively are the sentencing guidelines I previously discussed.

Section 6 would be deleted. 7 would be maintained.

The Honourable Roger Edwards

But re-numbered as 9?

Attorney General

Indeed.

The Honourable Roger Edwards

We have 6, 7, 8 and then that was 7, but the current number 7 would be 9 is that right?

The Honourable Mike Summers OBE

You have a new 6 and a new 7 haven't you?

Attorney General

We've got a new 6. A new 7 and a new 8 (right at the bottom of that page) which would mean 7 would become 9.

The Honourable Roger Edwards

I am now clear on the numbering. Yes.

Attorney General

Thank you Chair.

The numbering I believe in the bit in bracket was obviously changed appropriately. Then in order to give a clearer heading we are proposing to change the heading of the section to make it clear that it deals with penalties and compensation awards. Importantly now those penalties and compensation awards are not linked solely linked to investigations carried out under section 13, which is why we got rid of the original number 6 to make it a more general application.

The Honourable Roger Edwards

Any comments on 14.

The Honourable Dr Barry Elsby

If I may Chair could the AG just refresh my memory as to the top end of level 12 on the scale of penalties.

Attorney General

Chair I don't want to mislead the Committee my recollection is that 10 is £125,000 and that 12 will be £625,000 but I will happily advise the Committee in writing.

The Honourable Dr Barry Elsby

Thank you.

Attorney General

I don't have my crib sheet to hand.

The Honourable Roger Edwards

Thank you.

The Honourable Dr Barry Elsby

I wonder if you have considered looking at the option of including the 10% of profits rather than turnover as an option, and then say, whichever is the highest. So you could have a maximum level 12 or 10% of the licensee's profit, whichever is the highest.

Attorney General

We could do that Chair I think the advantages we could more easily determine turnover than profit it's capable of being manipulated to an extent by the accounting treatment inside the organisation (I don't know if other Colleagues have a view).

The Honourable Dr Barry Elsbey

You are going to be looking at the profit the year before they get fined. So they can't go back and alter their profits. So if you have declared a profit.

The Honourable Roger Edwards

Turnover would be the greater figure.

The Honourable Dr Barry Elsbey

Would it? sorry, forgive me, you are absolutely right. That's why I am saying change it from the lower to whichever is the highest.

So if somebody is making, oh, I don't know. It depends what that figures is at the top level of 12 is.

Attorney General

My concern Chair on that would be, this of course sentencing maximum so you'd want to keep the sentencing maximum as high as possible to give the appropriate discretion. My concern would be that reducing it to profit would reduce the sentencing powers in practise of the Regulator and therefore, something where a higher penalty might be appropriate might be limited. That would be my only concern.

The Honourable Dr Barry Elsbey

Okay, like you I am trying to make sure that the person who is being fined, (In other words they have done something wrong) should face the highest possible penalty. And if you are talking about the top of level 12 of the standard scale or 10% of the licensee's annual turnover, whichever is the lower, you are never going to exceed then the level 12 maximum because you are going to defer to the lower.

Attorney General

Absolutely Chair, so the reason why I present it in these terms in legislation is, obviously the Regulator would then propose to issue a penalty based on whatever level 12 was, and it would be up to those that represented the defendant - in this case to argue that 10% of their turnover was less than that. Actually that would be the way I'd quite like to present it because obviously that means the starting position is under the fine level. It is, I think the highest fine level we have, but again I'll confirm that to Members in writing.

The Honourable Dr Barry Elsbey

Am I being a bit slow here Chair, but, if you are talking about 10% of the turnover, whichever is the lower (your assumption is, I don't know, say the turnover is £20 million pounds, that's £2 million at 10% but the top level of fine at level 12 is say 7 or 8 thousand then you are never going to take in their turnover because it's always saying we refer to the lower.

Attorney General

Chair, that is absolutely correct and the question is whether or not the penalty should fit the crime or whether or not the penalty should meet the level of profit or turnover.

The Honourable Dr Barry Elsbey

But you are not going to refer to that because you are always going to say whichever is the lower.

Attorney General

Yes, so what we are looking for is a just penalty to address the wrong doing not necessarily the profit. We weren't proposing a financial forfeiture as such we were proposing what would be a relatively normal way of determining a fine but subject to the throttle based on turnover.

So it would inevitably be a variable fine depending on the nature or seriousness of the offence. (I use that word probably slightly wrongly)

The Honourable Roger Edwards

Okay

Attorney General

I don't know whether we are?

The Honourable Dr Barry Elsbey

Not entirely but maybe it's in my nature to try and get the most out of them that we can. I would be aiming to achieve a higher level than level 12 if their profit or their turnover rate justifies it.

Attorney General

Thank you. Chair if there was ever an argument in favour of regulatory independence that's it.

The Honourable Roger Edwards

Okay, let's move on from there. Clause 17 Publication, which is just a typo.

Attorney General

Thank you. Yes, it was correct in the version Members approved to come to the house but unfortunately we manage to insert it in the gazetting process.

CLAUSE 17 Publication

In subsection (2)(d), replace "nsure" with "ensure"

Clause 18 Confidentiality

It's not marked on my paper Chair, but I am aware that Members did want us to further consider confidentiality I should have put a place holder in for Clause 18. The reason it isn't is because despite my efforts I couldn't think of a better way of drafting it.

I had considered extending the provision at subsection (2) around Court orders to try and consider process data. I did consider whether we could put something in that said nothing in this clause shall prevent the production of reports in which the confidential data is used, as long as it is not disclosed. Of course that's just circular because in fact that's permitted anyway.

So I couldn't think of a better way of doing it, but if Members want to steer me in the right direction I'll happily work on another version.

The Honourable Mike Summers OBE

So in your view would this clause, as drafted, give a part of the Government (it doesn't matter which part it is I suppose, but the Chief Executive or the Standing Finance Committee or somebody else) the right to interrogate the Regulator about particularly sort of profitability and the effect of the price cap and those sorts of things.

Attorney General

I think absolutely there is an ability to interrogate the Regulator and find out what information they have got. This only prohibits the publication of the actual confidential data.

Its' a good question, I think that processing the data in general terms would be fine.

The Honourable Mike Summers OBE

I think the danger with the clause the way it is written is that it uses publication and disclosure in the same way.

Disclosure by data to another piece of the Government which is under all the same obligations of confidentiality is absolutely not the same as publishing something in the local newspaper or putting it on a website or something.

My concern here is just to ensure that parts of the Government, who have responsibility to make sure that what we have put in place is working properly, have the ability to seek enough information to be able to satisfy themselves on that point.

Attorney General

Thank you Chair, I have no difficulty at all with putting in something specifically that says that this clause will not prevent disclosure to other Government Officers who are subject also to a duty of confidentiality. My slight nervousness in policy terms is wherever we have done this the Government has criminalised that onward disclosure.

At the moment this clause doesn't criminalise it because it's a public duty falling on one individual. If we were going to insert that obligation then I think we would have to make it a criminal offence to disclose that information, which obviously makes it a level of seriousness but if you look at what we have done in the Taxes Ordinance or under the Statistics Ordinance we have had (and again I don't know whether Members are inclined in this way) in the Statistics Ordinance persons have to be so designated by the Statistician and then they have to swear an oath before they get any of the paper work in order that they understand.

The Statistics Ordinance creates a different confidentiality regime to ensure that those who get it are controlled. If that's what we want to do then I can.

The Honourable Mike Summers OBE

What happens in the Taxes Ordinance?

Attorney General

Taxes Ordinance simply makes the disclosure of that information a Criminal offence.

The Honourable Mike Summers OBE

On anybody who discloses it. The advantage of that one is of course the group of people that get it is so easily defined that it will be somebody in the Taxes Department. Effectively we know exactly where to look.

Attorney General

Unless I can identify the class of people that hold the information, either by creating a regime whereby they all have to swear a separate oath (therefore, we can identify them all) or by identifying them as a particular class, then it's difficult to know where the information has been leaked from (if that makes sense)

If Members wish then we can put in some provisions around extending it to either a class or to people that take the appropriate oath.

The Honourable Mike Summers OBE

I think I'd feel much happier about that Chair. My concern is that we get ourselves in a position where we are afraid that something is not working the way that we thought it ought to be and you then attempt to find out and you can't find out because the Regulator is not permitted to provide you with the information.

The Honourable Roger Edwards

Because an Oath of Secrecy is on the Regulator.

I would have thought certainly that the Executive Council who, in this particular instance is the Governor, who oversees the regulation in that way, particularly when it comes to KPI and profitability and all the rest of it. I would have thought they should have access to that knowledge.

I understand that the Regulator can inform people in other ways rather than in detail. He can use the information that he has gathered to inform generally about it but the actual detail I would have thought would be needed by Executive Council and or other Government Officers in the proper exercise of their duties.

Attorney General

And indeed consultants potentially.

Okay so if I were therefore, to find a way of defining a class Chair which, I think would either need to be defined, (I think it would need to have a way of designating and probably would require a separate oath) We could make reference to those that have taken the oath.

The Honourable Mike Summers OBE

If it's provided to Executive Council then it's covered by the Executive Council Oath presumably.

Attorney General

So we could make reference to those that have taken that Oath. I will define a class. I'll criminalise disclosure and in that way we will get to the area that we need to I think.

The Honourable Roger Edwards

Thank you. We will come back to that in due course.

Attorney General

Clause 24C Crown and Government

24 is our next one that deals with the Government of South Georgia and the South Sandwich Islands and removes the British Antarctic Survey as previously vote upon.

CLAUSE 24 **Crown and Government**

- (a) In subsection (1)(b), delete paragraph (b);
- (b) In subsection (2)(d) delete "the British Antarctic Survey" and replace with "the Government of South Georgia and the South Sandwich Islands".

Clause 28 is the one that inserts the services provided by the Falkland Islands Defence Force.

CLAUSE 28 **Emergency services**

In subsection (1), after paragraph (e), add the following paragraph—
“(f) emergency and other services provided by the Falkland Islands Defence Force”

Clause 33 -The amendments relating to the powers of the Regulator.

1. Removing the right of the Regulator to issues exclusive licences at all
2. Adding a clause allowing exclusive licences outside the exclusive regime in PART 7 to be granted by the Governor in Council.

We tried to keep it quite short to avoid duplicating all of subsection 2 and 3.

CLAUSE 33 **Power to grant licences**

- (a) In subsection (2),
 - (i) after "licence" insert "issued by the Regulator";
 - (ii) in paragraph (b) delete "exclusive or";
- (b) In subsection (3), after "licence" add "granted by the Regulator";
- (c) after subsection (5), add—

“(6) An exclusive licence for any of the matters listed in subsection (1) other than the exclusive licence referred to under Part 7, may be granted by the Governor and the Governor shall have the powers of the Regulator under this section, with the necessary changes.”.

The Honourable Roger Edwards

Any queries Members? No. Move on

Attorney General

Thank you.

Clause 42 - Increase flexibility in relation to the non-exclusive licence in 42. I think this is what Members wished in the last meeting. We have reduced the notice period on a non-time limited licence to 1 year to allow it to be annually reviewed. We have also deleted subsection (3) because, as was pointed out, that was intended to deal with the exclusive licence, and is therefore, move to clause 63, which we will come to in a moment.

CLAUSE 42 Duration of licence

- (a) In paragraph (a) replace “2 years” with “1 year”;
- (b) Delete paragraph (c) and move to clause 63 as subsection (7).

Clause 43 Licensing procedure

Just changing Regulator to Governor.

CLAUSE 43 Licensing procedure

Delete “Regulator” and replace with “Governor”
(takes away Regulator’s power to make regulations)

44 Penalty

Proposed the removal of 44 now that it is addressed in section 14 Chair.

CLAUSE 44 Administrative penalty

Delete including the heading “Remedies for non-compliance”
(Incorporated in clause 14)

48 Crown and Government

As previously agreed 48 is changed by replacing the words on Crown and Government.

CLAUSE 48 Crown and Government (renamed)

Be replaced with the following:

“48. Exemption of Crown and Government

The Crown and the Government are exempted from the requirements of the provisions of this Part.”

(making provision clearer)

49 Amateurs

The definition of amateurs is taken from the previous Telecommunications Ordinance in place of the one that was there.

CLAUSE 49 Amateurs

Replace subsection (2) with the following:

“(2) In this section “amateur” means a person who is interested in radio techniques solely for a personal aim, without any commercial or financial interest or motive.”

(making provision clearer)

61 Saving for existing licences

in 61 to reflect the fact that we are not here yet with the Maritime Legislation we have changed;

61 (a) to include the persons discharging maritime regulatory responsibilities in the Falkland Islands.

CLAUSE 61 Saving for existing licences

Replace subsection (1)(a) with the following-

“(a) the person discharging maritime regulatory responsibilities in the Falkland Islands”, or”

63 Grant of licence

A new clause – sub clause 7 to address the point of the exclusive licence term expressed as maybe issued for an initial term of not more than 10 years’ and may continue until the Governor gives at least 2 years written notice of termination provided the licence does not continue beyond 20 years’ from the day it was issued, therefore, dealing with an automatic cut off and also addressing the point it is now in the right place.

CLAUSE 63 Grant of exclusive licence

After subsection (6), add—

“(7) A licence under this section may be issued for an initial fixed term of not more than 10 years and may continue until the Governor gives at least 2 years written notice of termination provided that the licence does not continue beyond 20 years from the date that it was issued.”

The Honourable Roger Edwards

Comments? No, fine.

Attorney General

Thank you.
There is a small change at;
64 Terms and Conditions (2)
Just to correct syntax.

CLAUSE 64 (2) Terms and conditions

- (a) In subsection (1)(b), before “for”, insert “subject to section 63(7),”;
- (b) For further consideration (accounts, profit and loss etc)

Then there is also a place holder for some matters raised by MLA Summers in relation to the financial information in sub section 2, which we have yet to discuss.

The Honourable Phyl Rendell MBE

In relation to 64 (2) (b) Attorney General, did we not talk about adding an operating cost.

The Honourable Roger Edwards

We did.

Attorney General

Yes we did Chair and we thought we’d take it outside the meeting to discuss before bringing the amendment back.

66 Obligations to subscribers

- (2) in particular, the licence must make provision-
 - (s) Excluding liability in cases of force majeure (as defined by the licence).
- Just deals with a typo that we found, best dealt with while we’ve got it in hand.

CLAUSE 66(2)(s) Obligations to subscribers
Replace “lability” with “liability”

71 Failure to provide information

(5) The licensee may appeal to the Supreme Court against a requirement imposed by the Regulator to pay a penalty under this section; and the Supreme Court may make any order it thinks appropriate (including increasing the amount of a penalty and making ancillary provisions as to costs or otherwise).

Deals with the amendment previously discussed between changing from Supreme Court to Magistrates Court.

CLAUSE 71(5) Failure to provide information

Replace “Supreme Court” wherever it appears, with “Magistrates Court”

Then a major change at;

75 Fees Regulations

Addresses the point raised earlier in the meeting Chair, dealing with fees regulations. First of all, it deals with Members wish to remove separate treatment of the exclusive licence fee by, deleting clause 76 and incorporating it within 75, linking this together with the fees regulations made by the Governor in Council.

It also addresses getting rid of the regulatory charges (which were previously contained in section 77). Which, will now fall within the ambit of the fees regulations and therefore, The Regulator will not be setting their own charges. Executive Council will be setting those charges, subject to the fees regulations, which will then be reviewed annually as part of the budget process.

So effectively The Regulator no longer has any finance raising powers, as such.

CLAUSE 75 Fees Regulations

(a) Replace subsection (1) with the following—

“(1) The Governor may by regulations (Fees Regulations)—

(a) require the payment of fees in respect of—

(i) the application for, or the issue, renewal or maintenance of, or otherwise in connection with, a licence under this Ordinance;

(ii) the performance of a function under this Ordinance or under a licence issued under this Ordinance; and

(iii) the performance of any service offered by the Regulator, including the supply of information or of documents.”

(b) In subsection (2), replace “6” with “7”

(c) Replace subsection (4) with the following—

“(4) Fees to be charged by the Regulator in accordance with the Fees Regulations together with any criteria for determining their amounts and any rules as to timing of payment, must be published—

(a) on the Regulator’s website, and

(b) in other ways that the Regulator considers appropriate.”.

Thank you Chair.

I think then we are on the home straight, I hope.

I have mentioned that the consequential amendments of 76 and 77 because they are now dealt with in 75.

CLAUSE 76 Exclusive licence fee

Delete and renumber and delete Schedule

CLAUSE 77 Services by Regulator

Delete and renumber
(Incorporated in clause 75)

We have got a couple of Governors in his or her discretion amendments and then;

CLAUSE 91 War and emergencies

In subsection (1) after “Governor” insert “acting in his or her discretion”

92 Other public service acquisition of control

(4)

We have now made sure that there is no obligation to consult the Regulator, in relation to those regulations.

CLAUSE 92(4) Other public service acquisition of control

Delete and renumber

(to avoid a situation where the Governor may have to choose between the advice of the Regulator and EXCO’s advice as required by the Constitution-informed by Crimes Bill experience)

We’ve taken out clause **96 Other improper communications** Because it is now covered properly in the Crimes Bill and would otherwise been a slightly conflicting provision.

CLAUSE 96 Other improper communications

Delete and renumber

(covered by the Crimes Bill)

We have to pick up MLA Elsby’s point from the previous meeting. Propose a change to the title of the offence under section **97 (5)** to make it clear that it is intended to cover with the disclosure of information as well as interference with it to make it more clearly laid out that the offence is one of either disclosure or interference.

CLAUSE 97(5) Interfering with communications

(a) After “Attorney General” add “or Governor acting in his or her discretion”;

(b) Rename the heading to “**Improperly obtaining and disclosing information and interfering with communications**”

102 Maritime and Aviation

We have proposed a slight change here. We believe the offence is still required because it’s not the Boats that committing the offence. It’s not inconsistent with the fact the Regulators, its acts that are committed from on board the vessel, which are unlawful. Therefore, we think it’s appropriate that we have changed it to “part” rather than ordinance to make it clear that the offences falling under this part which are applicable here.

CLAUSE 102 Maritime and aviation

In subsection (1) replace “this Ordinance” with “this Part”.

The offences must relate to this Part since clauses 27 and 30 provide for exemption from licence requirements.

103 Compulsory purchase

With feedback from our lands specialist we proposed a slight change here so that the compulsory purchase powers may be requested by the licensee but not exercised by the licensee, which is more consistent with the wording of the Lands Ordinance in this regard- Which, is where the compulsory purchase provisions, such as they are, exist.

CLAUSE 103 Compulsory purchase

(a) In paragraph (b) replace “the licensee or the Governor may” with “the licensee may request the Governor to”

(b) Replace the heading with “**Compulsory acquisition of land**”

The Honourable Roger Edwards

Any comments on 102 & 103?

No.

Attorney General

Thank you Chair.

The Remainder are changes from the words “Governor in discretion” to “Governor acting in his or her discretion”, which is the normal form of words. That relates to; 106, 107, 108, 109 and 110 as detailed and I’ll thank you to put them in those terms Chair, if that’s okay?

Chair, picking up the point raised at least in part by me at the last meeting – proposing the extension of the obligation to disclose encryption keys and passwords so to allow enforcement agencies (in particular) practical opportunity to have access to data where it is required in accordance with the Ordinance. That’s primarily of course, in relation to things like disclosure for detection of crime and matters of that nature.

Basically it intends to extend subsection 1 & 2 to deal with passwords or any other code which protects the code.

CLAUSE 106(1), (2) and (4)(h) Retention notices

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

CLAUSE 107(1), (2) AND (3) Disclosure requirements

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

CLAUSE 108 (1) and (2) Interception warrants

Delete “The Governor in discretion” and replace with “The Governor in his or her discretion”

CLAUSE 109(2) AND (3) Directed surveillance

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

CLAUSE 110(2) AND (3) Intrusive surveillance

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

The Honourable Mike Summers OBE

Is that right under the Crimes Ordinance?

Attorney General

No, I don't believe we do. So it would probably be better in a CPE if we were going to have it. In relation to the basis that it's most obviously a communications issue, but, there may be other circumstances which we could look at if you wish to, but it would be outside of this Bill.

The Honourable Mike Summers OBE

Well, to remove somebodies equipment there is a section isn't there? In the either the Crimes Bill or the CPE about removing peoples equipment, but it's not much good to you having removed it if you can't get into it. I'm not suggesting we should try and use this thread.

Attorney General

In fact it would work under this one because if one looks at 111 (1) (b) that would be a proper function under the terms of the CPE or the Crimes Ordinance.

CLAUSE 111 Requirement to disclose

(a) In subsection (1), replace the introductory words with—

“(1) This section applies where data is encrypted or protected by a password or other secure means and the data has come into the possession of a public body—“

(b) In subsection (2), after “key to the encryption” where it appears for the first time, insert “(“key to the encryption” includes a password or other access code).”

This amendment would have the ability of assisting Police officers in those circumstances. So, the matter is addressed, if that's what Members want?

The Honourable Roger Edwards

Thank you.

Attorney General

115 Functions

Is the point I made previously at the Committee, relating to the consequential amendment around criminal proceedings no longer being in the hands of the Regulator and therefore, just a consequential amendment addressing the fact that criminal proceedings are more likely to be commenced elsewhere.

CLAUSE 115 Functions

In subsection (2), replace “or criminal proceedings” with “proceedings or any decision to commence criminal proceedings”.

We have proposed a new part 15 in relation to repeals, savings and transitional or, consequential provisions, and I don't propose to repeat them because we have discussed them, at least briefly at the last meeting in more detail.

