APPENDIX A

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

REPORT OF THE COMMISSIONER
THE RT HON SIR GARY HICKINBOTTOM

VOLUME 1: REPORT

Presented to His Excellency John James Rankin CMG
The Governor of the Virgin Islands
4 April 2022

Published on the Authority of the Governor of the Virgin Islands

APPENDIX A

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BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Commissioner: The Rt Hon Sir Gary Hickinbottom

Secretary: Steven Chandler

BVI International Arbitration Centre
3rd Floor, Ritter House
Wickham's Cay II
Road Town, Tortola

Room RB 1.11
22 Whitehall
London SW1A 2EG

Tel: +1 (284) 340 9078
Email: steven.chandler@bvi.public-inquiry.uk

4 April 2022

His Excellency John James Rankin CMG
Governor of the Virgin Islands

Your Excellency

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Under section 2 of the Commissions of Inquiry Act 1880 (Chapter 237 of the Revised Laws of the Virgin Islands) and in an instrument dated 19 January 2021, your predecessor in the office of Governor, His Excellency Augustus Jaspert, appointed me as sole Commissioner in respect of a full, faithful and impartial inquiry into whether there was information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public, may have taken place in recent years; if there were such information, to consider the conditions which allowed such conduct to take place and whether they may still exist; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the Territory. On 22 January 2021, I attended before His Excellency and Senior Magistrate Tamia N Richards and took the oath. That same day, His Excellency and I attended and spoke at a press conference in Road Town, at which I formally opened the Inquiry.

On 29 January 2021, Your Excellency was sworn in as Governor in succession to Mr Jaspert.

Under the Instrument of Appointment, I was required to prepare and submit a written Report to the Governor within six months from the commencement of the Inquiry. For various reasons, to which I allude in my Report, it proved impossible to meet either that date or the extended date of 19 January 2022; and, by an Instrument dated 10 January 2022, you extended the period for submission of my Report to 19 April 2022.

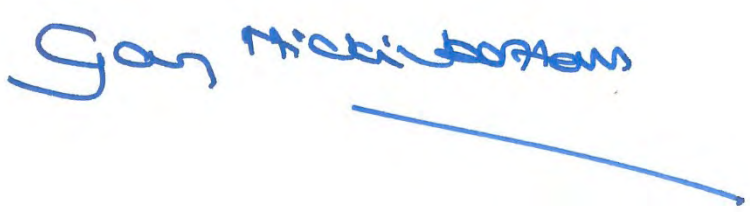
Elsewhere in this Report, I thank the members of the Commission of Inquiry team, supported by other public servants and technical expertise – who have given me invaluable support. It would be remiss of me not also to acknowledge the debt that I owe to public officers in the BVI who bore the burden of responding to my formal requests for documents and information, during times made more challenging by the COVID-19 pandemic; and to the many witnesses who gave their time, almost always with good grace and often to their own inconvenience. But, most of all, I thank the people of the Virgin Islands for their welcome, their kindness, their real interest and engagement with the COI and their support, for which I shall always be grateful. They continually strengthened my resolve to ensure that their best interests remained paramount as I conducted the Inquiry and prepared this Report.

As it is, I have completed my Report today, 4 April 2022, and now present it with its appendices and bundles of supporting documents and authorities for Your Excellency's consideration. As you are aware, throughout, I have made the Inquiry as open and transparent as possible, with hearings not only being held in public but also livestreamed with transcripts and documents being made available to the public whenever I have been able to do so. Whilst publication of the Report and its supporting documents is of course a matter for you, I sincerely hope that, after you have reviewed them but otherwise as soon as you are properly able, you will publish the Report and supporting documents in a form which gives the BVI public ready access.

As and when the Report is published, a record of the Inquiry will be lodged with the archives of the British Virgin Islands Government where it will be kept indefinitely. In the meantime, I am arranging for the Commission website (www.bvi.public-inquiry.uk) to be maintained at least until publication of the Report.

Finally, may I thank you and your predecessor for affording me the honour of serving the people of the British Virgin Islands by conducting this Inquiry.

I am, yours sincerely



The Rt Hon Sir Gary Hickinbottom
Commissioner

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APPENDIX A

EXECUTIVE SUMMARY

1. In my Terms of Reference, I was asked by the Governor to inquire into whether there is information that serious dishonesty in relation to public officials may have taken place in the BVI in recent years, and to make recommendations with a view to improving the standards of governance and operation of the agencies of law enforcement and justice. These are not, of course, discrete tasks – effective law enforcement and justice systems reinforce good governance and reduce the risk of dishonesty in government. Without good governance, there is at least an enhanced risk of such dishonesty occurring.

2. Over the last 12 months, I have gathered and analysed evidence relevant to those Terms of Reference. That has not been without its challenges. Some members of the public were reluctant to speak to me for fear of reprisal. The documents obtained from the BVI Government have frequently been disclosed in shambolic order, and often incomplete. In many areas of government at which I have looked, witnesses have struggled to explain what has gone on, which often proved different from both what the documents suggest had happened and what the law requires.

3. However, the evidence looked at as a whole paints a clear picture. With limited exceptions, in terms of governance (i.e. how government makes and implements decisions), the people of the BVI have been badly served in recent years. Very badly indeed.

4. Almost everywhere, the principles of good governance, such as openness, transparency and even the rule of law, are ignored. In many important areas of government – including the procurement of contracts, grants of assistance, appointments to statutory boards, the disposal of Crown Land and the grant of residence and belonger status – discretionary decisions are made by elected officials (usually, Ministers) on the basis of no criteria, or patently inadequate and/or unpublished criteria, or criteria which are as often as not simply ignored. They can and do make decisions – which expend huge sums of public money and affect the lives of all those who live in the BVI – as they wish, without applying any objective criteria, without giving any reasons and without fearing any comeback.

5. The relevant elected officials are well aware of this chronic lack of governance. The Auditor General and Director of the Internal Audit Department, whose job it is to audit government accounts and government projects, have consistently reported on these failures, indicated the dishonesty to which they might give rise and which they might obscure, and identified what needs to be done to prevent their reoccurrence. These auditors have been brave, forthright and clear in both their criticisms and their recommendations. But they have been consistently ignored.

6. Other constitutional pillars of governance, such as the Registrar of Interests, have been treated will similar disdain. Not only has there been a wholesale failure on the part of individual Members of the House of Assembly to make declarations of interests, there has also

been a quite deliberate refusal over the last two decades to set up any functional mechanism for the registration of such interests or enforcement of the obligation to make declarations as required by the Constitution and supporting BVI legislation.

7. Whilst the evidence suggests that they have worsened over time, these gross deficiencies in governance have afflicted almost all recent government Ministries, over different administrations. The BVI electorate, hoping for better from the next elected administration, have been consistently let down.

8. This raises the question: Why? Why has governance been allowed to languish in such a parlous state?

9. The Premier and current elected Ministers suggested that the main reason for these deficiencies was that the Public Service is not up to the task: it is under-qualified, under-trained, under-resourced and outdated as the result of neglect by successive Governors. They complain that the Public Service does not have the required policy making and policy implementation capacity which, they say, frustrates the ability of the elected Government to press forward with their policy agenda.

10. However, the evidence simply does not support such assertions. No doubt the Public Service – like many around the world – would benefit from more resources and a programme of reform better to deal with today's world; but, that notwithstanding, it is clear that the BVI Public Service has some eminently able, well-qualified and excellent personnel particularly at high level. I heard evidence from many of them. Whilst the Governor is responsible for the terms and conditions of public officers, insofar as the Public Service requires further resources (including more funding for pay), then the elected Government holds the purse strings. Insofar as the Public Service needs transformation, then the elected Government (in the form of the Cabinet) is responsible for any policy decision, as well as funding, required for such reform. Further policy developing capacity has always been in the elected Government's own hands. An example of how the elected Government can take steps to address any perceived deficiency in this regard is the recent decision of Cabinet to make provision for Ministerial Political Advisers. That was a decision that the elected Government could have taken at any time. So far as policy implementation is concerned, the elected Government has always been able to prioritise the Public Service for resources, but it has generally declined to do so in the face of encouragement by successive Governors to take steps to enable the Public Service to perform its functions better.

11. On the evidence, I cannot support the proposition that the gross failures of governance I have identified are due in any large part to failings in the Public Service or to any failings on the part of Governors to encourage and support change within the Service.

12. In the evidence received, I have been confronted by many courses of conduct by elected officials which have not been explained to anything like a satisfactory degree. How has it come to pass that, notwithstanding concerns for the public purse being raised explicitly many years ago, Members of the House of Assembly still enjoy a substantial allocation of public money to dispense in a manner which is for practical purposes unconstrained and unmonitored? Why have contracts on major projects been distributed in a manner which, to the knowledge of the elected public official driving them, results in added cost with no identifiable public benefit? Why has the need to maintain the autonomy of statutory boards been ignored? How is the value afforded to residency and belongership supported by the circumvention of the system which governs how they are granted? More generally, why in so many areas

of government do elected public officials prefer a system in which decisions are made using powers involving the exercise of unrestrained and unmonitored discretion, rather than a system that is open, transparent and guided by clearly expressed and published criteria? No sensible explanation has been put forward for these and other similar issues raised during the course of this inquiry.

13. The parlous failings in governance identified have not only been allowed by successive informed BVI Governments, but there is evidence that they have been positively endorsed and even encouraged. I have concluded that the elected BVI Government, in successive administrations (including the current administration), has deliberately sought to avoid good governance by not putting processes in place and, where such processes are in place, by by-passing or ignoring them as and when they wish – which is regrettably often.

14. That is all extremely troubling. Such a lack of accountability means that there is a void where governance procedures, checks and balances should be – procedures, checks and balances needed to prevent decision making being infected by factors other than the public interest, including dishonesty on the part of elected officials and/or those who might benefit from the decisions they make.

15. For the reasons set out in the Report, it was never intended that the COI itself would be involved in following money or conducting in depth investigations into particular projects or particular public officials. Those are tasks for the appropriate BVI authorities. But dishonesty in public office is not restricted to cash-in-hand bribery. An abuse of public office is a form of dishonesty that, in any particular circumstances, is highly likely to be serious. It is an abuse of office for a public official, when exercising a statutory power or duty, knowingly to take into account a private interest or any interest other than a legitimate strand of the public interest. Where, on the evidence, I am satisfied that that is a real possibility, then such conduct falls within paragraph 1 of my Terms of Reference, i.e. there is information that serious dishonesty in relation to officials may have taken place.

16. The evidence is such that it would be very difficult, if not impossible, for any impartial person to conclude anything other than that there is information that such dishonesty may have taken place in the BVI in recent years. On the evidence, I firmly conclude that there is not only information that serious dishonesty in relation to officials may have taken place here in recent years, but it is highly likely to have taken place. Whilst it is unnecessary for me to make any finding in relation to corruption in the form of direct personal bribery, given the overwhelming picture of the principles of good governance being ignored and worse, it would be frankly surprising if there were no such corruption. Further investigations by the appropriate authorities, which I have recommended, will identify who and when.

17. The elected Ministers say that they are tackling the deficiencies in governance which, to some extent, they accept. They are bringing forward a whole raft of measures that will result in improvement in decision making and implementation, and they submit that I can be confident that, within a short period of time, governance will be good, or at least better than it is now and adequate. That was on their election ticket, and (they say) they mean to see it through.

18. However, the evidence makes me extremely sceptical about such claims. There is a history of elected governments prevaricating over steps to make governance better and, in the meantime, ignoring the principles of good governance including existing measures adopting those principles. Whilst all steps taken towards putting in place a framework for better governance are to be welcomed, the circumstances in which the recent measures have been progressed (with the elected Government continuing to ignore the principles of good

governance in practice, despite their claims to the contrary and the evidence before this Commission of Inquiry), taken with historical antagonism, the people of the BVI can have no confidence that these measures will be pursued and implemented. In my view, on the evidence, it is highly unlikely that they will.

19. I have concluded that the conditions which have given rise to the current unhappy position with regard to governance and its consequences, as I have found them to be, still exist; and, unless steps are taken to prevent it, they will persist indefinitely.

20. Given the information before me, the waves in the sea of evidence would drive anyone with an independent and impartial approach to draw those conclusions. What is far more challenging – and, in my view, far more important – is what should be done now.

21. After the most careful consideration, I make four primary recommendations.

22. First, and with a particularly heavy heart, I have concluded that, unless the most urgent and drastic steps are taken, the current unhappy situation – with elected officials deliberately ignoring the tenets of good governance giving rise to an environment in which the risks of dishonesty in relation to public decision making and funding continue unabated – will go on indefinitely. In my view, that is wholly unacceptable. It is not simply that the people of the BVI deserve better – which they do – but the UK Government owes them an obligation not only to protect them from such abuses but to assist them to achieve their aspirations for self-government as a modern democratic state. I have concluded, with some considerable regret but ultimately very firmly, that for the current situation to continue will adversely affect those aspirations by delaying (or even entirely preventing) progress towards such self-government as a modern democratic state.

23. I have carefully considered lesser measures but, whilst I appreciate that the Governor and the UK Government will consider this only as a last resort – as do I – I have concluded that the only way in which the relevant issues can be addressed is for there to be a temporary suspension of those parts of the Constitution by which areas of government are assigned to elected representatives. The suspension should be as short as possible to enable principled elected government to be restored.

24. It is only with the most anxious consideration that I have been driven to the conclusion that such a suspension is not only warranted but essential, if the abuses which I have identified are to be tackled and brought to an end. These are abuses against the people of the BVI. If they are allowed to continue, then, in my view, they would put at severe risk steps towards self-determination as a modern democracy to which they are entitled and wish to take. Let there be no doubt – I have not recommended suspension of part of the Constitution to frustrate the hopes and wishes of the people of the BVI, but rather to enable them to fulfil those very aspirations. They deserve no less.

25. Such a suspension would mean that the Governor would temporarily take over executive powers that are currently exercised by the elected Ministers. I hope that he would take advantage of the huge pool of talent and wisdom in the BVI by establishing an Advisory Council and primarily relying on senior public officials in the BVI to advise and assist him. That is what I would urge.

26. Second – and again looking to the future – I have concluded that a Constitutional Review is also essential, with the aim of ensuring that mechanisms are put in place so that abuses which I have identified cannot continue or be repeated; and, more constructively, to ensure that the needs and aspirations of the people of the BVI (including their aspiration for self-government) are met. The last such Review was held in 2006, and led to the 2007 Constitution. The COI has demonstrated that that Constitution cannot take the weight it has to bear. The Review must be focused, open, inclusive and expedited.

27. Such a Review has, of course been in the wind for some time. Nearly two years ago, the Premier announced that a Constitutional Review Commission was to be established, to report within six months. However, no appointments were made until 31 December 2021, the detailed terms of reference have not been published, and the time for the Commission to report has been extended to an initial period of two years, i.e. by January 2024. It is not for me to make detailed suggestions as to how the Review should be conducted but, having considered all that I have received in evidence, it is in my view essential that the members of the Review team are drawn from a wide constituency and that its terms of reference are sufficiently focused and forward-looking to ensure that any new Constitution is robust enough to mend the abuses I have identified and ensure they do not recur, and allow the interests of the people of the BVI (including their aspirations for self-government) to be met – and met within a time frame that is as short as reasonably practicable.

28. Third, one of the root causes of the difficulties I have identified is the fact that many government decisions are made, not openly and transparently on the basis of objective criteria, but using an open-ended power involving unfettered and unmonitored discretion. I have recommended that there should be a review of such powers, with a view to curtailment and replacing them with decisions made in accordance with the principles of good governance.

29. Fourth and finally, whilst I regard the future more important than the past, I have concluded that a proper, independent and impartial audit should be undertaken in relation to several areas of government decision making and expenditure into which I have enquired. That is vital because, not only do those who live in the BVI have the right to know, but also further steps (such as criminal prosecutions and the recovery of public moneys wrongly expended) will be crucially informed by such investigations. In the meantime, where such steps can be considered by the relevant BVI authorities now, without the need for any further audit, I have said so.

30. In addition, I make recommendations in respect of particular areas of government including specific projects, schemes and programmes. These 45 recommendations are all by way of particular requirements, as I see them, within the framework of the four primary recommendations to which I have referred.

31. This COI was established for the welfare of the people of the BVI. I have conducted the Inquiry, and made the recommendations I have made, on the basis that their best interests are paramount. I have no doubt that they not only can but will achieve their aspirations, and thrive and prosper in the future. However, in my firm view, for them to do so, the political culture must change; and it will only change if action is taken, urgently and decisively, now.

32. I encourage His Excellency the Governor to implement my recommendations in full.

APPENDIX A

SUMMARY OF RECOMMENDATIONS

In the course of my Report, I make a number of recommendations, which are set out below. There are four primary recommendations (prefixed with "A"), all taken from Chapter 14; and 45 further recommendations (prefixed by the letter "B"), deriving from particular areas of government and taken from various specific chapters of the Report as identified.

Recommendation A1: Temporary Partial Suspension of the Constitution

I recommend partial suspension of the Constitution, by the dissolution of the House of Assembly, the cessation of ministerial government and necessary consequential suspension of provisions of the Constitution, for an initial period of two years. During that period, I recommend direct rule by the Governor with such assistance as he considers appropriate, e.g. an Advisory Council to advise him on the formulation of policy and exercise of his functions. That Council should reflect BVI civic society. In the period of the temporary constitutional arrangement, I also recommend and urge the Governor to draw primarily upon the pool of Public Service talent in the BVI to advise and aid him. In that period, the Governor should have all necessary executive powers, including the power to make any public appointments.

I recommend that there should be a return to ministerial government and an elected House of Assembly as soon as practicable; and the Governor should regularly, and at least every six months, take advice from any Advisory Council and/or from whom otherwise he considers appropriate as to the earliest practicable date on which such government can resume. The Governor shall publish a report on that issue at least once every six months.

Recommendation A2: Constitutional Review

I recommend that there be an early and speedy review of the Constitution, with the purpose of ensuring that abuses of the type I have identified do not recur, and establishing a Constitution that will enable the people of the BVI to meet their aspirations, including those in respect of self-government within the context of modern democracy. That will require a Constitution that is sufficiently robust to ensure adherence to the principles of good governance within government, but which also enables the progressive development of the BVI's own political institutions.

The Constitutional Review I propose must be broad. Without restricting its ambit in any way, in my view it will need to address the following issues (amongst others):

(i) how the executive ministerial government can be held to account in the House of Assembly (e.g. by some different structure, number and/or configuration of seats) and/or in other ways;

(ii) whether the current constitutional pillars of governance are sufficient, and in any event how those independent institutions can be effective;

(iii) the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers respectively, when they arise, are to be resolved;

(iv) a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required;

(v) whether there should be a regime in relation to election expenses in the form of (e.g.) a requirement on election candidates to submit a breakdown of expenses including donations above a specific sum and/or a cap on such expenses;

(vi) whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission; and

(vii) whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties.

The Constitutional Review I propose should begin its work promptly, and conclude its work within a year or, if the Governor is persuaded to extend that time, in 18 months. As a return to elected Government will be difficult without constitutional reform, I regard the time for this Review to be concluded to be of the essence.

The Constitutional Review I propose should be established by the Governor. I am aware that a Constitutional Review Commission has recently been set up by the elected government. Its membership has recently been announced but, so far as I am aware, its terms of reference have not yet been determined. It has an initial period of two years to report. Whilst the extant Commission may be a basis for proceeding with the Constitutional Review I propose, whether its membership, terms of reference and timetable remain appropriate are matters that now need reconsideration.

Recommendation A3: Curtailment of Open-Ended Discretion

I recommend that there be a review of discretionary powers held by elected public officials (including Cabinet), with a view to removing the powers where they are unnecessary; or, where they are considered necessary, ensuring that they are exercised in accordance with clearly expressed and published guidelines. This review could be conducted by a senior BVI lawyer, or retired BVI/Eastern Caribbean judge.

Recommendation A4: Audits and Investigations

I recommend that the Auditor General, together with other independent persons or bodies instructed by her to assist, as soon as possible, initiate a review of all areas of government (including, but not restricted to those identified in this Report) and prepare a timetable for the audit of appropriate areas and report to the Governor accordingly. The Governor should ensure that sufficient resources are available to her to undertake the audits as they arise under that timetable. The review will require the prioritisation, and possibly even the selection, of matters for audit. The Auditor General will be in the best position to make decisions as to such priorities and selections; but she may, for example, wish to prioritise areas which, in her view, may be more likely to give rise, in due course, to further steps (e.g. in relation to criminal investigation and/or steps to recover public money). The Auditor General should report to the Governor with the results of that review as soon as possible, and in any event within, say, two months.

I recommend that the Auditor General (assisted by other independent individuals as the Governor thinks fit) thereafter proceeds to perform the audits in accordance with that timetable, as agreed with the Governor. The Governor should ensure that sufficient resources are available to the Auditor General to enable her to perform these audits expeditiously. Once complete, the reports should as soon as practicable be published on the Auditor General's website, unless the Governor directs that publication should not be made (e.g. in the public interest).

I recommend that the Governor establishes one or more independent unit(s) to conduct investigations into projects and/or individuals as identified by the unit(s), taking into account the information in this Report, the audits that have been and will be conducted by the Auditor General and Internal Audit Department and, of course, information and intelligence that the unit(s) themselves gather. The unit(s) should also be responsible for taking steps to secure money, land or other assets pending criminal and/or civil confiscation and/or recovery proceedings, if appropriate. They should also be responsible for civil recovery. The Governor should ensure that sufficient resources are available to the unit(s) to enable them to perform their functions; and to the DPP's Office (and any other enforcement office) in relation to subsequent steps taken in respect of criminal proceedings and steps to recover public money.

Recommendations from Chapter 3 (Commission of Inquiry Methodology and Process)

Recommendation B1

I recommend that there should be a review of the Commissions of Inquiry Act 1880 in the light of this COI and the processes it has adopted as well as modern practices adopted in other Common Law jurisdictions, with a remit to make recommendations designed to improve the conduct of Commissions of Inquiry in the BVI.

Recommendations from Chapter 4 (Elected Public Officials' Interests)

Recommendation B2

I recommend that a system of registration of interests is established, that implements the requirements of the Constitution insofar as it requires the declaration and registration of interests by elected officials, gives clear guidance as to what must be disclosed and when, and has effective provisions (involving sanctions where appropriate) to require compliance. Subject only to any restrictions that are truly necessary, the register should be open to public access.

Recommendation B3

I recommend that, before the introduction of a registration of interests system designed to cover all persons in public life, a properly formulated and costed plan should be produced for the implementation of such a system, and a commitment made to ensure that it is, and will continue to be, funded and resourced so that the system is efficient and effective.

Recommendation B4

I recommend that, once the registration of interests system for Members of the House of Assembly has been established, evaluated and its extension costed, then consideration should be given to its extension to other public officials on an incremental basis. For example, the first tranche of public officers to be covered could be the most senior officers such as the Permanent Secretaries, the Financial Secretary and the Cabinet Secretary (or those acting in such roles); the second tranche could be members of statutory boards; and so on, until all public officers intended to be included are covered.

Recommendation B5

I recommend that sections 66 and 67 of the Constitution are amended to make clear the circumstances in which a person seeking election to the House of Assembly or a Member of the House who (either personally or through a dba, a partnership or company with which he or she is associated) contracts with the BVI Government needs to declare such an interest, how such a declaration should be made and the consequences of him or her not doing so.

Recommendation B6

I recommend that sections 66 and 67 of the Constitution are amended to make clear whether, having regard to the purpose of these provisions, the term "Government of the Virgin Islands" is intended to encompass statutory bodies whether engaged in commercial or non-commercial activity. It is my view that they should include such statutory bodies.

Recommendations from Chapter 5 (Assistance Grants)

Recommendation B7

I recommend that there should be a wholesale review of the BVI welfare benefits and grants system, including House of Assembly Members' Assistance Grants and Government Ministries' Assistance Grants. Without seeking to limit the ambit of that review, it should seek to move towards an open, transparent and single (or, at least, coherent) system of benefits, based on clearly expressed and published criteria without unnecessary discretionary powers. Such discretionary powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. The review should be conducted by a body established for the purpose, drawing upon the experience and expertise within the BVI, with expert input with regard to (e.g.) the design of any new scheme. Whilst this review is a longer-term project and may be evolutionary in its process, it should be conducted as soon as practical. It need not and should not, for example, await the outcome of other proposed reviews (such as the proposed Constitutional Review).

Recommendation B8

I recommend that, without prejudice to any new scheme that may take its place following the review I have proposed, House of Assembly Members' Assistance Grants and the Government Ministries' Assistance Grants in their current form should cease forthwith.

Recommendation B9

I recommend that the funds that have been allocated to such grants in the past be reallocated to the Social Development Department for distribution, on application, in accordance with its criteria for the distribution of benefits. Those criteria can be reconsidered in the light of the increase in both funds and calls on its funds which that transfer will involve. Over and above any transitional provisions considered appropriate, the Social Development Department should be able to make an assessment of individuals who claim that immediately revoking discretionary assistance granted to them in the past by elected officials would result in particular hardship and/or unfairness.

Recommendation B10

If and insofar as the review I have recommended concludes that there is some public benefit to having public funds allocated to local, district projects then I recommend that consideration be given to (i) having clearly expressed and published criteria by which such potential projects are assessed for public assistance; (ii) an open and transparent process for the proper recording, assessment and monitoring of projects; and (iii) assessment and monitoring being made, not by (or just by) elected public officials, but by a panel including members of the relevant district community. However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced by the change of system to one that is more open and transparent. Transitional provisions may be required. Funds that have been allocated to such grants can be reallocated for distribution through such transitional provisions, before any new, more permanent system is established.

Recommendation B11

I would expect the proposed review to conclude that there is some public benefit to having public funds allocated to grants for educational scholarships etc. If and insofar as it does, then I recommend that consideration be given to (i) having clearly expressed and published criteria by which applications for such grants are assessed for public assistance; (ii) an open and transparent process for the proper recording, assessment and monitoring of applications and grants; and (iii) assessment and monitoring being made, not by (or just by) elected public officials, but by a panel including members of civic society. However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced in (e.g.) their education by the change of system to one that is more open and transparent. Transitional provisions may be required. Funds that have been allocated to such grants can be reallocated for distribution through such transitional provisions, before any new, more permanent system is established.

Recommendation B12

With regard to past grants, I recommend that there should be a full audit of all grants made by Members of the House of Assembly (including COVID-19 Grants: House of Assembly Members' Grants) and/or Government Ministries/Ministers for the last three years, including applications which have not been granted, such audit to be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit presented to the Governor. Whilst I appreciate the difficulties of such an audit in circumstances in which there is a dearth of documentation, an independent audit enquiry should enable any further appropriate steps, such as a criminal investigation and the recovery of public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) to be taken. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps, including any criminal investigation etc, can await the outcome of that audit.

Recommendation B13

I recommend that, as soon as practical, a full audit of all four COVID-19 Assistance Programmes (i.e. the Transportation Programme, the MSME Programme, the Farmer and Fisherfolk Programme and the Daycares, Schools and Religious Organisations Programme) be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. There should be a specific requirement for public officials to cooperate with that audit, including by producing documents and providing information promptly when requested by the audit team. The Auditor General is best placed to identify the terms and scope of the exercise. Without seeking to limit the ambit of that review, I recommend that, in respect of each programme, the terms of that exercise should include consideration of (i) the authorised programme criteria; (ii) the steps (a) required and (b) taken to ensure the principles of good governance were met; (iii) the extent to which grants were made to those who did not satisfy the authorised programme criteria; (iv) where bands of grant were used, the extent to which (and why) bands were adopted without regard to the amount allocated by Cabinet to the programme and/or need; and (v) where there have been any proposals for back-end accounting, the extent to which the system of back-end accounting has been put into effect, and the extent to which it has proved effective in recovering money inappropriately allocated. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps, including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) can await the outcome of that audit.

Recommendation B14

I recommend that the appropriate BVI authorities consider whether a criminal investigation should be held into the conduct of the Premier's Office in obstructing the Director of the Internal Audit Department in respect of her audit of the COVID-19 Assistance Programmes.

Recommendation B15

I recommend that consideration should be given by the Governor as to whether an investigation, to be conducted by an independent person or persons, should be held into the conduct of the Premier's Office in obstructing the Auditor General in respect of her audit of the COVID-19 Assistance Programmes.

Recommendation B16

I recommend that consideration be given to amending the Audit Act 2003 so as to make a failure on the part of any person to cooperate with or otherwise impede the Auditor General, without legitimate excuse, a criminal offence.

Recommendation B17

I recommend that, notwithstanding the availability of any potential criminal sanctions for obstructing the Director of the Internal Audit Department and the Auditor General, a failure by a public officer or any employee of a statutory board to cooperate with either auditor, without reasonable excuse, should be treated as gross misconduct.

Recommendations from Chapter 6 (Contracts)

Recommendation B18

I recommend all contracts in respect of major projects (i.e. projects valued at over $100,000, even if they have been the subject of contract splitting or sequential contracts) considered by Cabinet (or, if not considered by Cabinet, considered and approved by a Minister) over the last three years should be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit presented to the Governor. The terms of that exercise should include consideration of (i) whether there has been any manipulation of a project to avoid the open tender requirements (e.g. contract splitting, or the use of sequential or otherwise associated contracts for the same substantive project), (ii) any waiver of the open tender process, including the adequacy of any reasons therefor, (iii) the means by which and by whom the contractor(s) were selected, (iv) whether the project was completed and, if not, the estimated costs and likelihood of completion and (v) value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps towards the recovery of public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) can await the outcome of that audit.

Recommendation B19

I recommend that (i) all government contracts other than major contracts should contain a provision that there are no associated contracts which together would trigger the open tender process for major contracts, and (ii) all Cabinet Memoranda which propose a tender waiver should be provided to the Director of the Internal Audit Department in advance so that she can make observations to Cabinet as to the appropriateness of a waiver and also instigate any audit of the project that she considers fit.

Recommendation B20

In respect of (i) the Sea Cow Bay Harbour Development Project and (ii) the Virgin Islands Neighbourhood Partnership Project, I recommend that each matter be referred to the appropriate authorities for consideration of whether a criminal investigation and/or investigations in relation to the recovery of the public money expended should be made, having regard to (i) all the available evidence including the Auditor General's Report on the project and the information provided to the Commission of Inquiry, and (ii) the dual evidential and public interest tests.

Recommendation B21

In respect of (i) the Elmore Stoutt High School Perimeter Wall Project and (ii) the BVI Airways Project, I recommend that the current criminal investigations (in which there are public officials as persons of interest) are allowed to run their course.

Recommendation B22

In respect of the government contracts with Claude Skelton Cline since 2019, I recommend that, as soon as practical, a full audit of these contracts be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the evidenced work done by Mr Skelton Cline under these contracts, (ii) the contractual obligations of Mr Skelton Cline under these contracts, and any mismatch between those obligations and the work done, (iii) to the extent that he was not performing his contractual obligations, the circumstances in which Mr Skelton Cline was paid out of the public purse, and (iv) whether the contracts provided value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

Recommendation B23

In respect of the government contracts with EZ Shipping concerning the provision of radar barges since 2019, I recommend that, as soon as practical, a full audit of these contracts be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the circumstances in which the services of EZ Shipping came to be retained by the BVI Government, (ii) the extent to which there was compliance with the procurement regime for major contracts, and the justification for any departure, (iii) why the services were provided prior to the approval of the Joint Task Force, the National Security Council, the Cabinet and/or the Governor, (iv) the policy objectives of the contracts, and the efficacy of the contracts in fulfilling those objectives as revealed by the data, and (v) value for money. Although this will be a matter for the National Security Council, in my view, consideration of national security should not affect the access accorded to the Auditor General in performing this audit (although it may affect her ability to publish her report in unredacted form). Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

Recommendations from Chapter 7 (Statutory Boards)

Recommendation B24

I recommend that there be a review of all statutory boards to establish (i) the extent to which those boards are behind in their obligations to submit timely financial reports and audits; (ii) the extent to which those boards are applying policies intended to promote good governance such as a conflict of interest policy and a political interference policy; and (iii) the extent to which those boards follow a due diligence policy. The review should be undertaken by a senior public officer and should identify what steps need to be taken to remedy any deficiencies and a timescale in which these steps should be accomplished, in the form of a report to the Governor. The review should be completed within six months.

Recommendation B25

I recommend that there be a review of the provisions under which statutory boards are established and maintained; and in particular, in respect of each, any powers that are exercised in respect of such boards by the executive government, with a view to identifying appropriate powers in statutory provision. This review could be performed by a senior BVI attorney, or a retired BVI/Eastern Caribbean judge.

Recommendation B26

I recommend that there should be an overriding statute that sets out the framework for all statutory boards. The results of the review I propose would feed into such a statute. More detailed parts of the framework can be dealt with in regulations and protocols made under the proposed Act. The regulations should provide for the appointment and removal of statutory board members, published and applicable to all such boards.

Recommendation B27

As part of the proposed Constitutional Review, I recommend that consideration is given to establishing a Statutory Boards Commission, which would be responsible for the process of selection and revocation of statutory board membership, and monitoring the internal policies and procedures put in place by statutory boards (such as declarations of interests and conflicts of interest, at least pending overarching provisions in, e.g., the Integrity in Public Life Act 2021 and new Registration of Interests legislation) intended to strengthen good governance. Whilst this Commission could have representatives appointed by (e.g.) the Governor, Premier and Leader of the Opposition, I recommend that it has a majority of members appointed from BVI civic society. Those appointments should, of course, be the subject of an open and transparent process.

Recommendation B28

I recommend that, pending such overarching provisions and as soon as practical, there should be a protocol for the appointment and removal of statutory board members, published and applicable to all such boards, which should be identified in the protocol itself. The protocol should be based on the principles of good governance, so that appointments and revocations of appointments are based on clearly expressed and published criteria. It should, therefore, include provision (e.g.) for advertisement of posts, appropriate application forms, appropriate checks, interviews before a panel including independent members, restricted circumstances in which the executive cannot proceed with the panel's recommendation, and the rights to an independent appeal in appropriate cases. It should not be necessary for it to include any residual ministerial discretionary powers. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. The Protocol should have, as a default, rolling periods of appointment, so that retirements are also on a rolling basis (even if reappointments are allowed).

Recommendation B29

I recommend that consideration is given by the Governor (and any independent investigator he might appoint to consider this matter) as to whether it is necessary for any appointments to statutory boards made since 2019 to be revoked to enable appointments through a more open and transparent system to be made.

Recommendations from Chapter 8 (Disposals of Crown Land)

Recommendation B30

I recommend that there should be a wholesale review of processes for the disposal of Crown Land, to ensure that such disposals are the subject of an open and transparent process. This review could (and, in my view, should) be led by a senior public officer. Without restricting the ambit of any such review, it seems to me that that review should include consideration of (i) an independent body or independent bodies being established to consider applications for Crown Land disposals for domestic and/or commercial use; (ii) the degree and nature of the involvement of members of local community in an advisory capacity; (iii) criteria for the disposal of Crown Land for domestic and commercial use (including whether applications for domestic and/or commercial Crown Land by non-belongers ought to be entertained and, if so, the criteria for such grants), which should be both published and applied; and (iv) whether there should be any executive discretionary powers in relation to Crown Land disposals. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance.

Recommendation B31

I recommend all disposals of Crown Land, whether outright, by lease or otherwise, over the last three years be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of the following (i) the extent to which a body independent of the executive (such as an Estate Land Committee) was involved in the selection process and, if so, the nature and extent of that role; (ii) any criteria applied in consideration of the application and by whom; and (iii) whether the executive exercised any discretion in relation to the selection process and, if so, how it was exercised and whether any guidance or criteria were applied. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

Recommendation B32

In respect of the disposal of Parcel 310 of Block 2938B, Road Town Registration Section, I recommend that the matter be referred to the appropriate authorities for consideration of whether a criminal investigation and/or investigations in relation to the recovery of the public money expended should be made having regard to (i) all the available evidence including the information provided to the COI; and (ii) the dual evidential and public interest tests.

Recommendations from Chapter 10 (Residence and Belonger Status)

Recommendation B33

I recommend that there should be a review of processes for the grant of residency and belongership status, and in particular the open discretion currently held by Cabinet to make grants. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. This review could (and, in my view, should) be led by a senior public officer. As part of that review, the position with regard to the length of residence required for belongership applications based on tenure should be clarified and confirmed by statute.

Recommendation B34

I recommend that all applications for and grants of residency and belongership status under the Fast Track scheme be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of the following (i) the extent to which the statutory criteria were applied to the application, and by whom, (ii) whether the executive exercised any discretion in relation to the selection process and, if so, how it was exercised and whether any guidance or criteria were applied, and (iii) whether, in terms of governance, there were any inherent weaknesses in the Fast Track scheme. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps including any criminal investigation can await the outcome of that audit.

Recommendations from Chapter 11 (Public Service)

Recommendation B35

I recommend that the Public Service Transformation Programme is led by the Deputy Governor, unless the Governor is satisfied that a joint lead by the Deputy Governor and the Permanent Secretary Premier's Office (or the Permanent Secretary of another Ministry) is more likely to result in a quicker or otherwise better finalisation and implementation of the programme. The implementation should be driven forward energetically, and without delay.

Recommendation B36

I recommend that the Public Service Management Code is finalised and put in place as soon as practical, with a view to it being incorporated into a Public Service Management Act at some early stage.

Recommendation B37

I recommend that the Department of Human Resources coordinates the expenditure on the training of public officers.

Recommendations from Chapter 12 (Law Enforcement and Justice)

Recommendation B38

I recommend that there is a review of the law enforcement and justice systems, to include not only the front-line agencies (such as the Royal Virgin Islands Police Force, the Financial Investigation Agency, HM Customs and the Immigration Department, insofar as the last two mentioned are involved in the law enforcement system), but also the Prison Service and the Office of the Director of Public Prosecutions. Consideration should be given as to whether it should also cover the whole or parts of the Attorney General's Chambers and/or the courts. I recommend that this review forms an element of the Constitutional Review I have proposed. The scope of the review will need careful consideration but it should in my view include a review of (i) structure (including whether the front-line law enforcement agencies should have a lead agency and what should that be, and under which arm(s) of government should law enforcement lie; and, particularly, where responsibility for border control should lie), (ii) resources and funding, (iii) conduct and standards, and (iv) terms and conditions. The review need not be a single project – strands will need to be identified and prioritised – and it can draw on the work of reviews currently in progress in relation to the Royal Virgin Islands Police Force and the Prison Service.

Recommendation B39

I recommend that all serving HM Customs and Immigration Department Officers at all levels of seniority be subject to full vetting by an independent agency. Without limiting the ambit of that exercise, it should involve determining if there has been a failure to disclose (i) relevant information before or when first appointed and which may have led to the officer being deemed unsuitable; and (ii) relevant information thereafter including the existence of a second job or a conflict of interest which could reasonably be seen to compromise the individual officer's ability to fulfil his or her role now and in the future. In the event that a similar exercise is not being undertaken in relation to the Royal Virgin Islands Police Force and the Prison Service, then their officers should be included in this process.

Recommendation B40

I recommend that officers appointed by the Commissioner of Police investigate possible corruption within HM Customs.

Recommendation B41

I recommend that consideration is given to ensuring that the Royal Virgin Islands Police Force and (as necessary) other enforcement agencies have the facilities and powers to prevent, monitor and detect crime, and prepare matters for prosecution, including by way of access to and use of modern scientific techniques and intelligence material. This can be done through a panel comprising representatives of (e.g.) the Attorney General, the Director of Public Prosecutions, the Police Commissioner, HM Customs Commissioner and the Immigration Department, with external expertise being brought in as and when required. The panel should prepare a report, setting out recommendations as to what is required, to be presented to the Governor.

Recommendation B42

I recommend that Criminal Procedure Rules are revised, to give the criminal courts modern case management powers.

Recommendation B43

I recommend that consideration is given to revising the Jury Act in two respects. First, consideration should be given to increasing the size of the pool of jurors by (e.g) changing the criteria to enable those who are long-term residents to sit on juries. Second, consideration should be urgently given to granting the court wider powers to hear judge-only criminal trials.

Recommendation B44

I recommend that consideration is given to building upon the current initiatives for revising, consolidating and publishing in readily accessible form the laws of the BVI, including early consideration for prioritising elements of this project and producing a work programme for it.

Recommendations from Chapter 13 (Governance and Serious Dishonesty in Public Office)

Recommendation B45

I recommend that the Complaints Commissioner be required to report annually to the Governor, Deputy Governor and the House of Assembly/Standing Finance Committee of the House of Assembly, setting out the extent to which there has been a response to her criticisms and recommendations. That would give the House/Committee an opportunity to scrutinise the report and raise questions about it as part of the budget process.

CHAPTER 1:
BACKGROUND

APPENDIX A

BACKGROUND

In this opening chapter, I set out a brief history of the BVI before introducing key aspects of the current constitutional arrangements, the economy and the management of public finances. It is not intended to be comprehensive, but rather to assist by giving context to the substantive issues considered later in the Report.

History[1]

1.1 The Virgin Islands have a rich history of which those who live in the islands are rightly proud.

1.2 The Virgin Islands lie to the east of Puerto Rico at the western end of the Leeward Islands. They comprise former Spanish possessions (notably Vieques and Culebra which, with Puerto Rico, were ceded to the United States of America ("the US") in 1898, following the Spanish American War); former Danish possessions (notably St John, St Thomas and St Croix which were purchased by the US from Denmark in 1917 and became the US Virgin Islands); and, at the eastern end of the group, what are now the Virgin Islands British Overseas Territory. Although, in its official name, the last is described as simply "the Virgin Islands", it is usually referred to as "the British Virgin Islands" to distinguish it from its US neighbour. In this report, I shall refer to the Territory as "the BVI".

1.3 The BVI has a land area of just under 60 sq miles, comprising about 60 islands, islets and cays, 16 of which are inhabited including the islands of Tortola (which, at approximately 12 miles long and three miles wide, is the largest island), Virgin Gorda, Anegada and Jost van Dyke.

1.4 The islands were settled by Arawak Indians from South America until the 15th century, when they were displaced by the Caribs from the Lesser Antilles. However, by 1493, when the first European sighting was made by Christopher Columbus on his second voyage to the Americas, the islands that are now the BVI appear to have been uninhabited. Columbus named the range of islands "Santa Ursula y las Once Mil Virgenes" ("Saint Ursula and her 11,000 Virgins"), shortened to "Las Virgenes" ("the Virgins"). They remained largely uninhabited until the 17th century.

1.5 In the 17th century, jurisdiction over the Virgin Islands was contested between the Spanish, the English and the Dutch. At the outbreak of the Third Anglo-Dutch War, in 1672, England took control of Tortola and Jost van Dyke; and subsequently, in 1680, Virgin Gorda and Anegada were formally annexed to the Crown. The islands comprising the BVI have remained under British influence since.

1.6 Excluding Anegada (which is coral limestone), the islands are low mountains formed of porous brown loam, which means that, despite high levels of rainfall, there are no rivers or inland lakes. Water is not easily retained; and the land is difficult to cultivate, that difficulty being compounded by the generally steep mountainous terrain. In the 17th century, with the use of slave labour, cotton was grown (notably on Virgin Gorda); and, from the 18th century, sugar plantations were established (notably on Tortola). Smuggling and privateering were also an inherent part of the economy.

[1] For the purposes of this Report, it is unnecessary to give more than a very brief history. The classic history of the British Virgin Islands, at least to the beginning of the 20th century, is A History of the British Virgin Islands by Dr Isaac Dookhan (Caribbean Universities Press) (1975) ("Dookhan") upon which this section draws, with due acknowledgment and appreciation.

1.7 With the price rises in both cotton and (especially) sugar in the second half of the 18th century as a result of Britain being involved in a succession of conflicts, trade in these commodities flourished and the slave population on the BVI dramatically increased to service the plantations. To encourage trade through Road Harbour, the Tortola Trade Act 1802[2] followed by the Importation and Exportation Act 1805[3] gave it free port status which, together with other trade privileges (such as Tortola becoming part of the packet service route), ensured both that legal trade flourished and illegal trade was relatively restrained.

1.8 However, this economic high was to be short-lived. The ending of half a century of consistent warfare in 1815 brought a period of general economic depression. The depression in the United Kingdom ("the UK") caused a decline in demand and prices for both sugar and cotton. For the BVI, that was compounded by (i) worsening of soil conditions and shortage of labour, (ii) increasing competition from Cuba, Brazil and the East Indies for sugar, and the southern states of the American Union for cotton and (iii) regular hurricanes but particularly a devastating hurricane on 21-22 September 1819 which destroyed Road Harbour and resulted in the packet station[4] being closed and many planters emigrating.

1.9 The cultivation of both cotton and sugar was dependent upon the labour of slaves, and slavery was an established institution in the BVI by 1672. Due to the low level of cultivation, the numbers of slaves remained relatively small until the late 18th century when numbers rose, 9,000 slaves being recorded by 1788. One of the crusading institutions for the abolition of slavery was the Methodist Church, which by 1789 had established a mission in Tortola which served almost entirely the slave community, over 2,500 being registered with the mission by 1796[5]. From the late 18th century, the numbers of slaves declined due to the collapse of the cotton and sugar trades, which resulted in both the emigration and manumission of slaves, and increasing pressure by the anti-slavery lobby. The slave trade was abolished in the British Empire on 25 March 1807[6]; and slavery itself was abolished on 1 August 1834[7], a date annually marked in the BVI by a three-day holiday in the first week of August. Slavery was initially replaced by a period of "apprenticeship" (indentured servitude) ranging from four to six years, which was finally abolished in 1838[8].

1.10 The abolition of slavery, adverse weather and the further fall in sugar prices in the 1840s led to the debts of plantation estates, incurred during more profitable times, exceeding the value of the underlying security[9], resulting in most plantation owners leaving their estates fallow and often in the hands of their attorneys or the receiver of the Court of Chancery. Disposal of the land was in practice impossible because of the (often complex) rights of those holding security. There were, consequently, vast tracts of unoccupied land in the BVI. Purchase of

[2] 42 Geo III c 102.
[3] 45 Geo III c 57.
[4] A packet station was a port at which ships which formed part of the Packet Service would dock. The Packet Service transported mail, private goods and passengers around the British Empire.
[5] The Methodist Church played an important part in the development of civic society, and the church still plays an important part in the BVI community. The Quakers were also prominent in the abolition movement, Samuel Nottingham for example manumitting 25 slaves and giving them 50 acres of land in Long Look for their common good, in 1776, before the establishment of the formal abolition movement organisations.
[6] The Abolition of the Slave Trade Act 1807 (47 Geo III c 36).
[7] The Slavery Abolition Act 1833 (3 & 4 Will IV c 73).
[8] Society in the BVI during the period of slavery was complex. It comprised clearly defined categories: white men, freemen (manumitted slaves, and manumitted children of white men and slaves), "liberated Africans" (i.e. those who had been prospective slaves on board slave trade vessels captured after the Abolition of the Slave Trade Act 1807) and slaves. Within those categories, there were stratifications based on, not only colour, but wealth and education. For example, within white men there were sugar plantation owners, cotton plantation owners, plantation managers, merchants, government officers and professional men (described in detail in Dookhan, chapters 3 and 4).
[9] This led to the collapse of the firm that owned many of the remaining sugar plantations in the BVI (Reid, Irving and Company) which for some time had been the only remaining effective line of communication with Britain.

land was, however, difficult if not impossible for the former slaves and their descendants until 1864 when two measures eased the problem of land transfer, namely (i) an enactment authorising the printing and use of a simple form to effect transfer of land for 4s 6d, and (ii) the adoption in the BVI of the West Indies Encumbered Estates Acts[10] which enabled the sale of encumbered estates by authorised Commissioners at prices former slaves and their descendants could afford and with security of tenure. With a relatively quick land registration process, from the 1860s, these resulted in the rapid expansion of smallholdings of generally below 20 acres (and often much smaller), with demarcated and recorded boundaries, which could be passed on to future generations.

1.11 The collapse of the sugar and cotton industries resulted in a sharp decline in population. By the 1899 census, the black population of the BVI had gradually fallen to 4,607, and the white population (which had been 1,300 in 1830) was only 32. The population since has been overwhelmingly black, with the white population accounting for no more than about 5%. From 1900, the population has gradually increased, at a greater pace in recent years. The population in 1951 was 7,429: in 1981, 11,647: and in 2011, 28,063. The estimated population is just over 30,000[11], of whom 24,000[12] live on Tortola, which is the home of the capital, Road Town.

1.12 A legislature, based on legislative government already established in other British West Indian colonies and involving some representative element, was introduced into the BVI in 1773. Over time, representative government has evolved; but this has been far from an easy, or even continuous, path.

1.13 In 1773, government in the BVI was formed of three limbs: the Lieutenant-Governor of Tortola (serving under the Governor of the Leeward Islands, based in Antigua), a nominated Council and an elected Assembly, loosely reflecting the British form of monarch, House of Lords and House of Commons. The Council comprised 12 members nominated by the Governor of the Leeward Islands. It both advised the Lieutenant-Governor and acted as an upper chamber of the legislature. The Assembly comprised of, at first, 11 then, from 1776, 15 members elected every three years. It was the lower, and representative, chamber of the legislature. With this legislature, the BVI was given control over its internal regulation.

1.14 However, the Council and the Assembly were frequently deadlocked over such matters as land ownership, the establishment of courts of justice and, especially, taxation which became an increasing issue as the main sources of tax as revenue either ceased (slaves) or was severely diminished (sugar) and the tax burden moved on to the increasing number of smallholders. Broadly, the Assembly were against the burden falling upon them, whilst the Council considered it should. The result was that, for periods often spanning years, the legislature was effectively deadlocked and unable to pass any legislation.

1.15 The mandate of the Assembly was in any event undermined by the apathy of the (still very small) electorate: in 1837, out of 143 electors, only 34 chose to vote (and there remained a vacancy in the Assembly because the only elector in one district could not be found). In an

[10] The West Indies Encumbered Estates Acts 1854-86 (17 & 18 Vict c 117, 21 & 22 Vict c 96, 25 & 26 Vict c 45, 27 & 28 Vict c 108, 35 & 36 Vict c 9, 49 & 50 Vict c 36) were Acts of the UK Parliament which followed the pattern of the Irish Encumbered Estates Act 1849 (12 & 13 Vict c 77) which established the Encumbered Estates' Court to facilitate the sale of Irish estates in which the estate owners had negative equity as a result of the Irish potato famine of the 1840s. The West Indies Acts provided for Commissioners in both the UK and participating colonies who had powers to override the rights of the security holders and allow the sale of the land. The BVI participated in the scheme from 1854.

[11] The estimate of population is based on data as of 1 March 2022, when the Worldometer estimate of population was 30,569, World Population Review 30,596 and Country Meters 31,283. Estimating the population of the BVI is difficult because of the generally high but fluctuating levels of itinerant population mainly from other Caribbean islands. Some sources put the population as high as 35,000.

[12] As of 1 March 2022, the BVI Government website put the population of Tortola at 24,045.

attempt to address this, the Constitution Act 1837 reduced the number of Assembly members to nine, removed residential qualifications, and voters were given as many votes as the number of members required for the Assembly.

1.16 From 1854, the representational element in the government of the BVI diminished.

1.17 The Constitutional Reform Act 1854 abolished the system of government by Council and Assembly in favour of a Legislative Council comprised an ex officio President, three members nominated by the Crown and six elected members. Amendments were made in 1859, reducing the number of elected members to four.

1.18 Although that broke the recurring deadlock and allowed more legislation to be passed, the system was changed again in 1867 in favour of full Crown Colony government. The elective franchise was abolished, with executive power being vested in the Governor (or, in his absence, the President of the Executive Council, which remained to assist and advise the Governor, although diminishing in number over time from four to two); and a Legislative Council which, like the Executive Council, consisted of officials and nominated non-official members.

1.19 In 1871, the Federation of the Leeward Islands was created and, not only was its legislature granted federal legislative powers, but the legislatures of component islands (which included the BVI) were able to grant it such powers over other subject areas. Under this provision, the Governor and Legislative Council of the BVI granted to the federal legislature the power to legislate over (e.g.) stamp duty in the BVI and even the power to determine the legislative structure within the BVI. Under that power, in 1902, the Legislative Council of the BVI was abolished at the instance of the Governor but by Act of the federal government[13]; so that, in the legislative process, from that date, there was no representation even on a nominated basis.

1.20 The BVI remained a part of the Leeward Islands Federation. Whilst there was not the same degree of nationalism as exhibited in other Caribbean territories, those who lived in the BVI began to seek more say in their own affairs (particularly regarding land), and moves to restore a local representative legislative government began in the depression of the 1930s. Those moves were generally stalled by the Second World War, but then resumed.

1.21 An event of particular note was the Freedom March of 1949. A fisherman from Anegada, Theodore H Faulkner, came to Road Town with his wife who was expecting a child at the Cottage Hospital (later the Peebles Hospital and now the D Orlando Smith Hospital). In frustration at the absence of medical (and other facilities) on Anegada, he spoke publicly in the marketplace and articulated the discontent of himself and other islanders. This culminated in 1,500 people marching through Road Town on 24 November 1949, with a petition addressed to the Commissioner calling for an elected assembly[14].

1.22 That event prompted greater debate which, in turn, led to the Leeward Islands legislature passing the Constitution (Virgin Islands) Act 1950, based on the recommendations of a local BVI Constitutional Committee. Democratically elected government – hard earned, and consequently highly prized – thus returned to the BVI. The 1950 Constitution established a Legislative Council for the BVI of eight members: two ex officio, two nominated and four elected. The first election under the new Constitution was held on 20 November 1950. In 1954, the system was reformed so that there was a majority of elected members: the

[13] Constitution (Virgin Islands) Act 1902.
[14] Faulkner at the Front - The Demonstration of 1949: Its Beginning, Golden Jubilee and Implications by Dr Quincy F Lettsome, published in The Nation Builders, Historical Supplement in the Virgin Islands Life & Style Magazine (June-July 2016).

Territory was divided into five constituencies or "districts" to return six elected members (Road Town returning two members). However, executive power remained outside the control of the elected Assembly and in the person of the Commissioner (later styled Administrator, and then Governor).

1.23 The Leeward Islands were de-federated in 1956, in favour of a West Indies Federation (which the BVI did not join), thereby returning the whole legislative function to the BVI, which became a Crown Colony in its own right.

1.24 The passage of the executive function to elected representatives did not take place until 1967. In 1952, a "Committee System" was introduced, with the establishment of two committees, the Public Works and Communications Committee and the Trade and Production Committee, each chaired by a member of the Executive Council. From 1954, the chairmen became "Members" with an obligation to support executive decisions in public. Following a further Commission on Constitutional Reform, in the new Constitution of 1967[15], a ministerial system was introduced with three Ministers including a Chief Minister, i.e. an elected Member of the Legislative Assembly appointed by the Administrator (from 1970, the Governor) as the person best able to command the support of the majority of elected members in that Assembly. Matters of special responsibility (such as external affairs, defence and internal security) remained with the Administrator to determine, on advice of the Executive Council, but otherwise control over executive matters was devolved to the Ministers.

1.25 In 1959, the BVI formally adopted the US dollar as its official currency.

1.26 In the late 1960s, a 199-year lease of Crown Land in Wickham's Cay and more than four-fifths of Anegada (where land had traditionally been treated as common land for farming) was signed with a company owned by Ken Bates (a British businessman and hotelier), with a view to the development of the land. The leases would have resulted in most islanders being excluded from the relevant land. In 1968 Noel Lloyd started a community group (the Positive Action Movement) in which Mrs Patsy Lake was also prominent, to protest against the Bates' company's leases and development, with organised marches over several weeks and lobbying of the UN. As a result of these protests, a Commission of Inquiry was set up; and, in 1970, the land was repurchased by the BVI Government with funds loaned by the UK Government. The cause is commemorated in the Noel Lloyd Positive Action Movement Park in Road Town, the home to a statue of Noel Lloyd.

1.27 The history of the BVI is regularly interrupted by hurricanes of high and sometimes devastating force. In 2017, there had already been severe flooding in early August. On 6 September 2017, following late-stage intensification and late slight deviation south, the eye of Hurricane Irma – at the time, the most powerful recorded Atlantic hurricane – passed over Tortola, Virgin Gorda and Jost van Dyke, with Road Town bearing its full brunt. With a sustained wind speed of 180mph, the category 5 hurricane was of such intensity as to be recorded on seismometers calibrated for earthquakes.

1.28 The effects of the hurricane were devastating. A state of emergency was declared by the Governor, His Excellency Augustus Jaspert, the following day, 7 September 2017. Four people died as the direct result of Hurricane Irma[16]. It stripped not only all vegetation, but also bark, resulting in "browning" of the landscape. About 85% of housing stock was destroyed, together with most commercial property: the estimated damage to property was over $3.5 billion. The

[15] Virgin Islands Constitution Order 1967 (SI 1967 No 471) as amended by the Virgin Islands (Constitution) (Amendment) Order 1970 (SI 1970 No 1942). I shall refer to the 1967 Order as amended as "the 1967 Constitution".

[16] Charles Thomas, Derek Ragnauth, Richard Alan Benson and Xavier Samuels (All 4 casualties of Hurricane Irma now identified (bvinews.com), BVI News 9 October 2017).

devastation was compounded by further flooding (notably of Road Town) which occurred as the result of torrential downpours of rain a week later, and the effects of another category 5 hurricane (Hurricane Maria) which obliquely struck the BVI on 20 September 2017[17]. Supplies of food, water, fuel and medicinal products were very limited. It took four months to restore water supply, and six months to restore electricity supply to the whole Territory. Recovery was hampered by the BVI Government being largely self-insured, and private homeowners being generally underinsured[18].

1.29 Longer-term recovery was also hampered, of course, by the COVID-19 pandemic as a result of which the BVI closed its borders on 22 March 2020 at 11.59pm. The first cases of COVID-19 were confirmed in the BVI on 25 March 2020, and a complete 24-hour a day lockdown with closed borders was implemented on 27 March 2020 initially to 2 April 2020 but then twice extended ending on 25 April 2020. Various periods of lockdown, curfew and restrictions have followed.

The Constitution

The BVI as a British Overseas Territory

1.30 The BVI is now one of 14 British Overseas Territories[19] ("BOTs"). It is therefore not part of the UK; but, with the UK and the Crown Dependencies, the BOTs form a single realm over which the Crown is sovereign. Following the general decolonisation of the second half of the twentieth century, they thus remain uniquely British.

1.31 Constitutionally, the Westminster Parliament has unlimited power to legislate for the realm including each of the BOTs. However, the people of each BOT, including the BVI, have a right of self-determination. That right springs from article 73 of the United Nations Charter ("the UN Charter")[20] – which falls within Chapter XI, "Declaration Regarding Non-Self-Governing Territories" – which expressly recognises the paramountcy of the interests of the inhabitants of non-self-governing territories and the obligation of states which assume responsibilities for the administration of such territories to develop self-government and to protect those inhabitants from abuses. Article 73 provides:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

[17] In this Report, I shall refer to Hurricanes Irma and Maria and the associated flooding, together as "the 2017 hurricanes".
[18] The UK Government both gave aid to assist with the immediate consequences of the 2017 hurricanes and also offered a loan guarantee to assist with financing the recovery (see paragraph 1.175 below).
[19] Following the 1999 White Paper Partnership for Progress and Prosperity: Britain and the Overseas Territories (Cm 4264), the British Overseas Territories Act 2002 introduced the term "British Overseas Territory" to replace the term "British Dependent Territory". Section 1(1)(a) of the 2002 Act amended the definition section of the British Nationality Act 1981 (section 50(1)) to define "British Overseas Territory" as a territory listed in Schedule 6 to the 1981 Act. In addition to the BVI, the BOTs listed in that schedule comprise Anguilla; Bermuda; British Antarctic Territory: British Indian Ocean Territory; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St Helena, Ascension and Tristan da Cunha; South Georgia and the Sandwich Islands; Turks and Caicos Islands; and the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus.
[20] Adopted by UN Conference on International Organisation (the San Francisco Conference) on 26 June 1945, entering into force on 24 October 1945. The UK signed the Charter on 16 September 1945 and ratified it on 20 October 1945.

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible…".

In this context, of course, the BVI is a non-self-governing territory, for which the UK assumes the responsibilities of administration.

1.32 The right of self-determination is normative, and therefore recurs in various other international instruments. For example, article 1 of the International Covenant on Economic, Social and Cultural Rights[21] provides:

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing… Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

1.33 The foundation for the current UK policy in respect of its relationship with the BOTs was set out in the March 1999 White Paper, Partnership for Progress and Prosperity: Britain and the Overseas Territories[22], which refers to "a renewed contract" or "partnership" between Britain and the Overseas Territories[23]. It states[24]:

[21] Adopted by UN General Assembly Resolution 2200A (XXO) on 16 December 1966, entering into force on 3 January 1976. The UK signed the Covenant on 16 September 1968 and ratified it on 20 May 1976. Reflecting the normative nature of article 1 of this Covenant, article 1 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly Resolution 2200A (XXI) on the same day (16 December 1966) and entering into force on 23 March 1976, is in identical terms. The UK also signed this Covenant on 16 September 1968 and ratified it on 20 May 1976. Article 25 guarantees an individual's right to take part in the conduct of public affairs, directly or through freely chosen representatives. The right can therefore be seen in individual human rights terms (see also, e.g. article 3 Protocol 1 of the European Convention on Human Rights which guarantees "effective political freedom" as a human right).

[22] Cm 4264.

[23] See, e.g., Foreword page 4.

[24] Foreword page 4.

"The principles that underlie our partnership are clear:

- First, our partnership must be founded on self-determination. Our Overseas Territories are British for as long as they wish to remain British. Britain has willingly granted independence where it has been requested; and we will continue to do so where this is an option. It says a lot about the strength of our partnership that all the Overseas Territories want the constitutional link to continue. And Britain remains committed to those territories which choose to retain the British connection.
- Second, the partnership creates responsibilities on both sides. Britain is pledged to defend the Overseas Territories, to encourage their sustainable development and to look after their interests internationally. In return, Britain has the right to expect the highest standards of probity, law and order, good government and observance of Britain's international commitments.
- Third, the people of the Overseas Territories must exercise the greatest possible control over their own lives. We are proud that our Overseas Territories are beacons of democracy. We applaud their achievements, and want them to have the autonomy they need to continue to flourish.
- Fourth, Britain will continue to provide help to the Overseas Territories that need it. It is a source of much pride that the effectiveness of their governments' policies has meant that budgetary help is necessary only for Montserrat and St Helena – both for special circumstances."

1.34 The current policy is set out in the June 2012 White Paper, The Overseas Territories: Security, Success and Sustainability[25], which builds on the 1999 White Paper. In respect of their mutual relationship, it sets out the main benefits and responsibilities of the UK and the BOTs including the following:

> "The UK Government's fundamental responsibility and objective is to ensure the security and good governance of the Territories and their peoples. This responsibility flows from international law including the Charter of the United Nations. It also flows from our shared history and political commitment to the wellbeing of all British nationals. This requires us, among other things, to promote the political, economic, social and educational advancement of the people of the Territories, to ensure their just treatment and their protection against abuses, and to develop self-government and free political institutions in the Territories. The reasonable assistance needs of the Territories are a first call on the UK's international development budget. A consequence of these responsibilities is that the UK Government carries significant contingent liabilities in respect of the Territories. The Government has a duty to manage these liabilities effectively and therefore maintains certain residual powers to ensure it is able to discharge this duty.
>
> ....
>
> Being an Overseas Territory entails responsibilities. We expect Territory Governments to meet the same high standards as the UK Government in maintaining the rule of law, respect for human rights and integrity in public life, delivering efficient public services, and building strong and successful communities. Territories in receipt of budgetary support are expected to do everything they can to reduce over time their reliance on subsidies from the UK taxpayer.

[25] Cm 8374.

> ....
>
> … [W]e believe that the fundamental structure of our constitutional relationships is the right one: powers are devolved to the elected governments of the Territories to the maximum extent possible consistent with the UK retaining those powers necessary to discharge its sovereign responsibilities.
>
> ....
>
> The Government maintains the UK's long-standing position on independence for the Territories. Any decision to sever the constitutional link between the UK and a Territory should be on the basis of the clear and constitutionally expressed wish of the people of the Territory. Where independence is an option and it is the clear and constitutionally expressed wish of the people to pursue independence, the UK Government will meet its obligations to help the Territory to achieve it."

1.35 The importance of promoting self-determination of the peoples of BOTs was recently emphasised in the UK-Overseas Territories Joint Ministerial Council Communiqué 2021 (published on 18 November 2021, following the Joint Ministerial Council Meeting on 16-17 November 2021):

> "The principle of equal rights and self-determination of peoples, as enshrined in the UN Charter, applies to the peoples of the Overseas Territories. The UK and Overseas Territories reaffirmed the importance of promoting the right of self-determination for the peoples of the Territories, which is a collective responsibility of all parts of the UK Government…. For those Territories with permanent populations who wish it, the UK will continue to support requests for the removal of the Territory from the United Nations list of non-self-governing Territories."

1.36 The Preamble to the Constitution reflects the right (and, indeed, the clear aspiration) of the people of the BVI in respect of self-determination. Having, amongst other things, acknowledged the "distinct cultural identity" of the people of the BVI and "their quest for social justice, economic empowerment and political advancement", it states that the provisions of the Constitution are made on the following premises:

> "Accepting that the Virgin Islands should be governed based on adherence to well-established democratic principles and institutions;
>
> Affirming that the people of the Virgin Islands have generally expressed their desire to become a self-governing people and to exercise the highest degree of control over the affairs of their country at this stage of its development; and
>
> Noting that the United Kingdom, the administering power for the time being, has articulated a desire to enter into a modern partnership with the Virgin Islands based on the principles of mutual respect and self-determination;…".

As Hon Marlon Penn (the Leader of the Opposition) put it, the Constitution "reflects our advancement as a territory and our desire for greater autonomy to manage our affairs"[26].

1.37 Therefore, the relationship between the UK and the BVI as a BOT, as reflected in these instruments and policies, is an inherently complex one. In the relationship, the UK Government has the following obligations, responsibilities and interests:

[26] Hon Marlon Penn Position Statement paragraph 2.

(viii) The people of the BVI have the right to determine their own political status. They have expressed the wish to become self-governing, on a modern democratic model. The UK Government has the obligation to assist the BVI in developing self-government, including the development of their free political institutions.

(ix) In the meantime, the UK Government has an obligation to devolve powers to the elected BVI Government to the maximum extent possible, consistent with its sovereign responsibilities.

(x) Its sovereign responsibilities, as recognised in the international instruments referred to above, include the obligation to ensure the advancement (including the political and economic advancement) of the people of the BVI, their just treatment, and their protection against abuses.

(xi) Although, in respect of its obligations in relation to the BVI, the interests of the people of the BVI are paramount, in meeting those obligations, the UK Government has to take into account its following further responsibilities:

(a) a responsibility in respect of international security and, generally, its obligations under international law and

(b) a responsibility to the people of the UK insofar as its actions in respect of the people of the BVI may adversely affect them.

1.38 For their part, the BVI (like other BOTs) is obliged to adopt the highest standards of probity, law and order, and good governance. That is not simply because the UK Government as a matter of principle is committed to such standards of government irrespective of place: the inhabitants of BOTs are generally not only British citizens[27], they are British citizens for whom the UK Government has obligations to ensure their security, their good governance and (expressly in article 73(a) of the UN Charter) their protection from abuses.

The BVI Constitution: Structure

1.39 Each BOT has its own written constitution which, whilst having features and language in common with the constitutions of other BOTs, is uniquely tailored to its own circumstances and is contained in an Order in Council (i.e. an Order made by Her Majesty The Queen on the advice of Her Privy Council acting on the recommendation of her (UK) Ministers made under statutory and/or prerogative powers).

1.40 The legal basis for the constitution of the BVI is section 5 of the West Indies Act 1962[28], which provides:

> "Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified."

1.41 It is noteworthy that:

[27] See paragraphs 10.5-10.7 below.
[28] 1962 c 19.

(i) Section 5 gives the power to Her Majesty in Council to establish a constitution for a BOT under which legislative powers "for the peace, order and good government" of the territory are devolved to a local legislature subject to specified reserved powers.

(ii) Section 5 expressly applies to the BVI[29].

(iii) The power conferred by section 5 includes the power to vary or revoke the relevant Order in Council by a subsequent Order in Council[30].

(iv) Orders in Council made under section 5 are not subject to affirmative Parliamentary resolution, nor are they subject to annulment by Parliamentary resolution; although (a) they have to be laid before Parliament after they have been made, and (b) draft Orders in Council under section 5 are generally sent to the House of Commons Foreign Affairs Committee at least 28 sitting days before they are submitted to Her Majesty in Council which, in practice, allows for timely scrutiny by that committee[31].

1.42 As indicated above, the BVI was granted its own constitution, with executive powers generally residing in elected Ministers, in 1967[32]. The current Order in Council setting out the constitution of the BVI is the Virgin Islands Constitution Order 2007[33] as amended by the Virgin Islands Constitution (Amendment) Order 2015[34,35]. Chapters 3-6 of the Constitution provide for the government of the BVI.

1.43 As I have explained, Her Majesty The Queen is Head of State; and, by section 46(1) of the Constitution, executive authority is vested in Her Majesty although, subject to the Constitution, the Governor has the power to exercise that authority on her behalf. The Governor can thus, in that sense, be seen as the Head of Government[36].

1.44 Section 36 of the Constitution provides for a Deputy Governor and section 37 gives the Governor the power to appoint the Deputy Governor (or another person) to act in the office of Governor, when for any reason, the Governor is unable to perform his or her office[37]. Section 38 sets out the functions of the Deputy Governor, including that he or she shall (a) assist the Governor in the exercise of his or her functions relating to matters for which the Governor is responsible under section 60; (b) assist the Governor in the exercise of such of his or her other functions, being functions in the exercise of which the Governor is not obliged to act in accordance with the advice of any other person or authority, as the Governor, acting in his or her discretion, may direct; and (c) perform such other functions, not of a ministerial nature, as (subject to this Constitution and any other law) may be assigned to the Deputy Governor, at the request of the Premier, by the Governor acting in his or her discretion. The current Deputy Governor, David Archer Jr[38], said his role was to look after overall good governance within the Public Service[39]. His involvement in coordinating the Public Service occupied the majority

[29] Section 5(5).
[30] Section 7(2).
[31] British Overseas Territories Law (Hendry & Dickson: 2018: Bloomsbury) ("Hendry & Dickson"), p 20.
[32] SI 1967 No 471 (see paragraph 1.24 above). The 1967 Constitution was replaced in 1976 (Virgin Islands (Constitution) Order 1976 (SI 1976 No 2145)), and then again in 2007 (the current Constitution).
[33] SI 2007 No 1678.
[34] SI 2015 No 1767.
[35] In this Report, references to "the Constitution" are to this 2007 Order in Council, unless otherwise appears.
[36] See Hendry & Dickson page 38.
[37] See paragraphs 13.18-13.25 below, in relation to who should preside in Cabinet in the absence of the Governor.
[38] David Archer Jr joined the Public Service as a cadet in 1997. He was based in the Department of Human Resources. He took on increasingly senior roles in human resources, becoming the Director of Human Resources in October 2014. He became the Permanent Secretary in the Deputy Governor's Office in August 2010 and then Senior Liaison Officer in the Governor's Office on 1 January 2018. Mr Archer was appointed as Deputy Governor on 1 March 2018 (T17 23 June 2021 pages 218-219).
[39] T17 23 June 2021 page 259.

of his time[40]. The Deputy Governor chairs a monthly meeting of all Permanent Secretaries[41], and said he might become involved should, for example, a public officer raise a concern over the conduct of a Minister[42]. There is a Deputy Governor's Office which has its own Permanent Secretary[43].

1.45 However, that is not the full picture, because the Governor's powers are of course subject to the Constitution. Whilst reserving some powers to the Governor[44], the Constitution generally devolves executive powers to elected Ministers (i.e. Ministers chosen from the elected legislature who, in Cabinet, are responsible for the formulation of policy[45]) and legislative powers to that legislature.

1.46 The legislature consists of Her Majesty and an elected unicameral parliament – called the Legislative Council from its reinstatement in 1950 until the 2007 Constitution[46], and the House of Assembly since – with a four-year term which, since 1995, has comprised 13 elected Members (nine elected from single-seat district constituencies and four elected from the Territory treated as a single constituency) and, as ex officio, non-voting Members, a Speaker (elected from inside or outside the House of Assembly by its Members) and the Attorney General[47]. A table of administrations within the elected legislature is set out below (Table 1).

1.47 There is no regulation of election spending, the evidence being that candidates fund their own election campaigns and they spend what they like[48]. The Premier accepted that regulation of election spending was needed[49], and I see the force in having monitoring and perhaps capping of election spending. I have made a recommendation that is considered in the context of the Constitutional Review I propose[50].

1.48 So far as the Speaker is concerned, the current Speaker Hon Julian Willock explained that every appointment to date (including his own) has been from outside the elected Members: as he put it, "You're asked by whoever the ruling Government is if you wish to be the Speaker"[51]. That was reflected in the evidence of his immediate predecessor: Ms Ingrid Moses-Scatliffe said that she was invited to be Speaker in 2011 by the then Premier Dr the Hon D Orlando Smith OBE[52]. The Speaker is therefore essentially a political appointment by the ruling

[40] T17 23 June 2021 page 219-220.
[41] T3 7 May 2021 pages 112-113 (Dr Marcia Potter); and T6 18 May 2021 (Dr Carolyn O'Neal Morton).
[42] T17 23 June 2021 pages 227-228 (David Archer Jr); T1 4 May 2021 pages 82-83 (Sandra Ward); and T3 17 May 2021 pages 113-114 (Dr Marcia Potter).
[43] Currently Sharleen Dabreo-Lettsome (T42 30 September 2021 pages 8-9). The Deputy Governor's Office is part of the Governor's Group. In his first report as Deputy Governor, David Archer Jr described the Office of the Deputy Governor as overseeing the following: RVIPF, the Civil Registry and Passport Office, the Department of Disaster Management, the Supreme Court and the Commercial Court, the Magistracy, the Department of Human Resources, the Attorney General's Chambers, the Office of the Director of Public Prosecutions, the Archives and Records Management Unit, the Office of the Supervisor of Elections and Sister Islands Programme Unit (all entities which come within the scope of the Governor's constitutional functions) (Deputy Governor's Report 2018 6 Months in Office March-August 2018 page 3: the report is publicly available).
[44] See paragraph 1.52 below.
[45] Section 56(6) of the Constitution (see paragraph 1.58 below).
[46] As explained above (paragraphs 1.22ff), although the Legislative Assembly was reinstated in 1950, the BVI was essentially governed as part of the Leeward Islands Federation until its abolition in 1956. Defederation enhanced the political status and power of the BVI by making them a colony in their own right; but it is not until the constitutional reforms of 1967 that a ministerial system was introduced and drove forward internal executive self-government. It was not until the 2007 Constitution that the current form of government, as described here, was introduced.
[47] Section 63 of the Constitution.
[48] As Hon Neville A Smith said: "If I want to spend two dollars on my campaign and lose, [or] 200 and win, I think that's the discretion of me" (T11 15 June 2021 page 96). The party (as controlled by its senior members) pays for national work, which partly funds individual campaigns (T12 16 June 2021 page 158 (Dr Hubert O'Neal)). See also T11 15 June 2021 page 24 (Hon Vincent Wheatley).
[49] T14 18 June 2021 page 163.
[50] See paragraph 14.13(v) and Recommendation A2 below.
[51] T14 18 June 2021 pages 20-21.
[52] T5 21 June 2021 page 118. It was also reflected in the evidence of Hon Julian Fraser who regarded the independence of the Speaker as vital but currently absent (T16 22 June 2021 page 85).

administration. A number of those from whom I heard expressed concern about the Speaker not being elected, and I have made a recommendation that that too is considered in the context of the Constitutional Review I propose.[53] The current Clerk of the House of Assembly, who is the Accounting Officer for expenditure by the House (and who, amongst other things, advises the Speaker on financial matters in relation to the House), is Mrs Phyllis Evans who has been the Clerk since 2 February 2009[54].

Table 1
Administrations within the Elected Legislature since 1967

Legislative Council

Election	Term	Chief Minister	Party
14 April 1967	Sixth	Hon H Lavity Stoutt	UP
2 June 1971	Seventh	Dr the Hon Willard Wheatley MBE	Ind/VIDP
1 September 1975	Eighth	Dr the Hon Willard Wheatley MBE	Ind/UP
12 November 1979	Ninth	Hon H Lavity Stoutt	VIP
11 November 1983	Tenth	Hon Cyril B Romney	Ind/UP
17 November 1986	Eleventh	Hon H Lavity Stoutt	VIP
12 November 1990	Twelfth	Hon H Lavity Stoutt	VIP
20 February 1995	Thirteenth	Hon Ralph T O'Neal OBE	VIP
17 May 1999	Fourteenth	Hon Ralph T O'Neal OBE	VIP
16 June 2003	Fifteenth	Dr the Hon D Orlando Smith OBE	NDP

House of Assembly

Election	Term	Premier	Party
20 August 2007	First	Hon Ralph T O'Neal OBE	VIP
7 November 2011	Second	Dr the Hon D Orlando Smith OBE	NDP
8 June 2015	Third	Dr the Hon D Orlando Smith OBE	NDP
25 February 2019	Fourth	Hon Andrew A Fahie	VIP

Ind: Independent
NDP: National Democratic Party
UP: United Party
VIDP: Virgin Islands Democratic Party
VIP: Virgin Islands Party

[53] See paragraph 14.13(vii) below and Recommendation A2.
[54] See paragraph 1.165 below, and T26 14 July 2021 page 126.

1.49 Political parties in the BVI appear to attract less rigid adherence than parties in some other countries. However, since 2007, there have been two main political parties: the National Democratic Party ("the NDP") and the Virgin Islands Party ("the VIP"), the former holding power from 2011-19 (with Dr the Hon Orlando Smith as Premier) and the latter holding power from 2007-11 (with Hon Ralph T O'Neal as Premier). Prior to the 2019 election, the NDP held 11 of the 13 House of Assembly seats. However, in the election which took place on 25 February 2019, in the district voting, the VIP had a total of 4,855 votes (50.30%) of a total of 9,653 valid votes from a registered electorate of 15,038 (i.e. a turnout of 64.64%). The VIP won eight of the 13 seats (four of the nine single-district seats, and all four of the territorial seats)[55] and formed the new government under their party leader, Hon Andrew A Fahie, who became Premier and Minister of Finance[56].

Table 2
2019 Election Results

First Electoral District

Hon Andrew Fahie (Premier and Minister of Finance)			
Andrew Fahie	VIP	742	81.45%
Sylvia Romney-Moses	PVIM	141	15.48%
Stephanie Brewley	PU	28	3.07%
		911	**100.00%**

Second Electoral District

Hon Melvin Turnbull			
Melvin Turnbull	PVIM	550	54.19%
Carnel Clyne	VIP	465	45.81%
		1015	**100.00%**

Third Electoral District

Hon Julian Fraser			
Julian Fraser	PU	519	47.10%
Aaron Parillon	NDP	294	26.68%
Arlene Smith-Thompson	VIP	289	26.22%
		1102	**100.00%**

[55] In paragraph 1 of their Position Statement dated 1 June 2021, the elected Ministers describe the result of the election as "an overwhelming mandate". However, the following summary of the 2019 election result from the Report of the Ad Hoc Elections Legislation Committee (October 2020) at page 19 is perhaps more objective:

> "There was a 64.64% voter turnout. That means some 35.36% of the registered voters did not vote in the last election or 7 out of every 20 voters. Of that significant low voter turnout only 46.54% voted for the elected government, which is less than half the people who voted. They won a landslide number of seats but cannot claim any significant mandate from the public, and cannot say that there is any overwhelming public confidence in their vision for the country."

The Committee was formally set up by the Governor, at the request of Cabinet. Its members were chosen by Cabinet, and it was chaired by the Deputy Governor.

[56] Unless otherwise appears, references in this Report to "the Premier" are references to Hon Andrew A Fahie.

Fourth Electoral District

Hon Mark Vanterpool			
Mark Vanterpool	NDP	442	49.72%
Luce Hodge-Smith	VIP	385	43.31%
Carl Scatliffe	PVIM	38	4.27%
Vincent Scatliffe	PU	24	2.70%
		889	**100.00%**

Fifth Electoral District

Hon Kye Rymer (Minister for Transportation, Works and Utilities)			
Kye Rymer	VIP	638	51.53%
Wade Smith	PVIM	396	31.99%
Elvis Harrigan	NDP	204	16.48%
		1233	**100.00%**

Sixth Electoral District

Hon Alvera Maduro-Caines			
Alvera Maduro-Caines	NDP	575	51.85%
John Samuel	VIP	534	48.15%
		1109	**100.00%**

Seventh Electoral District

Dr the Hon Natalio Wheatley (Deputy Premier and Minister for Education, Culture, Youth Affairs, Fisheries and Agriculture)			
Natalio Wheatley	VIP	384	44.76%
Kedrick Pickering	Ind	338	39.39%
Hipolito Penn	NDP	136	15.85%
		858	**100.00%**

Eighth Electoral District

Hon Marlon Penn (Leader of Her Majesty's Loyal Opposition)			
Marlon Penn	NDP	726	57.94%
Dean Fahie	VIP	527	42.06%
		1253	**100.00%**

Ninth Electoral District

Hon Vincent Wheatley (Minister for Natural Resources, Labour and Immigration)			
Vincent Wheatley	VIP	891	69.72%
Hubert O'Neal	NDP	324	25.35%
Jose DeCastro	PVIM	63	4.93%
		1278	**100.00%**

Territorial (At-Large) Seats

Hon Sharie de Castro (Junior Minister for Tourism) Hon Neville Smith (Deputy Speaker of the House of Assembly) Hon Shereen Flax-Charles (Junior Minister for Trade and Economic Development) Hon Carvin Malone (Minister for Health and Social Development)			
Sharie de Castro	VIP	4778	12.49%
Neville Smith	VIP	4694	12.27%
Shereen Flax-Charles	VIP	4033	10.54%
Carvin Malone	VIP	3936	10.29%
Myron Walwyn	NDP	3335	8.72%
Henry Creque	NDP	2799	7.32%
Ronnie Skelton	PVIM	2639	6.90%
Sandy Underhill	NDP	2418	6.32%
Trefor Grant	NDP	2246	5.87%
Shaina Smith	PVIM	1805	4.72&
Curnal Fahie	PVIM	1619	4.23%
Dancia Penn	Ind	1607	4.20%
Lesmore Smith	PVIM	1063	2.78%
Dirk Walters	PU	769	2.01%
Verna Smith	PU	278	0.73%
Rajah Smith	PU	232	0.61%
		38251	**100.00%**

Ind: Independent

PU: Progressive United

PVIM: Progressive Virgin Islands Movement

NDP: National Democratic Party

VIP: Virgin Islands Party

1.50 The House of Assembly currently comprises the Premier, the four other Cabinet Ministers and two Junior Ministers (see below), together with, now, two backbench Members of the ruling VIP, Hon Neville A Smith (the Deputy Speaker) and Hon Alvera Maduro-Caines (who was elected as an NDP candidate, but crossed the floor on 20 January 2020). There are four opposition members: Hon Marlon A Penn (Leader of the Opposition) and Hon Mark H Vanterpool (both NDP); Hon Julian Fraser (Progressive United); and Hon Melvin M Turnbull Jr (Progressive Virgin Islands Movement).

1.51 Subject to the Constitution, the legislature has power to make laws for the peace, order and good government of the BVI. To become law, bills passed by the House of Assembly require the assent of the Governor on behalf of the Sovereign or, at the Governor's discretion (save for those matters specified in section 79(2) where reservation is mandatory), the assent of Her Majesty through the Secretary of State for Foreign, Commonwealth and Development

Affairs[57]. Furthermore, laws to which the Governor has assented may be disallowed by Her Majesty through the Secretary of State, but only after the House of Assembly has been given time to reconsider the law before disallowance[58].

1.52 In terms of executive government, the elected Ministers have responsibility for all areas except those reserved to the Governor. Section 60 of the Constitution makes the Governor responsible for the conduct of any BVI Government business (including the administration of any department of government) with respect to identified, reserved matters, as follows:

> "(1) The Governor shall be responsible for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including the administration of any department of government, with respect to the following matters—
>
> (a) external affairs, subject to subsection (4);
>
> (b) defence, including the armed forces;
>
> (c) internal security, including the Police Force, without prejudice to section 57[59];
>
> (d) the terms and conditions of service of persons holding or acting in public offices, without prejudice to section 92[60]; and
>
> (e) the administration of the courts.
>
> and the Governor shall keep the Premier fully informed concerning the general conduct of these matters, and the Premier may request information in respect of any particular matter.
>
> (2) The Governor, acting after consultation with the Premier, may assign to any member of the Cabinet, responsibility for the conduct, on behalf of the Governor, of any business in the House of Assembly with respect to any of the matters mentioned in subsection (1).
>
> (3) The Governor, acting in his or her discretion, may, by directions in writing, delegate, with the prior approval of a Secretary of State, to the Premier or any other Minister designated by the Governor on the advice of the Premier such responsibility for matters of external affairs or internal security as the Governor may think fit upon such terms and conditions as he or she may impose.
>
> (4) Notwithstanding subsection (3), the Governor shall, by directions in writing, delegate to the Premier or to any other Minister designated by the Governor on the advice of the Premier, on the terms and conditions set out in subsection (5), responsibility for the conduct of external affairs as they relate to any matters that fall under the portfolios of Ministers, including—

[57] Section 79. In this Report, unless otherwise appears, "the Secretary of State" refers to the Secretary of State for Foreign, Commonwealth and Development Affairs (or, prior to 2 September 2020, the Secretary of State for Foreign and Commonwealth Affairs).