“PART 15

REPEAL, SAVINGS, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

117. Repeal of Telecommunications Ordinance

- (1) Subject to this Part, the Telecommunications Ordinance 1988 (in this Part referred to as the repealed Ordinance) is repealed.
- (2) Section 61 of the repealed Ordinance continues to apply until a date determined by the Governor by Order in the Gazette.
- (3) The Governor must provide for the disapplication in the Falkland Islands of the Marine, &c, Broadcasting (Offences) Act 1967 and the Mobile Telephones (Re-programming) Act 2002, in the Order under subsection (2).
- (4) The Regulator and the Telecommunications Appeal Panel referred to in the repealed Ordinance cease to exist with effect from the date of commencement of this Ordinance.

118. Saving of licence

A licence issued in terms of Part II of the repealed Ordinance continues to exist on the same terms and conditions as provided in the repealed Ordinance until the date of expiry of the licence or until a new licence is issued under this Ordinance.

119. Amendment of Wireless Telegraphy Ordinance

Section 3 of the Wireless Telegraphy Ordinance 1994 is amended—

- (a) in subsection (1)(a) by replacing “Telecommunications Ordinance 1988” with “Communications Ordinance 2016”;
- (b) by replacing the heading with “Saving for Communications Ordinance 2016”.

Consequential amendments

To renumber the provisions and to change cross references throughout the Bill.

My final comment is that I am aware now that a degree of re-numbering will be required and therefore, just for the benefit of the Select Committee Report I am proposing that we formally note that.

Thank you Chair.

The Honourable Roger Edwards

That has covered all the amendments that we have to date in the Bill. Does any Member wish to raise any other item or amendment that we can take back with Clause 18 Confidentiality for further review?

No response.

In that case, I propose that we bring this particular session to a close. We will return to another Select Committee on the 5th January 2017 at 1330 for the next Select Committee.

Thank you.

The Honourable Mike Summers OBE

Chair, at that meeting will we have a clean copy of the revised Bill?

The Honourable Roger Edwards

I was about to ask if we could. Yes, we can have a clean copy.

Attorney General

Revised together with the Select Committee report. What I will also do Chair, if I may, is make sure the original drafter has had a chance to have a look at this as well, to make sure that there is nothing else that we were recommending in terms of consequential amendments.

The Honourable Roger Edwards

We will have agreed wording for confidentiality then or terms. Or are you content that you have been given sufficient information.

Attorney General

No Chair, I think the meeting will have to confirm the wording of the new Clause 18 - which we will bring back with all of the amendments to the Bill (and will be tracked so you will be able to see those). You will also have this report, which is the Select Committee report identifying the changes which we need to keep anyway. Once we examine it on this piece we can amend it on this version.

The Honourable Roger Edwards

Any other Members? Thank you.

**Select Committee of Elected Members on the Communications Bill 2016
Court & Council Chambers**

05 January 2017

Attendance:

Elected Members

The Honourable Roger Edwards (Chair)

The Honourable Jan Cheek

The Honourable Dr Barry Elsby

The Honourable Ian Hansen

The Honourable Michael Poole

The Honourable Gavin Short

Officers

Mr Peter Judge, Attorney General

Apologies

The Honourable Phyl Rendell MBE

The Honourable Mike Summers OBE

The Honourable Roger Edwards

Good afternoon everyone, could I please remind you that this is a Select Committee of the House, so please can I ask you all to turn off your mobile phones and once again to ask you please to speak clearly and speak one at a time otherwise we cannot hear you and it makes it impossible for the clerks to do their typing up after the meetings.

We have before us amendments that were brought forward as at the 14 December which was the last Select Committee and it is our intention today to go through those amendments to see if they cover the ground that we wanted.

Attorney General

Thank you Chair, and obviously for the record, wishing everybody a Happy New Year before we start, for those that we haven't had the opportunity to do so already.

Obviously happy to take questions on any part of the Bill but thought it would be worthwhile just reminding ourselves of the amendments proposed against the text from the gazetted version and so it is probably worthwhile going through those that are in front of Honourable Members.

The first proposal was to delete clause 3 which was an overview clause which is now unnecessary given that we have an arrangement of provisions clause and therefore hopefully is non-contentious.

CLAUSE 3 Overview

Delete

Clause 5 – Electronic communication objectives arose from an extension to make it clear that both the communications was important from within the Falkland Islands and outside. Also to encourage the promotion of up to date technologies in the provision of services. This seems to be non-controversial.

CLAUSE 5 Electronic communications objectives

(a) In paragraph (b), after “communication”, insert “in the Falkland Islands and”

(c) Add after paragraph (r) the following paragraph:

“(s) to promote and support the use of up to date technologies in providing electronic telecommunication services.”

We this proposed an extension relating to 7(2) dealing with appointments and addressing the question of what happens if we haven't got a regulator for a period of time.

The Honourable Dr Barry Elsby

Do you wish us to raise concerns at this time or do you wish to talk through

Attorney General

Sorry I wasn't intending to stifle debate, if there any points please just raise them.

The Honourable Dr Barry Elsby

If we look at clause 7(2) it talks to how the regulator will work and you quite rightly say if he is out of the Islands, this clause makes provision for the Governor to appoint someone to act in the role of regulator. My view of the clause as it is written now would restrict our ability to appoint a regulator who is based outside of the Falkland Islands. At the moment we haven't made a final decision as to whether the regulator will be here or outsourced to somewhere else and my reading of this proposed amendment is that we can't have such a person based out of the islands.

Attorney General

Chair, if I may, I believe that interpretation is correct, so if it is not... I take the point, the reason why it was drafted in those terms in because in the Constitution certain posts are considered incapacitated when they are outside the Falkland Islands. But Members did quite correctly raise the fact that there might be the possibility in future for there to be a regulator outside the Falkland Islands and therefore, if Members were inclined to maintain that then you would want to remove the proposed (c) "the person who is appointed as Regulator is not present in the Falkland Islands, the functions of the Regulator under this Ordinance will be performed by the Attorney General or another officer designated by the Governor."

The Honourable Michael Poole

I would support its removal; I think we need that flexibility.

The Honourable Jan Cheek

This doesn't in anyway inhibit the ability of a regulator to sub contract some of the technically complex part of the job to others, does it?

Attorney General

No it wouldn't that is quite correct.

The Honourable Roger Edwards

The proposal is that clause 7(2)(c) is deleted anyone have any objection to that.

The Honourable Gavin Short

Mr Chair, only in as much as I think we would probably be remised if we did not have a regulator sitting in the Falklands, but it is presupposing the debate that comes after this.

The Honourable Michael Poole

Yes you would make that decision in the policy debate when you look at who you are recruiting and contracts.

The Honourable Ian Hansen

But it does allow for that flexibility of something does go in that direction.

Attorney General

So, unlike a post like Attorney General and Financial Secretary that cannot be discharged by a person that is not in the Falkland Islands, this would not be one of those posts by making this change.

The Honourable Roger Edwards

If we left it in as has been pointed out surely it must be the intention to have the regulator here on a day to day basis overseeing things as they go along. If he goes overseas for leave or medical or something else then the Governor can appoint or the Attorney General takes over or another officer is designated by the Governor. Why, by taking out (c) does it change that?

Attorney General

Because it means that the regulator who is never present in the Falkland Islands may be appointed. The effect of (c) if we left it in was that if we appointed somebody overseas it would then conflict with them discharging the office of regulator when sitting in office that wasn't in the Falkland Islands. I think that is the Member's point.

As a matter of policy Members may well in Executive Council decide that they wish to fill the post using an international appointment based here, but that would be a policy decision which could be made separate from the framework created by the Bill. Now the Bill as amended wouldn't be inconsistent with appointing somebody remotely even though I hear the fact that you may not wish to.

The Honourable Roger Edwards

Anyone else have any comments on that. We will move on, we will delete sub paragraph (c).

CLAUSE 7(2) **Appointment**

Replace subsection (2) with the following—

“(2) In the event that—

(a) the office of the Regulator is vacant;

(b) the Regulator is incapacitated; or

~~(c) the person who is appointed as Regulator is not present in the Falkland Islands, the functions of the Regulator under this Ordinance will be performed by the Attorney General or another officer designated by the Governor.”~~

(definition of person includes a corporate body)

Attorney General

The next clause 8 is one that we have debated at some length, it is in relation to the renamed heading previously called “independence” is now called “Exercise of certain powers and annual report” this does two things, first of all making a positive obligation to reporting seen as useful in the context of the confidentiality conversation we will have in a moment and also, making it clear, where regulator independence is important and those areas where the direction of Executive Council would ordinarily be sought.

The Honourable Roger Edwards

Previously it was raised that it is the actual strength of independence, the willingness to be independent, particularly on whether or not the price cap was working properly. Are we absolutely certain that this independence gives the regulator sufficient powers to ensure and enforce the price cap. If he feels that it is not working correctly, can he come back and ask for more robust cap mechanism to be in place?

Attorney General

Chair, the mechanism for the annual report clearly highlights where the regulator might for example choose to criticize the Government’s choice of licence for example, if it did feel that it hadn’t imposed sufficient price cap controls to protect the public, that would appear in the annual report and be seen by Honourable Members and Legislative Assembly and therefore be public. The ability if Executive Council does grant an exclusive licence to vary that licence save that the price cap review times is practically limited but nonetheless the annual report would give a forum for the regulator to highlight any deficiencies they felt were appropriate and again it is slightly more complicated now because of the fact that Executive Council can in certain circumstances direct the regulator in certain aspects and that might make life a little but uncomfortable if the regulator wished to criticise the Government which something under the old regime they could have done, but I don’t think it would stop it, it would just make it slightly more warm under the collar if I call it that.

The Honourable Roger Edwards

Any comments?

The Honourable Michael Poole

Can I just make one Chair? I think Peter knows I'm not entirely convinced of the need for this level of independence, but I've made my piece with it and this drafting. I just have one minor point. Sub paragraph 5 refers to an annual report being submitted as soon as reasonably practicable after the year end. That makes sense. Can we put a time cap on that, no later than 3 months after the year end?

Attorney General

Yes, I don't see any reason why we can't do that.

The Honourable Jan Cheek

That would seem reasonable I think.

The Honourable Dr Barry Elsby

I presume we are talking calendar years here and not financial years or any other definition of year.

The Honourable Jan Cheek

Yes well the previous paragraph refers to calendar year doesn't it? Section 4.

The Attorney General

Yes it does so it would be calendar years. 5 must be read in the context of 4, so it must be calendar years.

So, it must be made within 3 months' after the end or within 3 months' of the end.

The Honourable Jan Cheek

Dare I suggest no later than 3 months because we actually want it sooner if possible. 3 months is the absolute.

Attorney General

Yes so within 3 months of the end of the yeah absolutely, of the year.

The Honourable Roger Edwards

To which it relates.

Attorney General

Yes to which it relates.

The Honourable Roger Edwards

Are Members happy, any more comments?

Thank you.

CLAUSE 8 Independence (renamed)

Be replaced with the following:

“8. Exercise of certain powers and annual report

(1) Except as provided in subsections (2) and (3), the Regulator, in the exercise of the powers conferred on it under this Ordinance must not be subject to the direction or control of any other person or authority.

(2) The Regulator must have regard to the electronic communications objectives, the regulatory principles and any other policy objectives set by the Falkland Islands Government.

(3) The Governor may give policy directions to the Regulator in the exercise by the Regulator of the functions under section 11(b), (d) and (f).

(4) The Regulator must submit an annual written report to the Governor and to the Legislative Assembly about the exercise of the Regulator’s functions during each calendar year.

(5) An annual report must be made as soon as reasonably practicable after the end of the year to which it relates.

(6) The Regulator must include in the report information of any attempts by any person or authority to improperly direct or control the Regulator in the exercise of the powers specified in subsection (1).”

Attorney General

The next item relates to Clause 11 which just clarified by removing references to Government - which were considered confusing in favour of the Governor, to make it clear.

CLAUSE 11 Specific duties

(a) in paragraph (d) delete “or the Government”;

(b) in paragraph (f) replace “the Government” with “the Governor” and after “Governor” delete “(but this paragraph is subject to section 8(1))”.

Attorney General

The next item is Clause 12 Chair, which deals with General Powers and that removes the power to commence Criminal proceedings on the assumption that, that will then be exercised in practise by the Attorney General. Therefore, there isn't an independent power. In reality, everybody is entitled to issue Criminal proceedings. Private citizens can so, it may act in so far that it's a regulatory powers but it doesn't in relation to other citizens anyway. So again I don't think that is particularly contentious. What we've also added is a new subsection (4) in relation to regulation making powers, again because Members wanted to be able to frame those.

The Honourable Dr Barry Elsby

I wonder if the Attorney General could just talk me through the regulator taking civil proceedings. How would they do that? Would that be via the Attorney Generals Department? Would they hire their own Council? What would be the process and where would they take funds from to enable them to do this?

Attorney General

What it means is that the civil proceedings can be issued in the name of the Regulator. In practise the Regulator will either use the Government Service, if she or she wants to, or alternatively could hire private council. The issue being that he Regulator will be the body issuing those proceedings. Effectively the safeguard here is that, because the Attorney General is a Government Officer, in the event that we wouldn't want there to appear to be.... The Attorney General interfering with the collection of a debt. The circumstances most likely to arise are the collection of a fine that remains unpaid, or, a civil penalty that remains unpaid.

The Honourable Dr Barry Elsby

Again, and it's probably in the Bill somewhere, but if it wasn't just a simple matter and the Regulator wanted to embark on civil proceedings that escalated to the Supreme Court. I don't know what but again where would the funds be raised from to enable them to engage council from the U.K or whatever.

Attorney General

The Bill anticipates the Regulator will have a budget voted by the Legislative Assembly in the normal way.

The Honourable Dr Barry Elsby

But it is unlikely to incorporate fees for civil proceedings which can be very large. Again what would be the process if they wish to.

Attorney General

The process if you wish to obtain a larger budget would be that followed by any department. Which, would mean an application to Standing Finance Committee for additional budget to cover the issue. If it was an action that required a consultation with ExCo then that would go there, if not it would go through the Standing Finance Committee only I imagine.

The Honourable Dr Barry Elsby

Could we ever have a situation where he was taking civil proceedings against the Government?

Attorney General

I can't imagine any, because I can't imagine circumstances where.

The Honourable Dr Barry Elsby

What happens if the thought the licence was in.... no we've covered that bit. Again I'm just trying to think of possible scenarios that might conflict.

Attorney General

The most likely scenario would be if the Regulator received an instruction that he or she thought was unlawful, and therefore didn't wish to follow it. Now the chances of that arising here in practise are very low, but the sort of circumstances that arise in other jurisdictions are, for example;

The Secretary of State issuing a direction which the receiving body of the direction feels they can't comply with. So you often find that NHS trusts or other sort of slightly arm's length bodies will seek to challenge the direction given. I can't imagine that arising in this context here. That would be probably most expensive and only the only circumstance I can think where the Regulator and the Government would be at odds.

The Honourable Dr Barry Elsby

Okay, thank you very much for that.

The Honourable Roger Edwards

This particular point was actually raised during the initial reviewing of the Bill and it was clearly pointed out that the Regulator only has power to institute civil proceedings and criminal proceedings would be normally referred to the Attorney General in the normal way.

The Honourable Dr Barry Elsby

But civil proceedings can be very costly Chair, and again there is a rare case he could have for a judicial review over the Governors decision and that could be very expensive indeed.

The Honourable Gavin Short

Sorry Mr Chair, it's probably been asked before but I want to clear it up in my head. Could we have a situation where the Regulator wants to launch a civil proceeding or starts a civil proceeding and comes along looking for money and we say sorry chum. Or do we not have the right; say as in cases that involved your department. You know, it's more or less automatic that money has to be made available.

Attorney General

There are very few circumstances where monies can be charged directly to the consolidated fund and I think that's the situation that Members are concerned about. If the charges were to be made directly to the consolidated fund then that would have to be absolutely express in this Bill, and it isn't. There isn't an intention that this could be directed to the consolidated fund therefore, the Regulator will have to apply for a vote in the normal way. Again we think that that is quite proper. There is when obviously that can be used as a mechanism in practise to stifle the independence of a Regulator but the check against that is that if they believe that's happening that will appear, I'm sure on the front page of the annual report. I'm quite certain in those circumstances both the public interest (in all senses of the word) and indeed wider governance concerns would be raised at that time. I think you have got a fail-safe in the annual report that we have now introduced and I think that that is probably a sensible balance recognising that funds are not of an ending amount.

The Honourable Jan Cheek

Chair I'd just like to make the point following on from what the Attorney General says. We wouldn't want to do something as an Assembly that curbed the powers, let alone the independence of a Regulator, otherwise, why have one.

The Honourable Roger Edwards

Well indeed much of the reason for having this Select Committee and going through the Bill in such detail is to ensure that the Regulator does have the powers that we felt were lacking in earlier Bills so why would we ever wish to impose a restriction on the Regulator by not giving him funding. I don't think it would be a problem.

The Honourable Gavin Short

For once I agree with you Mr Chair, of course we don't know the mind set of those who will follow us over the years.

The Honourable Roger Edwards

And, we can't predict that, I'm afraid. Any other comment? No, we will move on.

Attorney General

Thank you Chair, again I should point out whilst discussing it that when we look at the following clause which deals with compliance investigations, again it could be quite costly to run compliance investigations and that would be a matter again over which you would collectively look when applying to vote. But, again if it was a matter that was in the public interest, I think it likely that it would be supported, but nonetheless it is a matter for politicians at that time.

CLAUSE 12(2)(d), 12(4), (5) and (6) General Powers

- (a) In subsection (2)(d) delete "or criminal";
- (b) Delete subsections (4), (5) and (6);
- (c) After subsection (3) add—
“(4) The Governor may make regulations regarding the exercise of powers by the Regulator under this section.”

Attorney General

The next clause we propose relates to Clause 14 and this fairly significantly replaces and brings together provisions about compensatory awards and penalties. When we reviewed this together, we were keen to ensure that it was very clear that penalties and compensatory awards fell within the power of the regulator, so that not only can you be fined for doing something wrong but anybody that has been harmed and requires compensation for that harm can also receive an award.

We have simplified it by putting it all in one place and removing clauses that had appeared in two different places. The other thing that it has done is it means that it is now a general application applying to anyone with a licence that carries out contravention and not a different procedure for some with one type of licence and another procedure for a different type of licence. Again, I think Members were quite comfortable with that in the previous discussion, but again, happy to take any questions.

The Honourable Michael Poole

Just one question for clarity, subsection 6 which refers to (6) In the case of an exclusive licensee, the amount of the penalty may not exceed level 12 on the

standard scale or 10% of the licensee's annual turnover, whichever is the lower, and annual turnover is calculated as the licensee's annual turnover—

- (a) for the year preceding that in which the penalty is imposed, and
- (b) in respect of the licensee's business carried on in reliance on the licence."

Would a breach of the price cap be covered under this section?

Attorney General

Yes

The Honourable Michael Poole

In that case, maybe I'm over thinking this, is there a risk that an exclusive licensee could breach the price cap in the knowledge that the revenue they could raise from doing that would always exceed the maximum potential fine, because it based on the previous year's revenue.

Attorney General

Yes, that is the case and it would be a question for whether or not by breaching the price cap it is one breach or whether it is a continuing breach which would be prosecuted as multiple offences or multiple penalties. Technically if you could manage to manufacture a single breach of licence and generated a significant revenue increase then you could potentially create more than £625,000 worth of revenue. Those circumstance, if that level of bad faith arose however Members do have termination provision powers and I suspect it would quickly be escalated to that level of decision making.

The Honourable Dr Barry Elsby

Chair, I do share my Honourable colleagues' concern, if you cast your mind back to previous sittings and I will certainly be moving an amendment in the House when it comes to the House to say that this is not sufficient deterrent and we need to increase the 10% for the very reasons my Honourable colleague has mentioned, that if the breach is going to cost them a significant amount as we see it but worth it from their point of view, they won't be deterred and we need to raise that and perhaps give an unlimited power in the way of setting no maximum fine, because the whole point is to give the regulator the power to deter abuse of exclusive licensees.

The Honourable Michael Poole

10% of turnover in my view is more than sufficient as a deterrent, I think the simpler way to avoid this to try and relate it to the year in which the revenue is being raised, but I guess that is kind of administratively quite difficult.

Attorney General

Sorry, if I may Chair, my inclination would be in favour of saying this, that the House at any point the ability to amend a piece of law and the level 12 fine is the highest standard scale fine available on the scale and I mentioned it is going to be very difficult when doing something of this nature to commit a very isolated incident that only gave rise to one breach. With clever penalties it may well be the case that more than one penalty point has arisen, my instinct is that this maybe sufficient penalty but it is entirely a matter for members of course, and if it is found that it is not an amendment would be rushed through the House, but again it really is a matter for Members. It is an issue that rose in the previous licence and is a commercial matter, but of course it is a matter for the House to decide upon.

The Honourable Dr Barry Elsby

If I may Chair, it is something I will bring up when we get as far as that but clause 71 which talks about the failure of the licensee to provide the regulator with the required information in

71 Failure to provide information

(5) The licensee may appeal to the ~~Supreme Court~~ **Magistrate Court** against a requirement imposed by the Regulator to pay a penalty under this section; and the ~~Supreme Court~~ **Magistrate Court** may make any order it thinks appropriate (including increasing the amount of a penalty and making ancillary provision as to costs or otherwise).

Is the maximum level of level 12 or 10% covered by that for instance 71(5).

Attorney General

If I may Chair, 71 (2) sets a maximum penalty there at level 10. So 71 (2) The Regulator may require licensee to pay a penalty not exceeding an amount equivalent to level 10 on the standard scale. The Clause takes us to it's relation to other types of Order that the Court may make. For example it may make an order for production or similar order to say that whatever the Court needs to take in hand to make sure something happens that's the purpose I think of the other Clause.

The Honourable Dr Barry Elsby

So would there be a limit on the penalty a Magistrate could issue under part (5)?

Attorney General

I would take the view that the Magistrate can't have greater powers than the maximum penalty set out in 7 (2) (a)

The Honourable Dr Barry Elsby

I'm no Lawyer I bow very much to the Attorney General's interpretation but, as a layman reading it, it seems the Magistrate has unlimited power there to set a fine but I accept what you say.

Attorney General

That's kind thank you.

The Honourable Roger Edwards

Anyone else? We will move on.

CLAUSE 14 Enforcement orders (renamed)

(a) Replace subsection (1) with the following—

“(1) This section applies where the Regulator considers that a person (whether a licensee or not) has failed to comply with —

(a) the provisions of this Ordinance;

(b) the provisions of a licence or other instrument issued under this Ordinance; or

(c) in the case of a licensee, fails to comply with the terms and conditions of the licence.”;

(b) Replace subsection (3) with the following—

“(3) The Regulator may by order in writing require the person to pay a penalty or compensation awarded under the powers in section 12(2)(i).”;

(c) In subsection (4)—

(i) after penalties, insert “or compensation awards”;

(ii) in paragraphs (a) and (b) after “penalty” insert “or compensation award”

(iii) in paragraph (d), at the beginning insert “subject to subsections (5) and (6),”;

(iii) in paragraph (e), at the beginning, insert “subject to subsections (5) and (6),”;

(d) Insert the following new subsections after subsection (4) and renumber (current subsection (5) becoming subsection (7)—

“(5) In the case of a licensee other than an exclusive licensee referred to in Part 7, the amount of the penalty may not exceed an amount equivalent to level 10 on the standard scale.

(6) In the case of an exclusive licensee, the amount of the penalty may not exceed level 12 on the standard scale or 10% of the licensee's annual turnover, whichever is the lower, and annual turnover is calculated as the licensee's annual turnover—

(a) for the year preceding that in which the penalty is imposed, and

(b) in respect of the licensee’s business carried on in reliance on the licence.”

Current subsection (5) becomes subsection (7)

(e) insert following new subsection

“(8) The Regulator must publish criteria to be applied in determining the amount of a penalty or compensation award.”

(f) Delete subsection (6) and renumber.

Current subsection (7) becomes (9).

(g) Insert the following new subsections after subsection (7) and renumber—

“(10) A penalty imposed under this section is enforceable as a debt due to the Regulator.

(11) A compensation award imposed under this section is a debt due to the person in whose favour it was made.

(12) A penalty and a compensation award carry interest at such rate as the Governor may specify by notice in the Gazette.”

(h) replace the heading with **“Enforcement orders, penalties and compensation awards”**

Attorney General

We turn the page. The next one I believe relates to Clause 17. Which simply removes a typographical error.

CLAUSE 17 Publication

In subsection (2)(d), replace “nsure” with “ensure”

Attorney General

Clause 18 is a matter that Honourable Members will no doubt wish to discuss. This is the Clause that Members have not previously seen in this Committee and is an instruction for re-drafting in relation to access to information confidentiality. If I remind Members and those listening the original Clause put a limitation on the Regulators ability to publish data presented to it either containing; commercially confidential information, personal data, or things which are asserted by the Providers being confidential. Members were concerned about that, in part the issue is addressed as we’ve talked about processing data and the obligation to publish (which appears here, elsewhere and also in the annual report positive obligations. This deals with things which are primarily confidential. First of all we have replaced the provision in relation to personal data to make it more clearly in accordance to the constitutional obligation to respect privacy and therefore personal data can only

be published with the consent of the persons whom the data relates. Which I think is much more clearly in line with our constitutional protections. Then relation to confidential data what is proposed in the draft is effectively a two stage process. First a class or group of individuals may be identified by notice in the gazette and then after that the Regulator may disclose to any person. So in that class providing there is a necessity for it. The operative provisions being going up to subsection 5 and also 6. Then 7 engages Executive Council again in saying that it may make regulations about this entire process seeking a dual key process but saying the method by which it will be done we further regulated to give clarity and assurance to all sides. I know it's a matter that Members may wish to still discuss. That's the current draft which I hope reflects the majority of Members wishes.

The Honourable Jan Cheek

Was that one on which Mike had a query?

The Honourable Roger Edwards

It is, one of the things he had a query on was the fact at 4 it refers to subsection 4. I think that should be subsection 3. Otherwise it's referring to itself. We've already altered the references at 4 (b) and 6. The question was whether or not acting under privilege for disclosures Members raising confidential items during the Assembly. I would have thought that it was no different to this Bill than any other confidential information that a Member has and decides to raise it under his political privilege in the house. I think that is right, is it not Attorney General?

Attorney General

Absolutely. Any Member discussing matters in the House, any report prepared for the house or indeed the testimony of a witness to this House or any Committee of this House is privileged that means that defamation proceedings and the like are not available to people if they feel they have been defamed. If a person held confidential information and then disclosed it in this House it would follow that it could actually not be brought against them under this Legislation. I think that is a consideration that the Governor when making a decision about whether to designate people would no doubt have in mind. I think the mechanism here allows that decision making at that time.

The Honourable Jan Cheek

And the Member themselves would have some ethical arguments with themselves before they could disclose something that is confidential.

Attorney General

Quite so Chair, thank you

The Honourable Michael Poole

I think that this is a vast improvement on where we started from. Just to make sure I am getting this clear. Obviously the licence defines the information that this exclusive licensee is bound to provide to the Regulator it's not particularly onerous; profit and loss account, balance sheet, breakdown of different business lines. Pretty basic format, all seems quite sensible and has policy development and regulatory oversight. This Clause is fundamentally about where that data then goes – as you've described Peter – but in my mind there is a couple of bits that are redundant in this.

I would suggest that 3 (b) which allows somebody providing what they view as commercially confidential information to define it as being commercially confidential and effectively prohibiting the Regulator from sharing it any further.

I don't think that is necessary, I think it should be for the Regulator to make that assessment. They are only getting information that's been defined in the licence anyway. I would suggest deleting 3 (b).

I would also change the opening of section 5 which allows the Governor to designate people. I think that should be the Governor in Executive Council. It should be the Governor, by notice in the Gazette. I don't see the need for it to be in the Governors discretion.

The Honourable Roger Edwards

That was changed earlier I believe. Was it not?

Attorney General

I think this Clause has been significantly re-written since the last time we discussed it. Would you like me to respond to the Honourable Member on these points?

The Honourable Roger Edwards

If you would please, I was just looking to see if there was any note taken at the time. Personally I would be reluctant to start removing stuff out of Clause 18 here, because they were put in with considerable thought behind them and then just to delete them at this stage, I think might be dangerous.

Attorney General

I'll just address the three points;

The first is that – yes there are specific requirements to provide information some of which are listed. There is also a general obligation to provide the Regulator with what they request. The hope in the relationship is that we will have a situation

where information can freely pass between the regulator and those regulated and there is a feeling that that information can be full and frank to a point. The first point is the information the regulator may get maybe slightly wider than those listed and just for clarity.

The second point is that at 3(b)

- (3) Subject to this section, the Regulator must not publish or disclose information—
(b) provided to the Regulator on the express understanding that it is to be treated as commercially confidential.

This issue about information provided to the regulator on the understanding that we treat it as confidential, again, is intended to both reinforce the relationship so the regulator says I want to see this and the person says I don't have to give this to you and they say no, but we will give it to you providing we can keep this very close. Again the first aspect of that is that it might help to get access to information we might not otherwise be given, the second aspect being that this was a request commercially requested during negotiations so this particular point is a matter that has been agreed with us by SURE. If Members are against it, fine, but those are the circumstances.

In relation to the third point which was the Governor acting in discretion as mentioned in (5)

- (5) The Governor acting in his or her discretion, by notice in the Gazette, may designate persons or a class of persons whom he or she considers reasonably necessary to receive the information referred to in subsection (4) —

Again in negotiations this issue of being regulated and having a regulator wanting to ensure that it was not a political point scoring but in fact regulator and policy reasons why the information would be shared was a matter of concern to the proposed exclusive licence holder. Again, the idea of it being in discretion was that effectively an independent person would be persuaded whether or not Members of EXCO or the wider MLA group for example or indeed any other class of persons, they would have to access the information and be persuaded. Therefore we could demonstrate that that class designation was not a political one which is why we have proposed "Governor in discretion". But, if Members are against that, again the circumstances of why we have drafted them in those terms.

The Honourable Ian Hansen

Just a point of clarification please, under (3) (b)

- (3) Subject to this section, the Regulator must not publish or disclose information—

(b) provided to the Regulator on the express understanding that it is to be treated as commercially confidential.

Which the Honourable Michael Poole was suggesting we remove, if that were to remain, all the information that the regulator gets, no matter what conditions if this group of a designated class of persons, whoever they may be they would receive whatever information the regulator has, would they not?

Attorney General

If they needed it, that is the second part of the test. There is a difference between publication and disclosure. But, again, in your example, it does relate to both publication and disclosure. They would only be able to disclose in the manner set out, to a class of persons when it is necessary for them to have it.

The Honourable Michael Poole

Is there not a risk that 3(b) would currently allow the exclusive licensee to provide the basic data that is required under the licence and say this is commercial in confidence, we view it that way. So, everything the regulator is receiving even the most basic data has to be treated in that manner.

Attorney General

Yes, you are absolutely right.

The Honourable Michael Poole

So, that is really why I would propose it is removed. I take your point about want to share information this maybe makes an exclusive licensee feel a bit more reluctant to do that, but hopefully that would come down to the individual regulator building that relationship and I don't think this would prevent that from happening as long as we had the right person in that post.

Attorney General

Forgive me, this is to stop the regulator from publishing it, it's about if we have a class of documents which genuinely SURE says is confidential, if SURE is indeed who Members prefer in their exclusive licence, if they provide it to us and say its confidential that means the regulator is alerted to the fact that it can't go on its website for example. It's about what creates the pipe and once it's in the pipe it can then be seen in accordance with the rest of the section using the mechanisms. So, those that need to see it can still see it, it's just the regulator can't stick it on their website.

I think it is a moot point, I think you are right that on one level, it would be nice if the regulator could simply exercise discretion about whether or not that information he

had was confidential, but I can also see an argument in favour of the third party being able to similarly alert the regulator to things that are confidential but they can do that whether or not it says so in the Bill.

The Honourable Roger Edwards

We have gone through this particular point previously and we see in Government a considerable amount of commercially in confidence stuff, but we wouldn't dream of publishing it and that was raised earlier about the different levels of confidentiality in clause 18. One is the general publication of stuff and the other is confidential information or what is by the license holder is considered to be commercially confidence or other confidential information but we might need to know in the course of our work and decision making and I think that is different and that would be covered, this would allow us to see that information although it is being pointed out to that the regulator is commercially confidential but we would have access to it would we not?

Attorney General

Providing the procedure is followed. We discussed earlier there is a difference between the raw data and data having been processed, so if it can be processed in a manner whereby it is no longer confidential then of course there may be information that everyone is comfortable to publish which is generated because of access to confidential information but doesn't actually contain any once it's been produced.

The Honourable Roger Edwards

So from what the Attorney General has said I would prefer to leave this section as amended in front of us. Does any Member disagree?

The Honourable Dr Barry Elsby

I'm not sure I disagree, but I think the point my Honourable Colleague was making is important. There has been a great deal of public interest in ensuring that we are as open as we can be in this process and that the exclusive licensee and we think there will be an exclusive licensee is as open with the public as they can be. Are we going to be able to disclose all the information we hope to be able to disclose to the public if the exclusive licensee hands it over to the regulator and says "we treat this as confidential". Will the regulator then have to treat all the information, I think that is the point my Honourable Colleague was making, is it going to be an injunction from publishing the sort of information that we expect the public to see. If they wanted to be awkward – not the public but the exclusive licensee.

Attorney General

If I may Chair, yes it will and it's not unusual for this set of circumstances to arise in practice. Let's try and work out a worked example: Let's say for sake of argument

that SURE if they are indeed the exclusive provider or indeed anyone else, provide the information to us and habitually mark it confidential even though it shouldn't be. What you would expect the regulator to do is to phone up and say "oi, why are you putting all of this stuff as confidential when it isn't" and that is part of how we develop a respectful relationship and in the event that you can't then the regulator absolutely slams the provider in the report that is then read out in the House and that is how the relationship operates and why a regulator can both criticise Government and those they regulate in a report to the House is a useful tool. My hope would be that, that would be seen as.... You wouldn't want to be criticised in an Annual Report. I appreciate it is once annually and we might therefore, have a period of time where this is a bit uncomfortable as we work it all through but, that's how I'd expect it to work in practise. It happens for; example in a Legal context – Lawyers are entitled to write without prejudice at the top of letters and if they do so the other Lawyer isn't allowed to show them to the Court. When the other side, either accidentally or intentionally leaves it on the top of letters to long you go "hold on a second you are abusing privilege and I want you to change your behaviour" That, in practise tends to work. You are right it is open to be used improperly and my hope would be that it wouldn't be, but it could be.

The Honourable Dr Barry Elsbey

If it was used inappropriately it would rightly be brought up in the annual report. What redress would we have to ensure that they no longer did that? That they were much more open. Short of taking the licence away.

Attorney General

A – you could (as I've mentioned before) rush a Bill through the House suggesting it's inappropriate.

The Honourable Dr Barry Elsbey

If we rushed a Bill through the House today, how would we change this Clause to make it certain that more information is made public?

Attorney General

This is going to sound like a cop-out and I apologise Chair. I can't comment on hypotheticals is really the answer because I think when we find out what we are not getting or how it's being abused the proportioned response is to address that abuse from the actual example that we experience. I think that would be the proportionate way of responding so it's very difficult to say exactly how we'd change it. One option is to follow the Honourable Members suggestion and remove 3 (b) as we suggest. There may be from the worked example a smarter way of doing it that I can't currently think of. That's probably my weakness in not being able to think of other scenarios.

The Honourable Roger Edwards

The option is of course, is to invite you to go away and look at it and.....

Attorney General

Have another Select Committee Chair? Yes.

The Honourable Roger Edwards

Well, there may well be if necessary. If Members believe that this item. I don't personally see that this item is so in bounds upon us because those who need the information will be able to get it and that's the point behind it. There is an awful lot of information that we get hold of that we don't publish to the general public out there, and right and proper too. I would hope that the only information that they are referring to here as commercially confidential, is commercially confidential and would not be released to the public in any account.

The Honourable Jan Cheek

I think that we could go through endless what ifs based on the idea that everyone is devious and trying to get around whatever we put in place. I think what's important is to see how it works in practise.

The Honourable Gavin Short

I must admit I am struggling with this Clause. Simply because commercially in confidence to me means something that can normally be used by a rival if they find out about it. If you are in a monopoly situation you don't have a rival.

The Honourable Roger Edwards

We get hold of that information we see that information in the course of our work in the course of our decisions we can see that information. The General public cannot see it, but we can.

The Honourable Michael Poole

That's what it comes down to. This Clause is about the public and it should be because, what we are asking for in terms of basic information from the licence holder should be in the public domain. Its profit and loss accounts it's balance sheets, it's breakdown of business lines. There is a public interest in seeing that and as Gavin's described there is no reason not to publish it for an exclusive licence holder. The evidence is Jan, over a number of years that, without the robust

legislation in place they will publish nothing. So we have got a chance here to rectify it and it's simply just by deleting that sub clause.

The Honourable Jan Cheek

Companies do have to lodge certain accounts which are then publicly available anyway.

The Honourable Michael Poole

And this does go a step deeper in terms of detail, it breaks it down to the Falklands Business unit and it looks at different business lines which you may not naturally see in the annual accounts.

Attorney General

If I may Chair, but only to add colour to the debate. There are two circumstances primarily where commercial confidentiality is relevant.

The first relates of course, to – as we approach a new competition, so information about certain things that they carry out will be important when we get closer to the end of the licence.

There is also this question about proprietary construction of the kit. So again there may be certain circumstances (and it has been mentioned) that the current provider does things in a way that its competitors don't know about and that they wouldn't want to tell them about. Again, I am not technically able enough to give you an example of what that might be, but there was a mention that the way they do their work is potentially quite valuable. As terms of proprietary intellectual property - if I call it that. It might be for example those sort of circumstances, and I for one, probably wouldn't know that that was important and therefore it would need to be flagged to me. Now again, it doesn't necessarily mean we need be but, I just stress again it is a matter that arose commercially and therefore, we'd need to feed that back if the Members were inclined to remove it.

The Honourable Ian Hansen

Whoever the licensee is eventually there is a Clause in the licence that actually demands that they have to produce a minimum amount of information anyway. That's correct isn't it? They have to.

Attorney General

Quite so.

The Honourable Ian Hansen

To me this goes a little bit further than that minimal information does it not? This could be something that may not be in the licence but the Regulator might be able to ask for and obtain under the point that it is treated as confidential apart from coming to those who have the discretion the designated persons who might be able to make a decision on that. Therefore, I am reasonably comfortable about leaving that in, in that case, because, otherwise my fear would be that we could end up with just the minimal information that's it as there is no obligation to give anything else. Would that be correct?

Attorney General

The Licence does contain obligations to provide specific information, but also the ability for the Regulator to ask for more. Plus, there are obligations upon the regulated to demonstrate that they have done the things they say they would have done. In order to demonstrate they have done them they may need to give us information which they wouldn't wish to be shared more widely, but nonetheless the Regulator could still say. "I have received this information to my satisfaction" and the sort of things I've had are: data from a machine that goes around and checks signal levels or whatever it happens to be.

Yes there is a range of things that the Regulator may get. As I say my concern and initially in proposing this was that my hope was that without it, and a trusted environment the Honourable Member is absolutely right the amount of information flow is very low level and the Regulator will in practice get the very bare minimum that is required. Whereas, hopefully (and again this may not materialise) that if a secure pipeline of information could be created that more information would flow more freely. Therefore, the quality of regulation could be improved, but, again, whether or not that actually happens will we wait to see.

The Honourable Roger Edwards

Do Members want to put this Clause to the vote?

Members

Yes

The Honourable Roger Edwards

Is that the general consensus?

The proposal is that subsection 3 (b) provided to the Regulator on the express understanding that it is to be treated as commercially confidential – be deleted.

That is the proposal.

Who supports that proposal?

Its 3 Vs 3 therefore it fails.

The Honourable Dr Barry Elsby

Chair you could have phrased the question. Can I put the question another way?

I would like to propose....

The Honourable Roger Edwards

We have voted and at present it stays in. Should you wish to remove it I suggest you raise it as an amendment in the House. This has been well discussed well alerted and if need be it can be taken again to a vote in the House. At present it remains in.

The Honourable Michael Poole

Can we continue through that section please Chair if you don't mind

The Honourable Roger Edwards

Yes please.

The Honourable Michael Poole

The second bit – I only had two other comments- was section 5. The Governor acting in his or her discretion as it said. I'd suggest removing acting in his or her discretion on the basis that; to some extent it goes against our goals of internal self-government and also I just do not accept the argument that Executive Council is not independent. They are elected to represent the people of the Falklands. If an exclusive licence holder has a problem with that then so be it. The policy making body of the Government should be able to designate and be trusted to designate individuals and groups of individuals in the Government that can be trusted with data.

Attorney General

Chair, I have already responded to the rational for that so I don't suppose to repeat myself unless Members wish me to.

The Honourable Dr Barry Elsby

Could you please, we have discussed a few things here and I just want to make sure I've got it clear in my mind what your view is.

Attorney General

My point in relation to this item is that: The concern of Sure, when discussing this with them was that there would be an inclination to use it, not for policy purposes but for political purposes. I felt by putting somebody independent to balance the arguments for and against i.e The Governor acting in discretion. Then it could demonstrate that the class of persons could be objectively justified as those that required if for policy making reasons or for regulatory reasons rather than for, purely political reasons. Therefore, it would demonstrate that a non-political balance had been struck in designating the group. That's why it was felt that it would be appropriate.

I do agree with the Honourable Member that making the Governor referee is not desirable and in normal circumstances we would seek to avoid. In this case as we are only designating a class, I felt it was a suitable use of the designation. It is a matter before Members, Chair.

The Honourable Ian Hansen

Just under 5 then again Attorney General. Is there a failsafe somewhere? I mean, it says the Governor acting in his or her discretion may designate persons or class of persons. Well, I think we are all assuming that MLA's will be in that class of persons. Is there any reason why the Governor could, under this Bill, this paragraph, exclude MLAs. That wouldn't be helpful at all would it?

Attorney General

Absolutely Chair.

So the Governor, or indeed the Governor in Council (although perhaps the latter less likely) could potentially not designate even Executive Council.

It could be the case that the Governor – whether in discretion or, chooses no policy reason why Members should see it at all, (which does seem a bit peculiar but)

The most likely decision is a decision between whether Executive Council in the discharge of its office, compared to Executive Council in the discharge of the wider MLA group would see it.

I think that Honourable Member hits the point firmly on the head.

The Honourable Roger Edwards

Any comment

The Honourable Gavin Short

I have to confess Chair, that I am probably not content with the way it's worded at the moment.

The Honourable Roger Edwards

So it will come to a vote again then does it?

The proposal is that it should be “The Governor, meaning the Governor in Council, rather than the Governor acting in his or her discretion” is that what you are proposing?

The Honourable Michael Poole

It is.

The Honourable Roger Edwards

So the proposal is that sub paragraph 5 be altered so that it reads the Governor rather than the Governor acting in his or her discretion.

Attorney General

So it would be the removal of the words acting in his or her discretion from the Clause Chair.