[58] Section 80.

[59] Section 57 concerns the National Security Council ("the NSC"); and section 57(3) requires the NSC to advise the Governor on matters relating to internal security and obliges the Governor to act in accordance with that advice unless he or she considers that giving effect to the advice would adversely affect Her Majesty's interest.

[60] Section 92 concerns particular Public Service appointments and how they are to be made (see paragraphs 11.2-11.3 below).

(a) the Caribbean Community, the Organisation of Eastern Caribbean States, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution;

(b) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Virgin Islands;

(c) the relationship between the Virgin Islands and the United States Virgin Islands in matters of mutual interest;

(d) tourism and tourism-related matters;

(e) taxation and the regulation of finance and financial services; and

(f) European Union matters directly affecting the interests of the Virgin Islands.

(5) The terms and conditions referred to in subsection (4) are the following:

(a) separate authority shall be required from or on behalf of a Secretary of State for the commencement of formal negotiation and the conclusion of any treaty or other international agreement by the Government of the Virgin Islands, provided that general authority may be granted in specified matters to commence the formal negotiation of, and where it is deemed appropriate, to conclude any such treaty or international agreement;

(b) no political declaration, understanding or arrangement in the field of foreign policy shall be signed or supported in the name of the Government of the Virgin Islands without the prior approval of a Secretary of State;

(c) a formal invitation to a member of government or Head of State of another country to visit the Virgin Islands shall not be issued without prior consultation with the Governor;

(d) the costs of any activities in pursuance of subsection (4) shall be borne by the Government of the Virgin Islands;

(e) the Premier or other Minister shall keep the Governor fully informed of any activities in pursuance of subsection (4); and

(f) the Premier or other Minister shall provide to the Governor on request all papers and information, including the text of any instrument under negotiation, available to the Premier or other Minister with respect to any activities in pursuance of subsection (4).

(6) Any matter that is delegated to the Premier or to any other Minister under subsection (4) shall be performed by the Premier or such other Minister in a manner that is in the best interests of the Virgin Islands and not prejudicial to the interests of Her Majesty and, for this purpose, the Governor and the Premier shall, from time to time, hold conference to ensure the proper safeguard of those interests.

(7) In the event of any disagreement regarding the exercise of any delegated authority under subsection (4), the matter shall be referred to a Secretary of State whose decision on the matter shall be final and whose directions shall be complied with.

(8) Where the Governor, acting in his or her discretion, determines that the exercise of any function conferred on any other person or authority (other than the House of Assembly) would involve or affect any matter mentioned in subsection (1), the Governor may, acting after consultation with the Premier, give directions as to the exercise of that function, and the person or authority concerned shall exercise the function in accordance with those directions."

1.53 The departments of government which fall within section 60 are referred to as "the Governor's Group".

1.54 Whilst finance is a function devolved to the elected Government, the Constitution allows the Governor to draw from the Consolidated Fund, if necessary, to ensure that his section 60 functions are discharged. Section 103(1) provides:

> "No money shall be withdrawn from the Consolidated Fund except on the authority of a warrant under the hand of the Minister charged with responsibility for finance…; but where, in the opinion of the Governor, acting in his or her discretion, moneys are required to enable the Governor to discharge his or her responsibilities under section 60, such moneys may be withdrawn from the Consolidated Fund either:
>
> (a) on the authority of a warrant under the hand of the Minister; or
>
> (b) on the authority of a warrant under the hand of the Governor, acting in his or her discretion."

1.55 Over and above the reserved powers in section 60, in narrowly defined circumstances and following a prescribed procedure, the Governor has power to declare a Bill should have effect even if not passed by the House of Assembly for the purposes of complying with any international obligation applicable to the BVI[61].

1.56 The Governor is also ultimately responsible for governance in the BVI. Whilst there is no provision in the Constitution expressly imposing a duty on the Governor in this regard[62] and all elements of government have an obligation to promote and pursue good governance, as I have described[63], the UK Government through the Governor has obligations to those who live in the BVI to ensure their security, good governance and protection from abuses. The Governor therefore has an obligation to prevent abuses of the people of the BVI, and so is responsible for (amongst other things) ensuring that governance within the BVI does not fall to a level that gives rise to an unacceptable risk of such abuses occurring.

1.57 Furthermore:

(i) The Governor presides at Cabinet meetings[64], but does not have a vote. He can, however, express approval or disapproval of a particular course of action during discussions in Cabinet.

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[61] Section 81.

[62] As there is in the Cayman Islands Constitution, which provides that, in exercising his or her functions, "the Governor shall endeavour to promote good governance and to act in the best interest of the Cayman Islands so far as such interests are consistent with the interest of the United Kingdom" (The Cayman Islands Constitution Order 2009 (SI 2009 No 1379) Schedule 2 paragraph 32); and Governor Position Statement paragraph 45).

[63] See paragraph 1.38 above.

[64] See paragraphs 13.18-13.25 below.

(ii) As I have described, to become law, bills passed by the House of Assembly require the assent of the Governor or, if he or she declines to give it or otherwise reserves it, of Her Majesty through the Secretary of State; and, after the House of Assembly has been given time to reconsider, laws to which the Governor has assented may be disallowed by the Secretary of State[65].

1.58 Otherwise, government policy and responsibility for the conduct of the business of government is a matter for the elected Government.

1.59 The Constitution provides for a Cabinet of a Premier and four Ministers selected from elected members of the House of Assembly to whom the Governor, acting in accordance with the advice of the Premier, assigns responsibility for the conduct of areas of business of the Government and the administration of government departments[66]. The Premier is appointed by the Governor but, if one political party gains a majority of the seats of the elected Members of the legislature, the Governor is required to appoint the elected Member recommended by a majority of the elected Members who are members of that party (i.e. usually, of course, the party leader)[67]. The other Ministers are appointed by the Governor from the elected Members in accordance with the advice of the Premier; and one of the Ministers is appointed by the Governor as Deputy Premier, again, in accordance with the advice of the Premier[68]. The amendment to the Constitution made in 2015 enables the Governor, again acting on the advice of the Premier, to appoint in addition no more than two Junior Ministers to assist in the performance of ministerial functions relating to economic development; but these do not sit in the Cabinet. There is consequently a total of seven Ministers, forming a majority in the House of Assembly (which has a total of 13 voting Members).

1.60 Under the Constitution, the Cabinet has a separate legal persona, distinct from its members[69]. The formulation and implementation of government policy is a matter for Cabinet, section 47(3) of the Constitution providing:

> "The Cabinet shall have responsibility for the formulation of policy, including directing the implementation of such policy, insofar as it relates to every aspect of government, except those matters for which the Governor has special responsibility under section 60, and the Cabinet shall be collectively responsible to the House of Assembly for such policies and their implementation."

1.61 Otherwise, responsibility for the conduct of the business of government is generally assigned to particular elected Ministers[70]. Section 56 of the Constitution, so far as relevant, provides:

> (1) The Governor shall, acting in accordance with the advice of the Premier, by directions in writing, assign to any Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including responsibility for the administration of any department of government.(5) Where a Minister has been assigned responsibility under this section for the administration of any department of government, the Minister shall (subject to this Constitution and any other law) exercise direction and control over that department, including directing the implementation of government policy

[65] See paragraph 1.51 above.
[66] Sections 52 and 56.
[67] Section 52(1)(a).
[68] Section 52(2) and (3).
[69] Section 47(1). The Attorney General submitted, and I accept, that section 47 creates a separate legal persona (or, as Sir Geoffrey Cox QC on behalf of the Attorney General put it, "constitutional entity": T5 13 May 2021 page 26) which, over and above its constituent members, applied for and was granted participant status in the COI (Order No 5 dated 13 May 2021).
[70] Section 56. Unless otherwise appears, in this report, references to "Ministers" are to elected Ministers in the BVI Government.

as it relates to that department, and, subject to such direction and control, the department shall, unless otherwise agreed between the Governor and the Premier, be under the supervision of a permanent secretary who shall be a public officer; but two or more departments of government may be placed under the supervision of one permanent secretary.

(6) A Minister assigned responsibility for any matter under this section shall exercise his or her responsibility in accordance with the policies of the Government of the Virgin Islands, as determined by the Cabinet and in accordance with the collective responsibility of the members of the Cabinet for the policies and decisions of the Government."[71]

1.62 The Governor is ex officio chair of the Cabinet; and the Attorney General is an ex officio member[72]. Like the Governor, the Attorney General has no right to vote.

1.63 The current Cabinet is comprised as follows:

The Premier and Minister of Finance, Hon Andrew A Fahie

The Deputy Premier and Minister for Education, Culture, Youth Affairs, Fisheries and Agriculture, Dr the Hon Natalio D Wheatley

The Minister for Transportation, Works and Utilities: Hon Kye M Rymer

The Minister for Natural Resources, Labour and Immigration: Hon Vincent O Wheatley

The Minister for Health and Social Development: Hon Carvin Malone.

The Attorney General is Hon Dawn J Smith.

There are two Junior Ministers, namely Hon Sharie B de Castro (Junior Minister for Tourism), and Hon Shareen D Flax-Charles (Junior Minister for Trade and Economic Development).

1.64 On 8 July 2021, Cabinet approved the appointment of Ministerial Political Advisers (up to three for the Premier, and one each for the other Ministers including Junior Ministers) with a salary of up to $120,000 per annum taken out of monies allocated to Ministers for consultants[73]. Although initially intended to reflect UK Ministerial Aides appointed under section 15 of the Constitutional Reform and Governance Act 2010[74] (under which the aides are temporary civil servants), as their name suggests, the BVI role is overtly political in scope. They are therefore not public officials (or, in UK terminology, civil servants) at all, but rather consultants (although subject to a Code of Conduct and supervision by an Integrity Commission for Ministerial Political Appointments made up of three Permanent Secretaries and chaired by the Permanent Secretary Premier's Office).

1.65 The Cabinet Handbook, published by the Cabinet Office in November 2009, is "the authoritative instrument governing Cabinet and its proceedings…"[75]. It firmly endorses the principle of Cabinet collective responsibility as a well-established principle based on public

[71] Section 56 is set out in full below: see paragraph 11.9.
[72] Section 47. Section 49(6) provides that the Attorney General has no right to vote (see paragraph 1.85 below).
[73] Cabinet Memorandum No 281/2021: Ministerial Political Adviser dated 18 June 2021, and Expedited Extract of Cabinet Minutes dated 22 July 2021.
[74] 2010 c 25.
[75] T8 2 June 2021 page 29 (Mr Haeri for the Attorney General).

interest[76]: "Collective responsibility is at the core of the Cabinet system of government"[77]. It equally endorses the "natural correlative" of Cabinet collective responsibility, i.e. Cabinet confidentiality[78], which, in the BVI, is not time-limited: it is maintained for ever[79].

1.66 The Cabinet Handbook deals with "Cabinet business" as defined in paragraph 4.1 to include:

(a) memoranda (Cabinet papers or submissions);

(b) emergency non-memorandum matters (including genuine emergencies agreed to by the Chairman and the Premier and there is no time to have memoranda prepared);

(c) matters for mention by individual Ministers and Members; and

(d) draft Minutes and Minutes for endorsement by Cabinet.

1.67 The recording and dissemination of Cabinet decisions is dealt with paragraphs 4.22-4.26, as follows:

"Cabinet Minutes are not operative until signed[80]

4.22 The outcomes of Cabinet deliberations are recorded as Cabinet Minutes by the Cabinet Secretary assisted by the Cabinet Recording Secretary. Cabinet Minutes are not operative until they are confirmed by Cabinet and signed by the Cabinet Secretary and the Chairman of the Cabinet.

Minutes to record decisions taken

4.23 Cabinet Minutes are recorded by the Cabinet Secretary assisted by the Cabinet Recording Secretary during or after meetings in a form that enables the necessary action to be taken. Cabinet Minutes do not record discussions at the meeting, only decisions. Minutes are recorded as draft Minutes.

4.24 Minutes recorded on the day of Cabinet meeting are considered draft Minutes until confirmed at the next meeting and signed by the Cabinet Secretary and the Chairman of the Cabinet, at which point they become the Minutes of the meeting. Draft Cabinet Minutes are finalized as part of the agenda of the next meeting. Once draft Minutes are finalized, the Cabinet Secretary takes possession, destroys same or causes same to be destroyed.

Doubts about Minutes to be raised before next meeting

4.25 If there arises any doubt by a Minister or Member concerning the accuracy of Minutes circulated, it is for that Minister or Member to raise the doubt with the Cabinet Secretary before the next Cabinet meeting, if possible.

Circulation of draft Cabinet Minutes

4.26 Cabinet Minutes are issued in draft as soon as practicable after the adjournment of every Cabinet meeting. Draft Cabinet Minutes are circulated to Members of the Cabinet only together with the agenda and Cabinet documents approved by the Cabinet Steering Group for the next meeting of Cabinet."

[76] As Mr Haeri on behalf of the Attorney General agreed (T8 2 June 2021 page 32).
[77] Cabinet Handbook paragraph 2.1 (as emphasised by Ellis J in Skelton Cline v Cabinet Office of the Virgin Islands 23 May 2019 (BVI High Court of Justice Ref BVIHC 2016/0063)).
[78] Cabinet Handbook paragraph 2.10; and T8 2 June 2021 pages 31-32 (quote from Ellis J in Skelton Cline (at paragraph 120).
[79] Cabinet Handbook paragraphs 2.13 and 11; and T8 2 June 2021 pages 33-34.
[80] The headings are shown as sidenotes in the original.

1.68 However, of the 94 Cabinet meetings held in 2020, only 21 had Cabinet minutes finalised by June 2021[81]. That created an obvious issue because they generally remain as drafts and become operative only when they have been finalised, and approved and signed off by the Cabinet Secretary and Chairman, subject only to paragraph 2.3 which gives the Cabinet itself power to override this requirement[82]. The Cabinet Secretary Sandra Ward explained that Cabinet can authorise action on a decision prior to that approval by issuing an "Expedited Extract" of that decision, setting out the decision in a form upon which action can be taken. Once the minutes have been confirmed, then the Cabinet Secretary will issue a "Regular Extract" of a decision. Cabinet decides whether to issue an Expedited Extract; the issue of Regular Extracts is left to the Cabinet Secretary[83]. On the evidence, the use of Expedited Extracts appears to be a regular occurrence, and they have been used across different administrations for some time. The request that Cabinet sanction the issue of an Expedited Extract is contained in the Cabinet memorandum put before Cabinet seeking a particular decision, the justification being the need to act before Cabinet next meets. Expedited Extracts were used in 2020 when no Cabinet minutes were in fact being prepared, to enable government to continue to function.

The BVI Constitution: Issues

1.69 No one who gave evidence to the COI considered that the Constitution, as currently framed and operated, works in practice. I will focus on two aspects of the evidence.

1.70 First, issues have recently arisen concerning the scope of devolved and reserved powers and functions, and the line between the two. The elected Ministers submitted that the Governor and/or the UK Government have failed to respect (and have even openly undermined) devolved powers by claiming and exercising powers and functions which are properly devolved under the Constitution. Because they say that this has led to a frustration of good governance, I will deal with this issue when I consider governance[84].

1.71 Second, the evidence and submissions of Hon Julian Fraser had, as one focus, the role of the Premier under the Constitution and in practice[85].

1.72 The function of the Cabinet is set out in section 47(3) of the Constitution, to include the formulation of policy[86]. Therefore, the BVI follows the well-established democratic model of elected Members of the legislature – in the case of the BVI, in Cabinet as a separate legal persona – being responsible for policy, but themselves being subject to oversight by, and the will of, the legislature.

1.73 However, in his evidence to the COI, Hon Julian Fraser (a Member of the Legislative Council/ House of Assembly since 1999, and a Minister in VIP administrations for the periods 1999-2003 and 2007-2011) said that, in the context of the BVI, this was not the true picture. He said that section 47 was "devoid of reality" because of two fundamental flaws.

1.74 First, he submitted that the Cabinet was not, in reality, subject to any sensible supervision by the House of Assembly. He said:

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[81] T8 2 June 2021 page 37 (Cabinet Secretary Sandra Ward).
[82] Cabinet Handbook paragraphs 4.22 and 4.24; and T8 2 June 2021 pages 38-39.
[83] T1 4 May 2021 pages 114-117.
[84] Paragraphs 13.12-13.130 below.
[85] Hon Julian Fraser Position Statement dated 31 May 2021, to which he spoke in oral evidence: T16 22 June 2021 page 68ff. His oral evidence essentially confirmed the views set out in his position statement.
[86] See paragraph 1.60 above, where the sub-section is set out.

> "But the fallacy is the part about Cabinet (Ministers) shall be collectively responsible to the House of Assembly for such policies and their implementation. Ask yourself this question. Who makes up the House of Assembly? And the answer which is the Cabinet, namely: The 5 Ministers and the Attorney General, and a cast of supporters namely: The 2 Junior Ministers, the Dep. Speaker and another Back-Bencher plus the Speaker. That is a total of 11 out of 15 Members. So who are you kidding when you are trying to pin an unrealistic responsibility on the 'House of Assembly' to hold the Cabinet to account? You know that this is nonsense, and you didn't need me to tell you this, but you asked."[87]

That passage refers to Members of the House of Assembly who are not elected and do not have the right to vote (i.e. the Speaker and the Attorney General). However, as I have described, the simple mathematics are that the Cabinet together with the two junior Ministers, amount to seven, and so the Ministers of the ruling government therefore are in a majority in the House of Assembly (which has 13 voting Members)[88]. In practice, in recent times, the ruling party has had a substantial majority of seats in the House of Assembly[89].

1.75 Nor does Hon Julian Fraser consider that there is any other way in which the Cabinet is held responsible. There is (he said) no effective Opposition, nor a Second Chamber, nor an effective press holding the government to account as there is in the UK[90]. He did not consider that the Public Accounts Committee ("the PAC") has any real power: it does not hold its hearings in public[91], and reports to the House of Assembly which is effectively controlled by the Cabinet[92].

1.76 However, second, the Cabinet is under the firm control of the Premier, who appoints all Ministers as well as the Speaker and Deputy Speaker: therefore, Hon Julian Fraser said, "Our current System imposes legal dictatorship powers on our Premier…. Simply put he dictates what is or is not Government's Policies…"[93].

1.77 The result, he said, is "… that the Cabinet being accountable to the House of Assembly, means being accountable to itself, which essentially means the same as being accountable to the Premier"[94]. In Hon Julian Fraser's view, this arises directly out of the Constitution which sets the number of Ministerial positions and gives the Premier the power to select Ministers (and, in practice, the Speaker) (hence, the reference to "legal dictatorship powers…")[95]. In any event, he considers section 47 of the Constitution, which places policymaking power in the hands of Cabinet as overseen by the House of Assembly, to be a dead letter.

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[87] Hon Julian Fraser Position Statement paragraph 4(vi).
[88] As Hon Julian Fraser confirmed: T16 22 June 2021 pages 71-72.
[89] The current VIP government hold nine of the 13 seats; the previous NDP government held 11 of the 13 seats (see paragraph 1.49 above).
[90] Hon Julian Fraser Position Statement paragraph 4(vii).
[91] T16 22 June 2021 pages 79-80.
[92] Hon Julian Fraser Position Statement paragraph 4(ix).
[93] Hon Julian Fraser Position Statement paragraph 7(i) and (ii) (emphasis in the original).
[94] Hon Julian Fraser Position Statement paragraph 7(iii). Hon Julian Fraser said that the original purpose of the at-large seats was that they should be Members independent of the (main) political parties, to create diversity (T16 22 June 2021 page 83), but those seats are now contested by the two main political parties and are vital to their holding power. His solution to the problem of the Premier having overriding power and the lack of diversity would be to have coalition government (T16 22 June 2021 page 77) and/or a second House of Assembly Chamber designed to hold the current chamber accountable (Hon Julian Fraser Addendum to Position Statement: a proposal also made by the Leader of the Opposition: Hon Marlon Penn Position Statement paragraph 2(h) and T17 23 June 2021 pages 198-200). Hon Marlon Penn agreed with Hon Julian Fraser that an elected government needs to be held to account in some way (see T17 23 June 2021 page 197), but they disagreed as to the effectiveness of the Opposition in doing that: the latter did not consider it was effective.
[95] T16 22 June 2021 pages 72-74.

1.78 Looking at the evidence before me as a whole, I see that, due to the constitutional structure, the Premier holds a position of particular power. I will return to this issue when I consider possible constitutional reform[96].

Constitutional Review Commission

1.79 The current Constitution was, by way of a 2007 Order in Council, following a Constitutional Review which reported the previous year. As I have indicated, there is a considerable body of opinion that that Constitution need reconsideration. A Constitutional Review has been mooted for several years.

1.80 On 11 June 2020, the Premier made a Statement in the House of Assembly, "Moving Forward with Virgin Islands Constitutional Review: The People, the Constitution and the Economy"[97]. In it he announced the establishment of a Constitutional Review Commission, with the following Terms of Reference:

> "1. To re-evaluate the vision of the people of the Virgin Islands, as expressed in the preamble to the Virgin Islands Constitution Order, 2007, and to amend accordingly, if necessary;
>
> 2. To evaluate the current Virgin Islands Constitution Order, 2007, and determine whether it is in strategic fit to facilitate the people of the Virgin Islands in achieving the revised vision;
>
> 3. To identify any gaps in relation to the Virgin Islands Constitution Order, 2007;
>
> 4. To make recommendations for Constitutional Reform, if necessary, based on outcomes of the re-evaluations."

The Commission was to comprise nine members, seven appointed by the Premier and two by the Leader of the Opposition. It was said that Commission would be required to submit its report to Cabinet within six months of commencing work, subject to the Chairman requesting an extension of one month by letter to the Premier.

1.81 Reports on the Commission have been limited. However, on 20 January 2022, a Post Cabinet Meeting Statement was published recording Cabinet decisions from its meeting on 31 December 2021[98], as follows:

> "Reviewed and noted the House of Assembly Resolution No 15 of 2020, approving an eleven (11) member Constitutional Review Commission; agreed to amend Cabinet decision to reflect the increase in membership from nine (9) to eleven (11) members; approved the appointment of the following persons to the Commission, nominated by the Premier, in accordance with the said Resolution, for a period not to exceed two (2) years with effect from 4th January, 2022."

The names of the 11 members of the Commission are then set out. Mrs Lisa Penn-Lettsome is the Chair of the Commission, and Ms Janice Stoutt is her Deputy Chair.

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[96] See paragraphs 14.13(i) below.

[97] Statement by Premier and Minister of Finance during the Ninth Sitting of the Second Session of the Fourth House of Assembly - Moving Forward with Virgin Islands Constitutional Review: The People, The Constitution and The Economy (11 June 2020) (https://bvi.org.uk/house-of-assembly-statement-by-premier-fahie-constitutional-review/).

[98] The Cabinet of the Virgin Islands Post Meeting Statement 20 January 2022 paragraph 3.

1.82 The setting up of the Commission was also referred to in the Speech from the Throne on 18 January 2022, which indicated that the Constitutional Review, "which has been overdue for some time, will be moving forward this year"[99].

1.83 There do not appear to have been any subsequent announcements of the Commission's work.

Constitutional Pillars of Governance

Introduction

1.84 The Constitution, supplemented by other measures, establishes several positions and institutions which are intended to act as checks and balances to executive power. These are considered immediately below.

Attorney General[100]

1.85 The post of Attorney General is established by section 58 of the Constitution, the main function of this public officer being as "the principal legal adviser to the Government of the Virgin Islands", who manages civil litigation on behalf of the BVI Government and manages the Attorney General's Chambers[101]. He or she is also an ex officio (non-voting) Member of the House of Assembly and Cabinet, and an ex officio (voting) member of the National Security Council ("the NSC")[102].

1.86 The Attorney General also has a duty to ensure that, so far as possible, "the operations of Government are conducted lawfully and constitutionally"; and, as appears in the Vision Statement of her Chambers, her role is "… to uphold good governance and the proper and adequate administration of justice…"[103]. The current Attorney General accepted that, as it is her responsibility to rectify poor governance where identified, she would bear some responsibility for any poor governance in the BVI. The Attorney's role is not only to step in when things go wrong in governance terms, but (she said) to take steps to ensure that they did not go wrong[104].

1.87 As his or her main function, the Attorney General acts as independent legal adviser to all arms of the BVI Government with the usual responsibilities as a legal practitioner, with the main constitutional safeguards being that he or she is appointed by the Judicial and Legal Services Commission and has security of tenure[105]. However, as the current Attorney General accepted in her evidence to the COI, there are tensions between the various arms of government, which requires of the Attorney General, strength of mind as well as independence[106].

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[99] Speech from the Throne: Positioning the Virgin Islands to continue improving the standard of living of our people delivered by His Excellency the Governor John J Rankin, CMG, First Sitting of the Fourth Session of the Fourth House of Assembly, 18 January 2022.
[100] Conventionally in Common Law countries known as simply "the Attorney".
[101] The quotation is from section 58(2), and the rest of the job description is from the Attorney General's Role Profile (Appendix 1 to her Position Statement).
[102] Sections 63, 44 and 57 respectively. For further details of the NSC, see paragraphs 6.432 and 11.5 and footnote 7 below. The Attorney General also sits on the Advisory Committee on the Prerogative of Mercy (section 44).
[103] Attorney General Position Statement paragraph 15.
[104] T1 4 May 2021 pages 29-31. The Attorney General made these statements in the context of an application she made that she should, in her own right as Attorney, be a participant in the COI because of this particular interest in governance.
[105] Section 85, and T16 22 June 2021 pages 23-24 and 29-31. A person holding the office of Attorney General "may only be removed from office for inability to discharge the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour" (section 85(9)).
[106] T16 22 June 2021 pages 25-27.

1.88 The current Attorney General is Hon Dawn Smith, who has held the post since 1 October 2020, having split her earlier working life between the public and private sectors[107]. Her predecessor was Hon Baba Aziz. Hon Dawn Smith was appointed by the elected Ministers to represent them and their respective Ministries as participants in the COI; and she was a participant in her own right[108].

1.89 The Attorney General's Chambers have 46 staff positions; but, as at 1 October 2020, over half were vacant. In respect of counsel, excluding the Attorney herself, there were 23 positions of which 16 (69%) were vacant. The position has not substantively changed since. The Attorney considers the recruitment process to be "inexplicably long and opaque" which, with the low compensation levels, make recruitment very difficult. The Attorney General says that, as a result, her staff are "overwhelmed", despite valuable assistance from external counsel and short-term consultancies[109]. She considers that "strong investment in institutional capacity building at this point in time" is required, not just in her Chambers, but in the overall system of law enforcement and justice[110].

1.90 Under section 3(1) of the Attorney General's Reference Act 2011, the Attorney General has the power (with the approval of Cabinet) to refer important questions of law and fact to the Eastern Caribbean Court of Appeal for hearing and consideration.

Director of Public Prosecutions

1.91 Section 59 of the Constitution provides for a Director of Public Prosecutions (the DPP), a public officer with powers to institute criminal proceedings etc. Vitally, section 59(6) of the Constitution provides for the independence of the DPP:

> "In the exercise of the powers conferred on him or her by this section and section 88(2) [which concerns the pursuit of penalties against a person who sits or votes in the House of Assembly without authorisation] the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority".

1.92 The DPP is the prosecuting authority in the BVI[111], her powers being set out in section 59 of the Constitution to include the power to (i) institute and undertake criminal proceedings against any person in respect of any offence; (ii) the power to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and (iii) the power to discontinue at any stage, before judgment, any such criminal proceedings[112]. The DPP prosecutes cases at all levels of the court system: in the Magistrates' Court, the Eastern Caribbean Supreme Court, the Court of Appeal and the Privy Council.

1.93 The DPP also advises the Royal Virgin Islands Police Force ("the RVIPF"), the Customs Department of the Ministry of Finance (usually known as Her Majesty's Customs, "HM Customs"), the Department of Immigration ("the Immigration Department") and the Financial Investigation Authority ("the FIA") in relation to criminal investigations, procedure and litigation. When a matter is investigated, a file is submitted to the DPP for review and advice, prior to charge. When reviewing such a file, in relation to all criminal offences, the DPP applies

[107] T10 14 June 2021 page 74.
[108] See paragraph 3.31 below.
[109] Attorney General Position Statement paragraphs 17-19, 25 and 28.
[110] Attorney General Position Statement paragraph 34.
[111] Section 59(2) and (4) of the Constitution. However, the police are still able to prosecute some minor offences (e.g. road traffic offences) (which the DPP considers antiquated and representing a conflict of interest, and should be abolished (DPP Position Statement paragraph 4(l); and T17 23 June 2021 page 73); and someone other than the DPP may commence criminal proceedings, but the DPP has the power under section 59(4) to take over and continue or discontinue any such proceedings.
[112] Section 59(2).

a two-stage test: an evidential test (there must be sufficient evidence to make a conviction likely) and, if that test is met, a public interest test (the DPP must assess whether it is in the public interest to commence and pursue a prosecution)[113].

1.94 The current DPP is Tiffany R Scatliffe Esprit, who has been with the Office of the DPP (until 15 June 2007, the Criminal Division of the Attorney General's Chambers) since 2006 as Crown Counsel, Senior Crown Counsel and Principal Crown Counsel before being appointed Acting DPP on 17 December 2019 and DPP on 5 May 2020[114].

The Commissioner of Police and Other Law Enforcement Agencies

1.95 The RVIPF is headed by the Commissioner of Police ("the CoP"), whose role is set out in section 57(4) of the Constitution:

> "The Commissioner of Police shall—
>
> (a) provide regular briefings to the National Security Council on matters of internal security, including the Police force;
>
> (b) have responsibility for the day-to-day operation of the Police Force and shall report regularly on such operation to the Governor; and
>
> (c) inform the Premier of any significant security developments in the Virgin Islands, including the occurrence of any significant criminal activity" [115].

The CoP therefore commands the RVIPF on all aspects of operational deployment and investigations and is responsible for setting its strategic direction. He is also a member of the NSC[116] which advises the Governor (who chairs the NSC) on matters relating to internal security[117]. The CoP, in effect, acts as National Security Adviser[118].

1.96 As reflected in section 57(4)(b) of the Constitution, internal security including the police, falls within the Governor's special (reserved) responsibilities; and so the RVIPF falls under the authority of the Governor (and to an extent, by way of delegation, the Deputy Governor)[119].

1.97 The current CoP is Mark Collins QPM who produced written evidence[120] and gave oral evidence[121]. His predecessor was Mr Michael Matthews.

1.98 In terms of law enforcement, the RVIPF is supported by:

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[113] DPP Position Statement paragraph 7.
[114] T17 23 June 2021 page 63.
[115] The functions of the CoP are considered further below: see paragraphs 12.7ff.
[116] For further details of the NSC, see paragraph 6.432 below.
[117] CoP Position Statement paragraph 3.
[118] T17 23 June 2021 page 8.
[119] Section 60(1)(c) of the Constitution (see paragraph 1.52 above); and T17 23 June 2021 pages 9-10 (CoP). HM Customs sits under the MoF and the Immigration Department sits under the MNRLI. Her Majesty's Prison sits under the Governor and the MHSD. See also Governor Position Statement paragraph 98.
[120] CoP Position Statement; and CoP Report on Law Enforcement and Security in BVI: Recommendations for Improvement from the COI dated 8 December 2021 ("CoP Recommendations Report"). Mr Collins was appointed CoP from 15 April 2021, being sworn in on 19 April 2021.
[121] T17 23 June 2021 pages 1-59.

(i) HM Customs[122]: Section 4(1) of the Customs Management and Duties Act 2010[123] provides for the appointment of a Commissioner for Customs ("the HMC Commissioner") and other customs officers as necessary for the administration of the Act. "Customs" is defined as "the department of Government responsible for the collection and security of the revenues of customs and control of all imports and exports to and from the Territory"[124] namely HM Customs within the Ministry of Finance (the MoF). The HMC Commissioner is therefore responsible for the administration and implementation of the Customs Act, subject to any policy direction of the Minister of Finance[125]. He or she is responsible for (i) the management, supervision and control of Customs; (ii) the collection and accounting of customs revenue; (iii) the care of public and other property under customs control and (iv) any other enactments relating to Customs matters[126]. The current HMC Commissioner is Wade Smith.

(ii) The Immigration Department[127]: Section 11 of the Immigration and Passport Act 1977[128] establishes an Immigration Department (which sits within the Ministry of Natural Resources, Labour and Immigration ("the MNRLI"[129]), consisting of a Chief Immigration Officer ("the CIO"), a Deputy Chief Immigration Officer and other Immigration Officers as appointed by the Governor. Under the 1977 Act, the CIO is responsible for the administration and discipline of the Immigration Department[130]: in practice, his obligations are to maintain the security of the BVI's borders to ensure that undesirable persons or persons whose presence in the BVI is not conducive to the public good are denied leave to enter or remain; ensure the smooth and efficient running of the Immigration Department (including training); and provide advice and guidance to the Government on the review of national immigration policy and legislation[131]. The current CIO is Ian Penn.

(iii) The FIA: The Financial Investigation Agency Act 2003[132] established the FIA as an autonomous law enforcement agency responsible for the investigation of white collar and other serous financial crimes taking place within or from the BVI including money laundering offences, including assisting to authorities from other jurisdictions.

The Auditor General

1.99 Section 109 of the Constitution provides for an Auditor General, and guarantees his or her independence in similar terms to those employed in respect of the DPP:

[122] The functions of HMC Commissioner are considered further below: see paragraphs 12.42ff.
[123] No 6 of 2010.
[124] Section 2.
[125] Section 4(2) read with section 2, which defines "Minister" as the Minister of Finance.
[126] Section 5(1). Under section 5(2) the responsibility of the Commissioner under subsection (1) may be exercised by officers.
[127] The functions of the Immigration Department, and particularly of the CIO, are considered further below: see paragraphs 12.83ff.
[128] The Immigration and Passport Ordinance 1977 (No 9 of 1977) as amended by the Immigration and Passport (Amendment) Act 1990 (No 11 of 1990), the Immigration and Passport (Amendment) Act 2000 (No 12 of 2000), the Immigration and Passport (Amendment) Act 2003 (No 8 of 2003) and the Immigration and Passport (Amendment) Act 2006 (No 11 of 2006). The consolidated version in general use, dated 2013, takes in only amendments to 2013; but, unless otherwise appears, none of the later amendments are relevant to the issues raised in this Report.
[129] In this Report, I use "MNRLI" to refer to the Ministry of Natural Resources, Labour and Immigration and its predecessors such as the Ministry of Natural Resources and Labour.
[130] Section 12 of the 1977 Act; and T5 13 May 2021 pages 110-111 (CIO).
[131] CIO Position Statement paragraph 3.
[132] No 19 of 2003 as amended.

> "In the exercise of his or her functions under this section, the Auditor General shall not be subject to the direction or control of any other person or authority"[133].

1.100 The Auditor General is currently Ms Sonia Webster who holds degrees in both accounting and law. She has worked in the Auditor General's Office since 1988. In 1990, she was appointed the Deputy Chief Auditor; and, in 1996, she was appointed to the post of Auditor General which she has held since, with two breaks of about two years each[134].

1.101 The Auditor General is required by the Constitution to audit and report on the accounts of all Government departments and offices annually[135,136]. Those annual reports must be submitted to the Minister of Finance who shall, within three months of their receipt, cause them to be laid before the House of Assembly.

1.102 The powers and duties of the Auditor General are otherwise prescribed by the Audit Act 2003[137]. They are subject to the principles set out in section 14 of the Act:

> "In performing his duties under this Act, the Auditor General shall, in particular, satisfy himself
>
> (a) that funds have been used for purposes approved by law and for no other purposes;
>
> (b) that each payment and receipt was made or received in accordance with the law;
>
> (c) that adequate instructions have been given to ensure
>
> (i) that money is collected, paid and accounted for in accordance with the law, and
>
> (ii) that property is received, held, issued, sold, transferred, destroyed, and accounted for in accordance with the law,
>
> and that those instructions are being complied with; and
>
> (d) that adequate records are being kept
>
> (i) of the collection and payment of money; and
>
> (ii) of the receipt, custody, issue, sale, transfer or destruction of property."

1.103 Section 19 gives the Auditor General wide powers to enable him or her to perform the relevant statutory function, in the following terms:

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[133] Section 109(4). The predecessor to section 109 was section 66 of the 1976 Constitution which provided for an Auditor (which, by virtue of section 43 of the Interpretation Act, was described as "Chief Auditor" until the Audit Act 2003 and thereafter as "Auditor General": section 24 of the Audit Act 2003) whose function was similarly described. Section 66(4) was in substantively identical terms to the current section 109(4).

[134] T18 28 June 2021 page 15. The Auditor General Ms Sonia Webster gave evidence to the COI on Day 18 28 June 2021, Day 19 29 June 2021, Day 49 15 October 2021 and Day 51 21 October 2021.

[135] Section 109(2). These are essentially financial audits conducted to provide assurance that the relevant financial statements (in this case, mainly provided by the Accountant General) are made fairly in accordance with the relevant accounting standards and to report any material errors or misstatements.

[136] There is currently a backlog in preparation of the Annual Reports, because of delays in providing the Auditor General with the relevant financial statements, the last certified Annual Report/annual accounts being for the year 2016 (although, at the time I took evidence, it was hoped that the financial statements for the years 2017 and 2018 would soon be with the Auditor General) (see paragraph 1.168 below). Of the Annual Reports which were before the COI, i.e. the Reports 2008-16, were all signed off by Ms Webster except the 2012 Report which was signed off by Ms Amoret Davies as Acting Auditor General.

[137] No 13 of 2003. Statutory references in this section of the Report are to sections of this Act, unless otherwise appears.

"(1) The Auditor General has all the powers necessary to enable him to perform his duties.

(2) In particular, the Auditor General has power to require a public officer—

(a) to conduct, on behalf of the Auditor General, an inquiry, examination or audit and to report his findings to the Auditor General;

(b) to give the Auditor General access to property that is in the public officer's possession or under his control as a result of the officer's duties;

(c) to search and provide extracts from Government records or records to which the Government has access; or

(d) to give or provide to the Auditor General any explanation or information the Auditor General considers necessary to enable him to perform his duties.

(3) A public officer shall comply with a requirement under subsection (2)."

1.104 Section 11, reflecting the constitutional duty to the same effect, requires the Auditor General to prepare an annual report[138,139]. It has to be read with section 12, which requires the Auditor General to submit a supplementary report with an annual report setting out (a) details of any instance where a public officer or other person did not fully comply with a requirement by the Auditor General, (b) details of significant non-collection of money or failure to receive, hold, issue, sell, transfer, destroy or account for property in accordance with the law, or (c) any other relevant comments on performance of public duties or exercise of public powers, record-keeping or value for money. The Auditor General explained that, in practice, these often provide more information about a particular programme, project, function or operation, often when, at the beginning of the relevant year, it is thought to give rise to certain high-risk factors[140]. Where the audits giving rise to such section 12 reports are effectively focused on performance, and whether economy, efficiency and effectiveness have been achieved, they are sometimes referred to as "Value for Money" (or "VfM") reports[141].

1.105 In addition to annual reports and section 12 reports, section 20(1) provides:

> "The Auditor General may at any time prepare and submit a special report to the Governor if he is satisfied that there is a matter that should be brought to the attention of the Governor."

At the same time as submitting such a report to the Governor, the Auditor General must submit a copy of the report to the Minister of Finance and the Financial Secretary[142]. The Governor is required to lay the report before the House of Assembly within three months of receipt[143]. A section 20 report normally focuses upon, not the audit of financial statements, but a performance audit; and usually takes the same format as a section 12 report[144].

1.106 It is down to the discretion of the Auditor General whether she prepares a report under section 12 (in which case it is submitted directly to the relevant Minister, who is given an opportunity to respond to the report in draft and who is responsible for laying it before the

[138] The Auditor General described the production of this report as being the "primary duty" of her office (T49 15 October 2021 page 111).
[139] The Auditor General is required to send reports to the PAC for scrutiny (see paragraphs 1.138-1.139 below).
[140] T18 28 June 2021 page 23.
[141] T18 28 June 2021 page 20; and T49 15 October 2021 pages 111 and 113.
[142] Section 20(3).
[143] Section 20(2).
[144] T49 15 October 2021 pages 111-112.

House of Assembly[145]) or under section 20 (in which case it is submitted to the Governor and to the Minister of Finance). Although she can prepare a section 20 report of her own motion, the Governor may request her to do so[146].

1.107 Section 21 provides that an enactment may appoint the Auditor General to audit the accounts of a body corporate or other body established by the enactment, such as statutory boards. Generally, the Auditor General uses outside resources to perform these audits because of a lack of her own resources[147].

The Internal Audit Department

1.108 The Internal Audit Department ("the IAD") was established as an entirely independent body by section 3 of the Internal Audit Act 2011[148]. The Governor appoints a Director, auditors and other necessary members of staff to the IAD; but the IAD and its Director report administratively to the Financial Secretary, and in the usual way it relies upon the allocation of funds by the Cabinet as approved by the House of Assembly. The current IAD Director is Ms Dorea Corea, who was Senior Internal Auditor from 2001, Deputy Director from 2006 and has been Director since 1 July 2013[149].

1.109 The functions of the IAD focus on performance audits. They are set out in section 4, as follows, to:

> "(a) monitor the systems of internal control of a Public Authority using generally accepted Internal Audit standards;
>
> (b) evaluate and report on whether the systems of internal control of a Public Authority are adequate and efficient to ensure that
>
> (i) Government assets are
>
> (aa) adequately safeguarded;
>
> (bb) used only for identified purposes or other purposes approved by law; and
>
> (cc) used economically and efficiently.
>
> (ii) risks may be identified and managed;
>
> (iii) the financial management and control information of a Public Authority is accurate, and reliable;
>
> (iv) the operations of a Public Authority are compliant with policies, procedures and the law;

[145] T18 28 June 2021 page 24.
[146] T18 28 June 2021 pages 24-25.
[147] T18 28 June 2021 pages 27-28 and T49 15 October 2021 pages 112 and 114.
[148] No 1 of 2011. Prior to 2011, as explained by the current Director, Ms Dorea Corea, it was known as "the Internal Audit Unit" and operated as an ad hoc committee or unit within the MoF under the Financial Secretary (see T22 6 July 2021 pages 6-7). Section 9 of the 2011 Act now provides that it "shall at all times operate independently of any entity being or likely to be audited". Wendell Gaskin, the Director of the Unit and then the new Department in the period 2009-11, said that he did not think that the existing powers of the Financial Secretary under which he had been acting were sufficient for the purposes of internal auditing, and he was instrumental in bringing the legislation to fruition ("I nursed that Act like a baby": T27 15 July 2021 page 22). In this Report, "IAD" is generally used to cover both the Internal Audit Department and its predecessor, the Internal Audit Unit. Some government departments have their own internal audit group, which have no connection with the (independent) IAD, e.g. HM Customs Internal Audit Unit (see paragraphs 12.49-12.50 below).
[149] T22 6 July 2021 page 5. The IAD Director Ms Corea gave oral evidence on Day 22 6 July 2021, Day 23 7 July 2021 and Day 49 15 October 2021.