The Honourable Roger Edwards

Those who want to see the proposal and change it please raise your hands. Then they do, so it is changed.

Thank you.

Anything else Mike?

The Honourable Michael Poole

The last point I had was really resulting change from that. 6 (a) should that now read “The Governor must be satisfied that the designated person requires the information”? Because, in effect you are putting a break on the Governors ability to designate people with the Regulator that can then ignore the designated class.

Attorney General

That’s quite right. Yes. In my opinion it absolutely should not say the Governor, because, the Governor doesn’t hold the information and the Governor can’t assess that information. And I think if there is no justified reason why the person needs the information they shouldn’t have it.

The Honourable Michael Poole

Other than Executive Council.

Attorney General

If there is no justified reason for Executive Council to have the paper work, and given that the Governor may make regulation to the circumstances where; under7 the Governor in Council may make regulations about how the information is treated. If despite having done that there is still no justified reason why the information needs to be given to – for example a member of the Regulators team, or anyone else – then the Regulator shouldn't be obliged to give it to them.

I am a little concerned that if we soften the control any further then the integrity of the information flow pipe fails basically.

The Honourable Michael Poole

I'm not sure it fails it's just different in that Executive Council have the ability.

Attorney General

I think it fails. My advice is that the pipe does not work in the event that Executive Council has control over all the information the Regulator has. The Regulator is no longer independent at all in practise. Except in relation to the imposition of fines.

The Honourable Michael Poole

Yes, which is as it should be in my view, but we have already discussed the sections on independence of the Regulator. Like I say, it doesn't seem like there is much support for altering that.

Attorney General

There might be. I might be standing alone as usual.

The Honourable Roger Edwards

Does any other Member wish to comment on that particular point? No.
No there isn't the support then so.

Was there anything else before we go onto the new Clause?

18 (a) I thought we had renumbered as 19 and all the others will re number as is.

Attorney General

They will and the heading at the top of the amendments makes it clear that we won't be putting a's into the document but we didn't want to re-number yet because there will be consequential re-numbering.

The Honourable Roger Edwards

Yes.

Attorney General

Again this picks up a point made earlier around the divulging of information and making it very clear that that is now an offence previously under the Clause it wasn't and that is what Members sought.

The Honourable Roger Edwards

Comments.

The Honourable Dr Barry Elsby

I am content that a fine is at level 6. I am concerned that there is a possibility of a one year prison sentence attached as well. If you feel that a fine is necessary but only at level 6 why are we talking about a year in prison.

Attorney General

The reason we chose these levels is, they are the ones that appear in the Statistics Ordinance which is what we have used as our bench mark. Those are the penalty levels for disclosure information gathered for statistical circumstances and we felt that there was asymmetry in applying a similar penalty level. There may be circumstances where the disclosure of information creates a very significant financial risk (litigation risk to the Government) and it's a matter for Members but, you need to consider something that would be a suitable deterrent from doing something which could create a significant financial penalty. i.e: being sued, On the Falkland Islands Government.

The Honourable Dr Barry Elsby

But if you look at the exclusive licensee again breaching terms of licence, we can impose a maximum penalty of level 12 or at the moment 10% of their revenue. Why aren't we incorporating a possibility of imprisonment for the executives who took the decision that lead to the fine?

Attorney General

We haven't in any circumstances extended Criminal Liability beyond the normal Corporate provisions in this case. We haven't made Officers liable and it's very peculiar to make Officers liable. We have done it on a couple of occasions, for example in relation to illegal fishing – Officers can be personally liable, as can Masters of Vessels. It's unusual to extend Corporate Liability to individual officers simply because piercing the veil of incorporation is a significant step to take.

There is also a question about in practise whether you could do it and what the purpose of the penalty is. In many cases the penalties in this Legislation have been established for the purposes of a corporate deterrent i.e we are seeking to make sure that all of those in control of a Corporation ensure that the things they promise to do are delivered. We are not saying, as you would do for example, in relation to Corporate manslaughter, that the nature of the thing that they do wrong (they are not killing people) through not compliance it's more a Corporate fine. It does seem to be to be appropriate not to pierce the veil in these circumstances because we are seeking Corporate compliance and I think identifying an individual who might be liable, unless we were going to make them liable by class ie. All directors are liable. Would then make all directors of/if we appointed Sure South Atlantic Ltd, criminally or civilly liable for a breach. I see serious dangers in any body wishing to provide telecoms services to the Falkland Islands in the event that breach gave rise to criminal personal liability.

The Honourable Dr Barry Elsbey

I'm not suggesting necessarily that we do extend it but it seems disproportionate that the man in the street could divulge some information and they might face a 1 year penalty in prison.

If we look at 18 (a) part 1 – talks about a person who contravenes and releases information they will face a penalty.

In 18 (2) it talks about a person who uses that to gain from that information. So, say one Commercial entity used confidential information from another commercial entity and they gained how does your concern about not imposing prison sentences on that Corporate body who have gained from using that confidential information.

Attorney General

Again, in terms of removing the protections of Corporate Directors it's in extremely serious thing to do and has only ever been done in the most serious of offences. This is primarily designed to address the individual – for example, in the employ of the Regulators Department, who obtains personal data off various customers and starts writing to them offering alternative services. Or, who hands out their personal data to a Company who can then sell them things or something of that nature. So I think it is important that if the Regulator is holding data and somebody (who is entitled to it) divulges it there needs to be a deterrents from them doing so and if they go beyond

that and are doing it. Obviously when establishing the extent of culpability the Courts and indeed the Prosecutors would take into consideration: was this accidental, was this deliberate, what was the quality and quantity of information that you sent. All of that would be born in mind, and of course the fine level is not a target, the fine level is a maximum as is the prison sentence. The question in the Honourable Members minds perhaps should be: in the most serious offence you can think of is the deterrent adequate?

In the event that everybody in the Falkland Islands had all of their data sold to somebody who wished to use that information against each individual would this penalty be adequate. Arguably it's a little bit low, but we would probably charge it multiple times. Anyway, so it's really a balance between finding. The question then is entering into a commercial arrangement – albeit a very unsavoury commercial arrangement. To what extent is it reasonable to expect that the Directing mind of a body would have controls in place (i.e the Board of Directors) to manage the situation that we are seeking to complain of. In relation to the example of Corporate manslaughter or indeed illegal fishing in our water given their importance, it's absolutely vital in my view that the controlling mind of those companies frankly at all times has in their mind that illegal fishing must be avoided at all costs. Therefore you would expect them to have it on the Board agenda and be discussing it regularly. Ditto with Corporate manslaughter. We want to make sure that our companies do not kill people. That should always be on the Directors mind. This I think is a matter of lesser importance when compared to things of that gravity. If Members were wishing to do something.... For an offence of this nature given in the scale of offences a fairly modest one on the scale we wouldn't be looking to escalate it Members of the Board as a class would be my suggestion to you Honourable Members.

The Honourable Roger Edwards

Any other Member wish to discuss or raise a point? Thank you for that.

The Honourable Gavin Short

That seems slightly unfair in a way. The person who releases the information can get done, the person who receives it can get done but they work for a company the company who uses it – are you saying – will not be touched?

Or am I misunderstanding this sorry.

Attorney General

Well, they might be receiving stolen goods. So it depends whether they have committed an offence or indeed whether or not they have committed a wrong.

There are circumstances where their behaviour will have given rise to an offence in itself. The operation of this Clause, in the event that somebody. Say for example

somebody unwittingly receives information not knowing it to be illegally obtained then there are circumstances where they might give rise to receiving stolen goods if they don't meet the defences. But this doesn't Clause doesn't create those offences those offences exist in other Legislation and would have to be applied at the time.

Given this is a communications Bill I think it becomes unduly complex to try and address that point here. It is adequately addressed in the Crimes Legislation and indeed in the ability to apply to Court to prevent onward disclosure or use of documents against a third party and all of those other things that we can find the ability to get to through other mechanisms.

CLAUSE 18 (**Confidentiality**)

Replace clause 18 with the following and rename the heading—

“18. Confidentiality - renamed (**Confidentiality and personal data security**)

(1) A licensee must not produce any information that contains personal data to the Regulator or to any other person except —

- (a) in accordance with an order or warrant issued under this Ordinance;
- (b) in accordance with any other order of court; or
- (c) with the consent of the person to whom the data relates.

(2) The Regulator must not publish or disclose information held under subsection (1) that identifies or could be used to identify the individual that it is about.

(3) Subject to this section, the Regulator must not publish or disclose information—

- (a) acquired in the course of the exercise of the Regulator's functions which it considers is commercially confidential;
- (b) provided to the Regulator on the express understanding that it is to be treated as commercially confidential.

(4) Subsection (3) does not apply to disclosure—

- (a) to, or in accordance with an order of, a court; or
- (b) where the information is provided to a person or class of persons designated under subsection (5).

(5) The Governor ~~acting in his or her discretion~~, by notice in the Gazette, may designate persons or a class of persons whom he or she considers reasonably necessary to receive the information referred to in subsection (4) —

- (a) for regulatory or other Government functions in connection with duties under this Ordinance; or
- (b) to assist the Regulator or the Governor with the discharge of regulatory duties under this Ordinance.

(6) Before the Regulator provides information to a person designated under subsection (5) —

- (a) the Regulator must be satisfied that the designated person requires the information for the proper performance of their functions or that they need the information to assist the Regulator in the proper performance of its functions under this Ordinance;

(b) the designated person signs a declaration that they will hold the information in accordance with the conditions imposed by the Regulator.

(7) The Governor may make regulations in relation to the confidentiality of information supplied to the Regulator, the security of data held by the Regulator, conditions for designation of a person under subsection (5) and the term of the designation.”

New Clause after clause 18

Insert following new clause after clause 18 and renumber

“18A. Divulging information and use of information for gain

(1) A person who contravenes section 18 is guilty of an offence and is liable on conviction to a fine not exceeding level 4 on the standard scale.

(2) A person who uses for gain (whether by that person or another) information that is held by the Regulator but that is not available to the public is guilty of an offence and is liable on conviction to one or more of the following penalties —

(a) forfeiture of the amount gained;

(b) a fine not exceeding level 6 on the standard scale;

(c) imprisonment for up to 1 year.”

The Honourable Roger Edwards

Are Members content with the Attorney Generals explanations? Okay fine. Thank you very much, we will move on.

Just a change which was voted upon.

Attorney General

It was. So we removed after a vote, reference the British Antarctic Survey and we added in South Georgia and the South Sandwich Islands.

CLAUSE 24 Crown and Government

(a) In subsection (1)(b), delete paragraph (b);

(b) In subsection (2)(d) delete “the British Antarctic Survey” and replace with “the Government of South Georgia and the South Sandwich Islands”.

Attorney General

A matter which I think Members were content with. Was the addition of Emergency or other services provided by the Falkland Islands Defence Force as a class of Emergency Services.

The Honourable Roger Edwards

Comments anybody? No, fine, thank you.

CLAUSE 28 **Emergency services**

In subsection (1), after paragraph (e), add the following paragraph—
“(f) emergency and other services provided by the Falkland Islands Defence Force”

Attorney General

Related to making it clear that the Regulator could not grant a licence which was exclusive and leave it silent on that point and also making it clear that amendment powers are only amendment powers in relation to the licences that the Regulator themselves has granted. It was implicit before but I think there is no disadvantage and indeed some advantage in being explicit.

We have new subsection (6), yes this was an extension to allow the exclusive grant writing powers to Executive Council so in relation to any area outside the exclusive licence (for example, individual licences) could potentially be exclusive within those terms it would revert back to Executive Council.

CLAUSE 33 **Power to grant licences**

- (a) In subsection (2),
 - (i) after “licence” insert “issued by the Regulator”;
 - (ii) in paragraph (b) delete ““exclusive or”;
- (b) In subsection (3), after “licence” add “granted by the Regulator”;
- (c) after subsection (5), add—
“(6) An exclusive licence for any of the matters listed in subsection (1) other than the exclusive licence referred to under Part 7, may be granted by the Governor and the Governor shall have the powers of the Regulator under this section, with the necessary changes.”.

The next item relates to duration of licences and we have after a little useful clarity (42) has been amended so that it now deals with the duration of licences which are either individual or class licences reducing the period of time for 1 years notice on licence, effectively an annual notice or a fixed term. We have deleted (c) and inserted it in clause 63.

The Honourable Roger Edwards

Are Members content with that change? Yes.

CLAUSE 42 Duration of licence

- (a) In paragraph (a) replace “2 years” with “1 year”;
- (b) Delete paragraph (c) and move to clause 63 as subsection (7).

Attorney General

Clause 43 makes it clear that the Governor and not the regulator is making regulation which is quite correct.

CLAUSE 43 Licensing procedure

- Delete “Regulator” and replace with “Governor”
(takes away Regulator’s power to make regulations)

Attorney General

As mentioned before we have strengthened clause 14 which we discussed and is reproduced earlier, we have therefore deleted clause 44 as it is included in clause 14 and brought it altogether in one place for general application.

CLAUSE 44 Administrative penalty

- Delete including the heading “Remedies for non-compliance”
(Incorporated in clause 14)

Attorney General

We have replaced Crown and Government to Exemption of Crown and Government to make it expressed, it was cross referring but we felt that was a little clumsy so we inserted a specific reference.

CLAUSE 48 Crown and Government (rename heading)

- Be replaced with the following:
“48. Exemption of Crown and Government
The Crown and the Government are exempted from the requirements of the provisions of this Part.”
(making provision clearer)

Attorney General

Amateurs has been replaced with the definition that was in the original ordinance which we felt was clearer.

CLAUSE 49 Amateurs

Replace subsection (2) with the following:

“(2) In this section “amateur” means a person who is interested in radio techniques solely for a personal aim, without any commercial or financial interest or motive.”

(making provision clearer)

Attorney General

Clause 61 simply makes it clearer because the previous reference was the Falkland Islands Maritime Authority which doesn't currently exist and therefore we have changed that to the person in charge of maritime regulatory responsibility in the Falkland Islands, to allow both the current position and the ones that will adapt under the new maritime legislation as it is brought through the House.

The Honourable Roger Edwards

Does anyone have any comments; if you do have comments as we go through some of these minor amendments do please interrupt.

CLAUSE 61 Saving for existing licences

Replace subsection (1)(a) with the following-

“(a) the person discharging maritime regulatory responsibilities in the Falkland Islands”, or”

Attorney General

Clause 63 was referred to earlier and again addresses the length of an exclusive licence so we've made the ability to issue an exclusive licence for an initial fixed period of not more than 10 years, so can't be longer than a 10 year fixed period but may continue after that on 2 years notice but including and obligation in any event, it can't extend beyond 20 years. So there is no way you will end up with a perpetual licence, there is actually a date in there which Members, I think we discuss that a couple of meetings ago which was helpful.

CLAUSE 63 Grant of exclusive licence

After subsection (6), add—

“(7) A licence under this section may be issued for an initial fixed term of not more than 10 years and may continue until the Governor gives at least 2 years written notice of termination provided that the licence does not continue beyond 20 years from the date that it was issued.”

Attorney General

Clause 64 (2) is a syntax – a small insertion and deletion. Which will of course have the effect of broadening to both capital and revenue.

CLAUSE 64 (2) Terms and conditions

- (a) In subsection (1)(b), before “for”, insert “subject to section 63(7),”;
- (b) In subsection (2)(b), delete “revenue”

Attorney General

This just corrects a typographical error.

CLAUSE 66(2)(s) Obligations to subscribers

Replace “lability” with “liability”.

Attorney General

Clause 71 (5) we discussed at some length and concluded that we should change it to Magistrates Court and indeed we have discussed the clause earlier today.

CLAUSE 71(5) Failure to provide information

Replace “Supreme Court” wherever it appears, with “Magistrates Court”

Attorney General

Clause 75, we fairly significantly changed this, there was previously two clauses, one was about fees and the other about additional services and rather than giving the regulator effectively a tax regime power by charging for services, we have put them all together in a single set of fees regulations, the Governor will regulate both charges for services and fees which may be slightly different. We also place an obligation to publish on the website, etc.

The Honourable Roger Edwards

That is right; we put it all under the same thing so the regulator no longer has any finance raising powers.

CLAUSE 75 Fees Regulations

- (a) Replace subsection (1) with the following—
“(1) The Governor may by regulations (Fees Regulations)—
 - (a) require the payment of fees in respect of—
 - (i) the application for, or the issue, renewal or maintenance of, or otherwise in connection with, a licence under this Ordinance;
 - (ii) the performance of a function under this Ordinance or under a licence issued under this Ordinance; and
 - (iii) the performance of any service offered by the Regulator, including the supply of information or of documents.”
- (b) In subsection (2), replace “6” with “7”
- (c) Replace subsection (4) with the following—

“(4) Fees to be charged by the Regulator in accordance with the Fees Regulations together with any criteria for determining their amounts and any rules as to timing of payment, must be published—
(b) on the Regulator’s website, and

(b) in other ways that the Regulator considers appropriate.”.

Attorney General

Clause 76 and the Schedule, we have removed which was the one that contained the fee to allow those fees to be set annually or however periodically Members decide, it is part of the fees regulations I have just discussed.

CLAUSE 76 Exclusive licence fee
Delete and renumber and delete Schedule
Incorporated in clause 75

Attorney General

Clause 77 is deleted as I mentioned is covered in the new clause 75.

CLAUSE 77 Services by Regulator
Delete and renumber
(Incorporated in clause 75)

Attorney General

Clause 91, the point was made that that should be Governor in discretion and therefore that was inserted.

CLAUSE 91 War and emergencies
In subsection (1) after “Governor” insert “acting in his or her discretion”

Attorney General

Clause 92 (4) – that simply removes a provision that required the regulator to advise on the making of regulations, they can do but are not required to.

CLAUSE 92(4) Other public service acquisition of control
Delete and renumber
(to avoid a situation where the Governor may have to choose between the advice of the Regulator and EXCO’s advice as required by the Constitution-informed by Crimes Bill experience)

Attorney General

Clause 96 – we have removed the section 96 offence because it is already adequately addressed in the new Crimes Bill which has now of course received assent. The offence will still exist when the Crimes Bill is commenced but the wording is slightly different and would have created once the Crimes Bill was introduced two slightly different offences which would have been unhelpful. We also said that we wanted to have as many offences as possible in the same Crimes Bill and therefore as a matter of policy it is better that it is in there and not here.

CLAUSE 96 **Other improper communications**

Delete and renumber
(covered by the Crimes Bill)

Attorney General

Clause 97 (5), we have extended the Governor as well as Attorney General in that clause as Members requested.

CLAUSE 97(5) **Interfering with communications**

- (a) After “Attorney General” add “or Governor acting in his or her discretion”;
- (b) Rename the heading to “**Improperly obtaining and disclosing information and interfering with communications**”

Attorney General

Clause 102, we have simply referred to this part rather than the Ordinance as we thought that was clearer also because the offences appear elsewhere in the Bill it was important that it was clear that the ongoing offence only related to those offences set out here and not those things that could accidentally, the offences are created elsewhere in the legislation, a clarity correction.

CLAUSE 102 **Maritime and aviation**

In subsection (1) replace “this Ordinance” with “this Part”.
The offences must relate to this Part only since clauses 27 and 30 provide for exemption from licence requirements.

The Honourable Roger Edwards

103 was purely to bring it in line with the current compulsory purchase ordinances.

Attorney General

Yes, and changing the heading accordingly. We then get to a simple change to adopt the form of language, the Governor acting in his or her discretion in favour the Governor in discretion and that is the same change in 107, 108, 109 110.

CLAUSE 103 Compulsory purchase

(a) In paragraph (b) replace “the licensee or the Governor may” with “the licensee may request the Governor to”

(b) Replace the heading with “**Compulsory acquisition of land**”

CLAUSE 106(1), (2) and (4)(h) Retention notices

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

CLAUSE 107(1), (2) AND (3) Disclosure requirements

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

The Honourable Dr Barry Elsby

It relates to 108 and 109 and I remember we discussed this at a previous meeting, forgive me for asking for clarification. Why is the Governor in discretion or a court able to issue warrants for surveillance. Why isn't it just a court? I know we talked about national emergencies before War and suchlike, but in such cases the Governor has more rules to apply anyway.

Attorney General

The thinking for this is again consistent with practise in other jurisdictions. There are times where a Minister of State may require interception for national security reasons and inevitably to make a Court application more people get to find out about it that perhaps you would want to if the matter was extremely secret. Therefore, in relation to this and other matters it was felt that the Governor, which may ultimately mean, the Governor having been instructed by the Secretary of State in the UK under our Constitution would be able to issue a warrant in those circumstances in order to protect the national interest.

The Honourable Dr Barry Elsby

If we look at the UK for instance, and perhaps I have watched too few detective stories. But, if the Police wanted to have electronic surveillance on a person how do they apply for that. Again it goes to the Court I think, am I right?

Attorney General

Well in fact no, the position is more complex in other jurisdictions in fact the protections I am suggesting in this Bill are better protections in many cases than are available (even under new Legislation) in the United Kingdom. So no longer can a Police Officer simply issue a warrant asking for data in any circumstance of this Bill, they must always go to Court. It is only in relation to these last sections which are

effectively intercepting information on its way somewhere. I think directing surveillance where there is a real feeling that this may be need for national security reasons.

In other jurisdictions there is sometimes an independent person who monitors what happens but they don't actually get to see it. They see it after the event with a view to critiquing whether it has been done right or wrong or in some circumstances effectively a private Judge that looks at them. I don't know exactly what the current position is in the United Kingdom. My feeling is that the Governor when acting in this context will in reality be in a chain of command up above that post anyway and so again the public will have some degree of assurance that the FCO systems will be monitoring as well.