(c) review operations and programmes of a Public Authority to ascertain whether the results are consistent with the objectives of the operations and programmes of the Government;

(d) report and make recommendations to the head of a Public Authority and the Committee regarding any irregularity or significant control weakness occurring within that Public Authority;

(e) design plans to be approved by the Committee for the development and maintenance of efficient internal audits of Public Authorities;

(f) design plans to be approved by the Committee for the improvement of systems of internal control of Public Authorities; and

(g) to prepare audit reports in accordance with [the 2011] Act."

In short, the IAD is a means by which the Government can monitor, assess and enhance good governance; and ensure that public bodies manage risk and their budgets sensibly[150].

1.110 The IAD performs audits in accordance with the guidance in the International Professional Policies Framework issued by the Institute for Internal Auditors[151]. It is usual practice to identify, as part of a report, any relevant audit limitations, e.g. where the internal auditors did not have full access to the relevant documents[152].

1.111 The reference in section 4 of the Internal Audit Act 2011 to "the Committee" is to the Internal Audit Advisory Committee established by section 6 of the Act ("the IAAC"). Its functions are set out in section 7, as follows, to:

"(a) establish standards and procedures for the effective control of internal audits by the Department;

(b) advise the Department in relation to the performance of its function under [the 2011] Act;

(c) advise the Department on policies and procedures for the development, maintenance, and improvement of systems of internal control for Public Authorities;

(d) in respect of each financial year, advise the Department on an audit programme for implementation by the Department, which shall include

(i) the Public Authorities to be audited within the financial year;

(ii) the intended manner in which the Public Authorities will be audited;

(iii) any Government programme or policies which are relevant to the Public Authorities to be audited; and

(iv) any internal audit control deficiencies relating to the Public Authorities, known to the Department;

(e) review audit reports forwarded by the Director."

[150] T22 6 July 2021 page 8.
[151] T22 6 July 2021 page 31.
[152] T22 6 July 2021 page 31.

1.112 The IAAC thus has a vital role in not only formulating the programme of audits, but also in ensuring that audited public authorities respond to the Department's reports and recommendations[153]. As the IAD Director put it, the IAD is dependent upon the Chairperson of the IAAC intervening to press the relevant public body to get things done[154].

1.113 The members of the IAAC are appointed by Cabinet on the recommendation of the Minister of Finance; and it comprises a chairperson, a senior public officer, a member who is not a public officer and, as ex officio members, the IAD Director and the Financial Secretary or Deputy Financial Secretary[155]. The IAAC is required to have at least one meeting per quarter[156]. However, since 2011, there has only been a committee in place for the three-year period 1 January 2014 to 31 December 2016 – there was no committee in existence from 2011-14 or 2017-21. During the period 2014-16, Ms Italia Penn was the Chairperson, responsible for calling meetings of the IAAC; but it seems the committee only met infrequently, even during that period[157].

1.114 The absence of a functioning IAAC meant that the IAD has been left without guidance as to its audit programme[158], and without any body in which to report. In that absence, it reported direct to the MoF[159]. The IAD Director from time to time made efforts to try and re-establish the IAAC, by writing to the Financial Secretary including nominating potential candidates for appointment, but received no explanation for the failure to re-establish the IAAC[160].

1.115 Eventually, on 21 June 2021, Cabinet made three appointments including Ms Italia Penn as Chairperson[161].

1.116 The duties and powers of the IAD are set out in Part II of the 2011 Act, and include:

(i) the duty to carry out internal audits in respect of public authorities specified in the audit plan for the financial year as approved by the IAAC[162];

(ii) the duty to submit as soon as practicable a concluded internal audit to the IAAC, the head of the relevant public authority and (if different) the relevant Permanent Secretary[163];

(iii) the duty to submit an annual report to the IAAC, and to the Minister of Finance[164];

(iv) the duty to conduct an ad hoc investigation of a public authority if advised to do by the IAAC[165];

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153 T22 6 July 2021 page 21.
154 T22 6 July 2021 pages 50-51.
155 Section 8(1).
156 Section 8(4).
157 For example, the IAD Director could not recall any meetings from August 2015 to December 2016 (T22 6 July 2021 pages 11-12).
158 The IAD Director explained that, when the IAAC was in place and functioning, it would set the audit programme for the IAD. When it was not, the IAD would have to set the programme itself (T23 7 July 2021 page 5).
159 T22 6 July 2021 pages 15-16.
160 T22 6 July 2021 pages 15-16. Dr Orlando Smith, the Premier and Minister of Finance 2011-19, said there was no reason not to re-establish it: he could not offer any explanation: and he could not recall any correspondence from the IAD Director seeking its re-establishment, nor indeed the Financial Secretary bringing the issue to his attention (ibid pages 33-34). Nor could Glenroy Forbes, Financial Secretary 2017-19 or Jeremiah Frett, the current Acting Financial Secretary, explain why there was a hiatus and why it took so long to re-establish the IAAC (T25 13 July 2021 pages 74-76, and 112-113). They each accepted that the IAD Director had approached them to press for the re-establishment of the IAAC, and they had considered people to serve on it; but, as Mr Forbes put it, it dropped down the priority list (ibid page 113).
161 Gazetted 24 June 2021. The other two appointments were Mrs C Jovita Scatliffe and Mr Terrence Gumbs, neither of whom had served before. As at the date the IAD Director first gave evidence to the COI (6 July 2021), the new Chairperson had not contacted her with a view to holding a first meeting (T22 6 July 2021 page 13).
162 Section 13(a).
163 Section 13(b).
164 Section 18.
165 Section 14.

(v) the power to investigate a public authority where there is a suspicion of irregularity or fraud[166];

(vi) the power to conduct follow-up reviews of an internal audit to assess any progress made concerning a problem or deficiency identified with the public authority in the report[167]; and

(vii) the power to require a public officer to give the IAD access to property that is in the public officer's power or control, and to request from any public officer or employee of a public authority any information or document including electronic data for the purposes of an internal audit[168].

1.117 The last-mentioned power – to require a public official to allow access to information necessary to conduct an internal audit – is vital to the IAD's function, as the Internal Audit Act 2011 itself recognises. Section 23 makes it a criminal offence without reasonable excuse to fail to provide information requested by the IAD, in the following terms:

> "A person who
>
> (a) without legitimate excuse, fails to provide any information within his or her knowledge which is relevant to an audit being carried out by the Director or an auditor;
>
> (b) without legitimate excuse, fails to provide information required by the Director or an auditor or in any way intentionally prohibits the provision of such information;
>
> (c) deliberately provides inaccurate information or evidence; or
>
> (d) by any means, impedes the Director or any person involved in an audit, in the performance of their duties under this Act,
>
> commits an offence and is liable on summary conviction to a fine not exceeding three thousand dollars or imprisonment for a term not exceeding one year, or both."

The maximum sentence of one year imprisonment reflects the seriousness with which the legislature views any failure of a public officer to cooperate with the IAD.

1.118 In respect of any report, the IAD Director explained that a draft is sent to the public authority being audited, to give it an opportunity to respond in what was called a "Management Response". If no Management Response is received, the report remains in draft, and it is the function of the Chairperson of the IAAC (if functioning) to assist in obtaining a response[169]. If there is no response, then the report simply stays in draft. If there is a management response, the report is then finalised, and sent to the IAAC (if it is functioning) before it is sent to the relevant permanent secretary, the MoF, the Auditor General and the Deputy Governor[170]. If the relevant public authority agrees with the findings and recommendations, then they must

[166] Section 16.
[167] Section 15.
[168] Section 12(a) and (d).
[169] T22 6 July 2021 page 21, where the IAD Director said: "[T]he Chairman will then get involved in the process to ensure that the public authority responds to the report". She said that the absence of an IAAC meant that the audit stays as a draft and is not laid before the House of Assembly, and thus it can be ineffective: "In the absence of the Committee, we usually don't have any resolve" (T22 6 July 2021 pages 22-25, quote at page 25).
[170] T22 6 July 2021 pages 20-21.

also agree to a timetable to implement necessary change[171]. Although the IAD may conduct a follow-up report, it is largely a matter for the IAAC to take up matters with the relevant Minister or Deputy Governor[172].

The Complaints Commissioner[173]

1.119 The Complaints Commissioner was established by section 66A of the 1976 Constitution, inserted by section 14 of the Virgin Islands (Constitution) (Amendment) Order 2000[174], with "functions and jurisdiction as may be prescribed by law"[175]. The independence of the Commissioner is guaranteed by section 66B(2) which, in similar form to the provisions applying to the DPP and the Auditor General, provides that:

> "In the exercise of his functions, the Complaint Commissioner shall not be subject to the direction or control of any other person or authority".

Sections 66A and 66B of the 1976 Constitution were transposed into the 2007 Constitution as sections 110 and 111.

1.120 The functions and jurisdiction of the Complaints Commissioner are provided for by the Complaints Commissioner Act 2003[176]. By section 4(1), "…the principal function of the Commissioner shall be to investigate any action taken by a department of Government or a public authority in the exercise of its administrative functions" in the circumstances set out in section 4(2) which focus upon where a person has or may have sustained an injustice as a result of maladministration including where the Commissioner considers of his or her own motion that he or she ought to investigate the matter on the ground that some person or body of persons has or may have sustained an injustice as a result of maladministration. The Commissioner has the same power as a High Court Judge generally to summon witnesses and compel them to give evidence and produce documents[177].

1.121 "Maladministration" is defined in section 2 of the Act, as follows:

> " 'maladministration' means inefficient, bad or improper administration and, without prejudice to the generality of the foregoing, includes
>
> (a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;
>
> (b) abuse of any power (including any discretionary power) or authority including any action which
>
> (i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory; or

[171] T22 6 July 2021 page 23.
[172] T22 6 July 2021 page 25.
[173] Mrs Erica Smith-Penn (who has been Complaints Commissioner since 1 January 2021), and her immediate predecessor Mrs Sheila Brathwaite (Complaints Commissioner from 1 July 2015 to 31 December 2020) gave oral evidence on 1 July 2021 (T21 1 July 2021 pages 5ff). At the beginning of her evidence, Mrs Brathwaite gave a short opening statement setting out her experience as Complaints Commissioner (T21 1 July 2021 pages 7-10). At the conclusion of her evidence, Mrs Smith-Penn gave a statement in which she made a number of points which were far removed from the work of the Complaints Commissioner (T21 1 July 2021 pages 81-97). The manner in which these points were raised was unhelpful, and their form was such that they were of no real assistance to me. I gave Mrs Smith-Penn the opportunity to set out her submissions in writing. However, she ultimately chose not to do so.
[174] SI 2000 No 1343.
[175] Section 66B(1).
[176] No 6 of 2003.
[177] Section 11.

(ii) was based wholly or partly on a mistake of law or fact;

(c) unreasonable, unjust, oppressive or improperly discriminatory procedures".

1.122 Sections 3 and 5(4) exclude areas from the scope of the Commissioner's jurisdiction that are commonly excluded from the scope of an ombudsman's jurisdiction, e.g. the functions of any court, deliberations and proceedings of the Cabinet or House of Assembly, and circumstances where the complainant may pursue a legal remedy through the courts.

1.123 Section 5(2) and (3) provide:

"(2) The Commissioner may investigate a matter notwithstanding that such matter raises questions as to the integrity or corruption of the public service or of any department of Government or public authority, and may investigate any conditions resulting from, or calculated to facilitate or encourage corruption in the public service or any such department or authority, but he shall not undertake any investigation into specific charges of corruption against individuals.

(3) Where in the course of an investigation it appears to the Commissioner that there is evidence of any corrupt act by any individual, he shall report the matter to the Governor with his recommendations as to any further investigation he may consider proper."

Mrs Erica Smith-Penn and Mrs Sheila Brathwaite (the current Complaints Commissioner and her recently retired predecessor) explained that, if they had a suspicion of corruption during one of their investigations, in practice they would either refer it to the Governor (and thence to the Auditor General who has more investigative powers) or refer it direct to the relevant criminal authorities[178].

1.124 The Complaints Commissioner can only make recommendations, and Mrs Brathwaite considered that recommendations were ignored in "at least 50 per cent of the cases"[179]. She said that consideration should be given to the Complaints Commissioner having the power to require public officers to adopt recommendations made: she did not regard the ability to lay a special report before the House of Assembly to be effective in terms of enforcement[180]. Both Mrs Brathwaite and Mrs Smith-Penn favoured the setting up of a Standing Committee of the House of Assembly to which the Complaints Commissioner's reports would be sent and which had powers to require compliance[181].

1.125 Under section 12, the Commissioner is required to send a copy of a report to the relevant government department or public body, the Governor and each member of the Cabinet: although, in practice, it is sent not to each Cabinet member but only to the Premier, and it is sent to the relevant Minister whose subject area is under scrutiny in draft before the report is finalised[182]. By section 14(1):

[178] T21 1 July 2021 pages 27ff.
[179] T21 1 July 2021 page 50.
[180] T21 1 July 2021 pages 42 and 51-52.
[181] T21 1 July 2021 pages 56-58. The suggestion is for a committee similar to the Register of Interests Committee. That committee, however, has been less than a success (see paragraphs 4.45ff below).
[182] T21 1 July 2021 pages 36-37.

> "If, within a reasonable time after the Commissioner issues his report or the time specified under section 12(3), no action is taken which seems to the Commissioner to be adequate and appropriate, the Commissioner, after considering the comments, if any, made by or on behalf of the relevant department or authority, shall lay a special report on the matter before the Legislative Council."

1.126 In addition, the Commissioner is required to produce an annual report within six months of the end of each financial year, and the Governor (through the Premier) is required to lay such a report before the House of Assembly within four months of receipt[183].

1.127 Mrs Brathwaite considered that it would be wrong to conclude that delays in these annual reports being submitted is indicative of a lack of efficiency on the part of the Complaints Commissioner. She gave the example of the 2014 report which was sent to the Governor on 24 June 2015 (i.e. within the statutory timescale) but not laid before the House of Assembly until 18 April 2016. Mrs Brathwaite explained that the annual report formally has to be presented by the Premier as the Governor is not a member of the House of Assembly. She suggested that were it possible for a report to progress from Governor direct to the House of Assembly, then the Office of the Complaints Commissioner "would not be viewed as being late with our Reports"[184]. While there could be many reasons why the annual reports of the Complaints Commissioner have not been laid before the House of Assembly in good time, that this has occurred may be an indication of the standing that this constitutional position is in practice accorded.

1.128 The Annual Reports show a substantial decline in contacts with complaints to the Commissioner over the last 10 years.

Table 3
Numbers of Contacts with/Complaints to the Complaints Commissioner

Year	No of Contacts/Complaints[185]
2011	135
2012	117
2013	115
2014	123
2015	91
2016	77
2017	22
2018	16
2019	45
2020	30

[183] Section 24.
[184] T21 1 July 2021 pages 40-41.
[185] These are described as "contacts" in the 2011-18 Reports, a term which is self-explanatory. The term "complaints" was used in the 2019-20 Reports. This seems to equate to "contacts". "Inquiries" was a term explained by Mrs Brathwaite as circumstances in which a complaint is made and some steps taken in respect of it even if falling short of an investigation: so, for example, of the 30 complaints in 2020, 12 became inquiries: T21 1 July 2021 page 47.

1.129 Mrs Brathwaite considered that there were several reasons for this decline[186]:

(i) The devastation caused by the September 2017 hurricanes meant that her office was not open for some months and people who might otherwise have complained had more pressing priorities. However, that cannot explain the general decline in numbers which occurred prior to September 2017, including the decline to 22 in the nine month period to September 2017.

(ii) Mrs Brathwaite also considered that there had been improvements in public service as a result of public officers' growing respect for the Complaints Commissioner's Office, coupled with initiatives of the Deputy Governor to reward good performance in the Public Service. However, that does not reflect the general thrust of the evidence presented to the COI as to the Public Service being generally understaffed and unable to cope with workloads.

1.130 Mrs Smith-Penn and Mrs Brathwaite explained the recent small increase in people making complaints as resulting from matters being referred which are not in the Complaints Commissioner's remit but where she nevertheless had tried to assist, e.g. human resources matters, some of which (they said) could be concluded very quickly with, perhaps, just one phone call[187]. This means that, even of the currently low numbers of complaints, some do not properly fall within the scope of the Complaints Commissioner's jurisdiction.

1.131 On all the evidence, it seems more likely that the decline in numbers of contacts with and complaints to the Complaints Commissioner reflects the falling regard in which the post is held by other elements of the BVI Government, with the resulting loss of public confidence in the position[188].

1.132 The Commissioner's Office is currently staffed by the Commissioner herself, and two staff: a Lead Investigator, and a Senior Administrative Officer[189]. They are one staff member (a clerk) short: Mrs Brathwaite considered that, with four staff (one of whom was bilingual), that would be adequate for the current workload[190]. Mrs Smith-Penn is in fact seeking two more staff, including a lawyer to deal with rights including (until a Human Rights Commission is set up) human rights[191].

1.133 There has clearly been a falling off of interest in and influence of the Complaints Commissioner. The BVI Government has indicated that it will honour its commitment to set up a Human Rights Commission. This will enable the Complaints Commissioner to refocus upon her work as an ombudsman, i.e. complaints in respect of maladministration. However, in my view, steps also need to be taken to re-establish the credibility of this important position within the Constitution, including steps that encourage or require a relevant arm of government to respond to criticisms or recommendations of the Complaints Commissioner which are now regularly simply ignored. For example, the Complaints Commissioner could be required to report annually to the Governor, Deputy Governor and the House of Assembly/Standing Finance Committee of the House of Assembly ("the SFC") setting out the extent to which there has been a response to her criticisms and recommendations.

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[186] T21 1 July 2021 page 43 and 48-50.
[187] T21 1 July 2021 pages 44-47.
[188] I should make clear that I do not consider that this is any reflection on the attributes of those who have held this post.
[189] T21 1 July 2021 page 20.
[190] T21 1 July 2021 page 70.
[191] T21 1 July 2021 pages 71ff. Section 34 of the Constitution provides for a Human Rights Commission, but it has not to date been established. Until a Human Rights Commission is set up, as Mrs Smith-Penn put it: "… [W]e are quite happy to lead the charge" (T21 1 July 2021 page 76).

The House/Committee would then have the opportunity to scrutinise the report and raise questions with that arm of the government as part of the budget process. I have made a recommendation accordingly[192].

The Contractor General

1.134 The Contractor General was established by section 3(1) of the Contractor General Act 2021 as an independent appointment/office holder with the job of monitoring the implementation of government contracts. I consider the role further below[193].

1.135 The Act has not yet been brought into force; and a Contractor General has yet to be appointed.

The Registrar of Interests

1.136 In addition to a Complaints Commissioner, the Virgin Islands (Constitution) (Amendment) Order 2000 made provision for a Registrar of Interests, established through the insertion of a new section 66C into the 1976 Constitution. That section of the 1976 Constitution was transposed into the 2007 Constitution as section 112. The role of the Registrar is considered below[194].

1.137 Mrs Victoreen Romney-Varlack was appointed Registrar of Interests on 18 February 2008. She retired on 31 May 2021, when Mrs Clearlie Brown-Turnbull was appointed Registrar.

The Public Accounts Committee

1.138 The Public Accounts Committee ("the PAC") is a Select Committee of the House of Assembly established under Standing Order No 73 of the House of Assembly. The functions of the PAC are:

(i) in conjunction with the Auditor's Report, to consider the accounts of the BVI Government;

(ii) to consider any Special Report submitted by the Auditor General under section 20(3) of the Audit Act 2003;

(iii) in the case of any excess or unauthorised expenditure of funds, to report to the House of Assembly on the reason for such expenditure;

(iv) in the case of any shortfall in revenue, to report to the House of Assembly on the reason for such shortfall;

(v) to report to the House of Assembly any case of apparent extravagance or waste of public funds; and

(vi) to propose any measure it considers necessary, to ensure that public funds are properly brought to account and are economically spent[195].

[192] The recommendation is made in the chapter on Governance: see paragraphs 13.141 and 13.162, and Recommendation B45, below.
[193] See paragraphs 6.581-6.586 below.
[194] See Chapter 4, especially paragraphs 4.1-4.21.
[195] See T18 28 June 2021 pages 71-72.

1.139 In accordance with the Standing Order, the Leader of the Opposition chairs and the Auditor General advises the PAC; and opposition parties (if numbers allow) have a majority of places. The Committee may summon any Accounting Officer or other public official to appear before it and give explanations in relation to the expenditure of public money. It is mainly concerned with value for money reports[196].

The Economy

1.140 The BVI economy, measured in terms of gross domestic product ("GDP"), is estimated at over $1 billion; but, as shown by Table 4 below, its growth rate has been severely hit by, not only the effects of the 2017 hurricanes, but recently by the global economic constraints due to the COVID-19 pandemic (which resulted in the BVI economy experiencing a contraction of 17% in real GDP in 2020).

The BVI's GDP per capita[197] (at current prices) has risen from just over $1,000 in 1970, to over $45,500 in 2020. The unemployment rate in the BVI is generally low[198].

Table 4
BVI Economic Indicators[199]

	2005	2010	2015	2020
GDP (current $ millions)	994	1,021	1,174	1,092
Real GDP growth, year-on-year (percentage)	14.3	-0.1	0.8	-17.0

1.141 Like several other small island states and Overseas Territories in the region, the BVI has a service-based economy[200], with two major economic pillars: tourism and financial services.

1.142 As described above, traditional agricultural industries, such as the production of cotton and sugar, had collapsed by the start of the twentieth century. Revival efforts and introduction of new crops, such as tobacco, were largely unsuccessful and hampered by infestation, disease and extreme weather. The production of livestock declined following a revival during the Second World War, and agriculture remains a limited source of national income.

1.143 With the absence of any other industries of note to meet the goal of self-sufficiency, official interest began to focus on the opportunities for tourism, e.g. the Hotels Aid Ordinance 1953 encouraged hotel construction. The US Virgin Islands provided an opportunity for parallel development. In 1961, the promotion of tourism as the mainspring of "development" was accepted as the "firm policy" of the BVI Government[201]; and it has been the policy of successive administrations to encourage growth in the tourism sector.

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[196] T18 28 June 2021 page 73.

[197] UN Data British Virgin Islands. Retrieved from: http://data.un.org. This gives figures for GDP per capita (at current $) of $1,182 for 1970, and $48,511 for 2019.

[198] UN Conference on Trade and Development: General Profile: British Virgin Islands (Country Profiles, British Virgin Islands). See also Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(e)(iii).

[199] Indeed, the economy is reliant to an extent on workers from other (notably Caribbean) territories and states. The unemployment rate in 2015 was 2.9%. Current figures are not available; but COVID-19 will inevitably have had an adverse impact on this figure. The Acting Financial Secretary said that there have been "significant unemployment rises" as a result of the pandemic: Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(h)(iii).

[200] Over 90 per cent of the economy is service-based.

[201] Statement of Government Policy on the Application of the Aliens Land Holding Regulation Act, 27 October 1961, cited by Dookhan at page 231.

1.144 Prior to 2018, hotels and restaurants accounted for about 8% of the economy, as measured by gross domestic product; but services ancillary to tourism and other spill overs mean that the real economic contribution of tourism to the BVI economy was closer to 55% and an even greater share of employment[202]. However, the sector is particularly sensitive to external factors such as the health of the US economy and natural disasters. Whilst the BVI recorded a peak in tourist arrivals with over 1.1 million in 2016, the 2017 hurricanes hit the sector hard. In 2018, tourist numbers were down by 60% to just over 400,000. The hurricanes are estimated to have cost the BVI tourism industry alone over $1 billion[203].

1.145 Just as some recovery was being experienced, in 2020, tourism ground to an unexpected halt due to the need to restrict entry to the BVI as a result of the COVID-19 pandemic[204]. Steps in rehabilitating the tourist industry (including cruise ships) are only now being taken.

1.146 The second pillar of the economy, financial and allied professional services (including banking and insurance) accounts for 25-30% of the economy[205].

1.147 Initially driven by interest from the US, the International Business Companies Act 1984[206] paved the way for the BVI to become a global centre for offshore corporate and financial services, in particular the registration of corporate entities. Despite a steady decline in quarterly new incorporations in recent years (see Figure A below), data collected by the BVI Financial Services Commission ("the FSC") (the independent regulatory authority that supervises the industry) indicate that there were 366,364 registered active companies at the end of 2020[207]. The revenues from the financial services industry continue to be an important source of income for the BVI Government, accounting for about 55-60% of total recurrent revenue[208].

[202] UNDP, UNICEF and UN Women Eastern Caribbean COVID-19 HEAT Report, "British Virgin Islands: Human and Economic Assessment of Impact" (2020) ("the BVI COVID-19 HEAT Report") (COVID-19 HEAT Report). This report, drawing on data from the World Travel and Tourism Council, estimated that tourism in the BVI contributed nearly 60% of overall economic output, and two-thirds of employment (page 5).

[203] Director's Desk: Irma and Maria by Numbers, Focus (the magazine of the Caribbean Development and Cooperation Committee of the UN Economic Commission for Latin America and the Caribbean (Issue 1) January-March 2018) estimated the BVI sector loss at $1.06m (Irma and Maria by Numbers 2018).

[204] According to the BVI Government's Medium Term Fiscal Plan for 2020-2023, in 2020 central government was forecast to lose revenue from tourism in the range £17 million to $23 million. Overall, tourism revenue losses in 2021 were projected in the range $340 million to $430 million (Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(e)(iii) and Exhibit JF14).

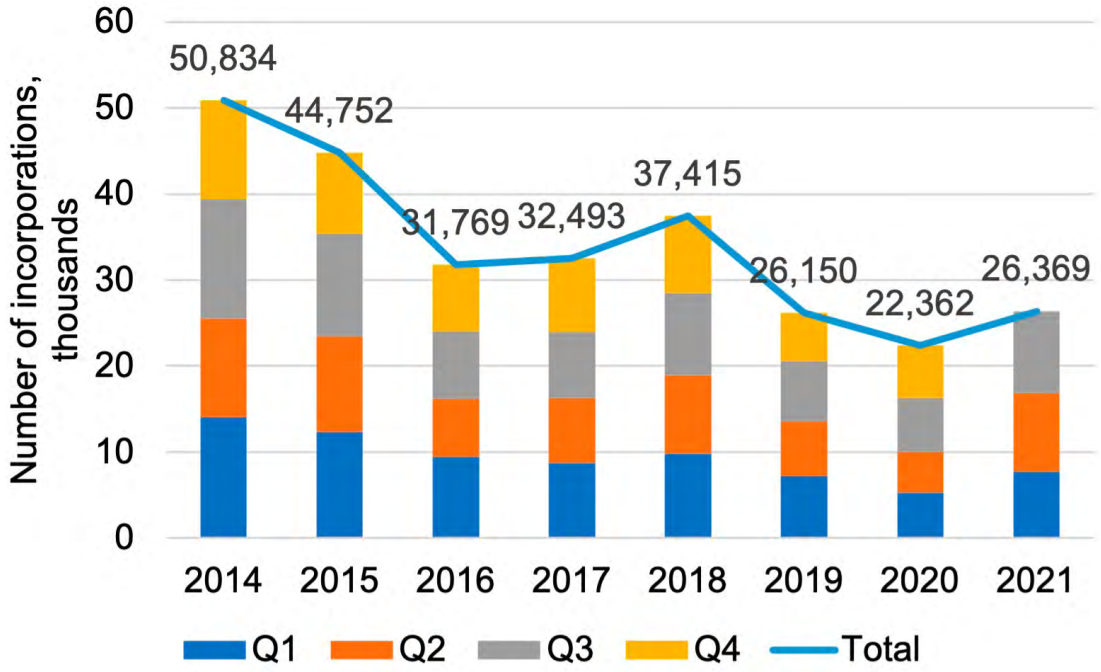
[205] The BVI COVID-19 HEAT Report records that national accounts data suggest that in 2017 finance and insurance activities contributed around 25% of economic activity (page 5). Other data suggest a slightly higher figure.

[206] Cap 249.

[207] The FSC quarterly statistical bulletin reports on the total business companies and company incorporations by quarter (https://www.bvifsc.vg/sites/default/files/q4_2020_statistical_bulletin.pdf).

[208] Monthly Report Dec 2020. The evidence of the Premier Dr the Hon Orlando Smith to the House of Commons Foreign Affairs Committee in 2018 was that financial services accounted for 33% of the BVI GDP, and 60% of its government revenue (House of Commons Foreign Affairs Committee: Fifteenth Report of Session 2017-19: Global Britain and the British Overseas Territories: Resetting the Relationship (HC 1464) (21 February 2019) ("the Foreign Affairs Committee Report") paragraph 30).

Figure A
Quarterly Incorporations (FSC)



1.148 To support this financial services industry, there is a history of a degree of co-operation and transparency on matters of financial intelligence and taxation at an international level (e.g. membership of the Caribbean Financial Action Task Force ("the CFATF") on Money Laundering and Terrorist Financing and the Egmont Group; and adoption of the Organisation for Economic Cooperation and Development ("OECD") Common Reporting Standard on the Exchange of Information on Taxation Matters). The UK has extended several international conventions to the BVI, including the following (both of which were recommended by the CFATF):

i) The UN Convention Against Corruption[209]. This has as its express purposes:

"(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property"[210].

Generally, by article 5(1):

"Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability".

[209] United Nations Convention against Corruption adopted by UN General Assembly Resolution 58/04 on 31 October 2003, extended by the UK to the BVI by the UK Declaration of Territorial Application to the British Virgin Islands 16 October 2006.
[210] Article 1.

By way of example of particular requirements set out in Chapter 2 (Preventative Measures), article 9(1) provides that:

> "Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption…".

The article then proceeds to set out specific requirements of the steps that are required to be taken in relation to the procurement regime.

(ii) The International Convention for the Suppression of the Financing of Terrorism[211]. This, for example, requires states to make certain money laundering conduct a criminal offence subject to appropriate sanction[212].

1.149 The evolving nature of global developments and policies, however, requires the industry also to adapt and evolve. For example:

(i) To avoid being placed on the European Union ("EU") list of non-cooperative jurisdictions for tax purposes, the BVI has co-operated with the EU and has implemented all its commitments, including the passage of legislation introducing economic substance requirements in 2018[213].

[211] UN International Convention for the Suppression of Financing for Terrorism opened for signature on 10 January 2000 and extended by the UK to the BVI by the UK Declaration of Territorial Application to the British Virgin Islands 21 May 2011.
[212] Articles 1-4.
[213] Economic Substance (Companies and Limited Partnerships) Act (No 12 of 2018).

(ii) The BVI currently maintains a private register of beneficial ownership using the Beneficial Ownership Secure Search system ("BOSSs") and participates in the 2016 Exchange of Notes[214] arrangement with the UK, through which law enforcement and tax authorities exchange information on beneficial ownership within 24 hours of the request or in one hour for urgent requests. The UK Sanctions and Anti-Money Laundering Act 2018 ("SAMLA")[215] contains provisions, originally advocated by a group of backbench MPs, to establish publicly accessible registers of beneficial ownership in all the BOTs, if not already implemented, by drafting an Order in Council. The BVI Government considers the imposition of such a register to fall within its devolved responsibility for management of economic and financial affairs, does not respect the 2007 constitutional settlement, and it will damage the BVI's economic interest. On 8 March 2019, it brought judicial review proceedings against the UK Foreign, Commonwealth and Development Office ("the FCDO")[216]; and is supporting an outstanding private claim for constitutional relief initiated in the BVI High Court by two Virgin Islanders against the decision[217]. However, although reluctant to agree to its introduction, in common with other BOTs with financial centres, on 22 September 2020 the BVI Government committed to introduce a publicly accessible register of company beneficial ownership, but with certain reservations, including that the format must be in line with international standards and best practices as they develop globally and, at least, as implemented by EU Member States[218]. In light of statements made by the inhabited BOTs, including the BVI, to adopt such registers, the UK Government decided it was not necessary to make any Order in Council, but it indicated that this would be kept under review[219]. The UK Government expects the BOTs' registers to be in place by the end of 2023[220].

1.150 Given the dependency and vulnerability of these vital pillars of the economy to external shocks, the BVI Government continues to consider policies, not only to restore and maintain the tourist and financial services industries, but also to diversify the economy.

[214] Exchange of Notes between the Government of the United Kingdom and the Government of the Virgin Islands in respect of the sharing of beneficial ownership information (gov.uk).

[215] 2018 c 13. This UK statute was passed in furtherance of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EC (the EU Fifth Anti-Money Laundering Directive).

[216] On 2 September 2020, the Foreign and Commonwealth Office merged with the Department for International Development for form the Foreign, Commonwealth and Development Office. In this Report, I shall refer to the FCDO and its predecessors as "the FCDO".

[217] Elected Ministers Position Statement paragraphs 11-15.

[218] BVI Government Press Release, BVI Premier Reiterates Territory's Commitment to an Appropriate Framework for Publicly Accessible Registers, 22 September 2020 (https://bvi.gov.vg/media-centre/bvi-premier-reiterates-territory-s-commitment-appropriate-framework-publicly-accessible).

[219] Governor's Response to the Elected Ministers Position Statement.

[220] The way in which the UK Government sought to impose transparency into beneficial corporate interests was raised as a criticism by the elected Ministers. It is dealt with at paragraphs 13.63-13.68 below.

Public Finances

1.151 The framework for the collection and use of public money is set out in Chapter 8 (sections 102-109) of the Constitution (under the heading, "Finance"), the Public Finance Management Act 2004[221] as amended[222] ("the PFMA") and regulations made under that Act namely the Public Finance Management Regulations 2005[223] as amended[224] ("the PFMR").

1.152 All revenues and money raised or received by the BVI Government are paid into the Consolidated Fund. Taxation revenue is the major source of revenue with the biggest contributors summarised in Table 5 below.

Table 5
BVI Government Recurrent Revenue Streams (Unaudited Actuals)[225]

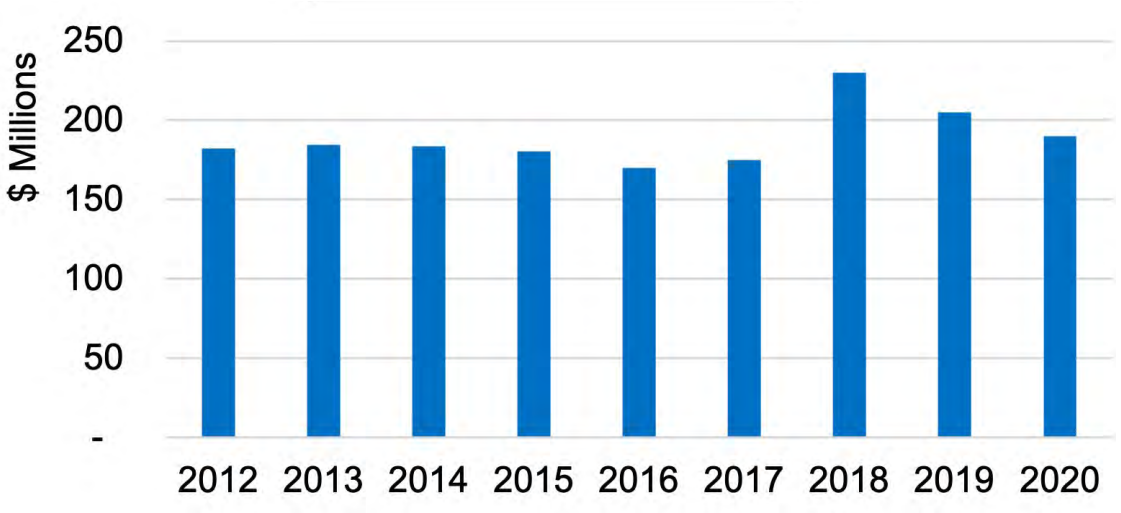
	2020		2019	
Financial services transfers	$190.0 million	53%	$205.0 million	56%
Payroll taxes	$48.0 million	13%	$54.8 million	15%
Import duties (on non-alcoholic and alcoholic goods and commercial licenses)	$33.3 million	9%	$46.3 million	13%
Sub-total*	**$271.3 million**	**75%**	**$306.1 million**	**84%**
Other	$89.2 million	25%	$57.8 million	16%
TOTAL*	**$360.4 million**	**100%**	**$363.9 million**	**100%**

* Numbers may not add up due to rounding.

1.153 The single largest source of income for the BVI Government is derived from fees from the financial services industry, with two windfall payments received in May and November, coinciding with the incorporation renewal deadlines. Payments are collected by the FSC and are transferred monthly to the BVI Government. Figure B below shows the total transfers in recent years[226]:

[221] No 2 of 2004. The Act came into force on 11 March 2004.
[222] As amended by the Public Finance Management (Amendment) Act 2005 (No 7 of 2005) which came into force on 1 December 2005, and the Public Finance Management (Amendment) Act 2012 (No 9 of 2012) which came into force on 14 November 2012 and which, amongst other things, replaced the nomenclature to reflect the changes made in the 2007 Constitution, e.g. "Cabinet" replacing "Executive Council".
[223] V SI 2005 No 87.
[224] As amended by the Public Finance Management (Amendment) Regulations 2005 (VISI 2005 No 87) which came into force on 1 December 2005, the Public Finance Management (Amendment) Regulations 2007 (VISI 2007 No 28) which came into force on 24 May 2007, and the Public Finance Management (Amendment) Regulations 2020 (VISI 2020 No 110) which came into force on 24 September 2020.
[225] Monthly Report December 2020.
[226] Monthly Report December 2020.

Figure B
BVI Government Revenue Streams: Financial Services Transfers



1.154 The BVI Government of course has both recurrent and capital expenditure. Table 6 below summarises the major recurrent expenditure items.

Table 6
BVI Government Recurrent Expenditure (Unaudited Actuals)[227]

	2020		2019	
Employee compensation	$110.2 million	31%	$115.0 million	37%
Grants	$79.3 million	22%	$91.9 million	30%
Services	$73.3 million	21%	$15.7 million	5%
Sub-total*	**$262.8 million**	**74%**	**$226.6 million**	**72%**
Other	$94.5 million	26%	$86.2 million	28%
TOTAL*	**$357.3 million**	**100%**	**$308.8 million**	**100%**

* Numbers may not add up due to rounding.

1.155 The BVI Government's largest recurrent expenditure item is on employee contribution, which covers salaries and allowances for public officers, House of Assembly members and the judiciary[228]. This is followed by grants to the National Health Scheme and other agencies, organisations and statutory bodies such as the BVI Tourist Board, the H Lavity Stoutt

[227] Monthly Report December 2020, and Budget and Actual Recurrent Revenue and Expenditure 2017-2020 - Q1.
[228] The actual spend on employee salaries and allowances for the years 2017-2020 was as follows: $119,476,569 (2017), $111,722,435 (2018), $114,954,607 (2019) and $110,234,085 (2020). Put another way, the approved budget for employee compensation for those years ranges between 41% and 43% of total recurrent expenditure (Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(a) and (f)).

Community College and the BVI Airports Authority ("the Airports Authority")[229]. The BVI Government's expenditure on services increased in 2020 due to unforeseen expenditure in response to the COVID-19 pandemic.

1.156 In addition to recurrent expenditure, the BVI Government spends money on maintaining, repairing or acquiring physical assets (i.e. capital expenditure). The plan and profile for capital expenditure is outlined in the BVI Government's capital investment programme. Budgeted capital expenditure has been $66.0 million and $75.4 million for 2020 and 2019 respectively. Table 7 below records actual expenditure. The underspends in capital expenditure are attributed to interruptions due the COVID-19 response in 2020 and a revision to the Recovery and Development Plan ("the RDP"), following the change in administration in 2019.

Table 7
BVI Government Capital Expenditure: Central Government and the Recovery and Development Agency (RDA) (Unaudited Actuals)[230]

	2020	2019
Central government	$31.3 million	$25.7 million
RDA	$2.7 million	$3.8 million
TOTAL	**$34.0 million**	**$29.5 million**

1.157 In order to finance any negative differences between expenditure and revenue (i.e. deficit), or large capital projects, the BVI Government is able to use cash reserves or borrow money from commercial banks or the Caribbean Development Bank ("the CDB"). At the end of 2020, the central government held $149.5 million in debt, with an additional $66.6 million in debt held by statutory bodies and guaranteed by BVI Government. The central government debt service costs (which includes principal and interest payments) totalled $15.9 million in 2020[231].

1.158 The budget is prepared in line with a budget calendar and is led by the MoF. The process starts from preparing revenue and expenditure projections and new programme requests to a draft budget and Appropriation Bill, which, when passed, authorises expenditure from the Consolidated Fund.

1.159 Once the draft budget, the Medium Term Fiscal Plan ("MTFP") and Appropriation Bill are approved by the Cabinet, the Bill is laid before the House of Assembly for the first reading, after which the Premier delivers a budget address[232]. The SFC, which comprises all the Members of the House of Assembly, is formed and is chaired by the Speaker. The SFC scrutinises and deliberates the draft estimates and calls upon public officers from the relevant departments to defend their budget proposals. Once this is completed, the budget is further read and debated by the House of Assembly before being passed and assented by the Governor, as the Appropriation Act.

[229] The BVI Airports Authority is a Limited Liability Company established under section 4 of the Airports Act 2003 (No 16 of 2003), which manages the three airports in the BVI, namely (i) Terrence B Lettsome International Airport, Beef Island ("Beef Island Airport"), (ii) Taddy Bay Airport, Virgin Gorda and (iii) Auguste George Airport, Anegada.
[230] Medium Term Fiscal Plan 2021-2023, and Monthly Report December 2020.
[231] Monthly Report December 2020.
[232] Budget Addresses and Budget Estimates are published online.

1.160 In cases where the budget does not come into force at the start of the financial year, a provisional warrant budget may be issued for a maximum period of four months from the beginning the financial year or until the Appropriation Act comes into force[233].

1.161 If there is a need for additional spending outside the approved budget, the relevant Ministries and departments work with the MoF to agree which additional spending is taken forward; this is presented in a paper to Cabinet for approval. A supplementary budget and Schedule of Additional Provisions are then approved by resolution of the House of Assembly. This process authorises the Accountant General to make payments in respect of that additional expenditure out of the public purse. The BVI Government introduces a Supplementary Appropriation Bill that retrospectively legalises the excess expenditure from the Consolidated Fund over the relevant year. These would include any cases of over expenditure (e.g.) identified by the Auditor General in an annual audit.

1.162 Under section 24 of the PFMA, in-year virements or re-allocation warrants can be made, without prior approval of the House of Assembly, to increase the sum assigned to a purpose within a supply vote in the Appropriation Act. A re-allocation warrant must be later laid before the House of Assembly. Additionally, section 6 of the PFMA allows Ministers to advance monies outside the original allocation in exceptional and specified circumstances from the Contingencies Fund, where funds cannot be provided under the re-allocation warrant.

1.163 After the close of the financial year, the financial accounts prepared by the Accountant General are audited and reported on by the Auditor General.

1.164 The Minister responsible for the public finances is the Minister of Finance, a post conventionally and currently held by the Premier. The operations of the MoF are supervised by the Financial Secretary.

1.165 Each department is required to have an Accounting Officer who is an appointed public officer responsible and personally accountable for the collection of revenue and spending of public money[234]. The PFMR outline the internal control system by which payments are authorised and made. Accounting officers or delegated public officers must certify the payment instrument to ensure that it is accurate, properly supported and that the services provided are satisfactorily delivered. Once these checks are complete, the payment instrument (with appropriate supporting documents) is sent to the Treasury Department within the MoF, where it is verified once again, before the payment can be issued. The Treasury should not make payments unless it has been allotted in the Appropriation Act or otherwise approved by the House of Assembly by resolution. However, in practice, the Treasury will make a payment if it is satisfied that, in due course, appropriate approval will be forthcoming even if that approval has not yet been given[235].

1.166 The Accountant General is the Chief Accounting Officer and is responsible for the Treasury Department and accounting arrangements in each department. The PFMA requires the financial statements to be prepared in conformity with International Financial Reporting Standards (IFRS) or more specifically the public sector equivalent, International Public Sector Accounting Standards (IPSAS). IPSAS were developed to improve the quality of financial reporting of governments and their agencies and help governments move away from cash to accrual-based accounting. However, challenges persist for the BVI Government in adapting

[233] Section 105 of the Constitution.
[234] Section 21(2) of the PFMA.
[235] For example, where money allocated to House of Assembly Members' Assistance Grants has been exceeded for a particular year and there has been no Supplementary Appropriation Act authorising the additional expenditure, but Cabinet has approved a supplementary provision (see paragraph 5.6 below);

to the new IPSAS reporting standard system, due to software upgrades and resource limitations. It is expected that IPSAS standards for financial reporting will be adopted from the 2018 accounts[236,237].

1.167 As noted above[238], the Auditor General is responsible for auditing the financial accounts of the House of Assembly, government departments and offices, and any other supplementary audits or special reports. The scope of the audits include performing procedures to obtain evidence about the amounts and disclosures in the financial statements and evaluating its presentation to ensure that funds have been used for the purposes approved by law – these are presented in a report. The Auditor General's report includes a certificate stating that the audit of the accounts for the financial year has been completed and any issues identified in the audit should be addressed by the BVI Government. If there are significant issues (e.g. incomplete evidence or non-compliant accounts), the Auditor General may provide a qualified opinion of the financial statements.

1.168 Under section 35(1) of the PFMA, the Accountant General shall, within four months after the end of the financial year or longer, if agreed, provide the accounts to the Auditor General. However, due to delays in addressing significant issues in the submission of the financial statements, there is a backlog in preparing the audited accounts, with the latest certified annual accounts prepared for the financial year 2016 completed in 2019. Since then, and despite the terms of section 19(2), as a result of the Treasury Department failing to provide the necessary financial statements, no annual report for the subsequent years has been prepared[239]. That means that neither the PAC nor the House of Assembly has had any opportunity to scrutinise the financial position of the BVI as revealed by the financial statements analysed and reported by the Auditor General. The BVI Government told the COI that it expects the 2017 and 2018 accounts to be prepared shortly for the Auditor General's consideration. A backlog of audited accounts may cause repeated audited issues to be carried forward without being addressed and impact the BVI Government's ability to borrow. The Deputy Governor said that, in relation to enforcement, the Auditor General has the powers "to demand and command information in a timely fashion"; but she is ignored[240].

1.169 Finance is a devolved area, under the Minister of Finance portfolio. The BVI has not received capital aid from the UK Government since the mid-1990s[241] but receives assistance in other ways, including technical cooperation or direct grant funding on specific projects. The BVI was removed from the list of recipient countries by the Development Assistance Committee of the OECD in 2000 due to its status as a high-income territory; and it is consequently no longer eligible for Official Development Assistance.

1.170 To encourage financial control over debt management, borrowing guidelines were introduced by the UK Government across BOTs in the early 2000s. They were introduced in the BVI in 2005, and established a framework of borrowing limits and defined ratios and targets for debt, annual debt service costs and the minimum level of reserves held by the government. These guidelines were replaced by more extensive fiscal framework arrangements named the Protocols for Effective Financial Management ("the PEFM) in BVI, which were signed by the BVI Government on 23 April 2012. Whilst of course the UK Government has contingent liabilities in respect of the BOTs, which would in any event warrant such guidelines, it also has an

[236] T18 28 June 2021 pages 88-91. The 2018 Annual Accounts have not yet been prepared (see paragraph 1.168 below).
[237] Training in IPSAS began in 2017 and is continuing (Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraphs 3.5(b) and 3.6).
[238] Paragraph 1.101.
[239] T18 28 June 2021 pages 20 and 29-37 (Auditor General), and T25 13 July 2021 pages 113-118 (Glenroy Forbes).
[240] T17 23 June 2021 page 264.
[241] UK National Audit Office - Contingent Liabilities in the Dependent Territories (30 May 1997).

obligation to assist each BOT to develop self-government to which financial stability of course contributes. These guidelines were intended to contribute to the financial stability (and, thus, the financial reputation) of the BVI by evidencing its commitment to responsible Government.

1.171 The PEFM establish core principles in medium-term planning, delivering value for money, the management of risk and accountability. For example, for a major project (i.e. a project of over $100,000 in value) the PEFM require a business case to be put forward for tender waiver, including consideration of any alternatives[242]. They require the annual production of an MTFP, to include an assessment of the BVI Government's fiscal and economic policy (including key risks), and performance and projections for expenditure, revenue and borrowing; and the MTFP is produced annually on a rolling basis, covering a period of three fiscal years[243].

1.172 The PEFM provide for the following borrowing limits:

(i) Net debt cannot be more than of 80% of recurrent revenue (where net debt is defined as the total outstanding value of public borrowing, including risk-weighted debt held by parastatal entities and statutory bodies, minus liquid assets).

(ii) Debt service cannot be more than 10% of recurrent revenue (where debt service is defined as annual payments resulting from public borrowing commitments and finance leases).

(iii) Liquid assets must be at least 25% of recurrent expenditure (where liquid assets are defined as the lowest total balance of unallocated liquid funds at the disposal of the BVI Government during the fiscal year and funds that not held against budgeted expenditure or liabilities of any form).

The methodology by which the ratios were calculated reflected international best practice on calculating liquid assets. These were amended and agreed by the UK and BVI Governments on 29 April 2020[244].

1.173 When the BVI Government is not in compliance with the aforementioned borrowing limits in the PEFM, it is required to present to the UK Government a plan to remedy the breach within three fiscal years of the breach occurring, unless written permission is provided for a longer period[245]. In the event of any substantive non-compliance, the BVI Government requires UK Government approval for (amongst other things) the MTFP and any new public borrowing.

1.174 The BVI Government has been in compliance with the net debt and debt service ratios since 2012. However, it has been in breach of the liquid assets ratio requirement. The PEFM provided a transitional period until 2015 by which time the BVI Government was expected to return to full compliance with all the borrowing limits. The BVI Government returned to full compliance at the end of 2019 (prior to the onset of the COVID-19 pandemic), when it achieved liquid assets to recurrent expenditure of above 25%.

[242] According to Protocol 11(a), the first stage in the planning, development and execution of a capital project is "appraisal and business case". It continues: "The [BVI Government] must ensure that all projects, however funded, are suitably appraised before the procurement stage to ensure value for money and that a robust cost-benefit analysis has been carried out. This appraisal must be used by Cabinet to determine whether or not the project should be initiated and if so on what terms." The Auditor General considered that this necessarily requires consideration of alternatives: T19 29 June 2021 pages 73 and 128-129.

[243] Section 36(2) of the PFMA.

[244] Letter Baroness Sugg to Premier dated 29 April 2020. The elected Ministers, nevertheless, complain about the borrowing limits: see paragraphs 13-51-13.54 below.

[245] However, unlike other BOTs with fiscal framework arrangements (such as Anguilla, the Cayman Islands and the Turks and Caicos Islands), the requirement for compliance is not enshrined in legislation in the BVI.

1.175 Following the 2017 hurricanes, which passed through several of the Caribbean BOTs, the UK Prime Minister announced a package of recovery and reconstruction. The UK Government provided $16.4 million to support a range of early recovery projects (e.g. in respect of housing recovery support, promotion of employment and port hurricane-preparedness) implemented in partnership with the BVI Government[246]. In total, in addition to a loan guarantee offer[247], the UK Government has, since 2018, provided £17.7million (approximately $23 million) of funding to the BVI covering a wide range of different areas including support for post-2017 hurricanes recovery, security, justice and law enforcement, governance and public financial management, the environment, disaster management and COVID-19 response, and public sector capacity building. The BVI has also benefited from UK Government environment funding through the Darwin Plus scheme and European Development Fund projects by virtue of the UK's membership of the EU[248].

[246] The full list of projects can be found attached to the draft Memorandum of Understanding between the UK Government and BVI Government, designed to transfer these projects to the latter. For some reason, the BVI Government was slow to sign the MoU (letters Governor to the Premier dated 22 May and 17 October 2019, both attached to the Governor's Response to Elected Ministers Position Statement. It is not clear from the evidence whether it has ever been signed by them.

[247] See paragraphs 13.55ff below.

[248] Letter from the Governor's Office to the COI dated 6 December 2021.

CHAPTER 2:
THE SCOPE OF THE COMMISSION OF INQUIRY

APPENDIX A

THE SCOPE OF THE COMMISSION OF INQUIRY

The COI Terms of Reference, as set out in my Instruments of Appointment, describe what I am required to do. In short, I have to establish whether there is any information that serious dishonesty in relation to public officials may have taken place in recent years; and, if so, whether the conditions which allowed that dishonesty to take place may still exist. In any event, I may make recommendations with a view to improving the standards of governance in the BVI and the operation of the law enforcement and justice systems.

In this chapter, I consider the scope of that task, e.g. what is meant by "serious dishonesty" and "governance" in this context.

Terms of Reference

2.1 Under the Instrument of Appointment dated 19 January 2021, what I am required to do as Commissioner is set out in four substantive Terms of Reference, as follows:

> "1. to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years;
>
> 2. if there is such information, to consider the conditions which allowed that corruption, abuse of office or other serious dishonesty to take place and whether they may still exist;
>
> 3. if appropriate, to make independent recommendations with a view to improving the standards of governance, to give the people of the Virgin Islands confidence that government is working in a fair, transparent manner; and
>
> 4. if appropriate, to make independent recommendations with a view to improving the operation of the agencies of law enforcement and justice."

Paragraphs 1 and 2

2.2 Four points arise in relation to the scope of paragraph 1.

2.3 First, it is uncontroversial that, for these purposes, the term "public officials" includes Ministers and other elected Members of the House of Assembly[1]. I shall use the shorthand "public officials" to include all the "officials" referred to in paragraph 1.

2.4 Second, what is covered by "recent years" requires an exercise of judgment or assessment by me. It clearly covers more than the current administration.

2.5 Third, I received submissions from Sir Geoffrey Cox QC and Edward Risso-Gill, Counsel for the Attorney General on behalf of the elected Ministers and their Ministries, and the Cabinet, in relation to the proper approach to establishing whether conduct falls within paragraph 1[2].

2.6 The starting point is the COI Terms of Reference, which are clear and focused. I emphasise, as I did throughout the course of the COI, that it is not part of my task to determine civil or criminal liability, or to adjudicate between competing cases. Furthermore, as Counsel to the COI emphasised in his submissions on this issue[3], my Terms of Reference are substantially different from those of recent inquiries in England and Wales set up to establish the facts as to what happened in which there has been a discussion of the appropriate standard of proof (e.g. Sir Thayne Forbes' Inquiry into allegations of the ill-treatment and unlawful killing of Iraqi nationals at Camp Abu Nabhi and the Shaibah Logistics Base in 2004, to which the written submissions on behalf of the Attorney General specifically referred[4]). On the contrary, paragraph 1 of my Terms of Reference requires me "… to establish whether there *is* information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public *may* have taken place in recent years" (emphasis added).

2.7 It is uncontroversial that "information" for these purposes equates to (or, at least, includes) evidence in all its forms and without any consideration as to possible inadmissibility in any particular forum; although, as submitted on behalf of the Attorney General, for me to draw a conclusion that it is established that there is information that corruption etc may have taken place, the relevant evidence, in its proper context, must be reasonably capable of belief[5]. Otherwise, as the Attorney General properly accepted[6], the approach to the evidence (including relevance and weight) is a matter for me.

2.8 On the basis of such evidence, the Attorney General submits that, before I draw a conclusion that conduct amounting to corruption etc *may* have taken place, I must conclude that there is a "real possibility" that such conduct has taken place. Again, although no doubt different words or formulations may be used, I agree.

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[1] The Attorney General for the elected Ministers, and Silk Legal for the other elected Members of the House of Assembly, confirmed their agreement to that proposition: T25 13 July 2021 pages 5 and 7. Section 79(1) of the Criminal Code (as inserted by the Criminal Code (Amendment) Act 2006) expressly defines "public official" to include "… a Minister, a member of the House of Assembly,… a public officer, a member or employee of a statutory board or a statutory corporation, a member or employee of a Government company… or any other person who performs a public function or provides a public service, whether appointed or elected, whether permanent or temporary, whether paid or unpaid….". In this Report, that definition of "officials" is adopted for the purposes of paragraph 1 of my Terms of Reference, i.e. it covers both elected and non-elected public officials. Section 2 of the Constitution specifies that someone who receives remuneration or allowances when holding the office of Member of the House of Assembly (or some other posts, e.g. as a member of the Public Services Commission) shall not be considered to hold public office. In this Report, the term "public officer" is used to refer to non-elected public officials, i.e. members of the Public Service or those who might be called "civil servants" in other countries (see paragraph 11.1 and footnote 1 below).

[2] Written submissions dated 6 October 2021, and oral submissions: T50 19 October 2021 pages 15-27.

[3] T50 19 October pages 25-26.

[4] The Report of the Al-Sweady Inquiry HC 818-1 paragraphs 1.160-1.174. In this part of his report, Sir Thayne Forbes discussed the "flexible and variable approach" adopted in a number of previous public inquiries conducted in England and Wales, notably the Shipman Inquiry chaired by Dame Janet Smith, where this approach was first applied. In short, such inquiries have not felt constrained by the need to apply a particular standard of proof.

[5] T50 19 October 2021 pages 22-23. For the avoidance of doubt, insofar as Sir Geoffrey Cox QC for the Attorney General suggested that there was, I do not accept that there is an additional criterion that I myself believe that the evidence is "likely to be true". Reasonable capability of belief is a criterion which can stand alone, without embellishment.

[6] Written Submissions dated 6 October 2021 paragraph 4.

2.9 Consequently, paragraph 1 requires me to establish whether there is evidence before me upon which I conclude there is a real possibility that corruption, abuse of office or other serious dishonesty in relation to public officials may have taken place in recent years.

2.10 However, that is the subject of two important caveats.

(i) Reflecting to an extent the observations of Lord Hoffmann in Re B (Children)[7], although the hurdle set by paragraph 1 is modest, given the gravity of the subject matter – serious dishonesty in one form or another involving public officials and, in some instances, very senior elected officials – it is not a hurdle that I would conclude has been met without particularly anxious scrutiny and consideration on my part.

(ii) Although the definitional criterion in paragraph 1 sets a modest hurdle, the likelihood of paragraph 1 conduct having taken place may of course inform the recommendations I may be minded to make. Therefore, even where I conclude that the paragraph 1 threshold has been met (and, therefore, that there has been conduct falling within paragraph 1), where appropriate and where I am able on the evidence to give a degree of probability that serious dishonesty has taken place, I shall make further observations and/or an assessment as to the likelihood of such conduct having occurred.

2.11 Fourth and finally, there is the scope of the phrase "corruption, abuse of office or other serious dishonesty", upon which I sought and received helpful written submissions from Sir Geoffrey Cox QC and Hussein Haeri of Withers on behalf of the Attorney General dated 7 June 2021 (and further written submissions from the IRU dated 5 and 8 September 2021), and from Silk Legal[8] dated 12 July 2021. The issue was also again the subject of discussion during the oral hearings[9].

2.12 The stance taken by the Attorney General was that, for conduct to fall within that phrase, it must be criminal. In her written submissions, she helpfully set out the patchwork of the many offences which may be engaged under the laws of England & Wales (including the common law offence of misconduct in office) and under the laws of the BVI (notably under Part IV of the Criminal Code: Offences against the Administration of Lawful Authority)[10].

2.13 However, it is important that I again emphasise the nature of this Inquiry. Whilst it is true that the range of recommendations I may make is very wide (and may include, e.g., a recommendation that an audit, a further inquiry or investigations be conducted into conduct which, on the basis of the information presented to me, may have occurred), I am not myself an authority investigating conduct with a view to establishing whether a criminal offence has occurred, or a prosecuting authority which is required to establish whether a criminal offence is likely to have occurred. I do not have to identify (let alone draft) particular charges for specified offences that may be brought against particular individuals – and it would be inappropriate for me to attempt to do so, such matters being for the relevant BVI authorities.

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[7] [2008] UKHL 35 at [10]-[11]. The comments were made, of course, in a very different context.

[8] As to representation, see paragraphs 3.31-3.34 below. The Attorney General represented the elected Government and herself, and Silk Legal represented the Members of the House of Assembly not represented by the Attorney General.

[9] T25 13 July 2021 pages 1-12, and T29 6 September pages 55-70.

[10] The Criminal Code was promulgated in 1997. In its original form Part IV of the Criminal Code included, at section 79, the offence of "Official Corruption". Part IV was substantially amended by the Criminal Code (Amendment) Act 2006 (No 8 of 2006) ("the 2006 Act") notably to create a suite of specific bribery-related offences applicable to a range of public officials and for which a new section 79 was the interpretation section. The Attorney General (in the guise of Law Revision Commissioner) has produced a revised edition of the Criminal Code showing the law as at 30 June 2013. That revision does not adopt the numbering given to various sections introduced by the 2006 Act but rather renumbers the Criminal Code. Given that it is unclear if the revised edition has been approved and is, in fact, used in practice, my preference has been to use the numbering introduced by the 2006 Act. The Integrity in Public Life Act 2021, not yet in force, establishes a new offence of corruption which can be committed in a raft of different ways; and without discarding any of the current offences available under the Criminal Code: see sections 27 and 29, and paragraphs 11.100-11.115 below.

I do not even have to identify particular public officials. Under paragraph 1 of the Terms of Reference, I merely have to ascertain whether the information before me establishes that conduct of one or more public officials falling within the description "corruption, abuse of office or other serious dishonesty", taken as a whole, may have taken place. It is a broad remit.

2.14 The discussion of the phrase "corruption, abuse of office or other serious dishonesty" during the hearings, and in the later written submissions, focused on "abuse of office". Section 84 of the Criminal Code[11] provides, under the heading, "Abuse of Office":

> "(1) Any public official who does or directs to be done, in abuse of the authority of his or her office, any arbitrary act prejudicial to the rights of another, commits an offence….
>
> (2) If the act referred to in subsection (1) is done or directed to be done for purposes of gain, the public official commits an offence…".

Curiously, the maximum sentence for each offence is the same, namely three years on summary conviction and seven years on conviction on indictment.

2.15 The Attorney General submitted, and I accept, that this offence "plainly encompasses the [common law] offence of misconduct in office", and indeed goes beyond its scope[12].

2.16 It is trite that "the circumstances in which the offence [of misconduct in public office] may be committed are broad and the conduct which may give rise to it is diverse"[13]. However, the elements of the offence were formulated in Attorney General's Reference (No 3 of 2003)[14] as comprising four elements, as follows[15]:

> "(i) [A] public officer acting as such (ii) wilfully neglects to performs [sic] his duty and/or wilfully misconducts himself (iii) to such a degree as to amount to an abuse of the public's trust in the office holder (iv) without reasonable excuse or justification".

Foresight of the consequences of the misconduct is not necessary[16].

2.17 Where the offence is based upon a wilful neglect of duty (i.e. failure to act), then the public officer must be aware that he has a duty to act, or at least be subjectively reckless as to the existence of a duty.

2.18 In any event, a mistake, no matter how serious, cannot be sufficient; nor can a mere breach of duty or breach of trust[17]. The threshold in this regard is a high one, being:

> "… conduct … so serious that it amounted to an abuse of the public's trust in the office holder. Each of the cases refers… to that level as being one where it is calculated to injure, that is to say has the effect of injuring, the public interest so as to call for condemnation and punishment"[18].

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[11] Section 84 was amended by section 12 of the 2006 Act, but only to include appropriate references to summary offences and conviction on indictment. The quoted text incorporates those amendments. In the Revised Edition of the Criminal Code 2013, section 84 is given as section 98 albeit the amendments do not entirely correlate with those introduced by the 2006 Act.

[12] Written Submissions dated 7 June 2021 paragraphs 34-36. Silk Legal agreed with the Attorney General on all material points: Silk Legal's Written Submissions dated 12 July 2021 paragraph 4.

[13] Attorney General's Reference (No 3 of 2003) [2004] EWCA Crim 868 at [61].

[14] Attorney General's Reference (No 3 of 2003) [2004] EWCA Crim 868 (Pill LJ, Cranston and Aikens JJ sitting as a Divisional Court of the Queen's Bench Division).

[15] The quote is taken from the judgment of Lord Thomas of Cwmgiedd CJ giving the judgment of the Court of Appeal (Criminal Division) in R v Chapman; R v Sabey [2015] EWCA Crim 539 ("Chapman") at [17] approving the earlier formulation.

[16] Written Submissions dated 7 June 2021 paragraph 17.

[17] Chapman at [30]-[31]; and Attorney General's Reference (No 3 of 2003) at [56].

[18] Chapman at [32]; and Attorney General's Reference (No 3 of 2003) at [56].

2.19 Reflecting the authorities[19], before the COI, the Attorney General submitted that whether a breach of duty reaches the necessary threshold for criminal conduct within the scope of misconduct in public office is fact-sensitive[20]. I agree. So, in any jury trial, whether there is evidence capable of meeting the threshold is a matter for the judge, but whether the threshold is in fact met on the facts as they find them to be is a matter for the jury.

2.20 However, there are a number of circumstances in which conduct is likely to be at least capable of meeting that threshold, for example where a public official (including a Minister), in the exercise of a statutory power or duty, knowingly takes into account a private interest or any interest other than a legitimate strand of the public interest. Although it is unnecessary for the purposes of the COI to rule out the possibility, it is very difficult to imagine a case in practice in which these circumstances occurred but the conduct of the public official was, nevertheless, incapable of meeting the threshold.

2.21 The public interest is, of course, generally a matter for those who are democratically elected or otherwise democratically-accountable, including those to whom elected representatives have lawfully delegated a particular public task. In acting, they are able to take the strands of public interest they consider relevant, and give weight to each as they consider appropriate. However, those who are required to act in the public interest do not have unlimited discretion in how they act: for example, in exercising their public functions, they cannot take into account something extraneous to the public interest. For example, they cannot take a bribe, or favour a relative or associate simply on the basis of their relationship (cronyism), or favour a person or group of persons without public interest justification. In each such case, it is difficult to see how an intentional and grave departure from the standards of behaviour expected from someone in public office, worthy of condemnation and punishment and calculated to injure the public trust in that office, is not capable of arising.

2.22 Given the scope of section 84 of the Criminal Code, I do not consider it is necessary to drill down further into the definition of "corruption, abuse of process or other serious dishonesty", as the Attorney General and Silk Legal accepted on behalf of all those they represent that, if conduct falls within the scope of this section, then it falls within that phrase.

2.23 It is also unnecessary for me to examine whether any non-criminal conduct might also fall within the scope of paragraph 1 of the Terms of Reference (as Counsel to the COI contended at the hearing on 13 July 2021); or the circumstances in which conduct which falls within section 84 might also fall within, perhaps more serious, other offences.

Paragraphs 3 and 4

2.24 Under paragraphs 3 and 4 of my Terms of Reference, if appropriate, I may make independent recommendations with a view to improving (i) the standards of governance, to give the people of the BVI confidence that government is working in a fair, transparent and proper manner, and (ii) the operation of the agencies of law enforcement and justice.

2.25 As the Attorney General properly accepted, these paragraphs of my Terms of Reference are free-standing, in the sense that, whilst any conclusion under paragraphs 1 and 2 may, of course, inform recommendations under these paragraphs, recommendations as to governance and the law enforcement and justice systems are not dependent upon any particular conduct being found under paragraph 1[21].

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[19] Chapman generally (the case concerns directions to the jury so that they can assess whether the threshold is met); and Attorney General's Reference (No 3 of 2003) at [46] and [61].

[20] Letter Withers BVI to COI: Written Submissions dated 8 September 2021 page 1.

[21] T5 13 May 2021 page 37.

2.26 The only issue that arises under these two paragraphs relates to the meaning and scope of "governance".

2.27 "Governance" is simply the process of making and implementing decisions.

2.28 "Good governance" is more difficult to define. It clearly involves a qualitative assessment of the decision making and implementing process measured against the agenda or goals which the relevant decisions pursue; and therefore what amounts to "good governance" is inevitably context-specific. In respect of state governance, the relevant agenda will be societal, political and economic; and governance therefore focuses upon how public affairs are conducted and public resources managed by public institutions, structures and systems, formal and informal. Because, in a modern democratic state seeking economic, social and political development, a crucial responsibility and obligation of government is to act in the public interest, good governance is seen in terms of characteristics which are likely to result in decisions which maximise the public welfare, i.e. decisions that are made and implemented in the public interest and not for any other purpose (e.g. in the interests of a particular elite group). Thus, in a widely-quoted passage, it has been said that the term "good governance" in a state context involves eight major characteristics: it is participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and follows the rule of law[22].

2.29 In practice, the application of these in a modern democracy should result in (amongst other things) an effective separation of powers; transparent, reasoned and recorded government decision making; sound and recorded (and, thus, auditable) financial management with budgeting, costings and scrutiny of expenditure to ensure proper use of public money and value for money; procurement of goods and services by the government on the basis of clear and published criteria, involving objective assessment and, where appropriate, open tendering; appointments to public offices and statutory bodies being the subject of open competition on clear and published criteria, involving objective assessment; and an independent Public Service providing objective and effective advice in respect of the formulation and implementation of policies[23].

2.30 Good governance in these terms ensures that the risks of corruption and other serious dishonesty in public office are minimised, whilst increasing public confidence in the government systems and decisions to which they are subject[24]. On the other hand, poor governance, of course, increases those risks, and decreases public confidence in the government. Whilst governance is concerned solely with process, in a modern democracy, a stable political system is heavily reliant on good governance; and so, as the elected Ministers appear to recognise, the rights and aspirations of the BVI people to self-determination is dependent upon good governance[25]. Furthermore, as again the elected Ministers recognise[26], in a modern democracy, good governance is also crucial to a stable and sustainable economy.

[22] Governance for Sustainable Human Development, United Nations Development Programme (1997). Several participants set out these characteristics in their position statements, e.g. Hon Marlon Penn Position Statement paragraph 1.
[23] How good governance is evidenced was one focus of the Governor Position Statement (paragraphs 3-19).
[24] See, e.g., Hon Marlon Penn at T17 23 June 2021 page 187 lines 9-17.
[25] Elected Ministers Position Statement paragraph 128.
[26] Speech from Throne 5 November 2020, reported in Cabinet Memorandum No 173/2021: Bill entitled Integrity in Public Life Act 2021 dated 16 March 2021. There is of course overlap, as self-determination is to an extent reliant upon a sustainable economy.

CHAPTER 3:

THE COMMISSION OF INQUIRY METHODOLOGY AND PROCESS

APPENDIX A

THE COMMISSION OF INQUIRY METHODOLOGY AND PROCESS

An Inquiry such as this must collect information relevant to its Terms of Reference, in the form of documents and witness evidence, written and oral. That information then has to be analysed and, based upon it, a report written setting out the Commissioner's findings, conclusions and recommendations.

In this chapter, I set out how I went about the task of the Inquiry, describing some of the challenges my team and I had and how they were met[1].

Establishment of the COI

3.1 By section 2 of the Commissions of Inquiry Act 1880[2] ("the COI Act"), whenever he or she shall deem it advisable, the Governor is given the power to issue a Commission appointing one or more Commissioners to inquire into any matter in which an inquiry would, in the opinion of the Governor, be for the public welfare (i.e. in the public interest).

3.2 Considering that it would be for the public welfare to hold such an inquiry, by an Instrument of Appointment dated 19 January 2021 Governor Jaspert established the COI with the following Terms of Reference:

> "1. to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years;
>
> 2. if there is such information, to consider the conditions which allowed that corruption, abuse of office or other serious dishonesty to take place and whether they may still exist;
>
> 3. if appropriate, to make independent recommendations with a view to improving the standards of governance, to give the people of the Virgin Islands confidence that government is working in a fair, transparent and proper manner;
>
> 4. if appropriate, to make independent recommendations with a view to improving the operation of the agencies of law enforcement and justice…".

As discussed in Chapter 2, the tasks to which these Terms of Reference give rise are to an extent independent. However, that does not mean that they are discrete; because good governance reinforced by effective law enforcement and justice systems is designed to reduce the risk of dishonesty in government. Without it, there is at least an enhanced risk of such dishonesty occurring.

3.3 Under that Instrument, Governor Jaspert appointed me sole Commissioner; and appointed Steven Chandler as Secretary to the COI. Further, under the Instrument, (i) I was given express power to allow for information to be given to the COI in confidence, and to hold meetings of the COI in private when I considered it appropriate to do so and insofar as it was consistent with the public welfare in achieving the objectives of the COI to do so; and (ii) I was

[1] In this Chapter, I refer to a number of COI Rules, Protocols, Orders, Rulings and Press Notices. These can all found in Appendix 4 of this Report.

[2] Chapter 237 of the Revised Laws of the Virgin Islands 1991 (Cap 237).

required to prepare and submit a written report to the Governor within six months from the commencement of the COI (i.e. by 19 July 2021), albeit the Governor had power to extend the period for submission of the report to a period no longer than nine months from that date (i.e. to 19 October 2021).

3.4 On 22 January 2021, I attended before Governor Jaspert and Senior Magistrate Tamia N Richards, formally accepted the Commission and took the oath. That same day, the Governor and I attended and spoke at a press conference in Road Town, at which I opened the Inquiry[3].

3.5 On 29 January 2021, His Excellency John James Rankin CMG was sworn in as Governor in succession to Governor Jaspert.

3.6 On 3 February 2021, on my recommendation and under section 13 of the COI Act, the Attorney General appointed Bilal Rawat to assist me in the COI as Counsel to the COI. Just as I was bound to conduct the COI in the public interest, in the examination of witnesses and his other assistance to the COI, the role of representing the public interest fell upon him[4]. During the course of the Inquiry, in addition to Mr Chandler and Mr Rawat, I was assisted by a core team of Andrew King (Senior Solicitor to the Inquiry), Rhea Harrikissoon (Solicitor to the Inquiry) and Juienna Tasaddiq (Assistant Secretary to the Inquiry), supported subsequently by a wider team who assisted with the review and management of documents and other information provided to the COI. All were security cleared to an appropriate UK standard. All owed a strict duty of confidentiality to me.

Preliminary Work

3.7 Inquiries, whether established on a statutory or non-statutory basis, have common elements. An inquiry must seek information and documents relevant to its Terms of Reference. It must decide from whom it will then obtain witness evidence (whether in affidavit or statement form), and on what issues. It must decide whether it need hold hearings and, if so, whether these can be held in public. It must decide which witnesses should be called to give oral evidence at any such hearings. Where, as with this COI, an inquiry is required to deliver its report within a fixed period, these elements will overlap to an even greater extent than usual. That reinforced in my mind the need to adopt a flexible, as well as open and transparent, approach to the work of the COI.

3.8 I made clear from the outset that I was willing to receive any information from any source that might be relevant to any aspect of my Terms of Reference. The invitation to anyone who believed they had information to provide the same was reiterated in several press notices issued by the COI. To facilitate this process, the Inquiry used a secure website through which the public could provide information as well as be kept updated on the progress of the COI[5]. The website portal allowed those submitting information to confirm whether they wanted their names and/or the information provided to remain confidential. Prior to its launch, the website underwent security testing and that testing continued on a regular basis[6]. The COI team was also contactable through Facebook, WhatsApp, email, telephone, a postal address in the UK and, of course, its office in the BVI.

[3] A copy of my statement to the press was published on the COI's website. It can be found at Appendix 4 to this Report.
[4] The Attorney General readily accepted that it was Mr Rawat's role to act in the public interest: T1 4 May 2021 page 32.
[5] The COI issued press notices and updates regularly through the website and Facebook.
[6] The COI's Press Notice: Privacy and Data Protection dated 28 January 2021 gave information about the security measures in place for the website.

3.9 The COI established a permanent base at the BVI International Arbitration Centre, Ritter House, Wickham's Cay II, Tortola ("the BVI IAC") where, following the opening of the Inquiry, I met early on with important constitutional actors including the Premier, Deputy Premier and the Attorney General.

3.10 Given this COI was established in the public interest, a vital element of this preliminary stage involved receiving information from members of the public in respect of concerns that they had. As well as the means of contacting me and lodging information described above, I held a substantial number of meetings with members of the public at the COI office at the BVI IAC. I also held "surgeries" on each of the main sister islands, which gave an opportunity to the people who lived on those islands to come and talk to me.

3.11 One substantial challenge was that some individuals who had information to divulge, expressed fear of discrimination or other forms of reprisal if they were seen to be assisting or even communicating with the COI. More than one person visited the COI and said that, simply as a result of the visit, they and their families would be the subject of victimisation. There is no doubt that these fears were sincerely and firmly held. There was evidence of people, immediately upon leaving a meeting with members of the COI team, being questioned as to what was discussed at the meeting and what they had said. I cannot say who caused this fear to be engendered, or these questions to be asked, except that they were patently neither acting in the public interest nor were they friends of good governance or of open and transparent government in the BVI. Whoever they might have been, for many who wished to come forward, confidentiality and anonymity (in the sense that information could not be traced back to a particular source) were clearly critical.

3.12 I therefore agreed with anyone who came forward that, other than among members of the immediate COI team, their identity as the provider of information would not be disclosed, directly or indirectly, unless they expressly agreed that it could be disclosed. Whilst that gave many sufficient comfort, regrettably there was evidence that others were still too fearful to come forward and give me relevant information. In respect of those who did come forward, members of the COI team and I saw many face-to-face or by a secure remote meeting facility.

3.13 Given the general sensitivity of those who came forward in having their identity revealed, where possible (which is in almost all cases) I have used information publicly available and information obtained from the BVI Government itself and public bodies rather than information received from members of the public; but the meetings I had with members of the public were particularly helpful in clarifying potential lines of investigation. I sincerely thank each of them for coming forward and providing the information that they did. I emphasise that, in making my findings and recommendations, I have not taken into account any information from members of the public (or from elsewhere) that is not openly recorded in the Report. However, I should also confirm that the the information received but which I have not taken into account broadly supports – and, in some areas, very vigorously supports – the findings and conclusions to which I have come.

3.14 It was never intended that the COI would conduct in depth financial investigations into particular projects, programmes or people; or "chase" bad money. The Terms of Reference did not require or expect it, and the time and resources I had were tailored accordingly. Furthermore, whether or not such conduct was taking place, two further factors mitigated against my focusing on dishonesty in the form of public officials obtaining a direct personal financial benefit from their office.

3.15 First, as I have indicated, potential witnesses feared that by giving information to the COI they would face adverse consequences. Some were not prepared to come forward at all. Some of those who did come forward made it clear that, by merely speaking with the COI, they firmly

believed that they and their families would suffer adverse consequences. Some were willing to speak, but only on the basis that their evidence would not be used by the COI unless it was used in such a way that they could not be identified: in such a small community it was in practice impossible to rely upon such evidence criticising public officials with such a guarantee.

3.16 Second, as I shall describe later in this chapter, documents and information disclosed by the BVI Government were generally received in such a shambolic state that, even after careful analysis and oral evidence from the relevant public officials, it was difficult to piece together what had happened. Notably, it was often impossible to ascertain why a course of public action had been taken, with the documents not reflecting the evidence of public officials or public officials being simply unable to explain why particular steps had been taken. As a result, public money was often spent without a proper audit trail.

3.17 However, as I have already described, dishonesty in public office takes many forms[7]. One is when a public official takes into account some private interest when making decisions in his or her role as a public official[8]. This type of dishonesty may be identified by a consideration of how decisions are made by the relevant public official(s). In respect of paragraph 1 of my Terms of Reference, this type of dishonesty was the focus. Of course, that dovetailed with paragraph 3 of my Terms of Reference in relation to governance.

3.18 For those most likely to be directly involved in the COI, it would have been immediately apparent that the Inquiry would likely seek documentary information from government bodies (including the statutory bodies which come within the portfolio of a particular Ministry) as well as former and current public officials. It was a welcome development therefore to be told that the BVI Government had adopted the policy that all Ministries, departments, statutory bodies and government-owned entities should provide appropriate and timely cooperation to the COI[9].

3.19 Beginning on 19 February 2021, the COI sent out letters of request for the voluntary production of information and documents from a variety of individuals but mainly elected Ministers and other public officials. Such requests continued through the course of the COI, albeit they became more focused as its work progressed. Altogether 156 formal letters of request were sent. I exclude from this number requests for affidavits, with which I deal below, as well as those responses which followed from the making of directions or an order. I well appreciate that these requests imposed a burden on public officers to whom the task of retrieving the documents fell; but, in the main, responses to requests that were received so that I did not have to use the power available under section 10 of the COI Act to require production of documents by way of summons.

3.20 Section 9 of the COI Act gives a Commissioner a power to "make such rules for their own guidance, and the conduct and management of proceedings before them". The power is a wide one, plainly intended to reflect that fact that the subject matter of Inquiries varies, so requiring different approaches. Further to that power, I published protocols and rules during the COI to assist witnesses, participants, legal representatives and the BVI public in understanding the processes I adopted in the COI.

[7] See paragraphs 2.11-2.23 above.
[8] The private interest can, but need not, be as simple as a personal bribe.
[9] COI Press Notice: Making requests for information and documentation dated 15 February 2021.

3.21 On 5 March 2021, to assist those from whom documents would be requested, I published two protocols[10], one setting out the procedure for providing documents[11] and the other outlining the procedure for the redaction[12] of any documents received which might need to be disclosed further[13]. Copies of both protocols accompanied all requests for information and documents issued by the COI from that point. I return to redaction of documents later in this chapter.

3.22 Following the issue of these protocols, on 10 March 2021 the COI wrote to each Member of the House of Assembly (including, of course, elected Ministers) with an open invitation to provide the COI with any information and documents which they had in their possession or control and which might be relevant to my Terms of Reference or to confirm that they held no such information. No substantive response was received: none of the Ministers or other Members provided any documents or other information pursuant to the request.

3.23 With the rest of my team, I was concerned throughout to ensure that the COI had measures in place to keep the information it received secure. Internally, the COI adopted a policy whereby hard copies of documents were disposed of securely as soon as they were no longer required.

3.24 From the beginning, information provided to the COI was held on a secure data management system ("the DMS")[14]. The FCDO provided the IT infrastructure to host the DMS, such an arrangement having the advantage of providing the highest level of security. It is worth emphasising that, with one exception, only members of my COI team had access to the information held on the DMS. The exception was narrow, but essential: FCDO IT personnel provided technical support (e.g. by resolving issues concerning the bulk submission of data), but working strictly to my order and owing a strict duty of confidentiality to me. Otherwise, of course, neither FCDO staff nor indeed anyone else had any access to the information held. That the FCDO provided IT infrastructure for the COI was known – the COI's own privacy

[10] A number of protocols were published during the course of the COI. They were drafted with those who may not be able to avail themselves of legal representation particularly in mind. They can all be found in Appendix 4 to this Report.
[11] Protocol for the Provision of Documents to the BVI Commission of Inquiry 5 March 2021. An amended version of this protocol (with some minor changes) was issued on 15 March 2021. That version can be found appended to this Report.
[12] Redaction is the retroactive editing (by "masking") of text in a document because it is not considered to be in the public interest to publish it, e.g. because it is the subject of legal privilege which is not waived, or because the public interest in publishing it is outweighed by some other interest such as the right to privacy.
[13] Protocol for the Redaction of Documents 5 March 2021. The current version of this protocol, as amended on 1 June 2021, can be found in Appendix 4 to this Report.
[14] Later, in circumstances to which I shall come (see paragraph 3.56 below], the COI used a commercial data retention and management system (Relativity) subject to the same strict constraints ensuring the documents and other information lodged with the COI remained secure and, so far as required, confidential.

notices refer to it[15] – although the fact that the DMS was supported by the FCDO was used by participants, in a foundationless and regrettable attempt to attack the independence of, and thus undermine public confidence in, the COI[16].

Participation and Representation

3.25 On 1 April 2021, with other members of the COI team, I returned to the BVI to continue the process of gathering information, including documents.

3.26 A press statement dated 6 April 2021 announced my intention to hold initial hearings in late April and early May[17]. In anticipation of those and further hearings, on 13 April 2021, I published two further protocols, one concerning applications for representation under section 12 of the COI Act[18] and the other concerning claims for expenses under section 15 of the COI Act[19].

3.27 On the same day, I published the COI rules[20] to explain how the COI would deal with matters such as the time and place of its hearings including remote hearings, the issuing of summonses, the process by which witnesses would be questioned and by which persons could apply to be legal represented before the COI. The Rules also defined what was meant by "COI Counsel", "COI Solicitor" and "Participant". They also made clear that participants, witnesses and their counsel owed a duty of confidentiality to me as Commissioner[21].

3.28 As to representation in the COI, section 12 of the COI Act provides:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be represented may, by the leave of the commission, be represented in the manner aforesaid".

Further, section 13 gives a Commissioner the power to authorise a barrister or solicitor to appear at a hearing "for the purpose of representing any person".

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[15] The COI issued two privacy notices on 21 January 2021 and 3 June 2021, both published on its website.

[16] Sir Geoffrey Cox QC, instructed on behalf of the Attorney General and the elected Ministers, made a lengthy submission which came down to the need to ensure the COI had the confidence of those he represented. In support, Sir Geoffrey pointed to the Inquiry using the address of a FCDO building in the UK; its Secretary being seconded from the FCDO; the Inquiry using a "Foreign Office server"; and the FCDO being described as a "joint data controller" of information held by the COI. I referred to the fears expressed to me by members of the public over being identified if they gave information to the COI which, in my view, reinforced the need to ensure the COI's data were both utterly and patently secure. I made clear that my concerns were for the public interest which went beyond the interests of the executive (T5 13 May 2021 pages 47-50 and see Ruling No 5 paragraphs 30 to 32). Subsequently, Hussein Haeri of Withers, again on behalf of the Attorney General and elected Ministers, returned to the fact that the FCDO had been described as a "joint data controller" when making submissions on the question as to whether the COI should be provided with recordings of Cabinet meetings (T8 2 June 2021 pages 59-62). In fact, the FCDO never "controlled" any relevant data, only processed them. The position was made clear in a press notice issued by the COI on 3 June 2021. In any event, the reliance on the reference to "joint data controller" is not to the point. While both Sir Geoffrey and Mr Haeri said that their submissions were not intended to question the integrity and independence of the COI, those submissions carried the obvious imputation that the COI was prepared to compromise its independence by allowing the FCDO ready access to information it had received. The COI has, throughout, been entirely independent; save in the highly restricted and inevitable form set out in the narrative here, the FCDO has never had access to information received; and these attempts by the participants to suggest otherwise were, in my view, not only unfounded but regrettable.