It was felt that there may be circumstances. In most cases one would expect the Court to be used, it's going to be much less controversial to apply to the Court to do it, but there may be national emergency circumstances on national security, rather than emergencies where one couldn't use emergency powers or wouldn't want to because you are not alerting yourself to this. You would nonetheless in the national interest want interception to be conducted within the Falkland Islands territorial waters without anyone being troubled with it.

The Honourable Dr Barry Elsby

They are extremely unusual circumstances and I think you are right, that the majority, one would hope, would go through the Police to the Court. How do we phrase this better, such that the Police realise going to the Governor isn't the norm, that you should apply to the Court. Is that going to be in subsidiary guidance? Or how are we going to do that? I think we need to set a clear path for the Police to say normally you will go to the Court and it's only these circumstances you won't.

Attorney General

I think the person to whom we should be directing the guidance in the Governor's office. I can't imagine a circumstance where the Governor would want to sign and interception warrant, except in circumstances where the direction had come from... In normal domestic matters....

The Honourable Dr Barry Elsby

I understand what you are saying. And you have touched on my final point, which was the first point really.

Oversight of this at the end of the year is some body going to be looking at the use in the Islands. How many were used, were they appropriate, unreasonable, what oversight are we going to have? Or is anybody going to have?

Attorney General

In relation to this area the oversight that we are going to have is going to be relatively modest. We are going to know if something has gone to the Court – unless the Court orders that it can't be talked about, which it might. In relation to judicial oversight we have a system of judicial oversight so if issued by a Court then superior courts can monitor under the Administration of Justice and ultimately the CJ might be able to call in decisions. There is very little oversight of this power here. I should also point out, as I understand there is no capability on the Islands to undertake these warrants at the moment. In the event that we wanted to enable the current base station facilities to carry out interception the Government is likely to have to ask for it and to pay for it. At the moment it's very limited risk in terms of oversight. I think the Honourable Member is absolutely correct that the question of oversight is a matter which troubles Members of Governments all over the world. We haven't gone into the complexities of the similar projections that there are in the U.K. I have assumed that the Governor will be extremely reluctant to exercise powers under this section, unless it is absolutely necessary and that the Constitutional arrangements for the oversight of the Governors functions will provide adequate public protection. i.e: That they won't do things unless the Secretary of State etc asked them to do so, or similar.

The Honourable Dr Barry Elsby

In your explanation you said that if it goes to the Court we will know about that. That's' the Royal we. Who knows about it?

Attorney General

Forgive me. It will happen here is what I meant. We – the Public, or indeed the Government are unlikely to be aware of it, unless the interception has been requested by the Government, which is probably the most likely circumstance.

It will either be defence.....

The Honourable Dr Barry Elsby

It's perhaps more common than we think. We have looked at cases of child sex abuse where data has been retrieved from phones/computers. I can see a situation where the Police may well want to look in a situation to see what's actually going on at the moment and actually monitor that in a live situation. So I don't see it is unlikely to be very unusual. I think it might be fairly common as we grapple with new technology.

Attorney General

The Honourable Member is absolutely correct. Retention notices are notices by which the Governor can ask that data be retained in the Falkland Islands and we

have discussed that and concluded that Regulations are likely to be made under subsection 4 of 106 around the retention of data and the process to be followed. We then have disclosure obligations and again in those circumstances Court orders will ordinarily be required for disclosure. Those are the ones we require if we want to see a person's text message records. Now that's a considerably stronger position than the one we are currently in at the moment there is no public protection for the disclosure of this, save that the Superintendent wishes to see that information for a Police investigation. It would be the U.K standard if we continued that here. The normal thing you would find here is that a Superintendent (a person of Inspector or above) can seek disclosure and disclosure must be given if it is required in relation to public criminal investigations. Here, we have hardened this and we have said the Chief of Police must be overseen by the judiciary because we have seen it being routinely used in the UK in a manner that I did not wish to recommend to Members when we looked at the Law here.

I would argue that the supervisions saved by Governors warrant is better here than in other jurisdictions by virtue of the fact that the Court can oversee disclosure.

In relation to what information we hold about people, Regulations will be made and retention notices can be issued if they need to be retained for a period. That's quite contentious in many cases because of the cost of retaining data. The advantage we have in the Falkland Islands actually is that the amount of data we produce is relatively modest and therefore, storing it's not going to be very expensive. If we want to keep it and make regulations about that for a period of time to detect a crime we are likely to be able to do that for a proportionate period without the cost question being a big one.

Disclosure is handing it over, interception is capturing as it happens. It's what I felt is what you would think of as wiretapping, although I understand in digital land there are no wires to tap. It's the digital equivalent. It's that sort of interception which is really quite specialist and as I mentioned we would need to introduce capability to do it. If we needed to do it and we desperately needed to list someone's calls then it would be a fairly serious matter because in most cases I don't think that's routinely used, but it's a power that we have and it's a matter that falls to security agencies in other jurisdictions which again is why the Governor the power is there.

CLAUSE 108 (1) and (2) Interception warrants

Delete "The Governor in discretion" and replace with "The Governor acting in his or her discretion"

Attorney General

Directed surveillance which is 109 is following somebody around with a camera or using your CCTV cameras. Not in general terms as the current web cams see who happens to be at the Fitzroy Memorial at the moment, or on the public jetty. This is where you start using your planes or cameras to specifically target an individual and again a very serious matter would usually use a fixed camera non directed

surveillance is more than adequate in practise. If you start having to follow individuals around or hide in bushes with microphones to try and capture what they are saying then you probably suspect you have a much more serious problem than the ordinary detection of crime.

CLAUSE 109(2) AND (3) Directed surveillance

Delete “The Governor in discretion” and replace with “The Governor acting in his or her discretion”

Attorney General

Intrusive surveillance is the last one. It’s more of the hiding in bushes trying to capture the national security information. I think there are circumstances where that is appropriate to be directed from higher authority.

The Honourable Dr Barry Elsby

Thank you for that. I wonder if we could ask the Attorney General to just give some thought to ways and oversight monitoring. Such that when it comes back to the House if we wish to ask for a process whereby we can at least have some idea of how much is going on of this each year, without looking at the individuals.

I think we as the Government do have the need to know and to be reassured that this not being abused, or used excessively.

There may well be no process we can have here to monitor that but.....

Attorney General

I’ll just remind Members if I may.....

The Honourable Roger Edwards

Are we going outside the Telecoms Bill in particular on this or....

Attorney General

Potentially if we are going to invent something new it may take some months’ to develop what it is we want which is absolutely fine if that’s what Members want. Let me just remind Members if I may about the Constitutional provision of the Governor acting in discretion. If I recall correctly the Constitution requires the Governor when acting in discretion to report that matter to Executive Council and we have strengthened that recently in the ExCo Standing Orders therefore, if something was being done I would expect the Governor to report to Executive Council. Not upon whom or for what reason but the fact that this discretion had been exercised. Therefore, there is an oversight because constitutionally the Governor would report that to Executive Council in accordance with the Constitution responsibilities.

The second point is that when it is done by a Court in effect the Court is being the supervisory body so the Court is the body that is saying you have made a case, or you haven't made a case in accordance with the public interest, grounds detailed in the section. The Court is in effect providing the confidence plus, as I mentioned earlier, the Court has within its own judicial structure the ability to call in and question decision making. Therefore, there is some assurance there, albeit that we in Government wouldn't see it.

Whilst it is possible to introduce the possibility for there to be some form of external monitoring body of some sort, given that we don't necessarily have the capability to carry out most of these more sensitive.....

The Honourable Dr Barry Elsby

I think something very simple like asking the Court to report to Executive Council once a year, how many times were their powers exercised.

Attorney General

I think we may struggle with independence of the judiciary if we started making them, it might have been a matter that the Judicial Improvement Board, or similar, might have been able to put their minds to but as we know that's been a contentious issue in other circles. There is a great deal of sensitivity about there being any suggestion that the judiciary reports to anybody. I think here I must say that the independence of the Judiciary is absolutely something I must stand and defend.

The Honourable Michael Poole

Chair, thanks to the Honourable Dr Barry Elsby for raising this, it is quite a distant issue and it feels faintly ridiculous discussing it to some extent but it is important that we get it right up front which you have described, countries have found that this can become problematic if you go down a certain road.

The fundamental question in my mind is does the Governor have a role in this at all. I see the arguments, the Governor could potentially make speedier decisions than the court and it involves fewer people possibly as well, but I'm not sure that those two arguments are strong enough to warrant the inclusion of the Governor in these provisions, clauses 107 – 111 at all. I would delete the Governor from them.

Attorney General

Would you like me to respond?

The Honourable Roger Edwards

That is a fairly radical decision to make.

Attorney General

As I have said, the most likely circumstances where this will arise is where somebody sitting in Cheltenham asks the Secretary of State to direct the Governor to do something. In circumstances where the public interest is defined, suggests that somebody in Cheltenham needs to ask the Secretary of State to ask the Governor to do something I suspect we probably want him to be able to do it without declaring emergency powers or without involving a court.

The Honourable Roger Edwards

The alternative is if we delete the Governor who is it going to be.

The Honourable Michael Poole

The Court alone. This person in Cheltenham should always be able to make the case through the Courts of the Falkland Islands to do that, it is a bit of a constitutional issue and I respect the Governor as the Governor of the Falkland Islands, but it is different. Going through the Court and going through that process locally is different than somebody in the UK directing the Governor to do something even if it is the Secretary of State.

The Honourable Gavin Short

I actually perhaps want to come in with a contrary view, I am actually quite comfortable with this, because if things get to that stage you probably have a fairly fast moving situation and I can think of circumstances given our geographical and geopolitical situation where you may be interested in what is going on and I certainly would not like to hamper or hinder any real time collection of data that may be felt necessary. It would probably be something that comes from slightly higher up the food chain that here. I am quite comfortable with it.

The Honourable Roger Edwards

As I have said, I think this would be a fairly radical move to delete the Governor from all these things and leave it up to the Court. I am perfectly happy with the Governor left in there and as you quite rightly pointed out MLA Short. The thing is it is such a wide option of what requests could come in, that this covers it all.

Attorney General

If it is any comfort, one of things and I just repeat, the Governor exercising anything in his discretion requires him to advise Executive Council so there is that loop. The other thing which it is entirely proper is for Executive Council and the Governor to discuss in hypothetical terms, because it is hypothetical the use of these powers to see whether or not Members can be confident from that perspective. I suspect and I

advise this committee, it is extraordinarily unlikely that the Governor would wish to exercise these powers except where it was absolutely necessary to do so for reasons that because of that it was unlikely that it was going to be discussed in detail. Therefore I think it is a useful string to have but it is a matter for Members.

The Honourable Michael Poole

Perhaps we can raise it with the Governor to see what he thinks when we next meet with him. The argument for the Court is that they are genuinely independent, the Governor, if the Secretary of State directs the Governor to do something, I'm sure they may argue against it if they disagree but they ultimately would have to follow that direction.

Attorney General

They would ultimately, constitutionally they have to and that could include for example, the Governor exercising the power to introduce a Bill into the House which is also constitutional. There are a whole range of circumstance where that could arise.

The Honourable Roger Edwards

You could ask the Governor for his comments. Can I ask you to make a note of that and raise it with him next week.

In regards to this particular Select Committee I am suggesting that we leave it in. Does anyone disagree with me on that? No, so we leave it in, thank you Michael for raising it.

CLAUSE 110(2) AND (3) Intrusive surveillance

Delete "The Governor in discretion" and replace with "The Governor acting in his or her discretion"

Attorney General

Clause 111, again, I hope Members will like (and we have discussed this in principle, I'm not sure if we have seen the drafting before), it relates to requirements for disclosure and what we have sought to do here is to extend the clause to make it clear that we are dealing with not only encrypted keys, so keys that unencrypt data but keys which protect access to data. It is not only things that change the data from one form to another but also a password for example that stops getting access to the data. Again, I am aware from conversation with colleagues in the Channel Islands that the extension of this clause is practically very helpful and therefore I recommend it to the House and I do as set out in Clause 111 proposed amendment.

The Honourable Roger Edwards

This was very pertinent in a recent case in America.

CLAUSE 111 Requirement to disclose

- (a) In subsection (1), replace the introductory words with—
“(1) This section applies where data is encrypted or protected by a password or other secure means and the data has come into the possession of a public body—”
- (b) In subsection (2), after “key to the encryption” where it appears for the first time, insert “(“key to the encryption” includes a password or other access code).”

Attorney General

Clause 115, this is just a consequential amendment because we removed the power to institute criminal proceedings earlier in the Bill.

CLAUSE 115 Functions

In subsection (2), replace “or criminal proceedings” with “proceedings or any decision to commence criminal proceedings”.

Attorney General

The final sections which was discussed in a little bit of detail at an earlier meeting relates to just the provisions on repeal, savings and consequential arrangements. It is slightly more complicated than normal because of course we still have a licensee currently operating under the existing Telecommunications Ordinance and therefore we have to withdraw it carefully and therefore this clause demonstrates the necessary care to ensure that one licence can continue until another one is granted and it can be enforced appropriately during that time.

I am happy to discuss any particular provision but we did discuss it previously.

The Honourable Roger Edwards

Does any Member wish the Attorney General to go through any particular repeal, savings and consequential arrangements? No.

INSERT NEW PART AFTER PART 14

(To repeal Telecommunications Ordinance and to provide for consequential provisions. Communications Bill cannot co-exist with the Telecommunications Ordinance)

“PART 15

REPEAL, SAVINGS, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

117. Repeal of Telecommunications Ordinance

(1) Subject to this Part, the Telecommunications Ordinance 1988 (in this Part referred to as the repealed Ordinance) is repealed.

(2) Section 61 of the repealed Ordinance continues to apply until a date determined by the Governor by Order in the Gazette.

(3) The Governor must provide for the disapplication in the Falkland Islands of the Marine, &c, Broadcasting (Offences) Act 1967 and the Mobile Telephones (Re-programming) Act 2002, in the Order under subsection (2).

(4) The Regulator and the Telecommunications Appeal Panel referred to in the repealed Ordinance cease to exist with effect from the date of commencement of this Ordinance.

118. Saving of licence

A licence issued in terms of Part II of the repealed Ordinance continues to exist on the same terms and conditions as provided in the repealed Ordinance until the date of expiry of the licence or until a new licence is issued under this Ordinance.

119. Amendment of Wireless Telegraphy Ordinance

Section 3 of the Wireless Telegraphy Ordinance 1994 is amended—

(a) in subsection (1)(a) by replacing “Telecommunications Ordinance 1988” with “Communications Ordinance 2016”;

(b) by replacing the heading with “Saving for Communications Ordinance 2016”.

Consequential amendments

To renumber the provisions and to change cross references and punctuations throughout the Bill.

The Honourable Roger Edwards

Thank you that conclude the amendments that we have discussed previously. I don't think there is anything that we have raised this afternoon that needs to be brought back to a further Select Committee, so I think in all honesty that we can now conclude that our Select Committee process is complete and we await to see a clean version of the amended Communications Bill prior to it coming to the House at whatever date is deemed appropriate because there is quite a lot of amendments to do. If it can be brought to the end of January, fine.

Attorney General

There is no reason Chair why it can't unless there is a procedural bar.

The Honourable Roger Edwards

So, we would hope that it would come to the next Legislative Assembly at the end of January and I can come back and make a report on the Select Committee.

Before I determine that the Select Committee is closed, does any Member wish to raise anything at all.

The Honourable Jan Cheek

Just a quick query will the clean Bill as will be remitted to Legislative Council be gazetted?

Attorney General

We weren't proposing to Chair.

The Honourable Jan Cheek

I just feel that people who have been listening will not necessarily have had time to amend their own copies of the Bill so they may be a little confused about some of the changes we have made.

It will be published with the papers a week before.

Deputy Clerk

Yes, I would hope to have the actual Select Committee record completed by end of next week so providing that Members are content with, that can go public.

The Honourable Jan Cheek

Just given the great public interest that clearly has been in the Bill I felt that it is important

Attorney General

Chair, if it is of assistance to Honourable Members I am perfectly able to confirm that we will ensure that a copy of the Select Committee amendments that we have and also a consolidated text are available I prefer through Gilbert House. The reason that I say I prefer that is I am concerned that because the Select Committee, Committee of the Whole and House has not examined the text and amendments may come forward, if I gazetted a Bill again which had things which you then changed it would then be published a third time in the gazette as a final Bill and might cause some confusion.

I have no wish to make it more difficult for Members to find out the information and we will make sure that Gilbert House both a consolidated text as presented to the Committee of the Whole as well as the individual items highlighted so that members of the public who want it can have access and indeed so that Members can see the consolidated version and I happy to do that in time for the end of January.

The Honourable Roger Edwards

I would be happy with that, but I would make a request that if people do want to see the outturn of the Select Committee which is a public forum, that they ask for it please in electronic form, it is already in excess of 270 pages almost 300 pages and by the time we add today's to it, it's going to be something like 350 pages or more. If we were to give out copies to everyone it would be a huge amount of paper. So could I make a request that the information available Gilbert House on the Select Committee will initially be in electronic form.

The Honourable Gavin Short

Mr Chairman, I apologise if I extend it to 351 or 352 pages, it is just a general query, it may not live within the Bill, I may have missed it. We talk about the retention of data, in what piece of Ordinance is it set down how long data is normally kept. Is it within this and I have I missed it or does it lie somewhere else.

Attorney General

It sits within the retention notices provision clause 106 (4) a general period or a provision in relation to general retention of data would be included and then individual retention notices for specific data would still be available but the general provision in relation to retention would be covered by virtue of the regulations made under 106 (4). There is a matter of debate and no doubt we would have that debate with the exclusive provider and indeed any other licensees if we felt that they needed to retain data about whether that would be 6 or 12 months or whatever the usual is.

106 Retention notices

- (4) The Governor may by regulations make further provision about the retention of electronic communications data; and the regulations may, in particular, make provision about—
- (i) the process to be followed before giving a retention notice;
 - (j) the maximum period for which data is to be retained under a retention notice;
 - (k) the content, giving, commencement, review, variation and revocation of a retention notice;
 - (l) the storage of data in accordance with a retention notice;

- (m) access to and disclosure of data retained in accordance with a retention notice;
- (n) destruction of data retained in accordance with a retention notice;
- (o) monitoring and enforcement of compliance with a retention notice;
- (p) payments by the ~~Governor in discretion~~ "Governor acting in his or her discretion" in respect of expenses of complying with a retention notice.

The question is usually not wishing to put an undue cost on anybody to have to retain data, but there are two issues that was previously raised in this Committee, the first one is retaining copies of data in the event that they are exported for processing at a location other than the Islands and that was a matter that MLA Short mentioned earlier and that may be something that is covered in the regulations. There may also be a question about how long data in general is retained, balancing the interest of the individual with the national interest and again the debate is usually about a figure between 3, 6, 9 or 12 months.

The Honourable Gavin Short

I thank you for your reply and of course that is why I couldn't find it, I have been desperately searching for it and couldn't see it, but of course, it will lie within the regulations.

What really sparked me to think about it of course was something I heard just before Christmas where the UK is getting into a bit of hot water with the European Courts of what is colloquially known as the "snoppers chart" in the UK about the length of data retention.

Attorney General

It is a very significant issue that is under the new legislation taxing policy makers in the United Kingdom a lot at the moment I understand.

The Honourable Gavin Short

I thank you for your reply.

The Honourable Roger Edwards

You raise one important point there and it's about regulation in support of this Bill. Do we have a timescale to bring in regulation in support of this Bill, because we are going to bring in a Bill hopefully at the end of January, that will be followed by the signing of an exclusive licence but we will need and there is reference throughout this to regulation and much of this Bill and the strength of the Bill will depend on

that regulation coming forward and being properly agreed. Do we have a timescale and work schedule to produce that regulation?

Attorney General

Yes Chair and the Executive Council have received the work schedule and the timescale at a previous meeting. A proposal was made when we introduced the Bill (and I don't think it's wrong of me to comment but if Members look at me oddly I will shut up), I don't wish to breach any Executive Council secrecy oath. When we introduced this I thought it was extremely important that Members understood the likely costs of introducing a Bill of this nature to the House and therefore when proposing this Bill for gazetting the paperwork did set out what we anticipated would be the cost of regulation and how it would be achieved. Those costs have been included within the budget I have submitted for the Law and Regulation Directorate but Members may also be aware that a separate paper on general regulation which has been discussed in the House (and therefore, I think can be debated here) was also proposed to Executive Council at that time and the Chief Executive was tasked with undertaking a review of where regulation should be delivered from within the Falkland Islands Government and of course he has been away so I don't think that that review has preceded in the short period of the holiday season, but I expect that it is a matter that we will be putting our minds to fairly shortly in this new year. We know what work needs to be done, we know how we would approach it, we understand the nature and scope of the work and we understand that we do need some very clear thinking on the policy that sits underneath each of those so we can bring forward secondary legislation proposals. We have also sought at Executive Council's request secondment from other Overseas Territories and Crown Dependencies although at the moment I am not aware that we have had any volunteers to get us started, but as previously reported I have to say how very generous Crown Dependencies and Overseas Territories have been to us in our initial conversations with them last year and their offer of support. Gibraltar, Isle Man and the Channel Islands as well as a number of others have been extremely supportive and extremely keen to share with us what they have any a lot of them have been on a very similar journey to the one we are about to embark upon and they couldn't have been more helpful. Some of them have even been prepared to fly to us in London when we were there to discuss things with OfCom and others. It is quite correct of me to record my thanks to the regulators in those jurisdictions and the offers of support that they have extended to the Falkland Islands. At the moment we don't have a person or persons identified but we do understand the possible costs of that and have made requests through the appropriate channels.