[17] COI Press Notice: Commission of Inquiry Team returns to the BVI dated 6 April 2021.

[18] Protocol for Representation under Section 12 of the Commissions of Inquiry Act dated 13 April 2021 (Appendix 4).

[19] Protocol for expenses claimed under Section 15 of the Commissions of Inquiry Act dated 13 April 2021 (Appendix 4). The expenses that can be paid under Section 15 are limited, and do not extend to the costs of legal advice or representation.

[20] Commission of Inquiry Rules ("COI Rules") dated 13 April 2021. An amended version of these Rules was published on 1 June 2021 (the most significant amendment being to the procedure for questioning witnesses). This version of the COI Rules can be found in Appendix 4.

[21] Set out in rule 18 of the COI Rules.

3.29 Persons falling within the scope of the first part of section 12 (i.e. those who are in "any way implicated, or concerned in the matter under inquiry") therefore have the right to be represented throughout the Inquiry whilst those not falling within that provision may still apply for representation. The right to be represented is subject to the Commissioner's wide case management powers under section 2 (which allows a Commissioner to exclude a person for the preservation of order, the due conduct of the inquiry and for any other reason) and section 9. Rule 13 of the COI Rules addressed the position of those who came within section 12, while rule 26 covered those who were outside its scope (e.g. a witness who wished to be legally represented while giving evidence to the COI).

3.30 At the outset of the COI, the Attorney General instructed Withers BVI ("Withers") and the Rt Hon Sir Geoffrey Cox QC, a consultant at that firm, to advise her for the purposes of the COI[22].

3.31 On 28 April 2021, the Attorney General made a written application that three (of the five) Cabinet Ministers[23] (and their Ministries), the Premier's Office and the Cabinet Office be granted participant status under section 12 of the COI Act, and they be represented by the Attorney or counsel instructed by her; and that she, in her own right, be granted such status. Following a hearing on 4 May 2021[24], I made an order in essentially those terms, on the basis that each Minister and the Attorney had a sufficient interest in governance to fall within the scope of section 12[25].

3.32 On 7 May 2021, I heard an application from Silk Legal (BVI) Inc ("Silk Legal") on behalf of all 13 elected Members of the House of Assembly and the Speaker (but not the Attorney General) in their roles as House of Assembly Members, on the basis that, as such, they each had a sufficient interest in governance (essentially the same interest as the elected Ministers)[26]. Those applying included the three Ministers who had already been granted participant status, and who were to be represented by the Attorney General. Having heard from all concerned, I made an order allowing 11 of the Members of the House of Assembly (including the Speaker) participant status[27]. That number included the two Ministers and the two Junior Ministers who were not the subject of the Attorney General's application of 28 April 2021.

3.33 In response to the order made in favour of Silk Legal, the Attorney General submitted a further application dated 12 May 2021. This was not resisted by Silk Legal; and, at a hearing the following day[28], I varied the orders earlier granted such that the other two Ministers and the two Junior Ministers received participant status on the same basis as that previously granted

[22] In a letter dated 21 January 2021 and published on the BVI Government website the following day, the Premier informed Governor Jaspert, that the BVI Government had appointed Withers and Sir Geoffrey to represent it in relation to all matters concerning the COI. I was advised by the Premier and Deputy Premier that Withers and Sir Geoffrey had been instructed at a meeting on 25 January 2021; and Withers confirmed the following day by email that they had been "engaged to advise & represent the Virgin Islands Government in relation to the Commission of Inquiry". Over time, and as a result of the applications for representation, it became clear that they were assisting the Attorney General who was representing the elected Government in the sense of the elected Ministers and the Ministries for which they were responsible.

[23] One of whom was the Premier and Minister of Finance.

[24] T1 4 May 2021 pages 9-77.

[25] Order No 1 dated 4 May 2021 and Ruling No 1 dated 10 May 2021.

[26] T3 7 May 2021 pages 4-44.

[27] Order No 4 and Ruling No 3 each dated 10 May 2021. The latter noted (paragraph 23) that the eleven Members, including some elected Ministers for whom I had given the Attorney General permission to represent, had submitted that they did not have confidence in the Attorney representing them before the COI.

[28] T5 13 May 2021 pages 1 to 33.

to the three Ministers so that they were now to be represented by the Attorney General and not Silk Legal. I also granted the Attorney General's application that the Cabinet, a legal persona under the Constitution[29], should also have participant status[30].

3.34 The Attorney General thus represented the whole of the elected Government (although not its two backbenchers) throughout the COI, while Silk Legal represented six members of the House of Assembly[31] together with the Speaker. The representation from Silk Legal was provided by Richard Rowe, Daniel Fligelstone Davies and Denniston Fraser.

3.35 I refused three applications for participant status. On 6 May 2021, I heard an application from Terrance B Neale of McW Todman & Co that Mrs Patsy Lake be granted participant status under section 12 of the COI Act[32]. I refused that application, but allowed Mrs Lake to be represented by Mr Neale while giving evidence as a witness[33]. I indicated that I would give written reasons for this decision[34], and Ms Lake expressly reserved her right to seek a judicial review of the decision[35]. On 13 May 2021, I refused the application made by Nelcia St Jean of McW Todman & Co that Mr Bevis Sylvester should be granted participant status, but once again allowed Ms St Jean to represent Mr Sylvester during his witness evidence[36] . An application under Section 12 of the COI Act was also made on behalf of Dr Orlando Smith but it was common ground that it was directed towards representation under rule 26. Accordingly, with my permission, Dr Orlando Smith was represented by Paul B Dennis QC of O'Neal Webster when giving evidence on 29 June 2021 and 27 September 2021[37].

3.36 I received and granted a further two applications pursuant to rule 26. These concerned: Dr Kedrick Pickering who was represented by Lewis Hunte QC of Hunte & Co Law[38] when giving evidence on 17 June 2021; and Mr Wendell Gaskin who was represented by Stephen Daniels of Capital Law and Associates[39] when giving evidence on 15 July and 24 September 2021.

The Inquiry Response Unit

3.37 Cabinet established the Inquiry Response Unit ("the IRU") following the announcement of the COI. The Attorney General provided me with a copy of her memorandum dated 5 February 2021 addressed to both elected and non-elected public officials which explained that the IRU would include members of her Chambers but would be administered by Withers and led by Sir Geoffrey Cox QC. It would be overseen by the Attorney General, to whom it worked.

[29] See paragraph 1.60 above.
[30] Order No 5 dated 13 May 2021 and Ruling No 5 dated 17 May 2021. The ruling sets out the circumstances of the Attorney General's application including that all Ministers had now signed a declaration expressing full confidence in the Attorney, that this was a volte face on the part of four Ministers; and that letters from Silk Legal and the Attorney which I had directed should be provided shed no light on the situation but merely indicated that the Ministers concerned had had a change of mind (see paragraphs 3-13).
[31] Hon Julian Fraser, Hon Alvera Maduro-Caines, Hon Marlon Penn, Hon Neville Smith, Hon Melvin Turnbull and Hon Mark Vanterpool.
[32] T2 6 May 2021 pages 3-20.
[33] Order No 3 dated 6 May 2021.
[34] Ruling No 3 dated 10 May 2021.
[35] T2 6 May 2021 pages 19, 55-56.
[36] T5 13 May 2021 pages 57-59; Order No 6 and Ruling No 4 both dated 13 May 2021.
[37] Order No 16 dated 29 June 2021. Dr Orlando Smith gave evidence on two other occasions (17 June 2021 and 8 July 2021) when he did not seek to have a legal representative present.
[38] T13 17 June 2021 page 50.
[39] Order No 17 dated 10 July 2021.

3.38 According to the Memorandum, the role of the IRU was to support the Attorney General's Chambers "in ensuring that information is provided in a systematic, efficient, and well-organised way without breaching any relevant legal obligations"[40]. That phrase occurred more than once in correspondence received by the COI from those within the IRU when writing on behalf of the Attorney General[41].

3.39 The Attorney General also provided a copy of a Guidance Note[42] intended to assist public officers who received a request for information from the COI. In outline, the officer concerned was advised to make contact with the IRU and fill in a questionnaire provided by them. The IRU would then advise on the scope of any search to be undertaken, review any information and documents identified and advise as to its disclosure to the COI.

3.40 The impression given was that the IRU would have a leading role in ensuring that all relevant documents were located and disclosed to the COI in good order.

3.41 While I recognise that the IRU sat between the COI and individuals or entities within the BVI Government of whom it was making requests for information and documents, I took the view from the beginning that, in the normal course of events, such requests should be sent directly to the individual or body concerned including Ministers. It was a matter for them if they wished to engage the services of the IRU (not all did). Further, it was important that the position of the Attorney General be respected and, save where appropriate, correspondence was addressed to her and copied to the IRU, who were working to her instructions, as necessary.

3.42 In early March 2021, the COI learned that publicly available BVI Government information was presenting the IRU's contact details as those of the COI. Further, media coverage was suggesting that the public could contact the COI through the IRU. Given the reticence which some members of the public had in approaching the COI, this was particularly unfortunate. Accordingly, the COI issued a press notice to make clear that the IRU was distinct from the COI, and members of the public could and should contact the latter directly rather than through the former[43].

3.43 Finally, while I was never provided with a list of all those comprising the IRU, its members attended COI hearings from time-to-time to represent the interests of Ministers (including the Premier) and some of the public officers who were asked to give evidence. That representation included the Solicitor General Jo-Ann Williams-Roberts, and Principal Crown Counsel Fiona Forbes-Vanterpool (both of the Attorney General's Chambers); Sir Geoffrey Cox QC and Edward Risso-Gill of Counsel; Hussein Haeri and Martha Eker-Male (both of Withers London), Niki Olympitis, Sara-Jane Knock and Lauren Peaty (all of Withers BVI). Others working in the IRU included Christina Liew and Jan Allesandrini (both of Withers London).

[40] Memorandum Attorney General to Ministers, Deputy Governor, Financial Secretary, Cabinet Secretary, Permanent Secretaries, Heads of Department, all Public Officers: Inquiry Response Unit dated 5 February 2021.
[41] The role of the IRU was canvassed at a hearing on 20 May 2021 (T7 20 May 2021 pages 10, 12-17).
[42] IRU Guidance Note No 1 dated 18 February 2021.
[43] COI Press Notice: Clarification on the role of the IRU: It is not part of the COI dated 4 March 2021.

Hearings Phase 1: 4 May to 19 July 2021 (Days 1 to 28)

3.44 I made a short opening statement at the start of the first hearing of the COI on 4 May 2021[44] setting out briefly the work that, with my team, I had undertaken thus far. Much of the information we needed was being provided by various Ministries and departments in the BVI Government. I was acutely aware that, notwithstanding the involvement of the IRU, much of the burden of collating documents for the COI was falling on the shoulders of public officers, whom, not for the last time, I thanked for their continued and appreciated efforts.

3.45 I also explained that a focus of the initial hearings would be on the production of information; and that at least some of the initial hearings would be held in private as various elected Ministers had, through the Attorney General, reserved their position as to whether documents they had provided to the COI could be made available to the public. I emphasised that all those involved in the hearings were subject to an obligation of confidentiality. I made clear that I could, and usually would, investigate any breach of that confidence, for example through the leaking of information disclosed during a private hearing. Consistent with my wish that the COI be as open and transparent as possible, I also said that I would consider the best way in which those parts of hearings held in private could, after the event, be made available to the public.

3.46 Regrettably, my decision to hold hearings in private was misrepresented in some sections of the media as a desire to hold secret hearings. It is difficult to see how any such misunderstanding could sensibly have arisen. However, the position was clarified in a press notice from the COI, which reiterated my wish and commitment to having as much of the work of the COI conducted in public as possible[45]. In respect of the seven hearings held entirely in private, the Attorney General was given time to consider whether she needed to apply for redaction of the transcript of each of those hearings before it could be published on the COI website. All seven transcripts were indeed published as promptly as the Attorney's response allowed.

3.47 As will be apparent from the above, the first matter I dealt with at the first hearing on 4 May 2021 was the Attorney General's application on behalf of the elected Ministers and in her own right that participant status in the COI be granted. During his submissions on that application, Counsel to the COI raised a query as to the role of Sir Geoffrey Cox QC and Withers, which gave rise to a potential conflict of interest[46].

3.48 The points made by Counsel to the COI and what followed are set out in my ruling of 10 May 2021[47] and I need not repeat them here to the same extent. Suffice to say that Counsel to the COI read into the record a BVI Government tweet from 21 April 2021 and a BVI Government press release dated 26 April 2021, purportedly issued by the Governor's Office, which indicated that Sir Geoffrey had been instructed to carry out an "independent and objective review" of matters which were the subject of the COI including "all aspects of Governance". Counsel to the COI raised a number of questions culminating in the obvious concern that, if Sir Geoffrey was indeed to be conducting a review in parallel to my own inquiry and then to report on his conclusions, then Sir Geoffrey, as the author of any such report, might find himself in the position of being a witness in the COI.

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[44] T1 4 May 2021 pages 1-7. The text of that opening statement was also published on the COI's website and can be found in Appendix 4 to this Report.
[45] COI Press Notice: Misrepresentation of the Commissioner's Opening Statement dated 5 May 2021.
[46] T1 4 May 2021 pages 62-69.
[47] Ruling No 1 dated 10 May 2021 paragraphs 17-35. The full Ruling can be found in Appendix 4.

3.49 The Attorney General asked for an opportunity to consider the matters raised by Counsel to the COI and to revert in writing[48]. Sir Geoffrey, who was attending the same hearing remotely albeit in a non-participatory capacity[49], helpfully interjected to assure me that anything he undertook would not be designed to impede or frustrate the COI. I took from Sir Geoffrey's remarks that, whatever his role was to be, it was not to conduct a shadow inquiry to my own. In any event, the Attorney General clarified the position in writing. Neither the tweet nor the press release represented the true position. Indeed, as I observed in my ruling, the press release (which did not in fact emanate from the Governor's Office) would have given the false impression that the Governor had commissioned an internal review in parallel to the COI established by his predecessor. In fact, Sir Geoffrey's role was more modest. He was instructed only on behalf of the Attorney and those Ministers and government entities which were the subject of her applications for participant status in the COI.

3.50 Between 4 and 20 May 2021, I heard evidence from a range of witnesses, primarily but not exclusively, current Ministers including the Premier and public officers, on different matters but including contracts entered into by the BVI Government. As was the practice throughout, witnesses were sent a summons requiring them to attend to give evidence. Efforts were made to accommodate witnesses, e.g. if they needed to give evidence remotely or if they had to attend to pressing government business at the return date and time of the summons. Witnesses remained subject to the summons which meant that they could be asked to return to give further evidence without the need for a fresh summons. The fact that a person had given evidence did not prevent him or her receiving legal advice in order to respond to requests from the COI or in advance of returning to give further evidence. Over the course of the COI, 68 summons were issued.

3.51 What emerged from those initial hearings cemented a concern already in my mind. Too often, when asked about a document not within the BVI Government's disclosure, the witness's response was that he or she would have to make enquiries. In short, despite what was (as I acknowledged at the time) no doubt the best efforts of public officers, the provision of documents to the COI was materially deficient. In some instances, it was not possible to reconcile documents. In others, cited documents were clearly absent. The result was that I made orders directing that identified witnesses should undertake further searches or otherwise comply with an already received request from the COI[50].

3.52 Plainly, and as I had emphasised on 4 May 2021, it was vital that the COI should be provided with all relevant information. I canvassed the wider issues arising from the problematic disclosure which the COI was receiving, including the role being played by the IRU, at a directions hearing on 20 May 2021[51]. Sir Geoffrey, on behalf of the Attorney General, explained that the IRU's "chief function was to focus the minds [of public officers] on the need to do the work necessary to cooperate with the inquiry". He readily conceded that documents were in "severe disarray" and went on to explain that this was the condition in which they were received by the IRU. While it is right to say that the majority of disclosure from the BVI Government did, with limited exception, come via the IRU, contrary to the impression

[48] T1 4 May 2021 pages 62-69.

[49] The COI Rules had defined counsel appearing on behalf of a participant or witness as a barrister or solicitor with rights of audience in the BVI. As I understand the position, although he had been instructed since at least 21 January 2021 and had begun work, Sir Geoffrey had yet to be admitted to the BVI Bar as of 4 May 2021 (see Ruling No 1 dated 10 May 2021 paragraph 17).

[50] Order No 2 dated 4 May 2021 (Cabinet Secretary Sandra Ward), Order No 6 dated 13 May 2021 (Bevis Sylvester), Order No 7 dated 13 May 2021 (Chief Immigration Officer Ian Penn), Order No 8 dated 18 May 2021 (Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton), and Order No 9 dated 18 May 2021 (Acting Financial Secretary Jeremiah Frett).

[51] A component of my wish that the COI should operate flexibly was that from time to time as hearings proceeded matters would arise where I had to make orders or give directions for its future course. Provided it did not cause inconvenience to witnesses, such hearings could be listed on the same day. On occasion e.g. if there were to be legal submissions, then a day was allocated for a directions hearing.

earlier given that they were more than a conduit for that disclosure, Sir Geoffrey confirmed that the IRU were disclosing documents simply as they had received them. The IRU did not (e.g.) carry out a full check for missing documents. Sir Geoffrey made the valid point that some of the documents which the COI was seeking would have been damaged or lost in the 2017 hurricanes. However, given that in many instances the COI's requests concerned documents produced in 2019 and 2020, that did not provide anything like a complete answer to the issue[52].

3.53 At the hearing of 20 May 2021, in light of the serious issues that had arisen, I issued an order directing that all recipients of a letter of request provide an affidavit as to the completeness of the response provided to the COI[53]. Further, I directed the Attorney General, as the person instructed on behalf of the elected Ministers and various government bodies under the Ministers' control, to make an affidavit confirming whether or not she had satisfied herself that all reasonable efforts had been made to comply with the letters of request issued thus far by the COI. By this point, the COI had sent out some 30 letters of request. In the meantime, further hearings were inevitably postponed, while these issues were addressed.

3.54 At a further directions hearing on 2 June 2021, and with the aim of keeping the BVI public informed, I explained that the way documents had been provided to the COI presented serious difficulties for its progress[54]. I set out the steps which I had put in place to mitigate those difficulties so as to resume hearings as soon as possible.

3.55 First, I referred to my order seeking affidavits explaining that, although these were directed to be provided by 31 May 2021, I had agreed to the Attorney General's request for an extension of time to 7 June 2021. I duly received a number of affidavits[55], all of which confirmed that all reasonable efforts had been made to comply with the relevant request; and that, if any further relevant material were located, then it would be disclosed by supplemental list. The Attorney General said that, based on the affidavits, she was satisfied reasonable efforts had been made to comply with the COI's requests. While these responses confirmed that public officers were being tasked with the responsibility of identifying documents to be provided to the COI, they did not extinguish my concern that the state of documentary disclosure would hinder and slow the work of the COI.

3.56 Second, and as already announced[56], I had commissioned the use of a specialist IT system called Relativity. This system has been used in several sensitive and document heavy inquiries conducted in the United Kingdom. It had two particular benefits: the system had robust mechanisms in place to satisfy me that information provided to the COI would continue to be held securely and with access carefully controlled, and its search and analysis functionality reduced the risk that continuing incomplete disclosure would hamper future hearings.

3.57 Third, I invited those with participant status (such as the elected Ministers, and other Members of the House of Assembly including the Speaker and the Attorney General), together with others with an obvious interest in the subject matter of the Inquiry (such as the Governor, the CoP and the DPP) to provide written position statements on specific questions concerning governance and the operation of the law enforcement and justice systems. That invitation had followed on from my ruling of 17 May 2021 where I said I would seek position statements from participants addressing specific questions going to these matters while explaining

[52] T7 20 May 2021 pages 28-42.
[53] Order No 10 dated 20 May 2021.
[54] T8 2 June 2021 pages 3-13. The text of my opening remarks was also published on the COI website.
[55] Given the purpose for which these affidavits were sought, there is no reason to include them as part of the material accompanying this Report.
[56] COI Press Statement: Commission of Inquiry - New Document Management System dated 28 May 2021.

that it was unlikely that I would be best assisted by participants making submissions at a time, in a manner and on matters entirely of their own choosing[57]. I return to these position statements below.

3.58 Fourth, I announced that the COI would shortly be issuing requests for a corporate statement from relevant Ministries on topics of particular interest. While I had always envisaged that witness evidence would be needed in either affidavit or statement form, these provided an added benefit in that a witness providing such an affidavit or statement should have been in a position to set out all the relevant facts, produce and explain all relevant documents (or lack thereof).

3.59 I was also able to announce the topics which I intended to investigate at forthcoming hearings. These were:

5) the interests held and declared by Members of the House of Assembly and elected Ministers;

6) questions arising from the position statements submitted by participants and others on governance and the law enforcement and justice systems;

7) the work of the Auditor General, the IAD and the Complaints Commissioner;

8) the composition and function of statutory boards;

9) the purchase and leasing of Crown Land; and

10) the system under which the BVI Government enters into contracts both in general and in relation to specific contracts.

In this chapter, I shall refer to these as topics 1 to 6.

3.60 Having set out the above programme, I explained that I would be inviting all those with participant status to identify in writing any issues within the above topics which they considered I should investigate and any witnesses whom I should call. No submissions were received. That the Attorney General did not avail herself of this opportunity was surprising given that at an earlier hearing Sir Geoffrey had said that he and his team were working on governance issues and case-studies were being worked up[58].

3.61 Adopting a topic-by-topic approach meant inevitably that witnesses would be called more than once. That inconvenience was, in my view, significantly outweighed by the advantages of dealing with the topics sequentially, not least the benefits that accrued to the BVI public who were more easily able to follow the matters which the COI was investigating. The programme was ambitious. As will be obvious, my Terms of Reference are wide. Inevitably, there was a need to focus on certain issues. The topics listed above were selected because, taken in the round, they were not unduly restricted, they encompassed more than one administration and, at least for some, they lent themselves to consideration of particular examples as case studies. Their selection did not mean that other topics were excluded. As the COI continued, evidence was received on other important matters such as the use of assistance grants and belongership.

3.62 To facilitate the forthcoming hearings, I issued further protocols. On 1 June 2021, I published a protocol giving practical information as to how hearings would be conducted[59] and a protocol concerning the provision of written witness evidence to the COI[60]. The latter explained the

[57] Ruling No 5 dated 17 May 2021 paragraphs 18-25.
[58] Day 5 13 May 2021 page 39 and Ruling No 5 dated 17 May 2021 paragraph 23.
[59] Protocol for the Conduct of Hearings dated 1 June 2021.
[60] Protocol concerning the provision of written witness evidence dated 1 June 2021.

form in which an affidavit and any accompanying exhibits should be provided to the COI, and how any application for redaction should be made. At the same time, a revised version of the protocol on redaction[61] was published with a view to ensuring that the need for redaction did not hamper the hearing programme.

3.63 The hearing on 2 June 2021 was the first public hearing of the COI's proceedings. I made clear that my intention was that, going forward, private hearings would be an exception. Indeed, thereafter, with very limited exceptions, all the hearings of the COI were conducted fully in public.

3.64 Given the restrictions consequent upon the COVID-19 pandemic, it was not possible to allow members of the public to attend the COI hearings in person. However, starting on 2 June 2021, I put in place arrangements to livestream each hearing on YouTube. The livestream operated on a three-minute delay, the purpose of which was to allow a legal representative, participant, witness or a member of the COI team to raise a concern that confidential or privileged evidence had been given. In that event, the livestream could be suspended, and the hearing go into private session so that the matter could be aired and determined safely.

3.65 The need to go into a private session arose on only five occasions. The first was on Day 37 (21 September 2021), when Mr Fligelstone Davies, present to represent the interests of Hon Neville Smith, had to deal with a personal matter[62]. The second was on Day 48 (14 October 2021), when Hon Vincent Wheatley disclosed some sensitive information in relation to a Cabinet decision. On that occasion, the COI went into private session following which it returned to a public hearing, and the gist of the evidence given by Hon Vincent Wheatley was read into the record[63]. I was also asked to go into private session on Days 50[64] and 52[65] (19 and 21 October 2021) when Governors Rankin and Jaspert respectively were asked questions about the use of radar barges. In the event, on 17 November 2021 the Attorney General confirmed that no redactions were sought in relation to the transcripts of these two private sessions and they were therefore published[66]. Finally, on Day 50, there was discussion in private concerning three documents over which the Attorney General had asserted privilege[67].

3.66 I concluded my remarks on 2 June 2021 by explaining that in all the circumstances it would not be possible to deliver a report by 19 July 2021 as my Instrument of Appointment originally envisaged. I had therefore written to the Governor seeking an extension of that time to which he had agreed in principle subject to being updated in mid-July.

3.67 Another advantage of the topic-by-topic approach was that the COI could resume its hearings while the process of obtaining affidavits continued. In fact, the COI had begun requesting affidavits on specific matters relevant to the forthcoming hearings in May 2021. Those requests continued thereafter as the COI continued its review of documents. They took the form of a letter which set out the matters to be addressed in the affidavit, directed the recipient to the COI's protocol on the provision of witness evidence and made clear that any application for redaction should be made concurrently with the submission of the affidavit and any accompanying exhibits. With my agreement, those asked to make an affidavit were able to nominate an alternative person to provide this evidence. Thus, requests directed to a Minister,

[61] Protocol for the redaction of documents (amended) dated 1 June 2021.
[62] T37 21 September 2021 pages 40-41. In this instance, there was no need to produce a redacted transcript.
[63] T48 14 October 2021 pages 299-303. A redacted transcript was published on the COI website.
[64] T50 19 October 2021 pages 259-270. Ultimately, the transcript did not require redaction.
[65] T52 21 October 2021 pages 68-105. The transcript was not redacted.
[66] T53 17 November 2021 pages 11-12.
[67] T50 19 October 2021 pages 115-118. This matter did not require redactions to the transcript.

as the person with the constitutional responsibility for a Ministry, almost invariably resulted in a senior public officer (usually, the Permanent Secretary) making the affidavit. Altogether, 82 requests for affidavits were made.

3.68 A persistent issue which arose was that, through the IRU, there were repeated applications for extensions of time to submit not only affidavits, but responses to requests from the COI for information, documents or submissions. Such requests were made from the inception of the COI and continued throughout[68]. Very few indeed were refused. Allowing extensions of time risked delay to the progress of the Inquiry. Without the continued ability of the COI team to work under extreme pressure of time, the risk of delay would have been much more significant. However, granting an extension should have reaped some benefits: in the extra time allowed, better evidence should have been provided, and a properly responsive affidavit would assist in determining which witnesses should be asked to attend a hearing and what issues need be canvassed at that hearing. Regrettably, the granting of extensions of time did not in practice always lead to such benefits accruing. A number of sequential applications for more time in respect of the same evidence was commonplace.

3.69 My intention was, insofar as witness availability permitted, to hear evidence on the topics I wished to investigate in the order listed above. Between 14 June and 21 June 2021[69], I heard from current and former Members of the House of Assembly as to their understanding of their obligations under the Constitution and Register of Interests Act 2006 to make a declaration of their interests (topic 1). I also received evidence on the use of the annual grant of public money given to each Member of the House of Assembly to distribute to constituents seeking assistance and in relation to section 66 of the Constitution. At the conclusion of the evidence on topic 1, I heard legal submissions on breaches of the Register of Interests Act 2006[70].

3.70 The next topic (topic 2) concerned the position statements on governance and the operation of law enforcement and justice. The first step in investigating that topic was, of course, to obtain position statements.

3.71 Beginning on 17 May 2021, requests for position statements on the subjects of governance and the law enforcement and justice systems were sent out to a range of individuals and bodies with an interest in such matters. There was no requirement to provide a response, but plainly it was helpful to the Inquiry to receive as many as possible. The decision to ask respondents specific questions was deliberate. It focused them on issues of particular relevance to my Terms of Reference. The questions that were put, and to whom, depended on whether the respondent was concerned with governance or law enforcement and justice or both. However, the questions were sufficiently expansive to allow respondents to set out their own concerns and views. Thus, for example, they were asked to identify strengths and weaknesses in the systems with which they were concerned and to suggest steps which ought to be taken to preserve or remedy those strengths or weaknesses.

[68] At a hearing where this was canvassed, Counsel to the COI accepted a point made by Mr Olympitis, on behalf of the Attorney General, that only one request for an extension had been refused (T10 14 June 2021 pages 43-44).

[69] On 4 June 2021 and ahead of the evidence on topic 1, I heard submissions from Mrs Forbes-Vanterpool, on behalf of the Attorney General, concerning the use at a public hearing of material obtained by the COI from the Registrar of Interests. Mrs Forbes-Vanterpool confirmed that the Attorney General was not representing the Registrar. As indicated at the hearing, I made an order directing that any current or former Member of the House of Assembly summoned to give evidence before the COI who objected to material relating to their interests being put into the public arena should make an application that the evidence be taken in private (Order No 12 dated 4 June 2021). Only one application was made to this order, which was later withdrawn.

[70] T15 21 June 2021 pages 229-280.

3.72 Those who provided position statements (and subsequent representations) are listed in Table 8 below. They have my sincere thanks. While it was not necessary to ask every person who provided a position statement to give oral evidence, I have considered all the position statements for the purpose of preparing this report. The final column in the table shows abbreviations for various position statements I have used in this Report.

Table 8
Position Statements on Governance and Law Enforcement and Justice

	Name	Position Statement, Supplement, Addendum or Response	Date	Abbreviation (where applicable)
1.	Hon Julian Willock (Speaker of the House of Assembly)	Position Statement	26 May 2021	Speaker Position Statement
		Michael B Matthews (former Commissioner of Police): Response to Hon Julian Willock's Position Statement	24 June 2021	
		Hon Julian Willock (Speaker of the House of Assembly): Letter in response to the former Commissioner of Police Michael Matthew's response to Hon Julian Willock's Position Statement	6 July 2021	
		Mark Collins QPM (Commissioner of Police): Letter in response to letters from the former Commissioner of Police and the Hon Speaker	7 July 2021	
2.	Hon Julian Fraser RA (Member of the House of Assembly)	Position Statement	31 May 2021	Hon Julian Fraser Position Statement
		Addendum to Position Statement	Undated (submitted under cover of letter dated 21 June 2021)	Hon Julian Fraser Addendum to Position Statement
3.	Elected Ministers	Position Statement	1 June 2021	Elected Ministers Position Statement
		Supplementary Note	Undated (submitted under cover of letter from the AG dated 19 June 2021)	Supplementary Note to Elected Ministers Position Statement

	Name	Position Statement, Supplement, Addendum or Response	Date	Abbreviation (where applicable)
		Hon Alvera Maduro-Caines (Member of the House of Assembly): Letter of support for the Elected Ministers Position Statement	1 June 2021	
		Hon Neville A Smith (Member of the House of Assembly): Letter of support for the Elected Ministers Position Statement	1 June 2021	
		HE John J Rankin CMG (Governor): Response to the Elected Ministers' Position Statement and Supplementary Note	15 July 2021	Governor's Response to Elected Ministers Position Statement
4.	Hon Dawn J Smith (Attorney General)	Position Statement	Undated (submitted under cover of letter dated 1 June 2021)	Attorney General Position Statement
		Supplemental Submission on Governance	11 November 2021	Attorney General's Submissions on Governance dated 11 November 2021
5.	HE John J Rankin CMG (Governor)	Position Statement	Undated (submitted under cover of email dated 2 June 2021)	Governor Position Statement
		Elected Ministers: Response to Governor's Position Statement	Undated (submitted under cover of email from Withers/IRU dated 17 August 2021)	Elected Ministers' Response to Governor Position Statement
6.	David D Archer Jr (Deputy Governor)	Position Statement	2 June 2021	Deputy Governor Position Statement
7.	Mark Collins QPM (Commissioner of Police)	Position Statement	Undated (submitted under cover of email dated 4 June 2021)	CoP Position Statement
8.	Robin Gaul (Chairman of the BVI Financial Services Commission)	Position Statement	4 June 2021	

	Name	Position Statement, Supplement, Addendum or Response	Date	Abbreviation (where applicable)
9.	Hon Marlon A Penn (Leader of the Opposition)	Position Statement	11 June 2021	Hon Marlon Penn Position Statement
10.	Ian Penn (Chief Immigration Officer)	Position Statement	Undated (submitted under cover of email dated 14 June 2021)	CIO Position Statement
11.	Tiffany R Scatliffe Esprit (Director of Public Prosecutions)	Position Statement	15 June 2021	DPP Position Statement
12.	Wade Smith (HM Commissioner of Customs)	Position Statement	Undated (submitted under cover of email dated 15 June 2021)	HMC Commissioner Position Statement
13.	Anthea L Smith (Chairperson Virgin Islands General Legal Council)	Position Statement	17 June 2021	
14.	Errol George (Director Financial Investigation Agency)	Position Statement	Undated (submitted under cover of email dated 25 June 2021)	

3.73 With the notable exception of the elected Ministers, none of those who provided position statements struggled to address the questions asked or to observe my direction that any response should be limited to 50 pages including any annexes, appendices or schedules. The elected Ministers submitted a 33-page position statement accompanied by 669 pages of appendices. Ultimately, I took the pragmatic view that, while this did not comply with the request, it afforded the elected Ministers more than ample opportunity to set out those matters they considered relevant to the questions I had raised.

3.74 As I have indicated, ensuring the security of the information provided to the COI was paramount. The only leak of information provided to the COI concerned the Elected Ministers Position Statement received by the COI on 1 June 2021. As it contained criticisms of Governors, with the agreement of the Attorney General and before being published, the position statement was shared with the Governor's Office. On 16 June 2021, when the COI was still taking evidence on topic 1, I was informed that the content of the Elected Ministers Position Statement was the subject of an article in Virgin Islands News Online ("VINO"). That article reported that the position statement had been shared with VINO by "senior sources" within the COI.

3.75 I considered this breach of the confidentiality owed to me to be extremely serious. As Counsel to the COI explained at the hearing, immediate inquiries were made of the COI team and I was satisfied that the source of the leak was not the COI. To that extent, the article in VINO was simply wrong. I directed that the Attorney General and the Governor's Office write to

me by the following morning with a list of all those known to have access to the position statement and identifying the inquiries that had been made to identify who may have leaked that document[71].

3.76 When the COI resumed the following day, I was able to confirm publicly that the Attorney and Governor's Office had both written to me. I had already spoken with the four people (including the Governor) in the Governor's Office who had access to the position statement and reassured myself that that office had not been the source of the leak. The Attorney's response had been that her inquiries were ongoing, and she would write to me in due course[72]. The information from the Attorney was that she could not provide me with a definitive list of all those known to have access to the position statement. She said it had been provided, at least in draft, to all Ministers and government backbenchers[73], and that an unspecified number of public officers also had access to the document. The Attorney said she was satisfied that no member of her legal and support staff was responsible for the leak. She noted that all Withers staff engaged by her had taken an oath of confidentiality. Subsequently, the Attorney was able to confirm that all the Ministers and Government backbenchers had confirmed to her that they had neither disclosed nor procured the disclosure of the position statement to the press.

3.77 Grateful as I am for the Attorney General's efforts, it seems to me that, in circumstances where she could not identify with any certainty the members of what appears to have been a very wide circle of those with access to the position statement, that someone in that circle was the likely source. Fortunately, following the steps I took in relation to this leak, there appears to have been no reoccurrence.

3.78 On 18 June 2021[74], before hearing further evidence from Members of the House of Assembly, I explained that progress on topic 2 (governance and the law enforcement and justice systems) was delayed for two reasons. First, given that the Elected Ministers Position Statement had made serious allegations of constitutional impropriety against Governors and the UK Government but with incomplete disclosure, fairness required me to give those criticised an opportunity to respond. For me to do so, I had directed the Attorney General to provide me with written submissions identifying with precision the criticisms being made and the legal basis for them[75], and to provide all documents relevant to the criticisms they were making. Second, belated requests for redaction of some of the position statements had only recently been received.

3.79 In the circumstances, I deferred the evidence of the Governor and Premier on topic 2 and gave directions permitting those with participant status and the Governor to file written responses, limited to 15 pages, to criticisms made of them in the position statements[76]. Substantive responses were received from the Governor and the Elected Ministers.

3.80 I was, however, still able to hear from other witnesses on topic 2. On 22 and 23 June 2021, I heard further evidence from the Attorney General, Hon Julian Fraser, the Commissioner of Police, the Director of Public Prosecutions, the Chief Immigration Officer Ian Penn, the HM Commissioner of Customs Wade Smith, Hon Marlon Penn and the Deputy Governor. The evidence of Hon Julian Fraser and Hon Marlon Penn was important in giving the perspective of those who serve as elected representatives. The evidence of public officials was necessarily of

[71] T12 16 June 2021 pages 129-134; Order No 13 dated 16 June 2021; and COI Press Statement: Ministers Position Statement: Breach of Confidentiality dated 16 June 2021.
[72] T13 17 June 2021 pages 4-5.
[73] While both Hon Alvera Maduro-Caines and Hon Neville Smith were represented by Silk Legal, they both submitted letters stating that they had seen the Elected Ministers Position Statement and agreed with its contents.
[74] T14 18 June 2021 pages 3-6.
[75] The Attorney General duly served a supplementary note.
[76] Order No 15 dated 18 June 2021.

a different character but was useful in providing insight into some of the systemic challenges faced in the public service. At the same time, issues of redaction having been resolved, the position statements received were published on the COI website. Subsequent representations received on this topic were also published.

3.81 The hearings then moved on to topic 3, by taking evidence from the Auditor General and the IAD Director. Responding to a COI request, these public officers disclosed copies of reports concerning audits they had undertaken in recent years. They were not asked about all of these reports, but rather about a selection of reports concerning projects which in my view were of relevance to a range of areas including the use of public money to provide assistance, the mechanisms for granting belongership status and the manner in which the BVI Government entered into contracts. In completing this topic, I also heard from the recently appointed Complaints Commissioner (Mrs Erica Smith-Penn) and her immediate predecessor (Mrs Sheila Brathwaite).

3.82 As the preparatory steps necessary to hold hearings into topics 4 (statutory boards) and 5 (Crown Land) were not yet concluded, hearings were scheduled in late June and July to take evidence concerning topic 6 (contracts), particularly in relation to projects such as the BVI Airways Project and the Elmore Stoutt High School Perimeter Wall Project, which had been the subject of audit reports. I also took evidence from the Clerk to the House of Assembly and the former Director of the IAD (Wendell Gaskin) on the system for administering the assistance grants which Members of the House of Assembly can dispense.

3.83 July saw an unfortunate increase in COVID-19 cases in the BVI. While the COI had, in conducting its hearings, been observing published health and safety guidance, additional measures were introduced on 7 July 2021 limiting further access to the hearing room and allowing witnesses to attend remotely if they wished[77]. Shortly thereafter, I directed that all witnesses should give evidence remotely[78].

3.84 On 14 July 2021, the Governor made a statement confirming that he had agreed to extend time of delivery of my Report by six months, and he was issuing a new Instrument of Appointment to that effect[79]. Consequently, on the same day I made a statement setting out the progress of the COI in respect of the topics I had identified on 2 June 2021. Unfortunately, and despite extensions of time being granted, ongoing delays in obtaining evidence from the elected Ministers meant that it was not possible to start and complete topics 4 and 5. I also explained that since witnesses would likely not be available in August, I had taken the decision not to sit in that month, but to use it to continue to prepare for further hearings.

The Warning Letter Process

3.85 Procedural fairness in an Inquiry – particularly the requirement that individuals have a proper opportunity to address potential criticisms against them before any findings are made – is crucial. The need to ensure that all witnesses and participants were treated fairly has been fundamental to the way in which I have conducted the COI.

[77] COI Press Notice: New COVID-19 Measures for Witnesses dated 7 July 2021.
[78] COI Press Notice: COI Hearings and COVID-19 dated 9 July 2021.
[79] The Governor's statement was published on the COI website.

3.86 This has been reflected in a number of ways. For example, rule 27 of the COI Rules provided that only I, and Counsel to the COI on my behalf, had the right to question a witness. Counsel representing a participant was required to make an application to put questions (including by way of cross-examination) to any witness. The rule was intended to minimise the risk of proceedings becoming adversarial.

3.87 On 13 June 2021, I received written submissions from Silk Legal to the effect that rule 27 and section 13 of the COI Act (under which a Commissioner is able to permit questioning) were in breach of the Constitution. It was submitted that, unless I applied what were referred to as "the Salmon Rules" strictly and allowed participants through counsel to examine and cross-examine all witnesses without restriction, I would be acting unlawfully.

3.88 "The Salmon Rules" was a reference to what are properly called "the Salmon principles". These six principles were recommended by a 1966 Royal Commission, chaired by the Rt Hon Lord Justice Salmon, appointed to review the UK Tribunals of inquiry (Evidence) Act 1921. They have been cited in the jurisprudence of the Eastern Caribbean courts[80], but have been the subject of judicial criticism. The modern view is that what is important is that those involved in an Inquiry are treated fairly, and what is fair depends on the particular circumstances of the Inquiry and the individual. The application of the Salmon principles (certainly, as strict rules) can risk unfairness.

3.89 In their written submissions, neither Counsel to the COI nor the Attorney General accepted Silk Legal's argument. Each focused on the duty to act fairly. I listed the issue for oral submissions on 13 July 2021. In the end, I did not have to determine the point as Silk Legal abandoned their argument without reservation[81].

3.90 They were right to do so. As their change in stance reflects, the proposition that the Salmon principles have the status of rules of law in the BVI is simply wrong. Moreover, the argument fails to give any proper consideration to the following.

(vi) As I have indicated above, as a matter of law, what fairness requires depends on the particular situation having regard to all factors including the need to avoid delay and to ensure the effectiveness of an Inquiry[82].

(vii) No doubt in part as a result of (i), the courts have recognised that, when conducting an investigation, Inquiries have a wide discretion as to the procedures they adopt[83].

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[80] See for example George v McIntyre [2003] ANUHCV20022/0545, ANHHCV2002/0546, ANUHCV2002/0546, per Mitchell J at paragraph 17. The learned judge set out the Salmon principles as follows:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness, he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by his legal advisers. (b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witness he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

[81] T25 13 July 2021 pages 12-27.

[82] See R v The Commissioner of Inquiry and the Governor of Turks & Caicos ex p Hoffman [2012] UKPC 17 per Lord Phillips at [35]-[38].

[83] See Douglas v Pindling [1996] AC 890 per Lord Keith of Kinkel at pages 902-3 quoting from a decision of the Federal Court of Australia (Ross v Costigan 41 ALR 319); Lewis v The Attorney General of Saint Lucia et al (High Court of Justice St Lucia) Suit No 854 of 1997 per Farara J at page 28 citing In re Pergamon Press [1971] Ch 388, a decision of the Court of Appeal of England and Wales.