The Honourable Roger Edwards

Does anyone have any other items to raise? No, in that case I will bring this Select Committee to a close and thank you for all your assistance along the way. Thank you to you Attorney General and Matt Bassford who is not here today, but thank you to

everyone and we will make our report to the House at the end of January all being well.

Thank you.

Appendix 1

Oral Evidence

Oral Evidence: Ms Nikki Buxton, Synergy Ltd

Good afternoon Honourable Members, Ladies and Gentlemen.

I am Nikki Buxton, the Managing Director of Synergy Information Systems, here to speak on behalf of my company, my customers, and the wider business community. Thank you for the unprecedented opportunity to speak to you today, on what is likely to be the most important piece of legislation during the life of this Assembly.

I am here today to ask you to:

5. Delay the decision on the Bill until an appropriate public consultation can take place.
6. To ask you to require a step-change in satellite bandwidth from the licence holder, rather than the microscopic changes we have experienced so far.
7. To oblige the licence holder to significantly develop the local network to relieve some of the pressure on the satellite bandwidth and to remove local usage from allocated bandwidth.
8. And finally, to urge you to allow the Falkland Islands to develop technologically, and not be held back by constraints against self-provision.

I see from the list of speakers who will follow me today that there are representatives of business, the oil industry, science and private consumers. Each of them will present their views on this subject, but I am confident that they will all agree that more work needs to be done before the Bill is passed and will urge you to delay your decision.

In various forums over the past few weeks, The Honourable Mike Summers has advised us all not to 'conflate' details of the Bill with the Licence. While I am pleased to have learned a new vocabulary word (thank you Mr Summers), as you are all aware, the Communications Bill does not and cannot stand alone. It is intimately tied to the Licence, the Price Cap Mechanism, the powers of the Telecoms Regulator and other associated legislation.

A strong Telecoms Regulator is the key to this whole process – we have all seen the results of the lack of telecoms regulation during the past decade. The post of Telecoms Regulator has been denied funding for the past five years, and is now only proposed to be funded at 25-28 thousand pounds per year. The Falkland Islands needs an experienced, technologically competent telecoms regulator, and I can guarantee we will not get one for this salary.

Without a strong regulator in place, all of the work of the Telecoms Working Group, and the Attorney General over the past two years on this issue will have been in vain, and we will be no further forward. The Bill and Licence are both overflowing with obligations which FIG are required to fulfil. I have to ask myself, are there

personnel in place to carry out these obligations? Are there technical and legal consultants in place ready to help? Until now, very low standards in telecoms provision have been accepted by FIG, and this cannot be allowed to continue.

Next, we need a step-change in satellite bandwidth provision, but I fear that this current process will not even allow us onto the first rung of the ladder. There is frankly no point in rolling out 4G without first significantly increasing the available bandwidth, as otherwise it will only serve to congest the network more and will grind the already almost unusable mobile data system to a halt.

There are new and improved satellite technologies being introduced on an almost continuous basis. While the footprint of many of these technologies currently misses the higher latitudes where the Falklands are located, not all do, and not all will in the near future. I'm afraid that waiting four years to review the satellite provision and associated technologies is not the best way forward.

A strong, technologically competent Regulator should be reviewing technologies on a much more regular basis, and the Bill and Licence should oblige the licence holder to invest in improved technologies on a more regular basis.

Without major investment in increased bandwidth, among other issues, we are in danger of our young people not returning to the Falklands when they complete their education, and FIG and businesses could have increasing difficulty in recruiting qualified personnel. Use of the internet in the wider world has become so integral to business, education and lifestyle, that our internet provision could become a deciding factor for these groups.

In recent years, Sure has improved both the speed and accessibility of the local network, but this needs to be continuously developed, and local usage should be unlinked from satellite usage.

Local 'cloud storage' and a locally hosted software Update Server at Sure would go a long way to relieving bandwidth constraints, and would allow the local transfer of data where required. As far as I can see, improvement of the local network was not addressed in either the Bill or the Licence.

Look into your hearts, and decide honestly if you think that the best possible deal has been done for the benefit of the whole of the Falkland Islands. If you cannot, then please listen to the public outcry and demand that more work is done to ensure that the whole of the Falkland Islands will benefit.

I urge you to be bold, Honourable Members. Delay the decision on the Bill and allow the public their voice in this matter. Take the time to examine all the elements both individually and holistically. For if you do not, I fear that you will be condemning the Falkland Islands to remain in the internet Dark Ages for the next decade.

Thank you.

Oral Evidence: Mr Stacy Bragger, Chamber of Commerce

Honourable Members, Ladies and Gentlemen,

Good afternoon and thank you for this opportunity to address you today on the important issue of the future telecommunications provision for the Falklands.

I am addressing you today in my role as Executive Secretary for the Chamber of Commerce. Whilst it is the Communications Bill that is here on the table today, it is the conditions in this Bill which gives force and effect to the new 12 year licence. This Bill cannot be dealt with in isolation from the agreement and the licence.

As you will be aware, the Chamber has frequently engaged with MLAs and FIG regarding telecommunications since late 2013.

The Chamber has detailed our position on what we believe the approach should be on future telecommunications to FIG in a number of different ways. The issue has been raised continually by the Chamber with MLAs at our bi-monthly meetings with the Trade and Industry portfolio holders MLAs Cheek and Poole and at our quarterly meetings with all MLAs. At the start of the process we provided FIG with a position paper on our stance. A presentation on its key messages was delivered to the FIG Telecommunications Working Group by Chamber representatives. Numerous letters outlining our concerns have been sent to FIG over the last three years. We have done this work because the outcome of the licence negotiations is so important to the business and wider community.

The Chamber is greatly disappointed with where we find ourselves today with the Communications Bill and the proposed licence.

The provision of telecommunications is absolutely key to the development of our business community and the Islands as a whole. The remoteness of the Islands means that great emphasis is placed on telecommunications. The need to make use of technological developments is vital. As the Islands continue to develop the lag behind available technology keeps increasing. There will always be a demand for more internet access. The amount of data available now is insufficient to bridge the current gap and the proposed increases will do little to increase the situation by 2019.

The Chamber believes that the drip feeding of megabytes that has been agreed will be totally inadequate as we move towards 2019. The business community needs to be able to effectively utilise cloud-based services, video-conferencing, modern sales and marketing platforms, mobile data and other data heavy services. The current data caps impede the ability to do so.

The 2012 Falkland Islands Census showed that 72% of households had internet access, representing a 17% increase in connected households since 2006. I would expect that the results of the recently conducted 2016 Census will show an increase

in this figure. The 2012 report's authors stated that this represented 'the increased importance, reliance and availability of external communication for Falkland Islanders.' This is recognised in the Islands Plan 2014-2018, Transport and Communications section, which states that the vision of this Assembly is 'to secure further improvements in the Islands' transport systems and integration with the rest of the world - both physical and virtual.' It goes on to say that 'We will unlock the potential for tourism, business growth and investment by improving the Islands' connectivity internationally, and ensure that the Islands' utilities are reliable, cost-effective and affordable.'

We do not believe that the fulfilment of the next exclusive licence period will achieve any of these aims.

The Falkland Islands enjoys competitive and innovative shopping and procurement; therefore, new technologies (equipment and operating systems) are readily available but are poorly utilised by businesses because of the internet service levels they require. Likewise, Falkland Islands businesses have become so accustomed, over the last decade, to such limited internet services that their strategies and plans no longer include anything that has a dependence on internet above that which is currently available. This holds back most businesses and curtails development. In each of the FIDC Business Climate Surveys conducted during the past decade, telecommunications was listed as one of the key barriers to growth by Falkland businesses.

Chamber of Commerce members already report that rather than having important large documents emailed to them they have to have the documents put on a memory stick and sent by DHL to them as to download them would wipe out their monthly data allowance. This is just one example of how businesses have to work their way around the current data limits.

For the business community, the fundamental requirement of the licence is that the Islands telecommunications provision develops over its life to a position where telecommunications are no longer a barrier to business. We do not believe that the proposed licence will achieve this and we will see yet another opportunity missed.

The Chamber of Commerce urges Honourable Members to delay the Bill and carefully reconsider and fully review the proposed 'deal' to make sure they are satisfied that it is the best possible deal for the Falkland Islands that this Assembly can achieve.

Responses from Chamber of Commerce members to Select Committee questions

At the meeting of the Select Committee on the Communications Bill held on 24th November Executive Secretary for the Chamber of Commerce Stacy Bragger was asked by Honourable Members to consult the Chamber membership on a couple of points.

The time frame before the next Select Committee meeting was limited so it wasn't possible to have an extensive consultation with the Chamber membership but hopefully the responses below give an insight into the views of businesses on the current telecommunications provision in the Islands.

1. What specific examples can businesses give of how the current data limits impact them?

A general theme of the responses was that businesses have to limit their internet based activities as they are worried about incurring overage charges. Businesses report that they are fed-up of having to carefully monitor their internet usage and feel that they are unable to improve and develop aspects of their business because they are restricted by the data limits.

The specific examples provided were:

- Downloading manufacturers/suppliers brochures uses up a significant amount of data so you have to be selective about what is downloaded which is restrictive.
- Digital marketing is becoming increasingly vital for businesses but the current data limits make it difficult for businesses in the Falklands to develop in this area as much as they would wish to.
- Visitors to the Islands expect free internet and so for hotels to meet this expectation it is very expensive when dealing with the data limits.
- Accessing online training courses is very difficult. Any courses have to be restricted to short courses that are PowerPoint based rather than video based.
- It is reported that businesses do not log on to view the accounts packages maintained abroad by their partners in Spain unless it is absolutely necessary, whereas they can have their local accounts package running in the background most of the day.
- It is difficult to update accounts packages as the companies that provided them are encouraging customers to use their replacement online package. There are very few accounting packages that are not online and all of them require you to watch instruction videos.
- Unable to use Cloud based services.
- It is reported that sharing information with auditors can be challenging. Sending information through a file-sharing internet site proved difficult and means that instead files are emailed which eats up the data allowance.

- Businesses report that often they have to exchange memory sticks when dealing with people overseas so that they don't have to download large files.
- It is reported that there is an indication that international regulations may in the future require fishing companies to have to fit real time video to monitor catches which would have a huge impact on data allowances.
- Data limits prevent companies synchronising data with partners' computers or servers off island.
- Businesses can feel reluctant to send data onward to clients as they don't want them to use their data allowance if they are on smaller packages.

2. If data quotas were set to the proposed 2019 levels would any members wish to self-provide?

The majority of members who responded said that they do not want to self provide and that the proposed 2019 levels would probably be adequate for the activities they do currently.

Some members said that they could possibly look to self-provide if they felt that the provider wasn't offering a reasonable service that met their requirements. One business felt that if self-providing gave a better deal than Sure could provide then naturally they would wish to self-provide.

It was also felt that self-provisioning should be seen as a helpful regulation tool for FIG rather than a threat.

Oral Evidence: Mr Dick Sawle

Hon. Members, Ladies and gentlemen.

Firstly I would like to thank you for extending me this opportunity to address you all on a subject which I believe is considered of vital interest to all of us who live here. There are only a handful here today to speak, but I believe our collective views will be shared by many who live here. I believe that I am right that this is the first time that members of the public have been allowed to speak to a select committee on the matter of a Bill. I believe this proves that Members see the importance of the matter under discussion. It should not simply be a tick-box exercise.

The Bill in front of the house today cannot be dealt with in isolation from other matters. Assent to this Bill, the deal with Sure is signed and then we are locked into a new telecommunications agreement with Sure for the next twelve years.

There are many aspects to this debate that I would make comment on, but instead of making points that no doubt you will hear from others today, I will concentrate on one important issue that this debate has sparked off.

We hear a lot these days about human rights. The sort of issues we read about are very clear cut – LGBT’s, economic migrants, refugees and asylum seekers to name but a few. So why is it that we hear about these sorts of things but seldom hear about the right of freedom of expression? Freedom of expression is a fundamental right that allows people to freely communicate however they wish. We seldom hear of any problems arising from this basic right because the developed western world assumes and takes for granted that nobody in a modern democratic society feels that their freedom of expression is hindered in any way.

In the Falklands we travel the world speaking quite rightly with pride about our democracy, our self-government, our independence and our Constitutional rights. I see that recently we attended the Joint Ministerial Council and the Communique issued underlines the “resolve to continue to promote respect for human rights....to promote understanding of our shared international human rights obligations” It all boils down to this today – in a nutshell, we must practice what we preach.

Our Constitution is our highest law and over-rides any other laws or policies that we may come up with. Our 2009 Constitution (Section 13) enshrines the right to Freedom of Expression based on the European Convention on Human Rights which itself is based on the 1948 Universal Declaration on Human Rights. This right is subject to restriction in very limited and narrowly defined circumstances, including telecommunications.

We would not be the first jurisdiction to have that particular condition placed on our right to freedom of expression. However, wherever governments have tried to impose this restriction, the courts have invariably overruled them. I am convinced this would also be the case here.

I therefore applaud the decision to allow for the licensing of personal Vsat systems and their exclusion from the Exclusive Licence.

I note that paragraph 14 of appendix B to this Bill states that “The Attorney General is aware of Queen’s Counsel’s opinion that suggests that a failure to recognise this possibility [i.e. an alternative to the exclusive provider] in legislation may be unconstitutional”.

I believe therefore that our Government has recognised that to prohibit self-provision by means of an exclusive licence is unconstitutional.

However, the policy as agreed by Executive Council, is that the fees for obtaining a Vsat licence will be set so high and the application made so difficult, that effectively a licence becomes unobtainable.

Freedom of Expression is non-negotiable and vitally important for a variety of reasons.

I do not believe that the agreed policy (Appendix B to this Bill) is a proportionate response to what is a fundamental human rights issue. The response itself is unconstitutional – it is not simply a hindrance, but designed to be a show-stopper. The licence fee is unreasonable and designed to be prohibitively expensive. To conduct business or pleasure these days we are not talking in megabytes, but in gigabytes or – in the near future – terabytes. The bundles on offer to ordinary individuals are too low and impede social interaction, education and development. The internet nowadays is simply another utility like water and power.

Why does Sure not simply provide what people want? Why not provide people either with a Vsat or a similar package to a Vsat at a reasonable price? This has nothing whatsoever to do with the Universal Service Obligation. It has nothing whatsoever to do with collective purchasing power and it has nothing whatsoever to do with contributing to costs. Let’s not get stuck in the dark ages of technology for the next twelve years. With a little more effort we can solve this to everyone’s benefit.

Hon Members – if you do pass this Bill today, then I urge you to pause and take stock before agreeing to any new deal.

Oral Evidence: Mrs Pippa Christie, Premier Oil

Honourable Members, Ladies and Gentlemen.

I am addressing you today in my role as Deputy Country Manager for Premier Oil. My colleagues at Premier in London will be happy to provide further detail and information on the points I raise today on their behalf as necessary.

Whilst it is the Bill under consideration today, it is difficult to separate discussion on the Bill from the proposed exclusive licence enabled by it. I'll start by summarising Premier's understanding of the Bill and the exclusive licence enabled under it and how this applies to Premier's operations before discussing Premier's future communications requirements and the effect the Bill and proposed licence may have in relation to these.

Premier understands that the Communications Bill and in turn the exclusive licence will apply to Falkland Islands territory – i.e. the Colony of the Falkland Islands and its territorial waters. As such it;

- (a) will apply to Premier's operations in the Falkland Islands (e.g. offices, bases and docks)
but
- (b) will not apply to moveable operations in the EEZ (e.g. drilling rigs, installation vessels and supply boats), most of which would be used at times outside of the EEZ and have intermittent, short-term or mid-term use in the EEZ.

The treatment of production facilities in the EEZ is not clear. Through discussion we understand that a possible interpretation is that a production facility which is "fixed" or tethered to the seabed could be considered an island and part of Falkland Islands territory, and consequently that an exclusive licence may be considered to apply to production facilities in the EEZ.

The potential lack of consistency in the treatment of moveable and fixed operations in the EEZ is unhelpful.

Clarification of the treatment of offshore oil and gas production facilities is required, and consistency with other offshore oil and gas operations is highly desirable.

We request that FIG consider addressing this matter in the Communications Bill by clarifying the status of oil and gas production facilities, which by their nature could be fixed to the seabed (such as a fixed platform) or could be a moveable vessel with a dis-connectable sub-sea link to the seabed (such as an FPSO vessel).

Premier's communications requirements for Sea Lion are distinct and will far exceed those of other users. At this stage, we expect that these requirements will require additional investment in communications capabilities.

Premier is currently investigating communications options for the Sea Lion development and has not selected a preferred solution.

Whether subject to the exclusive licence or not Premier will be looking for a preferred solution for all activities, locations, infrastructure and contractors.

There is a risk that the exclusive licence would prevent Premier from investigating the preferred solutions in the usual manner.

Competitive Procurement Process and Risks:

Typically Premier would look to the market to supply the safest, most secure, most efficient and competitive solution.

To include Premier's communication requirements in the exclusive licence at a stage when these requirements and possible solutions are not fully known may preclude Premier from pursuing the safest, most secure, most efficient and competitive solution for the Sea Lion development.

It is possible that Premier's requirements could enable a step-change in infrastructure for the benefit of the Falkland Islands.

Premier believes it is in FIG's interest to reserve for itself the power to issue new licences for oil and gas communication requirements which can be exercised as necessary at the time at which those requirements are known and technical solutions and providers can be identified.

This would allow FIG to make informed decisions at the time of Sea Lion Field Development Plan approval to ensure that maximum benefit is achieved for all relevant stakeholders.

The exclusivity provided under the proposed Sure licence may preclude FIG from doing this, despite it seeming apparent that FIG's decision to award an exclusive licence to Sure and Sure's decision to accept that licence are not founded or reliant upon contingent revenues from potential oil and gas developments, such as Sea Lion.

Premier believes that an exclusive licensing position should not be applied to oil and gas developments prematurely and that FIG should reserve the power to issue licences for oil and gas development communications.

This could be achieved in a number of ways:

(iii) **Outright Non-Exclusivity:**

Non-exclusive application of Sure licence to oil and gas businesses, allowing for additional communications licences to be awarded by FIG to third party providers in the right circumstances (for example alongside Field Development Plan approvals); and/or

(iv) **Optional Non-Exclusivity:**

FIG Amendment of Sure licence to allow for an FIG right to treat the provision of services to oil and gas businesses as non-exclusive under the licence (for example alongside Field Development Plan approvals);

If FIG do not consider non-exclusivity to be viable, then we believe at the very least the licence terms proposed should be amended to require the exclusive licence holder to support oil and gas businesses to identify and adopt preferred technical solutions in a commercially prudent manner and at a reasonable cost.

This would require some form of FIG sanction to dis-incentivise commercially damaging monopolistic practices (such as an FIG right to apply non-exclusivity).

We request FIG consider these options further. If FIG were to be minded to pursue any of these possible alternatives then Premier would be pleased to provide further detail these possible alternatives in writing.

Oral Evidence: Dr Haseeb Randhawa, Fisheries Scientific Section

- Thank the Select Committee for the opportunity to provide evidence on behalf of the scientific section of the FIG Fisheries Dept.
- I am aware that some of the points I raise here have been covered in previous public meetings or by others. However, they are reiterated here to demonstrate the relative importance of these concerns to our scientists.
- Falkland based scientists have contributed not only to the greater scientific community by publishing a large number of internationally peer-reviewed scientific articles over the past several decades, but also have contributed significantly to the economy and prosperity of the Islands by providing the knowledge base and support required for commercial development and sustainable exploitation of resources in various industries including fishing, farming, and agriculture. Decision makers must ensure that any agreement we enter with a provider provides Falkland based scientists with the tools necessary to continue providing essential services to industries so that as a community, we can continue to prosper.
- Main concerns:
 - Despite technological advances worldwide, the Falkland Islands lag behind regarding communication infrastructure and access. Already isolated geographically, this lag exacerbates our isolation from the rest of the world. Seeing that provider contracts are targeted for approximately 10 year duration, we encourage FIG to look into processes to ensure investment in infrastructure and technology by the provider so that the Falklands do not lag further behind in these areas.
 - The Falkland Islands are a small community in relative terms. As such, many Government Depts operate with small teams without abilities to realise economies of scale, including with respect to individual workloads. This is mirrored in many industries central to the Falklands' prosperity. As such, it is imperative that the Falklands be provided with the tools to develop network resources and access to become as efficient as possible. One of the main impediments identified by our team to achieving this efficiency is slow connection speeds, bandwidth restrictions, and reliability throughout the network. We encourage FIG to work with the provider to ensure increased reliability, bandwidth, and speed for the entire Falkland network.
 - We encourage FIG to look into ways of decreasing the strain on the network to improve performance. One way of achieving this objective may be to develop local networks for government, specific industries, etc. or some form of intranet that can allow for efficient communication and exchange of information without relying on a satellite connection. This would effectively reduce the bandwidth use by specific sectors and improve network efficiency as a whole.
- Specific examples:
 - **Usage of external data sources for scientific analyses, i.e. oceanography, meteorology.** These are generally free to download, e.g. NASA, National Oceanic & Atmospheric Administration (USA), but can be several GB in size.

It is important to understand that Fisheries is generally not interested in the images that can be downloaded relatively easily, but require to work with the metadata associated with these images for analyses. Due to the network limitations, it is sometimes difficult to access these during normal business hours. Asking employees to come in the evenings and weekends to download these data is not feasible as it can take several hours to download on our current network due to bandwidth and speed restrictions. Additionally, in the event that there is a corrupt file, the entire download may be cancelled, so leaving it to run overnight is not optimal. These data are generally required for either routine or specific analyses of fisheries data. Hence, any delay in accessing these freely available data decreases our overall efficiency.