(viii) The COI Act and COI Rules provided significant safeguards for witnesses including (a) the right to be legally represented[84], (b) the preservation of the privilege against self-incrimination[85], (c) the statutory prohibition against the use of any statement provided by a witness to the Commissioner in any proceedings whether civil or criminal, save for cases of perjury[86], and (d) the restriction on questioning to which I have previously referred which reduces the risk of a witness being subjected to allegations or criticisms of which they had not been previously notified[87].

3.91 On 23 August 2021, and to ensure that persons who may be the subject of criticism were given a fair opportunity to respond, I published a protocol concerning potential criticisms. The key elements of that protocol were as follows.

(i) In advance of giving evidence at a hearing at which a person of whom a criticism might be made gives evidence, that witness would receive a "warning letter" setting out the potential criticism and the evidence on which it was based.

(ii) At the same time, the person would be provided with a copy of that evidence.

(iii) The person would be invited to submit a written response to the warning letter (with any documents, and an indication of any other evidence that they wished to refer to or rely on) before attending to give evidence.

3.92 The protocol also set out how participants could and should themselves raise potential criticisms of a witness. Silk Legal did not submit any potential criticisms. On behalf of the elected Ministers, the Attorney General submitted a limited set of criticisms directed at Governor Jaspert, the UK Government/FCDO and previous Governors, and the Auditor General. The COI incorporated these criticisms into COI warning letters.

3.93 Although the responses often referred to the potential criticisms set out in the warning letters, the warning letters themselves were and remain confidential. Similarly, any written response received by the COI remained confidential until the witness confirmed its contents and agreed to it forming part of the record of the COI. At times, warning letters were sent to a person because of the position they held, e.g. a Minister or Permanent Secretary. Thus, for example, Governor Rankin was asked to address the criticisms submitted by the Attorney General of previous Governors. For the avoidance of doubt, insofar as I have made findings or reached conclusions which are critical of any individual or entity, these are restricted to matters in respect of which they had a full opportunity to respond.

Hearings Phase 2: 6 September to 24 November 2021 (Days 29 to 55)

3.94 On 23 August 2021, in light of the ongoing situation with COVID-19 in the BVI, I published a revised version of the protocol concerning how written evidence could be provided to the COI intended to make it easier to submit affidavits and statements. The following day, I announced that hearings would resume on 6 September 2021. By this time, material relevant to the Inquiry was being regularly published on the COI website, e.g. reports disclosed to the COI by the Auditor General and the IAD Director, and the responses of the elected Ministers and the Governor to each other's position statements had been published[88].

[84] See paragraphs 3.25-3.36 above.
[85] Section 15 of the COI Act.
[86] Section 16 of the COI Act.
[87] Rule 27 of the COI Rules.
[88] COI Press Notice: COI Team Return to BVI dated 24 August 2021.

3.95 One event which jeopardised the start of the second phase of COI hearings was the decision of the Speaker to apply for an injunction against me as Commissioner, Counsel to the COI and the two Solicitors to the COI prohibiting the latter three from working on the COI until they had been admitted as BVI legal practitioners. The Attorney General was also a party to these proceedings, as the fifth defendant.

3.96 By way of background, at a COI hearing on 14 June 2021, without notice, Silk Legal raised the issue as to whether Counsel to the COI and the two Solicitors to the COI were practising law in the BVI; and if so, whether they were therefore in breach of section 18 of the Legal Profession Act 2015. I explained that, in my view, the work done by counsel and the solicitors to the COI in assisting me as Commissioner did not amount to practising BVI law. The role is very different from that of a counsel and solicitor (e.g.) representing a participant or witness in the COI with a particular interest. Nonetheless, I indicated that applications for admission to practice in the BVI would be made. Given that, during the course of the COI's hearings there were indications that decisions may be challenged through judicial review, there was potential benefit in lawyers involved in assisting me being able to work in relation to BVI court proceedings, if necessary. The applications were duly made and were not opposed by the Attorney General, who in this instance was the guardian of the public interest. The Speaker and Hon Neville Smith filed objections to those applications. With the agreement of all parties, the applications were listed for determination on 26 October 2021.

3.97 To return to the application for an injunction, filed on 18 August 2021, it was listed for 2 September 2021. On 27 August 2021, Mr Justice Jack, sitting in the High Court, issued an ex parte ruling in which he raised the question of whether the Speaker had any standing to bring the application for an injunction without the permission of the Attorney General[89]. Following this decision, the Speaker discontinued his action on 1 September 2021[90].

3.98 That was not the end of the matter, however, as the question of costs fell to be determined. In two subsequent decisions, Mr Justice Jack found:

(i) that a contract dated 28 May 2021 by which Silk Legal would, for an unspecified sum, represent all members of the House of Assembly in respect of the COI and signed by the Premier was one where the Government of the Virgin Islands was the client[91]; but

(ii) the contract retaining the services of Silk Legal did not cover the application for an injunction, so the Speaker had therefore brought the application in a private capacity[92]; and

(iii) that the Speaker was liable for the Attorney General's costs assessed at $6,084[93]; and for the costs incurred by the remaining defendants, assessed at $98,676.51[94].

3.99 The present position is that a further determination on additional costs is awaited. I am aware that a special committee of the House of Assembly has been established to consider if, notwithstanding the decisions of Mr Justice Jack, the costs incurred by the Speaker should be paid from public funds.

[89] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 (27 August 2021).
[90] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 (13 September 2021) at paragraph 1.
[91] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 (30 September 2021) paragraphs 3-9.
[92] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 (30 September 2021) paragraphs 13-15.
[93] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 (30 September 2021) paragraph 23.
[94] Willock (Hon Julian) v Hickinbottom (The Rt Hon Sir Gary) and Others BVIHCV2021/0210 BVIHCV2021/0210 (11 November 2021) at page 39.

3.100 Ultimately as the date on which the admission applications were listed coincided with the conclusion of the COI's second and final phase of hearings, and no judicial review having in fact been pursued, there was no longer any utility in those applications being pursued. They were therefore withdrawn. While the point was not decided, I make clear that it remains my view that a counsel or solicitor assisting a COI is not practising BVI law. The argument that it does fails to appreciate the unique nature of an inquiry – a COI is, to use a lawyer's term, "sui generis". It ignores the fact that those assisting a COI do not represent any party they merely assist the Commissioner and, in so doing, they are obliged to act solely in the public interest. Further, the Attorney General was (or, certainly, should have been) aware that, when she appointed Mr Rawat as Counsel to the COI, he was not admitted to the BVI Bar. The logical consequence of the argument that counsel assisting a COI is practising BVI law would be that, in this instance, the Attorney General was complicit in the commission of a criminal offence. Fortunately, in my view, the argument is wrong, and that absurd result therefore does not follow.

3.101 The discontinuance of the Speaker's application meant that I could continue unhindered with the COI hearings. Between 6 September and 14 October 2021, I was able to hear from witnesses, primarily senior public officers and Ministers, in relation to topic 4 (statutory boards) and topic 5 (Crown Lands). I completed taking evidence in relation to contracts entered into by the BVI Government (topic 6) including those concerning projects which had been the subject of an audit such as the Virgin Islands Neighbourhood Partnership Project, the Elmore Stoutt High School Perimeter Wall Project and BVI Airways. I also took evidence in relation to the contracts between the BVI Government and Claude Skelton Cline (including hearing from Mr Skelton Cline himself), and concerning the use of radar barges. As in the first phase of the COI's hearings, I heard evidence on other subjects, in particular the BVI Government's leasing of buildings, the grant of residence and belongership status, and the assistance grants provided during the COVID-19 pandemic.

3.102 Counsel to the COI undertook the questioning of all witnesses called to give oral evidence during all the hearings. During this second phase of hearings, all witnesses who had received a warning letter were called to give evidence. This gave them the opportunity to confirm that they were content that any written response submitted in response to a warning letter should form part of the evidence before the COI, to answer additional questions in relation to that response, and to provide any other information which they considered relevant.

3.103 Among those called in relation to a warning letter were the Auditor General and the IAD Director, criticisms of whom were contained in representations received from the elected Ministers in relation to audits of the COVID-19 assistance grants. Similarly, Counsel to the COI put potential criticisms to both former Governor Jaspert and Governor Rankin which again arose out of the elected Ministers' representations. That happened during the final hearings of the COI (19 October 2021 to 21 October 2021) which completed the evidence on topic 2 (governance and law enforcement and justice). As well as hearing from the Governors, I also heard from the Premier on these matters.

3.104 As Counsel to the COI canvassed issues with witnesses in detail, there were only a few occasions when he was asked (usually by the legal representative of a participant) to put additional questions to a witness. Those questions, with my permission, were invariably put. The Attorney General also made two applications to cross-examine witnesses on specific issues, which I granted. No other participant made such an application. The first of the Attorney's applications concerned the Auditor General and the second Governor Rankin, both of whom were questioned by Sir Geoffrey Cox QC on behalf of the elected Ministers. It was possible to accommodate the cross-examination of the Auditor General within the hearing

timetable[95]. However, it was necessary to reschedule this aspect of the oral evidence of Governor Rankin to allow him to obtain legal representation. Accordingly, on 16 November 2021, I granted the Governor's application, under rule 26, that he be represented by Alex Hall Taylor QC of Carey Olsen (BVI), when he returned to complete his evidence[96].

3.105 Subject to concluding the evidence of Governor Rankin, I expected that the directions hearing held on 22 October 2021 would be the final hearing of the COI. At that hearing, I dealt with a number of matters including the opportunity for participants to provide written closing submissions, and the Attorney General's applications to submit further submissions in her own right on governance and to provide additional evidence by way of affidavit. I also gave directions as to the Attorney General's pending application to cross-examine Governor Jaspert. That application was not pursued[97]. However, in the event, I had to list a further directions hearing on 17 November 2021 to deal with additional matters including applications from the Attorney General to submit further affidavit evidence which I allowed[98].

3.106 The final hearing of the COI was held on 24 November 2021, scheduled for that date not only to accommodate Governor Rankin but also Sir Geoffrey Cox QC. As with the Auditor General, Sir Geoffrey was able to question the Governor at some length on all those matters which those he represented had wished to be canvassed[99]. By this date, the participants had submitted their closing submissions, albeit extensions of time had been required. The Attorney General's submissions carried the curious heading: "Summary of Submissions on behalf of the Attorney General and the elected [Ministers]". That suggested that the Attorney General intended to make further submissions. However, at the final hearing, neither Mr Risso-Gill (appearing on behalf of the Attorney General and the elected Ministers) nor Mr Rowe (on behalf of the remaining Members of the House of Assembly) sought to make oral (or further written) submissions.

3.107 Many weeks after the conclusion of the COI's proceedings, the Attorney General submitted an affidavit from Maya Barry of the Attorney General's Chambers, which concerned the disposal of a piece of Crown Land. Ms Barry had not been available to attend to give evidence to the COI. While reluctant to admit evidence received so very late in the day, I decided that in the interests of full inquiry, I should do so; and made an order accordingly on 7 March 2022[100].

3.108 I add one final observation. Much of the questioning of witnesses involved taking them to various documents of which there were often many. Often witnesses would themselves draw my attention to a document which they considered relevant to the answer they were giving. However, that the witness was not taken to a document which they had produced does not mean that I did not consider it while the hearings were ongoing and for the purpose of preparing this Report.

Redaction

3.109 My commitment to an open and transparent inquiry included the hope that, as the COI proceeded, I would be able to publish as much information as possible to the BVI public so that they would be better able to follow the course of the COI. However, there may be good reason why some information cannot be put into the public domain, e.g. where it contains personal data. In those cases, a balance has to be struck (in a COI, by the Commissioner), and

[95] T51 20 October 2021 pages 159-229.
[96] Order No 24 dated 16 November 2021.
[97] Order No 23 dated 22 October 2021.
[98] Order No 25 dated 17 November 2021.
[99] T55 24 November 2021 pages 4-95.
[100] Order No 26 dated 7 March 2022.

the information published with any parts which cannot be made public redacted (i.e. blanked out). Key to doing so is a redaction protocol or policy, and a willingness on the part of those asked to provide documents in accordance with that policy.

3.110 The COI's redaction policy, both in its original and revised form, drew on policies used in inquests and public inquiries in other jurisdictions, but tailored to both the BVI and my particular Terms of Reference. It envisaged a two-stage process in which documents would be provided to the COI in unredacted format, and then redacted following an application and decision by me, before being disclosed more widely. The key step introduced in the revised policy[101] was that those providing documents could be asked to make an application for redaction at the time that documents were provided. That change was introduced to make the process more streamlined, and to minimise the risk of further delays to the hearing programme. It assumed that the person or body providing the document would have no difficulty in identifying any confidential information that should be redacted.

3.111 Thus, the COI's standard practice when documents (including affidavits) were requested was to ask the provider of such documents to indicate what redactions were sought, and why, at the time the document was provided. The COI's requests made clear that the document might be used at a public hearing and further, e.g. in my report and by being published at large. This was important, as I wished to publish with my report the main evidence upon which I relied.

3.112 Ensuring compliance with redaction directions has been a major challenge for the COI, and one which has had a significant effect on its progress. All providers of documents to a degree appeared to find difficulty with complying with requests to identify redactions. That includes those Ministries and departments to whom, unsurprisingly, the majority of the COI's requests were directed. That was so, notwithstanding that those entities were able to call upon the IRU who were the route by which documents were provided to the COI and any application for redaction made.

3.113 It is unnecessary for the purposes of this report to go into detail. Suffice to say that there was a repeated failure on the part of the Attorney General and the IRU to make reasoned applications for redactions at the appropriate time and in compliance with the redaction protocol. I was given different reasons for this, including that the IRU lacked sufficient capacity.

3.114 The position became even more complicated and time consuming for the COI team when applications for redaction on the grounds of public interest immunity ("PII") were made. A successful PII application results in an Inquiry putting out of its mind relevant information because to use that information would compromise another important public interest such as national security. By way of example, the Response of the Elected Ministers to the Governor Position Statement was submitted to the COI on 17 August 2021. Its appendices included NSC material. If PII was going to be relied on in relation to that material, it required a properly formulated application. On 10 and 11 September 2021, the Attorney, assisted by the IRU, made a PII application in relation to this material with proposed redactions. I was informed that these redactions had the unanimous support of all members of the NSC. On 16 September 2021, I repeated my previously expressed view that the application was inadequate such that it could not be determined. That meant that, while the Response of the elected Ministers could be published on the COI website, the appendices could not[102]. Further, if anything in those appendices was to be referred to at a hearing, there might be a need to go into private session.

[101] Protocol concerning the provision of written witness evidence dated 1 June 2021.
[102] T34 16 September 2021 pages 4-7.

3.115 The issue arose again in relation to NSC material contained in a bundle prepared for a hearing which considered the BVI Government contract with EZ shipping for the supply of radar barges. That material was relevant to the questioning of Governor Rankin on 19 October 2021 and former Governor Jaspert on 20 and 21 October 2021. On 18 October 2021, the Attorney General, again with the assistance of the IRU, made an application in relation to that material. At the 19 October 2021 hearing, I found myself once again lamenting the fact that the application was in a form that rendered it impossible to determine[103]. The only solution was to go into private session on 19 October and 21 October 2021.

3.116 These already muddied waters became even murkier when, at the hearing on 19 October 2021, Governor Rankin said that the IRU had not been authorised to act on behalf of the NSC, nor had the NSC decided that material should be shared with the IRU[104]. I leave it to others to consider if the circumstances in which national security material may have been shared with Withers and instructed counsel, including by sending it to London, warrants some investigation. In any event, the outcome was that the Attorney General had then herself (and without the assistance of the IRU) to submit an application that the NSC material contained both in the appendices to the Response of the Elected Ministers and in the hearing bundle be redacted on grounds of PII. That application was made on 11 November 2021 close to the end of the COI's oral hearings. Fortunately, I was able to deal with it on an alternative basis to PII. Nonetheless, it is regrettable that it took so many months for the submission of the application in a form that might be determined.

3.117 Further, and importantly, the Attorney General, on behalf of the elected Ministers, while content that some material be placed on the COI website, reserved her position in relation to the further dissemination or use of a significant quantity of material provided by the BVI Government.

3.118 As I observed at the directions hearing on 22 October 2021, that was a position which, while contrary to the redaction protocol, was one I felt bound to respect. I therefore put in place a process by which the Attorney General would have a final opportunity to make an application for redaction to documents to which I proposed to refer in my report[105], failing which there could be no objection to these documents being made available to the public. That process has not been without its hurdles. In particular, the elected Ministers have continued to reserve their position in relation to disclosure to the public, arguing that documents should only go to the Governor. That is a position with which I strongly disagree. Whilst I am bound to deliver my Report to the Governor, I have never lost sight of the fact that this COI has been established in the interests of the people of the BVI; and I am anxious that they have every opportunity to understand both my conclusions and the information upon which they are based. It is my firm view that my Report should be accompanied by a bundle of those documents or parts of documents, suitably redacted, I have cited and upon which I have relied. Such a proportionate step can only enhance understanding of the basis on which findings, conclusions and recommendations have been made and so promote an open and transparent process.

3.119 The need to address the stance taken by the elected Ministers was an unwelcome burden at a time when my focus was on preparing this Report. It has caused delay and led to the need for a further extension to the date for the submission of this report[106].

[103] T19 October 2021 pages 57-62.
[104] T19 October 2021 pages 67-68.
[105] T53 22 October 2021 pages 8-9.
[106] COI Press Notice; Commission of Inquiry Extension dated 4 January 2022.

3.120 Publication of this Report and any accompanying material, is of course, a matter for the Governor. However, I am satisfied that both the Report and the accompanying material are now in a form that they can be made available to the BVI public without unnecessarily compromising any confidences, rights or privileges.

The Structure of the Report

3.121 As the following chapters will show, the report broadly follows the structure of the oral hearings.

3.122 In Chapters 4-12, I deal with the topics covered in the hearings, setting out the important information on that topic, my conclusions and any recommendations I make in relation to that particular topic. Chapter 13 deals with the issues of governance and serious dishonesty in public office, drawing the strands together on those matters. In Chapter 14, I set out my overarching recommendations. A full set of my recommendations can be found at the start of the report immediately after the Executive Summary.

Final Observations

3.123 I conclude this chapter with three final observations on the operation of the COI, which may assist those involved in future such Inquiries in the BVI.

3.124 First, there is the importance of any Commission of Inquiry being open and transparent.

3.125 For any COI, but particularly one (such as this) established for the public welfare, engagement with the public is vital. It must be as open and transparent as possible by keeping the public informed of its work. That challenge was particularly important here given the COVID-19 pandemic. I am pleased that our website proved useful in keeping the public informed. Not only were regular press notices and updates issued via the website (and simultaneously on Facebook), but a transcript of each hearing was published on the website as soon as it was possible to do so[107].

3.126 Similarly, the COI's dedicated YouTube channel provided an effective means by which the BVI public could follow the work of the COI and especially the evidence of witnesses. The COI website had a link to the recording of each hearing that was livestreamed. Of the 55 hearing days, 48 were livestreamed on the YouTube channel and remain available. As of 1 March 2022, the average number of views per hearing day was 7,192. Day 14 (18 June 2021) has had the highest number of views (21,435). Day 54 (17 November), a directions hearing without witnesses, has had the lowest number of views (1,529). Many views were in real time.

3.127 Second, there is the position of the BVI Government's senior law officer, the Attorney General.

3.128 The Attorney General is the principal legal officer for all branches of the government. Where, as here, a COI has been tasked to investigate the operation of one or more arms of government, the position adopted by the Attorney General is of course particularly important. To put this into context, it is necessary to return to the IRU.

[107] It was usually possible to do this within 24 hours of the hearing, save on those occasions where the Attorney General needed time to review the transcript for sensitivity and make any application for redaction.

3.129 The engagement of Withers to work as part of the IRU under the instruction of the Attorney General required a major contract[108]. Under that contract, signed on 8 May 2021 between the BVI Government and Withers LLP of London[109], the latter was, through Withers BVI, required:

> "to advise the Government on legal and strategic matters relating to the Commission of Inquiry … under the supervision of the **Attorney General**" (emphasis in the original).

The contract was signed by the Premier on behalf of the BVI Government. It covered the period from 20 January to 3 June 2021. On 15 June 2021, the contract was extended on 30 October 2021[110].

3.130 A new contract was entered into on 8 November 2021[111], running from 1 November 2021 to 28 February 2022. Again, signed by the Premier on behalf of the BVI Government, this new contract required Withers LLP to provide:

> "legal advice and representation in respect of the six (6) months extension of the Commission of Inquiry authorised by the Governor …"

3.131 The total renumeration for the period 20 January 2021 to 28 February 2022 was $6.5 million.

3.132 It is not for me to comment on whether these contracts provided value for money. I appreciate that the separate cost of public officers having to retrieve and collate documents for the COI would have been incurred in any event. I recognise that Withers (as part of the IRU) placed itself as an intermediary responsible for the transfer of documents from public officers to the COI, and established its own document management system in order to track that disclosure[112]. I recognise that they were involved in advising on the preparation of affidavits. It is also right to note, that, as well as representing Ministers during hearings of the COI, Withers (in the guise of the IRU) represented some (but not all) of the public officers who also gave evidence.

3.133 However, the stark reality was that, following the applications for participant status made on behalf of the elected Ministers and certainly from the submission of their position statement on 1 June 2021, Withers was no longer in a position, as described in its contract, to represent "the Government of the Virgin Islands". That term refers to all three branches under the Constitution of which the Governor (as well as the House of Assembly) is one[113]. However, as I describe above, in the course of the COI, the elected Ministers made serious criticisms of the Governor and his predecessors. Withers did not represent the Governors; and, in light of the criticisms made, it is difficult to see how they could properly have done so. Nor did they represent any public officer whose evidence might not accord with the position of the elected Ministers, preeminent among whom were the Registrar of Interests, the Auditor General and the IAD Director. Each of them was also criticised by the elected Ministers in very serious terms. Nor, so far as I am aware, did the representation offered by the IRU (and, in particular, Withers who comprised its majority) extend to those who were Ministers in a previous government or to former public officers.

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[108] Such contracts must be lodged in the Registry of the Supreme Court and are available to the public: see paragraph 6.10 below.
[109] Major Contract between Government of the Virgin Islands and Withers LLP (No PMO/003M/2021), Registered No 266/2021.
[110] Contract Extension Agreement between Government of the Virgin Islands and Withers LLP Registered No 327/2021.
[111] Major Contract between Government of the Virgin Islands and Withers LLP (No PMO/006M/2021) Registered No 530/2021.
[112] The Attorney General suggested giving the COI access to this system albeit the terms on which such access would have been provided were never explained. As Ms Knock, on behalf of the Attorney General, made plain, such access would not have reduced the difficulties with how the Government provided documents to the COI (T24 8 July 2021 page 47).
[113] This was certainly the position of the Attorney General in the costs litigation that followed the decision of the Speaker to seek an injunction against me as Commissioner and members of the COI Team (see Willock v Hickinbottom and Others judgment dated 30 September 2021 unreported at paragraph 10).

3.134 It seems impossible to avoid the conclusion that the primary role of Withers was to defend the interests of the elected Ministers, which was vigorously and fully done.

3.135 That brings me back to the Attorney General. I write now not of her involvement in the COI as a witness or a participant, but of her position as the legal adviser to the BVI Government in all its forms. As the Attorney General explained when she made her application for participant status on 4 May 2021, the potential for conflict of interest is inherent in her role since she advises all three arms of government. The Attorney observed that the Constitution itself safeguards her independence. In fairness to her, the Attorney was fully alert to the potential conflict that might arise between different arms of government in the COI. She was also aware that a conflict might arise between Ministers and public officers: indeed, as I recorded in my ruling of 10 May 2021, the Attorney had issued guidance as to the circumstances in which a public official, elected or not, may need to seek personal representation. Finally, the Attorney herself accepted that there was a potential conflict of interest between her advising an arm of government and her obligation to the public interest[114]. These were all matters, the Attorney said, she was well-used to navigating.

3.136 Whether a conflict of interest arose here, when and in what way is a matter for the Attorney General's professional judgment. In my view, during this COI, the Attorney General found herself walking an ever thinning and perilous tightrope. The reality is that, with Withers, the Attorney General together with others in her office such as the Solicitor General were representing the elected Ministers. Her clients, the elected Ministers, as they were entitled to do, chose to make criticisms of and to apply to cross-examine the Governor and public officers. That step raises a legitimate question, which I do not have to determine, as to the extent of confidence that a Governor can have in an Attorney General who has instructed Leading Counsel to make very serious allegations against a Governor and to cross-examine the Governor on those criticisms in a public forum. It can have come as no surprise to the Attorney that her proposition that the Solicitor General could act for the Governor (and the Auditor General and IAD Director) was not accepted. The Solicitor General was an active member of the very team representing the elected Ministers, which on their behalf, put forward the serious criticisms of the Governor and those two public officials to which they were responding.

3.137 If there is a broader lesson to be learned, in my respectful view, it is that in any future COI conducted in the BVI, the Attorney General should consider very carefully limiting himself or herself to representing a specific arm of government from the beginning – or, perhaps better still, none.

3.138 Third and finally, there is the continuing appropriateness of the Commissions of Inquiry Act 1880.

3.139 The experience of conducting this inquiry has reinforced my view that the statutory power vested in a Governor to establish a COI where the public interest is engaged is of real value to the people of the BVI. A Governor has a number of constitutional obligations, including a duty to promote good governance. The power to establish a COI to investigate a matter of real public concern is a means by which that duty can be met.

3.140 COIs differ in their subject matter and serve a distinct purpose separate from that exercised by courts of law. In that sense, the flexibility that the COI Act gives a Commissioner has much to commend it. I was able to use that flexibility to ensure that this COI has been open and transparent, and procedurally fair. I did not find myself wanting in powers.

[114] T1 4 May 2021 pages 24-26, and 44-46. And Ruling No 1 dated 10 May 2021 at paragraphs 3-7.

3.141 The Speech from the Throne delivered by Governor Rankin on 18 January 2022[115] said that the elected Government intended to introduce amendments to the COI Act to "bring the Act in line with the Virgin Islands Constitution and Human Rights Act to strengthen good governance". Insofar as that proposal carries the implication that this COI was not conducted in accordance with the Constitution, it is one I reject. The argument was never raised by the elected Ministers and the Attorney General would, no doubt, have raised the point given her constitutional role. The Human Rights Act is not even yet a bill. Nonetheless, in my view, the COI Act would benefit from updating. That is easily illustrated by considering the sanction for a failure to comply with a summons. The COI Act provides a Commissioner with the power to issue a summons compelling the attendance of witnesses and/or the production of information and documents. Under section 15 of the COI Act, a refusal to comply with a summons or to answer fully and satisfactorily all questions, without sufficient cause, would, on summary conviction, be liable to a fine not exceeding $140. By contrast, comparable provisions in the Integrity in Public Life Act 2021, to which the Governor assented on 11 February 2022, provide for a fine not exceeding $30,000 or imprisonment for a term not exceeding five years or both. There is considerable force in reviewing the sanction available under section 15 of the COI Act, which does not appear to have been altered since 1880.

3.142 Age in itself is not a good reason for discarding a statute. As I have indicated, the COI Act has not impeded me in conducting my Inquiry in a manner which, I believe, has allowed the people of the BVI to understand the purpose and work of the COI, and to see and hear elected officials and public officers give evidence on issues of public concern. However, since 1880, there has been a sea change in the approach to COIs notably in the extent to which they should be conducted in an open and transparent way, and there is an argument that should be reflected in the empowering statute.

3.143 Furthermore, any future COI will face challenges which reflect our modern age. For example, the importance given to redaction reflects not just the need that has always existed to minimise disclosure on public policy grounds, but also the increasing awareness of the use of personal information and the need to protect it. The COI Rules and protocols which I published have sought to address some of those challenges. I found no BVI precedent for the use of such rules and protocols. While they were produced for this COI, I hope that they may prove of some benefit to future COIs in the BVI.

3.144 The COI Act as it stands prompts a number of questions. For example, should Commissioners continue to enjoy the power to make their own rules under section 9 of the COI Act or should these be placed on a statutory footing? Is the power under section 2 of the COI Act to exclude a person for "any other reason" one that should be maintained? Should there be more specific provisions dealing with the circumstances in which hearings should be conducted in private? To what extent should the right to put questions to witnesses be limited? Should its power to inspect documents and other material be more clearly set out?

3.145 The conclusion of this COI provides a timely opportunity to review the COI Act, and that is what I will recommend. In doing so, I am not suggesting that COIs in the BVI should have the status of courts of law: a process that is not focused on adjudicating between competing arguments or making determinations of civil or criminal liability, but is required to investigate and report, has proved of value across the years and across the Common Law world. Nor am I suggesting that any particular provisions of the statutory scheme in (e.g.) England and Wales should be adopted without the most careful consideration. The purpose of the

[115] Speech from the Throne: Positioning the Virgin Islands to continue improving the standard of living of our people delivered by His Excellency the Governor John J Rankin CMG, First Sitting of the Fourth Session of the Fourth House of Assembly, 18 January 2022.

proposed review would be to consider, not just the work of this COI, but approaches adopted in other comparable jurisdictions with a view to improving the COI process in the particular circumstances of the BVI.

Recommendation

3.146 I deal with overarching recommendations below[116]. However, with regard to future COIs, I make the following specific recommendation.

Recommendation B1

I recommend that there should be a review of the Commissions of Inquiry Act 1880 in the light of this COI and the processes it has adopted as well as modern practices adopted in other Common Law jurisdictions, with a remit to make recommendations designed to improve the conduct of Commissions of Inquiry in the BVI.

[116] See Chapter 14.

CHAPTER 4:
ELECTED PUBLIC OFFICIALS' INTERESTS

APPENDIX A

ELECTED PUBLIC OFFICIALS' INTERESTS

A vital element of good governance is that public officials do not take into account private interests when making decisions in the public interest. In support of that principle, public officials are generally required to disclose any conflict between their own interests and the public interest in the decisions they make and matters they consider as a public official. Further, it is a specific requirement of the Constitution that Members of the House of Assembly declare their interests, not only before an election, but upon being elected and thereafter annually. The Constitution and supporting BVI legislation require a register of these interests to be kept.

This chapter looks at the process by which interests are declared, the compliance of individual Members of the House of Assembly and the extent to which elected Ministers and other elected Members have tried to establish a working system for the registration of interests as required by the Constitution.

Registration of Interests: The Law

4.1 The primary check on ensuring Members of the House of Assembly do not engage in activity in respect of which there is or may be a conflict of interest between their position and their private interests is a requirement for each Member to declare his or her interests which are then entered into a register kept for this purpose.

4.2 The requirement stems from the Constitution. Section 112 provides:

> "(1) There shall be for the Virgin Islands a Register of Interests, which shall be maintained by a Registrar who shall be appointed, and may be removed from office, by the Governor acting in his or her discretion.
>
> (2) It shall be the duty of any person to whom this section applies to declare to the Registrar, for entry in the Register of Interests, such interests, assets, income and liabilities of that person, or of any other person connected with him or her, as may be prescribed by law.
>
> (3) A person shall make a declaration under subsection (2) upon assuming the functions of his or her office and at such intervals thereafter (being no longer than twelve months) as may be prescribed by law.
>
> (4) This section applies to all members of the House of Assembly (including Ministers) and the holders of such other offices (except that of Governor) as may be prescribed by law.
>
> (5) A law made under this Constitution shall make provision for giving effect to this section, including the sanctions which may be imposed for a failure to comply with, or the making of false statements in purported compliance with, subsections (2) and (3) and, notwithstanding anything contained in Chapter 5, the sanctions which may be imposed may include the suspension of a member of the House of Assembly from sitting and voting in the House for such period as may be prescribed in such a law."

Section 112 is in materially the same terms as its predecessor, section 66C of The Virgin Islands (Constitution) Order 1976[1] inserted by The Virgin Islands (Constitution) (Amendment) Order 2000[2]. These provisions have therefore been enshrined in the Constitution since 2000.

4.3 Section 112 thus requires (i) there to be a Register of Interests; (ii) there to be a Registrar of Interests, appointed by the Governor, with the statutory duty of maintaining the Register; (iii) each Member of the House of Assembly to make a declaration of interests on being sworn in and then at least annually; and (iv) the BVI Government to make a measure under the Constitution to ensure that those requirements are made effective and enforced including provision for the imposition of sanctions on those who fail to make a declaration when required to do so.

4.4 That measure is the Register of Interests Act 2006[3] as amended by the Register of Interests (Amendment) Act 2007[4] ("the 2006 Act"), which came into force on 18 February 2008[5]. These measures were, as envisaged by the Constitution, enacted by the BVI legislature[6].

4.5 The 2006 Act sets out a scheme by which information concerning the interests held by Members of the House of Assembly (defined by section 2 to include the Attorney General and the Speaker, as well as elected Members) is collected and reviewed; and their compliance with their obligations under this Act is monitored and, if necessary, enforced by effective sanctions. Although the Constitution envisages the possibility, the 2006 Act does not impose any obligation on other public officers to declare any interests.

4.6 Under section 3(1), reflecting section 112(3) of the Constitution, each Member has an obligation to make a declaration of their interests on the date on which he or she assumes "the function of [his or her] office" (i.e. the date he or she is sworn in as a Member), and then on each subsequent anniversary of that date, in the form mandated by the Act. The declaration required is of the interests held at the date on which the duty to make the declaration arises including, where required by the registration form, any interests held by a spouse or minor dependent child[7].

4.7 The form is prescribed in Schedule 1 to the 2006 Act. It begins by setting out the purpose of the registration of interests, as follows:

> "The main purpose of the Register of Interests is to provide information of any pecuniary interest or other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches or vote in the House of Assembly, or actions taken in his or her capacity as a Member."

[1] SI 1976 No 2145.
[2] SI 2000 No 1343.
[3] No 5 of 2006.
[4] No 11 of 2007.
[5] The main amendment made in 2007 was to substitute "House of Assembly" for "Legislative Council", as necessary, to bring the nomenclature into line with the 2007 Constitution. There were no substantive changes.
[6] Hon Marlon Penn expressed pride in his party (the NDP) implementing the Registration of Interests Act 2006 as a "key legislative requirement that could be instrumental in achieving good governance, and, in particular to allow for greater transparency and accountability" (Hon Marlon Penn Position Statement paragraph 3).
[7] Section 3(2) read with section 2.

4.8 There appears to be an inherent tension between this preamble, which refers to "any pecuniary interest or other material benefit which *a Member* receives" (emphasis added), and those parts of the form which require disclosure of family interests, e.g. paragraphs 5, 6 and 7 of the form which require a declaration of gifts received by a spouse[8]. The obligation to disclose is clearly not restricted to material benefits received by a Member himself or herself.

4.9 Members, perhaps understandably, differ in their individual interpretation of the requirements in this regard. For example, Hon Melvin Turnbull said he considered that generally you have to declare interests of yourself, your spouse and your children[9]. Hon Alvera Maduro-Caines thought the preamble meant you were required to declare any assets or company in respect of which a Member might have a conflict of interest[10]. Hon Shereen Flax-Charles considered the purpose of this preamble was to require disclosure of any businesses that might be dealing with the BVI Government[11] (although she in fact disclosed businesses with which she was involved that did not do such trade); Hon Neville Smith similarly[12].

4.10 The form identifies 10 categories of interest, in respect of which it asks particular questions, namely:

13) Remunerated or unremunerated directorships in a company.

14) Remuneration from employment, office, trade, profession or vocation.

15) The provision of services to clients by a Member which depend upon or arise from the position of being a Member, for example by making representations to Ministers or providing advice on parliamentary or public affairs.

16) Sponsorship of over $2,500 received before the election at which the Member was elected; and any other form of sponsorship or financial or material support while a Member. This relates to "sponsorship" of a particular Member: there is no regulation or required publication of party funding or, indeed, the amount an election candidate can spend on his or her own campaign[13].

17) Gifts, benefits and hospitality from within the BVI.

18) Overseas visits related to or arising from the position of the Member which were paid for otherwise than by the Member or from public funds.

19) Benefits and gifts from a foreign government, organisation or person.

20) Interests in land other than that used for solely personal residential purposes.

21) Shareholdings which are either held by the Member, or his or her spouse or dependent children, and which either have a value over $25,000 or are less than that sum but greater than 1% of the issued share capital of the company or body in which the shares are held.

22) The final category on the form is headed "Miscellaneous", explaining:

> "If, bearing in mind the definition of purpose set out in the introduction to this Form, you have any relevant interests which you consider should be disclosed but which do not fall within the [other] categories set out above, please list them."

[8] Although Hon Julian Fraser (who was a Member of the House at the time the 2006 Act was passed) said he saw no such tension: T12 16 June 2021).
[9] T12 16 June 2021 pages 117-118.
[10] T11 15 June 2021 page 21.
[11] T10 14 June 2021 page 194.
[12] T11 15 June 2021 page 85.
[13] See paragraph 1.47 above.

By reference back to the preamble, this category therefore allows and requires a Member to declare any interests or benefits which are not included in the other categories and which might reasonably be thought by others to influence his or her role as a Member.

4.11 There are short explanatory notes on the form itself which provide some guidance as to the information to be provided under categories 1 to 9. For example, the Member is advised that membership of insurance enterprises should be declared under category 2, while making representations to Ministers, fellow members or public officers should be declared under category 3. Any financial or material benefit, whether direct or indirect, is to be declared under category 4. The explanatory notes also give guidance as to what does not need to be declared. Thus, services or facilities offered free or at a price lower than that generally available to the public need not be declared if known to be available to all Members of the House of Assembly.

4.12 The explanatory notes for category 6 refer to "the guidance pamphlet on Registration and Declaration of Members' Interests". No Member past or current said that they had received a guidance pamphlet. The Deputy Governor, David Archer Jr, said that it appeared that no pamphlet had ever been issued[14].

4.13 Section 112(1) of the Constitution provides for the appointment of a Registrar, upon whom sections 4(1) and 5(2) of the 2006 Act impose the obligation to maintain and keep a Register containing the information declared by Members in accordance with the Act. The format of the Register must be approved by the Standing Select Committee of the House of Assembly charged for the time being with the consideration of matters relating to the Register ("the Register of Interests Committee")[15]. The Registrar acts as the Clerk to the Committee[16].

4.14 The Registrar has to satisfy himself or herself that a full and accurate declaration has been made in the required form, and he or she can obtain further information from the Member concerned in order to do so[17]. Where the Registrar is satisfied that an entry in the Register has been made as a result of a fraudulent or materially misleading declaration by a Member, the Registrar is bound to cancel any consequential entry made in the Register, and require the Member to make a new declaration[18]. The Registrar may also require any person, including a Member, to supply such information and to produce such records which the Register of Interests Committee considers necessary or desirable for the purpose of allowing the Registrar to carry out his or her functions[19].

4.15 By section 9(1), the Register is not open to public inspection, being open to inspection only (a) for the purposes of a criminal investigation, (b) upon the order of a court in any legal proceedings or (c) upon a written request of a Member and on the payment of a fee. The Register of Interests (Amendment) Act 2021[20] added, as a new section 9(1)(ba) of the 2006 Act, that the Register is open to inspection upon the written request of a Commissioner of Inquiry appointed under the Commissions of Inquiry Act 1880[21].

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[14] T17 23 June 2021 pages 246-247.
[15] Section 4(2).
[16] Section 5(1).
[17] Section 5(3).
[18] Section 5(4).
[19] Section 6.
[20] No 2 of 2021.
[21] Under the Commissions of Inquiry Act, I had the power to call for these documents in any event; and, having called for them, to make them public if I considered it was in the public interest to do so. I directed that, if any Member or former Member of the House of Assembly called to give evidence in relation to Members' interests objected to information and documents being out into the public arena, then he or she must apply to the COI for an order that the relevant hearing be in private. In the event, only one application was made – and that was withdrawn immediately before the relevant hearing. All of the hearings were consequently heard in public and were livestreamed.

4.16 The provisions relating to the closed nature of the Register are supported by section 13 of the 2006 Act which, as amended in 2021, provides:

> "(1) The Registrar and any person appointed or designated to assist the Registrar in the performance of his duties under this Act
>
> (a) shall, before assuming office, subscribe to the oath of confidentiality referred to in Schedule 3;
>
> (b) shall not, save in accordance with the provisions of this Act or otherwise in relation to any court order or a written request from a Commissioner of Inquiry, disclose information
>
> (i) relating to any declaration or matter in the Register; or
>
> (ii) that he has acquired in the course of or in relation to his duties or in the exercise of any powers or performance of duties under this Act.
>
> (1a) Where a request for information is made to the Registrar pursuant to subsection 1(b), the Registrar may provide information that in his opinion is strictly necessary to fulfil the request and upon such conditions as to the preservation of confidentiality after the purpose for same has been exhausted as he shall deem appropriate.
>
> (2) The oath of confidentiality referred to in subsection (1)(a) shall be taken before a Magistrate or the Registrar of the High Court.
>
> (3) Where the Registrar or any other person appointed or designated to assist him contravenes subsection (1)(b), he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand dollars, or both."

4.17 The form of oath of confidentiality is set out in Schedule 3:

> "I, being the Registrar of Interests/a person appointed/designated to assist the Registrar of Interests in the performance of his duties under the Register of Interests Act, 2006, solemnly swear/affirm that I shall keep confidential all declarations and other information in connection with or relative to Members of the House of Assembly and the Register of Interests which has come to my knowledge in my capacity as Registrar of Interests/a person appointed/designated to assist the Registrar of Interests or in relation to such office that I hold and I shall not disclose such declaration or other information except as authorized by and in accordance with law.
>
> So help me God (omit if affirming)."

4.18 What happens when a Member is in default of his or her obligations under the 2006 Act? What are the mechanisms of enforcement?

4.19 Section 7 provides:

> "Where a Member
>
> (a) fails to make a declaration within a period of three months from the date on which the duty to make that declaration accrued,
>
> (b) fails to comply with a notice given by the Registrar under section 5(4) and has not, within the period allowed for compliance with the notice, shown that he has reasonable grounds for not complying with it,

(c) has failed to comply with a notice given by the Registrar under section 6(1) and has not, before the end of the period allowed for compliance with the notice, shown to the satisfaction of the Registrar that he has reasonable grounds for not complying with it, or

(d) has made a statement which the Registrar is satisfied is false or misleading in a material particular

the Member shall be in breach of the provisions of this Act, and the Registrar shall, within fourteen days of the knowledge of such breach, submit a report of such breach to the Committee, which shall meet to consider the report within twenty-one days of its submission."[22]

4.20 By section 8, the Register of Interests Committee may require the Member concerned to remedy breaches that fall within section 7(a) or (c) within a period of up to 28 days. It is a power, not an obligation, to require a Member to make a declaration. If the Member fails to comply with such a requirement (or falls within the scope of section 7(b) or (d)), the Committee must present a report to the House of Assembly, which is required to debate it within 14 days and may impose a fine not exceeding $5,000 and/or suspend the Member from sitting or voting in no more than two consecutive meetings of the House.