- **Usage of scientific electronic libraries (downloading pdfs of scientific papers for research purposes).** This is of great importance for scientists, especially for those working in remote places such as the Falkland Islands. Many papers that include images, especially description of species, are large files, often >20MB each. Downloading these can take several minutes to half an hour depending on bandwidth traffic. It is not uncommon for connections to time out before the paper completes its download.
- **Webinars – Professional development.** In the Falkland Islands, opportunities for professional development are limited. When sending staff overseas for these purposes, cost can become an issue. More and more scientific organisations and academic institutions offer webinars (web seminars). For instance, the American Association for the Advancement of Science (AAAS) offers webinars on: (1) new technical advances in different fields of study; (2) career webinars including topics such as advancing your scientific career, learning to network, learning to manage a lab, and mentoring early-career scientists; and (3) interactive educational webinars on different science topics. There are now many opportunities to attend seminars remotely. For instance, the Allan Wilson Centre for Molecular Ecology and Evolution in New Zealand hosts a series of prestige seminars (International Speaker Series) by top names in various fields of science, including Ecology, Evolution, Anthropology, Climate Change, etc. These are generally available to view live as a webinar for members and reaches 10% of the entire New Zealand population through live radio broadcasting, webinars, and public lectures. For scientists working in remote places where there is no critical mass to speak of, these webinars are the most cost effective way to keep abreast of advances in our field. More and more, conferences are making remote attendance possible, thus significantly decreasing costs related to professional development. However, current connection speeds and bandwidth restrictions do not make remote attendance possible and leads to lost training opportunities and further isolation. This is not only relevant to Fisheries scientists, but to all scientist in the Directorate of Natural Resources and in other branches of government. FIG needs to ensure that network improvements are built in to future contracts with providers to ensure its scientists can remain abreast of key developments in their respective fields through advances in communication technology.

- **Web training – Professional development.** Many organisations and academic institutions offer on-line training courses through e-learning or distance education. Some use platforms such as YouTube and Microsoft Animation for video streaming. These are cheap opportunities for professional development. However, these generally require minimum systems requirements that may or may not be met by current network standards. It is not uncommon for buffering to occur during video streaming, making it frustrating and inefficient use of our time.

- **Recruitment.** Having recently experienced interviewing 10 candidates for FIG recruitment via IP telephony, I cannot adequately express how frustrating the process was. There was not a single instance where we completed an interview without loss of connection. In some instances we had to complete the interview using a landline following multiple failures during the same interview. This is unacceptable by today's international standards and there needs to be a review of delivery of such services to improve our communication networks. This is not only frustrating, but becomes an impediment to recruitment. Recruiting contract workers from overseas is key to FIG and potential candidates recognise that they are moving to an isolated part of the world. I can only imagine a candidate's perception of our communications network if we aren't able to provide a clear connection for processes as important as interviews. FIG must ensure that IP telephony (or equivalent alternate technology) becomes more reliable and available in the Falklands.

- **Individual communication between scientists.** Living in an isolated part of the world, one cannot hop on a plane in the morning to meet with colleagues and return that evening as is commonly done in most parts of the world. As such, FIG needs to ensure that their scientists can effectively maintain lines of communication with overseas colleagues through IP telephony or video streaming. This is extremely relevant as scientists in the Falklands are required to play multiple roles and delve in different areas of expertise, sometimes perhaps outside of their comfort zone. Access to colleagues who are specialists in different fields is often key to bring a project to fruition. We may require a colleague to demonstrate a technique live rather than explain through a series of notes or back and fro e-mails. We may require the exchange of large files of information across our network in real time to get the assistance we need. More than anything, in the absence of a critical mass of scientists on the Islands, we need to be able to access the wider scientific community so not to feel isolated and fall behind in terms of technological advancements or advancements in our respective fields of research.

- In summary, FIG must not only protect our ability to communicate with the scientific community, but ensure it remains abreast of communication technology available overseas so that its scientists can continue to provide essential services to industry and the community and contribute to the prosperity of the Falkland Islands.

- Thank you for your attention.

Oral Evidence: Miss Felicity Sawle

Honourable Members, Ladies and Gentlemen;

Thank you for granting me permission to speak to you today regarding the new Communication Bill and subsequent 12 year renewal of the 'Sure' exclusive licence. Firstly, as I am sure that you are aware that I work for FIG, I would like to publicly state that any views or opinions I express here are mine alone as a private individual and do not necessarily reflect the views or opinions of my colleagues, my Department, or FIG as a whole.

Telecommunications are essential in modern life. With instantaneous transmission of data from anywhere in the world to anywhere else, I believe it is fair to say that everyone living in Developed Nations expects to be able to tap into a high quality telecommunication network, for private and for business use.

Not that long ago the only way to watch a movie at home was to buy a video cassette tape. Then in 1995 the technology companies Philips, Sony, Toshiba and Panasonic invented the digital versatile disc. That was only twenty one years ago, but the DVD made cassette tapes obsolete. I doubt young children today have ever seen a video cassette tape let alone watched a movie on one. How many stores still sell video cassette players? I would say none; because technology moved on and the old was replaced with the new.

With the modern world moving away from hard drives, CDs and DVDs and moving towards cloud-based storage and digital downloads, the Falklands are in danger of being left behind. What do we do when the technology companies stop selling computers with in-built hard drives because they offer a free cloud-based storage option? What do we do when companies stop manufacturing DVDs and CDs and move towards digital downloads? It took less than twenty years for the cassette, invented in the early 1950s, to become obsolete. The Apple iPod itself is only fifteen years old. Just imagine where we could be technologically in the next 12 years. With continued restricted MB usage the Falklands are in danger of following the fate of the cassette and becoming obsolete as well.

My internet package is what used to be residential silver and is now known as the 'lite' package. While my package quota has increased since November 2015, when I first connected with 'Sure', the quota is still far too restrictive for my needs. I live alone, the only person on the internet is me yet I still managed to get to 97% of my quota last month. I was forced to switch my router off for fear of going over my quota and incurring extra charges.

I cannot move onto the higher package because I still can't afford it. I already have a full time and a part time job. I recently built a house which means I have a mortgage to pay. I don't say this to garner sympathy, I am very proud of my financial independence, I make this statement to showcase how the public, or the 'little people' as I believe we are referred to these days, are being backed into financial

corners over our internet. And even if I could afford the 'bronze' package, I refuse on moral grounds to pay nearly a £1,000 a year for restricted internet.

The constant worrying over quota limits is exhausting. Apart from my parents, all of my family live outside of the Falklands. Even my brother is away right now learning to fly helicopters in Portland, America. If I want to communicate with my family I can only do so through the internet. At a pound per minute, I'm certainly not going to call them using my landline. Three of my cousins had children in recent years but I can't join their WhatsApp groups or see pictures of their children because I can't afford the MB usage.

Additionally, I am currently studying a HNC in waste management with the Northampton University via distance learning. I am very fortunate in that my manager gave me permission to use the internet at work to download course materials as the course is directly linked to my work. I have on occasion gone into the office on the weekends to do research because my private internet package won't allow for the kind of intensive research I need to do. Let me give you an example, my tutors' recommend that I spend at least 102 hours of independent study per module. Distance learning is very internet heavy, particularly since none of the published works recommended for reading are available in print in the Falklands. I am quite fed up of paying extortionate fees for woefully inadequate quotas to one company who take all the profits and give very little in return.

If Government approaches telecommunications with the view that only 'Sure' can provide these services, then what bargaining power do we have? How can we get a better deal if we rely on one provider for these services? How do we know that 'Sure' is offering the best deal when we have nothing to compare it to?

I can't understand why the Government did not put the provision of telecommunications out to tender. If 'Sure' is providing such a good deal then why are we sheltering them from competition or challenge?

I realise that this committee, like the public meeting, is essentially a tick-box exercise as the Bill is all but passed. But, hopefully, Members will rethink this Bill and subsequent 12 years exclusive licence, and note the frustrations expressed by all of us against this Bill and, perhaps, take our views on board and expend a little more effort in securing the best deal for the future of the Falklands and all who live here. Thank you for listening.

Oral Evidence: Mr Andrew Newman

Honourable Members of Legislative Assembly (MLA's), Ladies and Gentlemen. Thank you for this opportunity to provide evidence in this Select Committee on the new telecommunications Bill.

I provide this as a private consumer with the added benefit of working for FIG for 23 years, 12 in Regulation of which 3 were regulating Telecoms. For your benefit, I have I have outlined my evidence in the traditional Executive Council paper format. Any comments within are not intended in any way to cause offense to MLA's, FIG, Consultants or Sure South Atlantic Ltd.

1. Recommendations

- That you the Members of Legislative Assembly take advantage of the fact that notice has not been served on the current exclusive licence holder Sure South Atlantic, and that the licence has 3 years to run.
- That you the Members of Legislative Assembly do not move this draft Bill to a further reading.
- That you the Members of Legislative Assembly recommend that the Executive Council and the Government examine the entire issue with full scrutiny and take full account of all information before considering issuing a 10 year plus licence.

2. Additional Budgetary Implications

This may well require additional funding to achieve this. However, this cost is worth it to hear what your electorate has to say on the matter, and the advice they can offer. Considering the sums involved the additional costs are minimal.

3. Background

As a country, we have for more than two decades failed to plan and manage our telecommunications needs. This has been due to several factors, which are still relevant today. Our geographic location, our small remote population, lack of interested providers, lack of Government knowledge and therefore ambition for strategy and lack of understanding to influence the operator to provide the best service possible.

Each time the exclusive licence requires renewal we have the absurd situation where an operator being afforded the (until now free) privileges of an exclusive license, must be begged to provide a minimum needs service, through a method of their choice, for a long period of time. This situation should be totally reversed. Any business which has exclusive market position, for providing a fundamental utility, should never be in a position of making excessive profit and refusing to invest in our country or the actual service provided. It is shocking that the current offered improvements are an enhancement of the initial offer, how poor was that original offer.

From experience, I would assume that you are under pressure to move matters forward to the satisfaction of the licence holder, improvements will not continue, agreements will not be signed etc. Please do not give in to this pressure at the expense of listening, debating and properly consulting your electorate. The consultation undertaken by your consultants does not replace the requirement to consult on what you have achieved and what you intend to do next.

You have already heard that telecommunications, according to your approved plans and strategies, enforced by various surveys and opinions, are critical to our countries development and our populations standard of living. One must then ask why are you the Members of Legislative Assembly content to the extent that you agreed to put this draft Bill straight to gazette, your previous amendments were consulted on for 4 weeks.

This draft bill has many improvements from the 1988 Ordinance as amended. I would draw you attention to the key area with regard to making any new regime work. Regulation.

The last telecoms licence required a regulator, I could not fund or fill the post appropriately. My successor has had similar difficulties and in fact the establishment is no longer in the budget. This should concern you greatly. You have set establishments and the associated funding and failed, at the cost of the protection of the public's service and any real chance of maintaining a proper licencing regime. Recruiting for the regulator you envisage will be extremely hard, in a climate where the Falkland Islands struggles to recruit at all.

The powers were already in the amended 1988 Ordinance, parts 2A to 2G, 11A to 11I and 45 to 46H. They did not work. How do you have any confidence at all that this new bill and the regulator post system will work now? Nothing has changed.

Much is being made of the amount of content in this bill to prohibit self-provision. I should like to make clear to you that when I was regulator I progressed an amendment to the 1988 ordinance that dealt with this and many other matters, the then Executive Council (some of you are present) did not accept it and it was never completed. IF self-provision is such an issue, why has its use dropped to a less than half a dozen? Why has it had minimal impact on the public's provision and more importantly not one bit of difference to the increasing levels of profit enjoyed by the operator? What it does achieve is the only viable benchmark, you must consider this very carefully. If it is for a legal reason the Crown was intent to take self-providers to court many years ago under the current legislation, it did not and has not since.

4. Resource Implications

All resources available should be afforded to this vital infrastructure, it has to be right.

5. Legal Implications

The draft Bill can be amended to suite a revised position on the Licence and all other matters. The current legislation allows for the Government to issue a licence and regulate. Consideration should be given to creating a Regulatory Authority to remove it from FIG, enabling Aviation, Fisheries, Mineral and Telecommunications to be effectively regulated, funded by the licencing fees levied which should be commensurate to the regulatory effort required.

Select Committee on the Communication Bill

Evidence from Jason Lewis Technical director of JAYTEC Ltd

I would like to show my appreciation of the Select committee in allowing myself to present the following to this meeting. Below you will find a number of comment and remarks in reference to not just the communications bill but the Operating Licence for the provision of telecommunications for the Falklands. I make not apologise in doing this as I believe that elements of the communications bill are related and decision made in the licence might effect the Bill.

As this is a very wide subject and time is limited, several items that I have included in written form, I may choose not to verbally communicate, this is to avoid repetition on various parts.

Innovation

As a business I think it is very important to look forward an area that maybe government isn't necessary geared towards. When I look at the proposed licence I see stagnation and very little forward development, 4G, being the only glimmer of hope.

The world is moving forward and the Falklands will need to follow, the provision of the internet is a service and we should look at the business community as a whole to generate "content" to use this service, whether it's online media, business facilities, remote working(in Island) or home automation.

At present there are too many restrictions in place for this content to be developed. I would put forward the following proposals

- Free Local Internet – Without free local internet we are restricting what can be done locally by businesses. Yes there are issues but there could be solutions for them.
- Separation off Content and Services from the supplier – This will ensure that other businesses can provide content on the same terms and provide competition in online services such as webhosting and email services.
- Improved local speeds – To encourage more local content particular for media, an increased connection is required and technically possible.

Protection

When I'm looking at protection I'm looking for mechanisms that will protect the consumer both business and domestic. And though I feel there could be more protection for the standard users, the business users have little or no protection for unusual services.

My proposals are as follows

- Expand the function of the on-line broadband usage to give more information – This will allow users to examine and collate their usage from various locations including hotspots.
- Give the regulator access to all relevant information to assess complaints – The biggest complaint I hear is to do with usage and not believing what they are told from Sure.
- Give the regulator the power to investigate and arbitrate on business services offered by Sure to ensure that those services are fair.
- Allow Self provisioning of VSAT and other services without additional cost – This I feel is the easy way to regulate pricing and service levels from the monopoly. It has to be remembered that businesses don't necessary look at VSAT services to by-pass the monopoly but to provide redundancy to their mission critical network or to provide services not available from the monopoly.
- Ensure that there is continually investment in services throughout the licence including the notice period – At present as I understand it there is no mechanism to ensure that the licence holder carries on investing in the company to improve services and prices.

Openness

I'm not alone as a business person I will analyse situations and opportunities to evaluate their viability.

Unfortunately when we look at the monopoly the only figures as the public we see is the profit. With that information we naturally assume that the Islands are not getting value for money.

To resolve this I would suggest publishing the accounts of any company that provides at statute monopoly

Oral Evidence: Mr Roger Spink

In making my submission to the select committee I would re-iterate the statement made by the Chamber of Commerce to FIG in their 2015 position paper- *“That the licence be exclusive only to resale of telecoms services, thereby allowing businesses and individuals to self supply but not sell services. This will allow choice and testing of technology, and should impart an element of competition in that the licence holder should be able to install/provide the service cheaper than any business/individual. If a business needs a robust, reliable, balanced, and economical telecommunications system and cannot get that through the existing exclusive licence holder, why should their economic development be constrained by the deficiencies of the available licensed system? There can be no denying that the handful of VSAT installations in the Falklands outside of the control of C&W (now Sure SA) was the catalyst for investment and progress by the licence holder for the rest of the Falklands.”*

My belief that this freedom for self-provision should be incorporated into this bill when enacted is based on personal experience when we moved to Moody Brook and we were told only VHF internet services were available. On advising the General Manager of Cable and Wireless (C&W) at the time that if they failed to provide Broadband we would obtain our own satellite dish almost immediately lines were run by C & W so that we could enjoy the network supplied in the rest of Stanley. I have no doubt that without this ability to self-provide we would have been left with a substandard service for many years. Further I believe the threat of self-provision by other businesses and individuals has moderated the behaviour of the licensee.

I am not convinced a regulator would protect individual’s interests as can be seen from some local instances such as the appalling and potentially damaging dust some residents and their children at Mink Park have to put up with. Despite individual members of the Government working hard for the community having been informed of this issue The Falkland Islands Government as an organisation has failed to address or respond to this matter for a number of years. Given the lack of action on such an issue why should consumers have any faith that a regulator would protect their interests on telecoms?

The Bill excludes the British Antarctic Survey (BAS) from licence requirements. Whilst it is appreciated the sentiment behind this may be to encourage BAS to use the Falklands why should their requirements be favoured and discriminate over resident individuals, organisations such as SAERI and businesses who all contribute to the economic growth of the Falklands?

It is unclear to me what status the negotiations with Sure have reached or whether any commitments have been entered into by FIG but I would urge MLA’s before passing this legislation to review the representations received from all sectors of our community and given the importance of modern communications for our development and social interactions with the rest of the world revisit the deal that has been reached.

R K Spink
Moody Brook
Stanley
24/11/2016

Appendix 2

Written Evidence

Written Evidence: Deborah Davidson

Name: Deborah Davidson

I am writing this evidence in a purely personal capacity and not in relation to my employment within FIG.

I have lived in the Falkland Islands for 6.5 years, and recently got my PRP (May 2016). I will have stayed in the Islands for 7 years come May 2017, and would, ideally, like to apply for Status at that point.

I have recently started working for FIG within the Department of Mineral Resources, but prior to this, I worked for the South Atlantic Environmental Research Institute (SAERI) as a Marine Ecologist. I worked on many, varied projects during my time with SAERI, and within each of those projects and positions, internet access was truly vital.

1. As with all of my former colleagues, I had to conduct almost daily research by looking for papers/articles in online Journals, which are key to all forms of scientific research. With a limited data allowance, this becomes extremely difficult.
2. Communication was also crucial to several of the projects I was involved in, including various Consultancy pieces of work, such as Environmental Baseline Studies for oil-related activities. Skype is now the preferred option for communications between researchers/scientific institutes, etc., and conference calls are now standard. We certainly used this means of communicating with collaborators outside of the country for our various projects. However, the poor internet connection, and low speeds, which are suffered here, would very often render these important calls almost impossible. Obviously, when you are trying to coordinate (sometimes quite expensive) pieces of work, this is less than ideal.
3. Downloading large shared documents, for example from File Sharing websites, is also standard practice when working on collaborative pieces of work. This would usually take a very long period of time, given the aforementioned poor connection and speeds, etc. However, it was also hampered by the fact that downloading them could only really take place outside of standard working hours. This is further hindered by the fact that the internet speeds seem to dwindle even further beyond 17.00, when people return home and use the internet for personal use.
4. Finally, training is also paramount for the continuation- and development of the scientific work conducted within SAERI, and elsewhere. Nowadays, much training is done via distance learning. Our current internet provision does not

really allow for this, and certainly not even vaguely large volumes of online training. This is also true for online workshops and short courses. I know of several colleagues who were not able to partake in even small-scale training opportunities due to the constraint on internet access.

5. I have spoken about these issues in terms of my employment with SAERI, but I have no doubt that all of these hold true for many other FIG departments, and private sector companies.

Written Evidence: Emily Hancox

Name: Emily Hancox

I am writing this evidence in a purely personal capacity and not in relation to my employment within FIG.

I have FI Status, and was proud to be an FI sponsored student throughout college and university. I currently work for the FIG Department of Mineral Resources, and have been employed in other roles and sectors throughout the Falklands.

I am in strong agreement with the points made above by Deborah Davidson and would like to add a few additional comments.

1. In terms of online training, as well as online workshops, the world of Massive Open Online Courses (MOOCs) is expanding at a terrific rate, with the potential for learning experiences for all ages and within all sectors to be undertaken online. For many of these courses, there is no ability to undertake them at our current internet bandwidths, and with the requirements for several hours interactive connection per week, means huge expensive.
2. Whilst I do not understand all of the options available, I think there should be a delay in the decision on the Communications Bill and Operating License so that these options may be further reviewed with a greater level of input from the public as in the last week many options that seem very viable appear to have come to light.
3. The proposal for a review to begin in 2019 is unacceptable, and should be a constant rolling mechanism as with the rate of technology the Falklands will continue to lag behind.
4. There needs to be greater information regarding the regulation of the license, given the clear evidence of profiteering and lack of investment under the previous and current license to ensure that the Falklands and community get the best value for money rather.

Written Evidence: Mr David Lewis

From: happyhensnewhouse@gmail.com

To: Cherie Clifford

Subject: Communications Bill

Date: 22 November 2016 13:13:21

Dear Members,

After seeing the posts on facebook I must admit to being confused by it all. My main concern is whatever decision is made it takes into account everyone who lives on these Islands, from the people who can afford to self provide and those that cannot. I do believe Sure profit margin has been excessive to say the least.

You will have received a great deal of information from experts with regards the best way to move forward, with changing technology I do not envy you in your task to strike the correct balance.

Sure need to ensure the technology moves forward and does not stagnate, who knows what will be possible in the next few years. A robust agreement and the ability to police all aspects of the agreement is essential.

I trust you will endeavour to make the right decision, I know it wont be easy.

Yours Sincerely,
David Lewis

Written Evidence: Mr Stephen Luxton

To: Honourable Members

From:

Steph
en Luxton

Date: 22

Nov 2016

Ref: Submission to the Select Committee on the Communications Bill

1. This submission is made in a purely personal capacity and is not in my capacity as an employee of the Falkland Islands Government. I am a Falkland Islands status holder, ordinarily resident in the Falkland Islands, and currently residing outside Stanley.
2. My reason for submitting evidence is that I feel that there has been insufficient consultation with members of the general public or affected users, and insufficient ability to discuss the options open to FIG in ensuring the delivery of modern communications to the Falkland Islands. As a member of the public I feel that I have had insufficient time to consider the implications of all aspects of the Bill on me as an end user, and have insufficient understanding of the practical effect of the primary legislation without sight of the Regulations. The sole question and answer session dedicated to informing the public was curtailed to 1 hour for absolutely no clearly defined purpose, and clearly left people in the room with questions that they had not resolved.
3. The main points of this submission are contained in paras 4 to 9. Many of the concerns ultimately relate to the deferral of detailed provisions to Regulations which are not available for review. It is unclear whether Members have had sight of draft Regulations or whether they do not yet exist. While the extensive use of Regulations is to be expected, without sight of these Regulations it is not possible for a member of the public to determine the ultimate effect of provisions within the Bill. Many of the basic public concerns will ultimately only be quantified and confirmed or dismissed by not only the contents of the Regulations but also the way that the Regulations are implemented in final contracts, arrangements and service levels, by the manner in which the regulatory function is implemented, and by the effectiveness of that Regulator. There are a number of lesser points contained in para 10 onwards.
4. There is insufficient evidence available to the public at this time that proper consideration has been given to alternative contracting strategies which would

maximise reinvestment into the infrastructure and deliver the best service level and value to the end user. The final choice should deliver credible and continuing long-term improvements to telecoms in the Falkland Islands throughout the licence, including for any notice period. Alternative strategies for consideration might include:

- a. requiring local or Government ownership within the controlling legislation, or
 - b. providing for an alternative contract model requiring the provider to provide a service as specified by the Government from time to time for a specified profit margin, or
 - c. something else
5. There is insufficient evidence that the Bill provides sufficiently robust ability to control the apparently considerable profits made by the currently monopoly provider. These escalated profit levels are incompatible with the privileged position of a monopoly business and furthermore they would appear to increase into any notice period which cannot be reasonable. A business in a privileged position should be subject to extremely tight control on its activity and full disclosure of information to the regulator. It is arguable that since commercial confidentiality is largely redundant in a monopoly position, full disclosure of detailed accounts or at least key statistics should be made to the public, and that the requirement for this should be within the legislation.
6. There is insufficient evidence that the Bill provides the ability to exert leverage on the supplier to adopt and implement new technology to keep pace with worldwide technology and service developments in a timely manner throughout the course of the contract. It is known that there is a particular weakness in the current position which allows the provider to fail to invest throughout a period of contract notice, and it is not clear that this situation is remedied by the proposed Bill.
7. The Bill and related policy effectively provides an iron fist to destroy the self-provision of communications services. There is no evidence at all that self-provision of services that are unavailable from the current supplier at reasonable cost (e.g. uncapped broadband) has disadvantaged either the economies of scale for remaining customers, or had a measurable impact on the profits of the supplier. The likely outcome of allowing self-provision (which is not without its own risks to the end user) is that the vast majority of the population would continue to use some or all of the provided service. It is highly unlikely that self-provision would extend to services other than international internet

access, and highly unlikely that users would seek to self-provide telephone and local data services within the Falkland Islands.

8. The Bill gives far-reaching powers of enforcement that appear simple to administer, and potentially convoluted rights of appeal that are not precisely defined in the primary legislation (and as such cannot be understood at present) and may be difficult and/or expensive to pursue through legal process. Insufficient clarity appears to be available on the practical process to endorse it as a process which strikes a fair balance between the needs of the regulator and the rights of the end user.
9. There has been no visible consultation with existing directly affected user groups such as (i) amateur VHF radio users (e.g. 2 metre radio) and (ii) marine band VHF radio users, nor is it clear what aspects of such use will change, fall under different or new licensing arrangements, or may attract additional charges or restrictions. Numerous wide-ranging powers are provided for, without significant clarity as to whether – or how – they will be implemented.
10. Clause 27 would appear to prohibit transmission by (and therefore the use of) standard international satellite communications systems by a ship in port, which is illogical and appears to contradict clause 30.
11. Clause 110 appears to imply the exclusion of the possibility of intrusive surveillance against any premises other than residential premises. This appears to allow greater freedom to act against the person than against a business considered to be in breach of the law, which appears unjustifiable.
12. The Schedule imposes a very low licence fee for an exclusive licence, which is not commensurate with the level of profit that can be derived by the licensee. The licence fee should aim, as a minimum, to recover the cost of regulation.
13. The extraordinary licence fees proposed for users proposing self-provision are outrageously expensive, and the policy principle to discourage self-provision where it is allowed, by implementing punitive licensing fees, is unfair. The end user is required to pay a tariff to the Government as well as the fixed and operating costs of their own service. Such a fee, if any is levied, should be administrative only. It cannot be considered fair by any reasonable person to have an individual licence fee for a sole use licence which is more than fifty per cent of the value of the licence fee paid by the telecoms provider who has a monopoly over services in the whole of the Falkland Islands.

14. The preceding paragraphs highlight various concerns. The majority of the provisions in the draft Communications Bill are clearly necessary and long overdue for implementation. Current legislation is wholly inadequate to protect the interests of the Falkland Islands people. The key issue at stake to me as an end user is that the acceptability (or not) of the final outcome to the general public will largely revolve around its implementation and the practical effect upon the end user. That effect cannot be adequately defined without sight of the supporting Regulations.

15. I have no objection to this submission being published.

Stephen Luxton
22 Nov 2016

Written Evidence: Mr Drew Irvine

This is a written submission for consideration by the Select Committee on the Communications Bill and is being made by myself, Drew Irvine, of 9 McKay Close, Stanley, Falkland Islands, in my capacity as customer of the licence holder, and I would thank you in advance for the opportunity to present my case.

The Bill, the licence and the regulations are interconnected and it is not really possible to look at them in isolation. Some references may not therefore be specific to the Bill but are relevant and give context to the comments.

Executive Summary

1. Profitability of the Licence holder

- Profitability and returns being made are excessive for a monopoly provider.

2. Self-provision

- Making alternatives accessible is the best way to ensure that the customer gets the best deal as regulation is no substitute for competition.

3. Lack of accounting transparency

- The profitability, returns and investments made under the exclusive licence need to be transparent, reported on a timely basis and in the public domain.

4. Regulation

- Much faith is placed in the Regulator and Regulations despite the fact that this has failed in the past. Is this realistic and achievable?

1. Profitability of the Licence holder

Everyone in the Falklands will recognise that the country is remote and due to the small population things cost more here than they do elsewhere because of the lack of scale.

Telecoms are no different but where the supplier is afforded monopoly market access there must also be control over the performance, returns and profitability. The arrangement with the licence holder has failed over the last two decades as the level of performance, profits and returns made by the licence holder have been consistently excessive by any measure.

The risk of obsolescence, normally present in the telecoms sector, has been all but absent as there is no competitive market. This has allowed the licence holder to neglect investment by FIG's own admission, and customers cannot switch to a better alternative as no easy other option exists. A prime example is mobile data which has been virtually unusable. In a competitive market this would not have happened as

the provider would have been forced to upgrade to prevent customers from going elsewhere.

Given the guaranteed market exclusivity it is difficult to justify a return on capital greater than 10% but the publicly available Sure accounts show returns have been many times that and given the relative prosperity of the Territories covered by the Sure accounts it is likely that the profits are disproportionately higher in the Falklands than elsewhere.

Without knowing the detail it is difficult to see how the proposed broadband package increases will do anything to significantly reduce the margin of profit made and some argue that the drip feeding of the proposed increases will serve to maintain profitability rather than reduce it to more acceptable levels, which would more reasonably reflect the actual risk/reward position.

2. Self-provision

It is argued in the bill that the licence holder has collective purchasing power with which many will agree. It is also argued however that allowing individuals to self-supply would somehow undermine their position. These two statements contradict. If a licence holder with collective purchasing power cannot compete with an off the shelf self-provision solution then their returns are too high or there is something far wrong with what they are doing. Allowing self-supply, which most folk would never bother with given the hassle factor, allows an element of much needed competition and sets a level below which the operator would not allow itself to fall in terms of price, speed and download limits.

The licence provider has and will continue to lobby like mad for self-provision to be restricted or prohibited and that in itself should be telling as they will not want folks here to be able to benchmark them by accessing new technologies. It must be right that the onus of keeping up to date is on the licence holder, and if they fail to make sure that they are offering competitive services they should face the consequences in the market place as other Falkland island suppliers have to.

Much has been made of the few who have self-supplied by saying that they are somehow not contributing to the overhead. The facts would however suggest that this argument is spurious and indeed the reverse should apply in that the overhead of the licence holder spread amongst so many customers should reduce the unit cost way below the level at which self-provision would provide a practical and economic alternative. Indeed the idea of permitting self-provision is not to see its use increase but to force the licence holder to improve performance and make the supply more cost effective to ensure that they don't lose customers.

3. Lack of accounting transparency

The exclusive licence is a matter of "significant public interest" and as such it is important that there is sufficient financial information in the public domain to

ascertain how much profit and returns are being made by the licence holder in the Falkland Islands. As the licence holder has a monopoly which prevents competition there can be no argument that the information is commercially sensitive and its publication would somehow undermine the competitive position of the licence holder. The licence or bill should require the licence holder to include sufficient information in their annual accounts to enable the reader to ascertain how much is invested in FI and quantify the revenues and profits made in the Falkland Islands under the exclusive licence.

In practical terms the annual accounts should show as a minimum a split of all items required for public disclosure between the Falkland Islands and other geographical areas covered by the published accounts.

The information should be published on a timely basis, which is currently not the case. Although FI Company Law requires publication within 9 months of the year end the licence holder appears to have repeatedly flouted the requirements. Given the significant public interest I would suggest that the time limit for publication be reduced to a maximum of 6 months and that this be made a condition of the licence. This would make the reporting timescale the same as UK AIM listed companies under stock exchange rules, which are less stringent than full listing requirements, and should be easily complied with.

Given the public interest there is a question over whether the Licence holder should also be required to publish interim accounts but any accounts which are required to be published should be made available for download from the Sure website.

4. Regulation

Many including MLAs have commented on how poorly the licence holders have been regulated in the past. How then can there be any confidence that this will change in future?

Much faith is being placed in the Regulation regime this time but regulation is difficult as we can see in the UK and elsewhere. There were provisions which cover regulation in previous legislation but there was a lack of implementation and enforcement. How/why will it be any more effective this time?

If the UK with their labour pool have problems regulating markets with limited competition what chance does FIG have trying to recruit people of the right calibre to take on the role of Regulator?

Is the role of Regulator going to be properly funded? It does not seem likely for example that an effective Regulator could be recruited on a grade D salary.

Should the Regulator be part of FIG? The government has a vested interest through the receipt of tax revenues on company profits. It is also one of the biggest, if not the single biggest, customer which affords FIG a bespoke deal in terms of service

provision and costs, which is another conflict of interest. This suggests that the Regulator should, like the PAC, sit outside of and be independent from FIG and there are other precedents for this.

Is there really an effective mechanism to ensure investment and improvements takes place beyond 2019?

Is ensuring that the licence holder makes improvements enforceable?

Permitting self-provision would be a more effective and proven regulator of services than what is proposed.

Written Evidence: Falkland Islands Fishing Companies Association



Atlantic House, Stanley
Email: fifca@horizon.co.fk Tel: 22317

22nd November 2016

Dear Sir/Madam,

Written Submission by the Falkland Islands Fishing Companies Association in response to the proposed Telecommunications Bill (Paper Number 163/16)

I am writing on behalf of the Association who wish to express their views on the above.

Executive Summary:

- **Failure to follow own FIG procurement policy issued August 2016**
- **Concerns regarding the role of Regulator**
- **Operating Licence**
- **Part B of FIG Strategic Telecoms Review**
- **Price Cap Regime & Implementation for Regulated Telecommunications Services**
- **KPIs**
- **Strategic Telecommunications Review –Part A of Cartesian Report**
- **Communications Bill**

The Falkland Islands Fishing Companies Association (FIFCA) was created by law to represent all ITQ holders from the fishing industry. Our reason for submitting evidence are as a result of concerns that some issues are being overlooked and have not been adequately considered prior to the drafting of the legislation which might affect the industry.

FIG Procurement Policy:

1. We are concerned about the lack of following FIG guidelines on the procurement of services issued in August 2016. Whereby it states that procurement of services should be obtained for 'the best value for money', 'based on genuine and fair competition', 'withstand scrutiny by internal and external auditors and examiners', 'encourage an innovative market

response', 'deliver a solution that meets our requirement'. We would suggest this seems to have been disregarded.

The Role of the Regulator:

2. The role of the Regulator regarding the level of power and responsibility the position holds is of concern and referred to throughout this submission.

Operating Licence:

3. We are surprised to learn that the licence agreement has been prepared by the same people responsible for the Cartesian report and Telecommunications Review.
4. Under 1.2.3 we would be interested to learn under what possible circumstances the proposed operating licence might be modified.
5. We would question why the proposed licence is for 12 years when the suggestion from the Cartesian report suggested 10. What has prompted the change?
6. We noted the 2 years notice to terminate but we are concerned there appears to be no method for termination of the lease other than breach of terms. Could you please confirm that this is the case?
7. We note that 5.2 gives the proposed licensee entitlement to carry out any projects/construction etc. for operation, maintenance or improvements. This allows for the ability to compulsory purchase and should be subject to Planning and Building regulations.
8. We see that under 5.3 there is restriction on assignment of the Licence but this does not prevent any other Company buying the Licensee's Company.
9. Under Section 7 which acknowledges 'personal use' of equipment there is no mention of business use. In respect of the Industry this could be detrimental and stifling to business development. We would ask that this be reconsidered.
10. Under 9.4 the Licence notes possible breaches which should be remedied but does not offer any solution if the breaches cannot be resolved.
11. We are interested under Section 17 where UK practice would be followed unless no law applies whereby the code is voluntary. Could we ask when this might apply?
12. We are concerned that under Section 19 the Licensee is actively encouraged to report, enforce and assist the Regulator in preventing others from any breach of the Communications Ordinance. We question whether this is appropriate?

13. We note that under Section 20.4.2 referring to the publication of information is only by radio. We would suggest that it fails to acknowledge other forms of media to inform the public.
14. Under Section 26 – Quality of Service the section refers to providing a comparable service. Who is the service compared with?
15. Under 28.4 we would ask under what circumstances would there be a need to transfer data outside of the Islands. We would have concerns about data protection and privacy when an individual has not consented to this.
16. We would consider it is better and more sensible for the consumer that Codes of Practice under 30.3 should be established and formalised before the licence signed **not** three months afterwards
17. We note compliance under section 30.8 but what are the implications/enforcements if the Licensee fails to meet the targets?
18. Under Section 31.9.4 relating to Directory Enquiries or being part of the Directory we note the reasonable charge but would note that if this occurs there is no real choice for consumers.
19. We would suggest all amendments/changes under Section 37 should be communicated prior to the change not afterwards.

Part B of FIG Strategic Telecoms Review:

20. Under 2.2.4 the Review comments on the operations practice by Sure. It was noted that there had been no clear customer protection since the report in early 2015. This is another why any consumer codes ought to be in place prior to any licence being signed.
21. We would ask the same question as above from Section 2.4.2 on Key Licence Terms. Why when a suggestion of 10 years has been offered for any licence the proposal is now 12?

Price Cap Regime & Implementation for Regulated Telecommunications Services:

22. The document considers protecting customers with Sure receiving a 'reasonable rate of return' but we then note the proposed licence fee versus the amount of profit made by Sure which does not seem proportionate.
23. We would ask what will happen to the price control which is only in place for four years. There is no apparent information beyond that point.
24. We have concerns with the restriction on there being no competition for up to 12 years after the initial 4 years of any price cap and the lack of competitive accountability.
25. We would suggest under Section 40 that any review should be started **before** the end of the four year period not at its conclusion.
26. Under Section 42 we note that the future licence price should be **fair and affordable**. We would question whether that is the case when the proposed licence fee appears to be £10,000 total for the entire 12 years agreement.

27. We would be interested to know who is supposed to monitor and audit the service. And what would ultimately happen if the requirements are not met? We note it would take at least 2 years to terminate any agreement should it be necessary.
28. We have concerns under Section 66 that one person has the capability or credibility to interpret as necessary on matters which will always be open to interpretation.

KPIs

29. We have the same concerns as above with the enforcement of any action under the current circumstances.
30. We would consider that any performance measures should be comparative to other markets.

Strategic Telecommunications Review –Part A of Cartesian Report

31. We suggest that under Section 4.2 looking into Reviewing Market Conditions for potential competition has not been achieved.
32. We note that fixed telephony revenues have decreased but this does not appear to have had much effect on profits.
33. Under Section 2.2.3 it states that Sure's financials would be reviewed against a 'number of benchmarked operators'. We would ask who? And what was determined from the review?
34. In 2.2.4 paragraph 3 recommends that 'VSAT self-supply is not allowed at this stage'. We would reiterate our question above.
35. We are concerned that under 5.4.2 that the 'night time window' is not guaranteed after the licence is signed. We would ask why not?

Communications Bill

36. We strongly suggest under Section 1.1 (c) that a grade D is far too low for a position such as this. The role of Regulator needs to provide personal views and decisions which warrant a significantly higher level of salary. We would be interested to know the proposed recruitment strategy and time frame to secure the right person in this role. Further the Regulator would need to have a good working knowledge of current practice and be encouraged to keep up to date with technical advances. We would suggest, however, that considering all elements of the role, this will be too much for just one person.
37. We note there is currently no expiry date on the current Sure agreement under Section 3.4 so ask what the rush is to get a new licence in place?
38. We would ask under 3.6 who proposed Sure as the exclusive provider?
39. Under Section 3.7 it notes satellite phones would require licences as well as 'any new technology which receives or transmits data'. There is no mention of the **local** fishing industry or what the possible developments might be.
40. Further under Section 3.7 it states that the new law will take an 'overview of all' 'aspects of communication regulation'- this is from broadcasting, wireless

telegraphy etc. We would suggest that this gives the Bill too wide a remit which makes it unworkable.

41. Under Section 3.12 we note that this is not exactly correct if read together with the licence agreement. The licence agreement does provide for better management of personal data but Sure would be able to use information obtain and send it to third parties. We have some concerns about what might be sent to third parties and the possible implications for data protection.
42. Under 4.2 regarding VSAT we note previously there was the ability to 'outlaw use of VSAT' but nothing was done to enforce it. We would ask whether there has been any change which would now permit action. The challenges under human rights and welfare still exist.
43. Under Section 4.4 there is a mistaken belief that VSAT users do not use the proposed system. We would **strongly** suggest this is incorrect. We are aware that people using both and that having their own system holds Sure to account; and acts as a check and balance.
44. Although Section 4.6 mentions price caps, we would remind you that this is only for **4 years** of the proposed **12 year** agreement with the suggested provider. What is expected to happen during the other 8 years?
45. Under Section 4.7 we are concerned that the possibility of self-provision would be limited to private individuals only. This does not take into account any affect it might have on the fishing industry. Further this does not permit a choice by consumers to enhance their business the way they see might and places over reliance on the exclusive operator.
46. Under Section 4.11 listing the suggestions in the proposed bill it would appear at present that the industry would need licences across its operations. What would be the cost of this?
47. We would ask for more information regarding Section 4.18 and the reference made to the future regulation of fuel.
48. Under section 6 (c) (i) we believe there is over reliance on one person's opinion/decision. The position appears to be paid by FIG. Further throughout the documents there is too much expectation on one person to complete usual functions, keeping up to date with developments and continuous training etc. Plus on the other side acting as judge and jury in a position with a huge amount of autonomy and power. There is a right to enter property, compulsory acquisition of land, issue penalties and decide on licences on a case by case basis. We would suggest you are expecting far too much of one entity.
49. Please could we receive clarity under Part 4 –Electronic Communications as we note the fishing industry is not recognised as an exemption so we assume would require a licence. Is this the case?
50. Under Section 25 Private facilities are permitted to operate within their own gardens but not transmit to others locally. We would suggest this could damage the ability to conduct business with an over reliance and lack accountability to any exclusive provider.
51. We are concerned that under Section 27 (1) foreign vessels are exempt from licence but there is no mention of FI vessels. Could we ask for clarity on this please?

52. Under Section 30 it notes that the restrictions do not apply for anything occurring in territorial waters under international convention/law in maritime satellite communications. Could it be clarified what happens in internal waters? Is the assumption that under 27 (1) foreign vessels are exempt but locally registered vessels will be expected to obtain a licence?
53. We note that under Section 31 it is suggested that Wireless and Broadcasting Ordinance will be merged into the proposed telecommunications bill shortly. We suggest this makes the bill too far reaching. Further we would ask for a timeline on this.
54. Under Section 42 it states that licences will exist for not more than 20 years. Why has this been suggested?
55. We are concerned that the exclusive agreement appears to be for only £10,000 (total) whereas the profit recorded by the proposed licence holder was recorded at over five million last year.

In conclusion it is our opinion that the Regulator role is extremely wide and far reaching. Our concern is that one person or collective (*we note either is possible under the bill*) will be expensive and subject to un-defendable scrutiny. One entity should not have the decision on their personal interpretation of law, contracts and process. There is far too much autonomy and we are concerned that there are not enough checks and balances in place to prevent potential abuse.

Further we believe that this approach is over burdening and has failed to take into consideration the Industry and developments in communications. We do not believe the proposal will achieve a better system from the proposed provider because without the counter balance of self-provision they will be little accountability or improvement in the service.

We would suggest that in order to offer transparency the process of this service should be started from the beginning with a tender process. There should be better public consultation through the process in order to comprehend the requirements across the Community and the Industry.

Many thanks for the opportunity to state our concerns in this matter.
Please contact us if you require any further information,

Regards,

Executive Secretary, FIFCA.