4.21 Section 10 provides another enforcement route. A Member may make an allegation to the Registrar that another Member is in breach of the Act, whereupon the Registrar is required to refer the allegation to the Register of Interests Committee. If, following a hearing of the allegation, the Committee finds it to be justified, then it is required to report to the House of Assembly. That is an obligation. On such a report, the procedure is the same as under section 8.

4.22 As can be seen from the above, the 2006 Act provides for the House of Assembly to self-police the obligation on a Member to make declarations of interest.

4.23 There were two main concerns about the registration of members' interests canvassed during the COI: first, the form of declaration (including the clarity or otherwise of the form, how easy it is to fill in, and the consistency with which Members complete it) and, second, the failures in compliance (including the system for ensuring compliance). A third concern was raised by the elected Ministers, namely that the Registrar had breached section 13 and her oath of office (and thereby committed a criminal offence) by giving the Governor information relating to Members' defaults in compliance with the registration requirements; and successive Governors (but particularly former Governor Jaspert) had committed a criminal offence and undermined the rule of law by asking her to do so. I will deal with those issues in turn.

[22] 22 current and former Members of the House of Assembly gave evidence on registration of interests. Most Members said they were aware of section 3 and 7 of the 2006 Act: but not all. Mr Myron Walwyn, a former Member, said he was not aware of them at the time, and he thought that neither were other Members (T15 21 June 2021 pages 152 and 171). See also Hon Alvera Maduro-Caines (T11 15 June 2021 page 8); and Dr the Hon Natalio Wheatley (T12 16 June 2021 page 182).

Registration of Interests: The Declaration Form

4.24 As I have indicated, the form in which a declaration of interest must be made is mandated by the 2006 Act.

4.25 Hon Kye Rymer considered that, generally, the declaration form is clear enough[23]; but he was very much in a minority. Each Member has his or her own interpretation of the form[24]. As the Premier put it: "We would be hard-pressed to find two Members… who would fill it out in the same way"[25].

4.26 I am here solely concerned with the clarity of the form. I will deal with specific categories/ paragraphs within the form which on the evidence appeared to be ambiguous, in turn. In doing so, I leave aside circumstances in which Members have set out interests which they did not have to declare (e.g. a business which had closed[26], or travel which had been paid for by the BVI Government or self[27], or the family home[28], or a shareholding of a spouse[29]) on the (perhaps generous) basis that they made the declarations out of an abundance of caution rather than as a result of the form being unclear – and also errors where a Member simply missed something off the form accidentally[30].

4.27 Category 1 concerns "directorships in any company". Category 2 concerns "remunerated employment, office, profession etc". There was clear confusion amongst Members as to whether to include a business with a trading licence (known in the BVI as a "dba", from "doing business as") in category 1: despite the wording of the category, a number of Members put dbas there[31]. Similarly, Hon Alvera Maduro-Caines said in her pre-election notice that a business was a company of which she was a director, but it was a dba in respect of which the trade licence was owned by her husband[32]. Whilst most Members considered that, even if they disclosed a directorship under category 1, they would still be required to disclose a shareholding in the same company, Hon Neville Smith thought that if he put down a company under directorships in category 1, he need not put down a shareholding in the same company in category 9[33].

4.28 Category 3 concerns the provision to clients, through remunerated employment listed in categories 1 and 2, of services "which depend essentially upon or arise out of [the Member's] position as a Member of the House…". It therefore covers (e.g.) lobbying. However, Hon Carvin Malone said that he thought it covered circumstances in which he sought clients as a result of being a Member[34]; and Mr Myron Walwyn also said it would cover any paid employment

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[23] T11 15 June 2021 page 184.
[24] Hon Neville Smith T11 15 June 2021 page 100 and page 105.
[25] T14 18 June 2021 page 114.
[26] Hon Shereen Flax-Charles T10 14 June 2021 page 197 (Virgin Gorda Music School which was declared in her 2019 return although it did not re-open after the 2017 hurricanes).
[27] Dr the Hon Natalio Wheatley T12 16 June 2021 pages 202-203; and Hon Vincent Wheatley T11 15 June 2021 pages 243-244.
[28] E.g. Hon Alvera Maduro-Caines T11 15 June 2021 page 30; and Hon Vincent Wheatley T11 15 June 2021 page 246.
[29] Hon Kye Rymer T11 15 June 2021 page 179.
[30] E.g. Hon Alvera Maduro-Caines T11 15 June 2021 page 30, where she accepted that, by simple oversight, a parcel of land disclosed in 2015 and 2017 was not disclosed in 2016; and Hon Mark Vanterpool T14 18 June 2021 page 198 where he accepted he had omitted two long-held companies from each of his declarations, but he said he proposed to declare them in 2021.
[31] E.g. Hon Neville Smith T11 15 June 2021 pages 88-89; Hon Vincent Wheatley T11 15 June 2021 pages 232 and 235-236 and Hon Melvin Turnbull T12 16 June 2021 pages 99-100 (he expressly said that he did so because the form was unclear). Dr Orlando Smith said that the relationship between categories 1, 2 and 9 could have been clearer: although apparently filling them in correctly (T11 15 June 2021 page 90).
[32] T11 15 June 2021 pages 40-43; but these contracts with the BVI Government were not disclosed in the Register of Interests declarations pages 45-46. She said that the wording for the pre-election notice was produced by NDP Central Office.
[33] T11 15 June 2021 page 103.
[34] T15 21 June 2021 page 60.

that a Member might get by virtue of being a Member of the House, as well as lobbying. Mr Walwyn said that he did not consider that it would include intercessions made as a result of friendship with another Member/Minister, rather than as a result of being a Member of the House (which he considered distinguishable), and so the latter would not have to be included[35]. Hon Neville Smith simply said that he did not understand this category[36].

4.29 Category 4 concerns "sponsorship", both before an election and whilst in office. That was generally considered to cover all donations, financial or in-kind. However, Hon Sharie de Castro considered it covered sponsorship by election candidates of schools, groups and other community initiatives[37]; and Hon Melvin Turnbull considered that sponsorship was limited to circumstances in which the donor was overtly recognised by the donee, as opposed to a donation in respect of which there were "no strings attached"[38].

4.30 Category 8 concerns "any land, other than any home used solely for the personal residential purposes of you or your family". This appears to include all real estate; but Hon Julian Fraser did not disclose a condominium under this paragraph (but rather under category 10) because he thought it did not include a simple plot of land[39]. In his first declaration (in 2019), Hon Neville Smith considered it meant only land associated with (i.e. leased for bought/sold to/ from) the government; and (he said) nobody came back and said it was wrong, so he thought that interpretation was correct[40]. There was also some confusion as to whether this category required disclosure of land outside the BVI: for example, Hon Alvera Maduro-Caines said she did not know whether to disclose land in Nevis which is in her husband's name[41].

4.31 The question posed by category 10 is set out above[42]. There was considerable confusion about what this category covered. Hon Melvin Turnbull considered that it had to do with doing business with the BVI Government[43]. The standard letter sent by Ministers in response to the COI letter of 19 February 2021 asking about Members' compliance with the 2006 Act, said that category 10 did not specifically address interests of any immediate family members[44]; but, in examination, some current and former Members said that they considered that it did cover such interests[45]. Others said that it covered only the assets etc of the Member himself or herself[46]. Mr Ronnie Skelton said he did not know what was covered by category 10: he said

[35] T15 21 June 2021 pages 183-185.
[36] T11 15 June 2021 page 90.
[37] T10 14 June 2021 pages 143-144.
[38] T12 16 June 2021 page 109.
[39] T12 16 June 2021 page 38.
[40] T11 15 June 2021 pages 98-100.
[41] T11 15 June 2021 pages 31-33, especially at page 33 lines 16-24. She had the same uncertainty as to whether to disclose a business owned by her husband (T11 15 June 2021 pages 36-37).
[42] See paragraph 4.10.10.
[43] T12 16 June 2021 page 102.
[44] Which was the view expressed in evidence by (e.g.) Hon Sharie de Castro T10 14 June 2021 pages 148-150.
[45] The Premier T14 18 June 2021 page 152 (included his wife; but he accepted that other Members would have a different interpretation); Hon Shereen Flax-Charles T10 14 June 2021 page 208 (a spouse and dependent children: she accepted that, if drawn wider to include others (e.g. a sibling) who had interests which might be thought to impact on conduct as a Member would be beneficial: pages 210-211); Hon Carvin Malone T15 21 June 2021 pages 54-55 and 69 (wife and adult child); Hon Neville Smith T11 15 June 2021 page 111 (not just immediate family of spouse/children); Hon Vincent Wheatley T11 15 June 2021 page 253 (very wide, to cover friends and acquaintances). Mr Myron Walwyn agreed, but said the degrees of family covered were uncertain (T15 21 June 2021 page 180).
[46] Hon Kye Rymer T11 15 June 2021 page 181; Hon Julian Fraser (who was in the Legislative Assembly when this was discussed, and said he was clear as to the intent) T12 16 June 2021 pages 38-40; Hon Marlon Penn ("just me") T13 17 June 2021 page 132.

that what it meant could have been "lost in translation" during the discussions and debates on the Bill[47]. Hon Alvera Maduro-Caines, who was unclear about what the preamble meant, was also unclear as to what should go in category 10[48].

4.32 There is, consequently, no standard understanding with regard to the requirements of the declaration form and hence the 2006 Act. Dr Kedrick Pickering and Mr Archibald Christian recalled discussions from time-to-time within NDP caucuses, at a time when the NDP were the governing party, expressing concern about the content of and ambiguities in the form, and the need for further guidance[49]. The general view was that, in addition to better guidance on completion of the form, the form needed revising. As the Premier said, "one hundred per cent" the form needs revisiting – "there is room for a lot of improvement here" – but that, he said, would not be enough. He considered that it needs "some extra layers of laws to help…"[50]. I return to that below[51].

Registration of Interests: Compliance

Introduction

4.33 In respect of registration of interests, whilst there was some consideration of the declaration form as discussed above, the main focus of the COI was on the effectiveness of the system and, in particular, the degree of compliance set in the context of the machinery in place to ensure compliance.

4.34 In the course of the COI, I heard oral evidence from 22 current and former Members of the House of Assembly in relation to registration of interests. Prior to hearing that evidence, (i) none accepted that he or she was in default in respect of the personal obligations to disclose interests that the scheme imposed[52]; and (ii) none accepted that the 2006 Act, as in practice implemented, was other than an appropriate means of giving effect to the intention of the Constitution to have an effective Register of Interests that discloses, in a timely and complete manner, interests of a Member which might reasonably be thought to influence his or her actions in his or her capacity as a Member. However, the evidence revealed (i) that nearly all of the current and former Members had failed to comply with their constitutional and statutory obligations to file declarations in relation to their interests, and, more broadly, it painted a picture of general disregard of these obligations; and (ii) a consistent and entrenched lack of political will and resulting persistent failure to establish and operate the necessary mechanisms required by the Constitution and the 2006 Act to ensure compliance with the relevant provisions as they apply to individual Members of the House.

4.35 I will deal with each of those aspects in turn.

[47] T15 21 June 2021 pages 221-222.
[48] T11 15 June 2021 page 51-52: she said that parts of the form were unclear, a point which she had raised with other Members and with the Registrar "all the time" (page 52).
[49] T13 17 June 2021 pages 68-70; and T13 17 June 2021 page 83.
[50] T14 18 June 2021 pages 140 and 145.
[51] See paragraphs 4.108-4.109.
[52] For example, at the start of the relevant oral evidence before the COI on 14 June 2021, Mr Rowe of Silk Legal said that, "The evidence may be that all my clients [i.e. the current House of Assembly Members except the Ministers and the Attorney General] are compliant" (T10 14 June 2021 page 29).

Individual Members' Compliance

4.36 As I have described, under section 112 of the Constitution and section 3 of the 2006 Act, each Member of the House of Assembly has a personal obligation to file a declaration of interests on the date he or she assumes office and on each subsequent anniversary of that date.

4.37 Of the 22 current and former Members of the House of Assembly who gave evidence, most were clearly aware of (and, during their evidence, accepted) his or her obligation under section 3 to make a declaration on each due date; and accepted that, even if he or she were a single day late, that would be in breach of that section[53]. The Attorney General accepted that there is no defence of reasonable excuse: a Member either complies by the due date or he does not[54]. That was also the position taken by Silk Legal for the non-Minister Members, and Mr Lewis Hunte QC for Dr Kedrick Pickering[55].

4.38 It is clear that non-compliance would inevitably undermine the effectiveness of the Register[56]. However, with very limited exceptions, each of the Members and former Members who gave evidence failed to file declarations on time[57]. Table 9 (which can be found at the end of this section of the Report) sets out the occasions in respect of which Members accepted they made a declaration late and/or admitted a breach of section 3. As can be seen, some of the Members were in breach for only a few days or weeks; but some were in breach for several years. Hon Andrew Fahie made declarations in 2017 for the years 2015-17, and in 2021 for the years 2018-21, and was thus up to three years late. Similarly, Hon Marlon Penn made declarations in 2017 for 2013-16 and in 2021 for 2017-20, and was thus up to four years late. Hon Mark Vanterpool did not make any declarations at all for the six years 2011-16.

4.39 All of the Members accepted that the Registrar wrote to them just before a declaration was due, with a registration form to complete; and thereafter sent regular reminders to those who were (in her word) "delinquent"[58]. There was almost no response to any of these letters, some Members apparently treating them with disdain[59]: as the Registrar herself said to the SFC in 2014, she was "practically begging Members to desist from contravening the statute and to do what is required under section 3 of the Register of Interests Act"[60] but with little, if any, response. The Registrar also wrote to a previous Speaker about delinquent Members; and the Speaker also reminded Members about their obligations[61].

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[53] But not all. Mr Myron Walwyn, a Member and Minister until the 2019 election, said he was not aware of them at the time, and he thought that neither were other Members (T15 21 June 2021 pages 152 and 171). See also Hon Alvera Maduro-Caines (T11 15 June 2021 page 8); and Dr the Hon Natalio Wheatley (T12 16 June 2021 page 182). Further, late in the day, legal submissions were made on behalf of the Attorney General that there was no breach of section 3 if a Member did not lodge his or her declaration in the time required by that section, but only if he or she was more than three months late (see paragraph 4.41ff below).

[54] T10 14 June 2021 page 86: the Attorney General accepted that proposition with regard to the three months set out in section 7; but no Member suggested otherwise for the duty imposed by section 3.

[55] T11 15 June 2021 page 10 and T13 17 June 2021 page 76; and the general view of Members, see (e.g.) former Premier Dr Orlando Smith T13 17 June 2021 page 22.

[56] It is a self-evident proposition; but was specifically accepted by (e.g.) former Premier Dr Orlando Smith T13 17 June 2021 page 27.

[57] One possible exception was Hon Neville Smith: see Table 9 below.

[58] See, e.g., Hon Sharie de Castro T10 14 June 2021 pages 117-119; Hon Shereen Flax-Charles T10 14 June 2021 page 187; Hon Vincent Wheatley T11 15 June 2021 pages 217-218 and 220-223; Hon Julian Fraser T12 16 June 2021 pages 44-48, 58, and 61-64; Hon Melvin Turnbull T12 16 June 2021 page 92; Dr Hubert O'Neal T12 16 June 2021 pages 149-150; Hon Marlon Penn T13 17 June 2021 pages 123-124; Hon Mark Vanterpool T14 18 June 2021 pages 187-188; Hon Carvin Malone T15 21 June 2021 page 36; Mr Myron Walwyn T15 21 June 2021 page 162; Ms Ingrid Moses-Scatliffe T15 21 June 2021 page 125. Mr Archibald Christian described the Registrar as being "very assiduous" in reminding Members of their obligations under the 2006 Act (T13 17 June 2021 page 86). On all the evidence, that seems to be a fair description.

[59] E.g. Dr the Hon Natalio Wheatley said that, when he got such correspondence, he may not even have opened it (T12 16 June 2021 pages 179-180).

[60] See paragraph 4.51 below.

[61] Mr Archibald Christian T13 17 June 2021 page 86.

4.40 As I have indicated, in respect of a failure to comply with the obligations set out in section 3 of the 2006 Act, there is no defence of "reasonable excuse". Few Members sought to excuse their default. Some referred to the devastating effects of the 2017 hurricanes and of the COVID-19 pandemic; but neither appears to have prevented the Registrar from continuing to send out default reminders to Members, and in any event neither of those disasters begins to explain the scale or persistence of the defaults which occurred. In my view, two reasons for failures which were put forward provided stronger mitigation. First, some Members complained that, on being elected, they had no orientation or training[62]. However, whilst that provided personal mitigation, it merely emphasises the general systemic lack of regard given to these important obligations. Second, I accept that the declarations of some Members in 2021 (due after the COI had been established) were not lodged earlier because the Registrar was on long-term leave and thus unavailable for some months in Spring 2021.

4.41 That was the evidence. In terms of legal submissions[63], Sir Geoffrey Cox QC for the Attorney General on behalf of the elected Ministers submitted that it would be unreasonable to impose an obligation on a Member to make a declaration on the day that he or she is sworn in: he said he did not know of any scheme for registration of interests in any other parliament that does not give some time after the election of a member to make the appropriate declaration[64]. As I understood him, he submitted that the statutory provisions should therefore be construed to avoid this consequence. He submitted further that, if a Member failed to comply with the obligation to make a declaration on the due date in accordance with section 3, then he or she was not in breach of the statutory provisions until at least three months later, because section 7 states that, in those circumstances, "the Member *shall be in breach*, and the Registrar shall, within 14 days of the knowledge of such breach, submit a report of such breach to the Committee…" (emphasis added). So, he submitted, a Member was not in breach of the statutory provisions unless and until he or she was at least three months in default[65].

4.42 I accept that these provisions – as considered and enacted by the Members of the BVI legislature to whom, alone, they apply – are not as clear as they might be; and, for the reasons I shall shortly give, I do not consider the interpretation of these provisions to be crucial to the task set by my Terms of Reference. However, I prefer the interpretation apparently accepted by most witnesses[66] that section 3 imposes an obligation on Members of the House to make declarations on particular due dates: and, if they do not comply, then they are in breach of that obligation. As Sir Geoffrey accepted, section 7 does not impose any obligation at all, in respect of which any Member could be in breach; it provides that, where a Member has been in breach (i.e. breach of section 3) for more than three months, then the enforcement provisions set out in section 7 apply. For the first three months of the breach, there is simply no enforcement mechanism through section 7.

[62] Hon Sharie de Castro T10 14 June 2021 pages 114-118, and 126-7; Hon Alvera Maduro-Caines T11 15 June 2012 pages 8, 32 and 53-54; and Dr Hubert O'Neal T12 16 June 2021 pages 150-151 (had orientation, but Register of Interests was not mentioned: was not aware of the three-month period at all).

[63] Having taken evidence from current and former Members, I listed a hearing to receive legal submissions on the question of compliance with the 2006 Act. I heard from Sir Geoffrey Cox QC for the Attorney General on behalf of the elected Ministers, Mr Lewis Hunte QC on behalf of Dr Kedrick Pickering, and Archibald Christian on his own account. Silk Legal did not attend the hearing.

[64] T15 21 June 2021 pages 231-232.

[65] T15 21 June 2021 pages 233-237.

[66] Only Hon Carvin Malone, who gave evidence on the day Sir Geoffrey Cox made his submissions, appeared to rely upon Sir Geoffrey's construction (T15 21 June 2021 pages 13-30). Mr Rowe appearing for the House of Assembly Members except the Ministers and the Attorney General did not agree with Sir Geoffrey's interpretation: he considered, as do I, that, if a declaration is not made by the due date, that is a breach of section 3, but a breach not enforceable until three months have passed (T11 15 June 2021 pages 9-10).

4.43 However, as I have indicated, the precise interpretation of these provisions does not matter for my purposes, because I am here primarily concerned with, not individual default, but governance and in particular the effectiveness of the system which is in place to ensure compliance with the section 3 duty to make a declaration in due time. It is to that I now turn.

The Registration of Interests Scheme

4.44 I have already described the failure of Members to comply with their obligation under section 3 of the 2006 Act, and the efforts of the Registrar to obtain compliance. As I have explained, there is no sanction for default or means of enforcement before three months have elapsed from the due date. Breaches of more than three months are marked on Table 9. At that point, the enforcement regime beginning with section 7 is triggered.

4.45 Under section 7, if a Member has failed to make a declaration within three months of the due date, then, within fourteen days of knowledge of the breach, the Registrar is required to submit a report of the breach to the Register of Interests Committee which then has a power to refer the report to the House of Assembly itself. However, no such Committee was established until 2016. This was, again, despite the best efforts of the Registrar.

4.46 Mrs Victoreen Romney-Varlack was appointed Registrar on 18 February 2008[67]. The establishment of the Register of Interests Committee required a change to the House of Assembly's Standing Orders. The Registrar wrote to the Deputy Premier who was the Chairman of the Standing Orders Committee on 21 February 2008, and met him on 6 March 2008, to urge him to amend the Standing Orders appropriately.

4.47 In her 2008-9 Report, submitted to the Governor His Excellency David Pearey on 8 June 2009[68], the Registrar noted that some Members were late with their declarations – one being five months late – and, she said, if a Register of Interests Committee had been in existence "section 7 would have been invoked". Without a Committee, there was no available enforcement procedure. Furthermore, under section 4 of the 2006 Act, the Register of Interests Committee had to approve the format of the Register, so that, without a Committee, she noted that there could be no Register. As she said in her Report: "The Register… remains a blank book". She suggested that the then proposed amending statute which was to include public officers within the scope of the 2006 Act (which was, in the event, not pursued) should be used as an opportunity to take in other amendments including, she seems to suggest, making the register public.

4.48 Governor Pearey responded in a memorandum dated 16 June 2008[69], as follows:

> "Thank you so much for preparing the above report and forwarding it with your memo of 8th June. I congratulate you on a sound start in introducing to the BVI this important constitutional position which can contribute significantly to open government in the Territory. I agree that the 2006 Act has its limitations. It is, in a sense, no more than a beginning to what should become a rigorous and open process.
>
> The two areas in my view where the Act should be sharpened up are (a) in making the Register public and (b) in giving the Registrar teeth in the event of non-compliance. Such amendments will need to be carefully balanced so that all parties (politicians included) can see the benefits of greater rigour. You might

[67] Mrs Romney-Varlack retired on 31 May 2021, from when Mrs Clearlie Brown-Turnbull was appointed Registrar.
[68] The relevant extracts were read into the COI Record at T13 17 June 2021 pages 5-11.
[69] The relevant extracts were read into the COI Record at T13 17 June 2021 pages 11-12.

> therefore benefit from furthering your research into similar Registers in other countries so that, when you see the Premier, you are able to present to him a set of carefully judged outline amendments. If these are accepted they might then stand a chance of being quickly transcribed into law."

The Governor expressed the view that a change to Standing Orders to enable a Register of Interests Committee to be established was a priority. The Registrar agreed[70].

4.49 In August 2011, in another memorandum sent to Governor Pearey, the Registrar recorded that she had been in regular touch with the Chair of the Standing Orders Committee, and the Governor had pressed both Premier and Deputy Premier who had confirmed their intention to complete the revision of the Standing Orders before the election: she indicated that she would like to see the Register made public (which the Governor had raised with the Premier "who was non-committal"), and for the requirement for declarations to be extended to senior public officers (which the Governor had raised with the Premier and Deputy Premier who appeared to be in favour).

4.50 In an article in VINO on 6 January 2013[71], the Registrar is again recorded as noting that there was no Register; and she also noted the conflict of interest where a Member is in default given that the obligations in the 2006 Act are entirely self-policed. She suggests (i) the obligation to make declarations for the Register should apply to senior government employees as well as Members of the House of Assembly, (ii) the Register should be made public and (iii) the Register of Interests Committee should be stood down and be replaced by a committee of private citizens. It was reported that her pay had apparently been cut because of the limited work she had to do.

4.51 There was further correspondence in 2014[72]. The Registrar was still complaining that Members of the House were not complying with the Act, and still pressing for a Register of Interests Committee to be established. In a memorandum to the Governor, His Excellency Boyd McCleary CMG CVO dated 19 February 2014, copied to the then Premier (Dr the Hon Orlando Smith), she said of a recent meeting between the Governor and her:

> "One of the matters we discussed centred on the delinquency of some Members of the House of Assembly in filing or not filing their Declaration of Interests. I'm somewhat embarrassed to inform that there remains some Members who have never filed a Declaration since taking office on 8th December 2011. I have issued numerous requests and reminders. I have exercised courage and brought this matter to the forward during the [SFC] meetings, practically begging Members to desist from contravening the statute and to do what is required under section 3 of the Register of Interests Act. Unfortunately, my pleas have gone unheeded. It is this state of inaction and frustration that prompts me to now inquire whether you would exert some influence at Cabinet Level, thereby encouraging Members of Cabinet who are also Members of the House to respect the requirements of the Register of Interests Act and the Virgin Islands Constitution Order of 2007. In this connection, I'm hereby copying the Premier for his input."

4.52 She wrote the same day to the Chair of the Standing Orders Committee, Hon Ronnie Skelton, copied to the Governor, as follows:

[70] Memorandum Registrar of Interests to the Governor dated 23 June 2009, read into the COI Record at T13 17 June 2021 pages 12-14.
[71] Read into the record at T15 21 June 2021 pages 166-167.
[72] Read into the record at T13 17 June 2021 pages 27-31.

> "I write in connection with the Standing Orders Committee and the Draft Standing Orders of the House of Assembly. As you are aware, having been Chairman of the Standing Orders Committee for the period August, 2003 up to about March, 2007, the Report of the Standing Orders Committee was laid on the Table of the Legislative Counsel of the Virgin Islands at the 48th sitting of the First Session of the Fifteenth Legislative Council on 20th March, 2007. Since then, and up to present, there has been no forward motion on the Report.
>
> You are also aware that the Register of Interests Act, 2006 was brought into force on 18th February, 2008. Simultaneously, the Registrar of Interests was appointed to, among other things, maintain and keep the Register in accordance with the Act. Section 4 of the Act speaks as to how the Register shall be maintained and 'shall be in such format as the Committee shall approve'. Section 77A of the Draft Standing Orders of the House of Assembly make provisions for 'The Register of Interest Committee'. I have no doubt that you can understand how the work of the Registrar of Interests is hampered by the nonexistence of the Register of Interests Committee.
>
> Since the coming into force of the Act and appointment of the Registrar of Interests, six plus years have elapsed. The Act is not fully operational. The Register of Interests Committee has not been appointed. The Register of Interests remains a blank book. The Virgin Islands (Constitution) Order, 2007 and the Register of Interests Act, 2006 continue to be contravened. All this is hinged on the amendment of the Standing Orders of the House and ultimately the appointment of the Register of Interests Committee".
>
> I now crave your indulgence and seek your advice regarding the appointment of the Register of Interests Committee".

4.53 On 9 July 2014, Governor McCleary wrote to the Premier, as follows:

> "We have spoken several times about the importance of the Register of Interests legislation and of the need for a Register of Interests Committee to be established by the House of Assembly.
>
> I attach a letter dated 19th February, 2014 from the Registrar of Interests to the Hon Ronnie W Skelton, Chairman of the Standing Orders Committee in the House of Assembly, which spells out the issue in some detail. Mrs Romney-Varlack notes that, in the absence of such a committee: 'the Act is not fully operational… The Register of Interests remains a vacant book. The Virgin Islands Constitution Order 2007 and the Register of Interests Act 2006 continue to be contravened'.
>
> I welcome your assurance that the Register of Interests Committee will be established. I trust that this will not be much further delayed."

4.54 In a memorandum of the same date (9 July 2014), the Governor pressed the then Speaker of the House to encourage Members to comply[73]. The Speaker spoke to the Registrar, wrote to the Members of the House and raised the need for compliance in meetings with them, and brought the need for the Standing Orders Committee to provide for a Register of Interests Committee to the attention of the Premier and the Chairman of the Standing Orders Committee[74].

[73] Recalled by the Speaker Hon Ingrid Moses-Scatliffe: T15 21 June 2021 page 126.
[74] T15 21 June 2021 pages 128-129.

4.55 In evidence before the COI, the former Premier Dr Orlando Smith readily accepted that the establishment of the Register of Interests Committee was key in terms of compliance with the requirements of the Act, and the absence of such a committee frustrated the purposes of the Act in terms of producing returns in a timely way[75]. He said he could not explain the delay in the Standing Orders Committee setting up a Register of Interests Committee, which (he said) did not reflect a lack of interest but rather "a lack of concern for the consequences of making this fully operational": there was, he said, a reluctance in making the system operational, which he shared[76]. He accepted that, although Members did still produce returns, the absence of a Committee frustrated the purposes of the Act[77]. When he was Premier (i.e. 2011-19), Dr Orlando Smith said that he thought there was a collective view – indeed, he thought, unanimous amongst Members of the House – that the Register should not be public, a view which was his own, because of the risk of interference with privacy[78]. When asked about the delay in setting up the Register of Interests Committee, Mr Ronnie Skelton (the then Chairman of the Standing Orders Committee) said that all he could do was apologise for the inaction: he said "There is no excuse for it really, that I can come up with". He said that the possibility of making a small amendment to the Standing Orders just to establish the Register of Interests Committee (rather than waiting for the next comprehensive revamp of the Standing Orders) was considered: he said, "I don't know why it wasn't done"[79].

4.56 Therefore, as reported in the BVI Beacon on 18 April 2016, when the Registrar reported to the SFC, the Register was still "a blank book" because the Standing Orders Committee had not updated the Standing Orders to provide for a Register of Interests Committee, so there was nothing to inspect, a matter (it is reported) she had raised at every meeting she had with the SFC since 2008[80].

4.57 The Standing Orders were finally changed to allow for the establishment of the Register of Interests Committee; and the first committee was established by House of Assembly Resolution on 25 April 2016[81]. Under the Resolution, the Committee comprised Hon Mark Vanterpool (Chairman), Hon Archibald Christian, Hon Marlon Penn, Hon Alvera Maduro-Caines, Hon Julian Fraser and Hon Andrew Fahie, all of course Members of the House. At the time the Committee was established, Hon Mark Vanterpool had not made any declaration for at least six years; Hon Andrew Fahie had not made a declaration for at least two years, and would not make any declaration until July 2017; and Hon Marlon Penn had not made a declaration for at least four years and did not make any declaration until February 2017. No one at the time appeared to consider the implications of this clear conflict of interest. In giving his evidence, Hon Mark Vanterpool said that, when he was appointed to chair the Register of Interests Committee, the fact that he had not made a declaration for six years "can be considered a conflict of interest…" that would have "concerned" him[82]. But, at the time, it did not prevent him agreeing to chair this important committee[83].

[75] T13 17 June 2021 pages 34-35.
[76] T13 17 June 2021 page 32-33.
[77] T13 17 June 2021 page 35.
[78] T13 17 June 2021 page 20.
[79] T15 21 June 2021 page 212-213. Mr Ronnie Skelton said he considered there were no dissenting voices to the Register of Interests Committee being put in place and becoming operational (T15 21 June 2021 page 215); which, if so, would make the failure to proceed even less explicable.
[80] Read into the COI Record at T15 21 June 2021 pages 163-164.
[81] House of Assembly Resolution No 3 of 2016 (gazetted on 19 May 2016).
[82] T14 18 June 2021 page 194.
[83] Hon Marlon Penn also accepted that, in being delinquent and on the Register of Interests Committee, there could "possibly" have been a conflict of interest (T13 17 June 2021 pages 126-127).

4.58 In the event, during the Third Session of the House, the Committee met only once, in 2017[84]. None of its members could recall what was discussed; but it is clear that no format for the Register was approved and no reports of delinquency were brought to the attention of the Committee.

4.59 Following the 2019 election, the Register of Interests Committee was eventually reconstituted[85] as follows: the Premier (Chairman), Hon Shereen Flax-Charles, Hon Neville Smith, Hon Kye Rymer and Hon Marlon Penn. At the time these Members of the House were appointed to the committee, neither the Premier nor Hon Marlon Penn had made a declaration for over two years, and neither would make any declaration until February 2021; and Hon Kye Rymer had never submitted a declaration. Again, no one at the time appeared to consider the implications of this clear conflict of interest. The Committee has never met. The format of the Register remains unapproved, so that there is still no Register: it is, even now, "a blank book".

4.60 On 15 December 2020, following a period of leave, the Registrar sent a memorandum to the then Governor, Governor Jaspert, which attached a "Status Report on the Members of the House of Assembly Non-Compliance with the Requirements of Section 3 of the Register of Interests Act 2006"[86]. The memorandum read:

> "Arising out of a request by Your Excellency in early November during my… Leave and our mutual concern for the lack of compliance by Members of the House of Assembly in relation to the requirements of the Register of Interests Act, 2006, I now forward for your information and consideration the Status report on Members of the House of Assembly…
>
> …
>
> I await your comments of the Report at your convenience."

The report set out in tabular form the position with regard to individual Member's compliance or delinquency in providing declarations to the Registrar, and:

> "…in support of [the] report, copies of the most offending Members [were] attached for information. The Hon Andrew A Fahie, The Hon Julian Fraser & The Hon Marlon Penn.
>
> The Hon Mark Vanterpool did not file a single declaration for the period 2011 through 2018."

There does not appear to be any evidence before the COI as to the specific steps Governor Jaspert took in relation to this report (and the elected Ministers chose not to seek to cross-examine the former Governor on the issue); but it seems likely that, as he and his predecessors had done previously in pursuit of better governance, he encouraged the delinquent Members to comply with their constitutional and statutory obligations in relation to registration of interests[87].

4.61 Therefore, in summary, the constitutional requirements for a Member of the House of Assembly to make a declaration of interests on assuming office and thereafter no less frequently than annually, and for a Registrar to keep a register of those interests, was

[84] It was the job of the Chairman (i.e. Hon Mark Vanterpool) to call meetings.
[85] House of Assembly Resolution No 12 of 2019, passed on 2 September 2019 and gazetted on 12 September 2019.
[86] Memorandum Registrar to Governor: Status Report on the Members of the House of Assembly Non-Compliance with the Requirements of Section 3 of the Register of Interests Act 2006 dated 15 December 2020.
[87] This episode formed the basis of a formal complaint to the COI by the elected Ministers about Governor Jaspert: see paragraphs 4.68-4.78 below.

introduced in 2000 (and replicated in the 2007 Constitution). It took six years for the House of Assembly to pass the measure the Constitution required to give effect to those requirements, i.e. the 2006 Act. It took two years thereafter for the Act to be brought into force, i.e. 2008. It took eight years thereafter for the Register of Interests Standing Committee to be established, i.e. 2016. That Committee has met once and has never approved the format of the Register (a prerequisite for the establishment of any Register, so that, even now, no Register exists); nor has it ever considered any default of any Member. From 2008, the Registrar was vocal in her requests for a Committee to be established, as well as in her proposal that the Register should be open to the public and extended in its scope to senior non-elected public officials. The Governor supported her in her attempts to establish an effective registration scheme. Of the 22 current and past Members of the House who gave evidence, 17 had been in default for over three months and thus subject to the default procedure starting with a mandatory report to the Committee under section 7. No step has ever been taken against any Member for failing to make a declaration[88].

4.62 As Sir Geoffrey Cox QC for the elected Ministers accepted, on any view, the efforts made by the House of Assembly to give effect to section 112 of the Constitution and the provisions of the 2006 Act have been, at best, desultory[89]. There has never been a system of registration of interests that has worked properly or, indeed, worked at all to the extent that, over 20 years after the introduction of the requirement of the Constitution for a Register of Interests, there is still not even a Register.

4.63 Sir Geoffrey put forward three reasons for that failure, none of which involved any fault on the part of the elected Ministers or other Members[90].

4.64 First, he submitted that the 2006 Act "adopted a fundamentally flawed design to achieve its purpose; rendering the Register, even if it had been maintained perfectly and up-to-date, practically useless…"[91], namely that it provided for a Register that was not open to the public. In practical terms, it was only open to Members of the House; and then only (i) if the Registrar was satisfied that the purpose for the request had been made out and (ii) on payment of a fee. Even then, a copy of the Register could not be taken. There is no evidence that, before the COI's request, any request had ever been made to inspect the Register. This meant, he said, that the 2006 Act as passed by the Legislative Council was fundamentally flawed and "practically useless" (i.e. useless for practical purposes[92]) in giving effect to section 112 of the Constitution. The scheme was, in Sir Geoffrey's view, "stillborn"[93]. He accepted that "the Act… requires self-policing in terms of the Register. And… in self-policing, the self-policemen, the Members of the House of Assembly, [had] created an Act which, in terms of enforcement and implementation, is fundamentally flawed and hopeless"[94]. That is why, he boldly suggested, it is likely that the system was not regarded as a high priority by the Members of the House themselves[95]; and why, he suspected, "it was just never regarded as a serious system…"[96].

4.65 Second, there was "no preparatory programme of education and training in the importance of a… Register of Interests and to achieve the culture change necessary for it to be successful, either when the Act was passed or subsequently for Members at each election"[97]. With such

[88] T14 18 June 2021 pages 195-196.
[89] T15 21 June 2021 page 259.
[90] These submissions are recorded at T15 21 June 2021 pages 242ff.
[91] T15 21 June 2021 page 241.
[92] T15 21 June 2021 page 246.
[93] His word: T15 21 June 2021 pages 244, 249 and 261.
[94] T15 21 June 2021 page 246.
[95] T15 21 June 2021 page 241.
[96] T15 21 June 2021 page 247.
[97] T15 21 June 2021 page 242.

education and training, he submitted, "most of them [i.e. the Members] perceive the need for [a public register]"[98]. Sir Geoffrey laid this at the door of the UK Government which, he said, gave no support to the BVI in respect of registration of interests either when it passed the 2006 Act or since. In his view, someone should have pointed out to the BVI legislature that the 2006 Act was "unwise"[99] (and, presumably, also that it was "practically useless" and "hopeless").

4.66 Dealing with those two submissions together, eloquent as they were, I am afraid they do not correspond with the evidence that was before me. The Constitution set the framework, section 112(5) making clear that it was for the BVI legislature to pass a measure to implement it using the wide discretion it had to do so. I heard from a number of Members of the Legislative Council which, in 2006, passed the 2006 Act. They clearly considered the issues raised by the then Bill very carefully; and it seems that no Member then wished there to be a public register. The provisions of other jurisdictions relating to registration of interests were available to the Attorney General and thus to the House of Assembly: the current Attorney made clear that such provisions are considered when drafting legislation appropriate for the BVI. There is no evidence that support was not available, if required and requested; but it was not for the UK, or anyone else, to tell the Members of the Legislative Council that it would be "unwise" to have a Register that was anything but open to the public. That was a matter for the BVI legislature. The evidence was that the Legislative Council and then, at least until very recently, the House of Assembly were overwhelmingly against the Register being public, despite the Registrar and the Governor from time to time expressing their firm preference for, and the governance benefits of, a public register. I do not accept Sir Geoffrey's somewhat surprising submission made on behalf of the current elected Ministers that the legislature was somehow not competent to consider the issues it had to address; or that the failure was that of the UK Government for failing to give adequate support in respect of registration of interests. The 2006 Act was not a box ticking exercise for the UK Government, as he suggested[100]; but rather a box ticked by the BVI Government as a mere token gesture. As I have indicated, the attempts made to enforce the registration requirements on Members of the House of Assembly were, in Sir Geoffrey's phrase, "desultory, at best"[101]. That mode of proceeding was a deliberate and informed choice by Members of successive Houses of Assembly, whatever party was in power.

4.67 Third, Sir Geoffrey submitted that the Registrar did not seek and was not given appropriate advice after the Register of Interests Committee had been established in 2016[102]. This can be conveniently dealt with in the context of the elected Ministers' criticism of the Registrar that, in informing successive Governors that some Members of the House of Assembly were in default of the registration obligations, she was not only in breach of section 13 of the 2006 Act and her oath of office, but also committed a criminal offence. I deal with that issue immediately below[103].

[98] T15 21 June 2021 page 251.
[99] T15 21 June 2021 page 261.
[100] T15 21 June 2021 page 258.
[101] T15 21 June 2021 page 259.
[102] This submission was expanded in written submissions by Sir Geoffrey Cox QC and Edward Risso-Gill on behalf of the Attorney General dated 29 October 2021.
[103] Paragraphs 4.68-4.78.

Breaches of Section 13 of the 2006 Act

4.68 I have described how, in December 2020, apparently after the Registrar and Governor Jaspert had discussed the continued failure of Members and the Governor had asked the Registrar for further particulars, the Registrar sent a memorandum to him with an attached table setting out details of Members' defaults and copies of her correspondence with three of the most serious defaulters which sought the required declarations[104]. This was not the first time that the Registrar had sought the assistance of successive Governors in an attempt to encourage Members of the House of Assembly to comply with their constitutional and statutory obligations both to set up a system to enforce compliance and to file their individual declarations of interests. It was not secret: amongst others, the former Premier had been copied into some of the exchanges.

4.69 However, the Attorney General submitted that, in giving this information to the Governor, the Registrar was in breach of section 13 of the 2006 Act and her oath of confidentiality[105], and was committing a criminal offence, because "the information disclosed was manifestly acquired in the course of or in relation to her duties under the Act" and "the correspondence sent to the members [which was also disclosed with the report] also related to their declarations" [106]. The only correct course for the Registrar to take (the Attorney submitted) was to seek "expeditious advice as to the legal remedies open to her under the Act"[107]. She ought to have submitted a section 7 report concerning a Member's non-compliance, and had a Register of Interests Committee not met to consider her report within 21 days of its submission, then it was open to her "to seek an order of the High Court [presumably by way of judicial review] to enforce those statutory obligations and that the House should convene the Committee and consider the report forthwith"[108]. That would, it is said, "quite probably administered the shock necessary to evoke a wider compliance with the Act"[109].

4.70 Logically, on this basis, the Registrar equally breached section 13 and committed a criminal offence by disclosing to Governor Jaspert (and previous Governors), the SFC and the previous Speaker any information about delinquency or compliance (even in circumstances in which no names were mentioned), because such information had come into her possession in the course of or in relation to her duties under the 2006 Act. On that basis, she would be a persistent offender.

4.71 Further, the Attorney General submitted that

> "11. [T]he former Governor's request amounted to an invitation to the Registrar to breach both and to commit a criminal offence under section 13(3) of the [2006] Act…

[104] See paragraph 4.60 above.
[105] Section 13 and the oath of confidentiality set out in Schedule 3 to the 2006 Act are set out in paragraphs 4.16-4.17 above.
[106] This was set out in written submissions by Sir Geoffrey Cox QC and Edward Risso-Gill on behalf of the Attorney General dated 29 October 2021 (to which I shall refer in this section as "AG's Submissions"), the quotations coming from paragraphs 7 and 8. In those submissions, the breach of section 13 and her oath by the Registrar is described as "clear" (paragraph 11). Further submissions were made by the elected Ministers in their Response to the Governor Position Statement paragraphs 106-111. The Attorney General has expressly reserved her position as to whether to take steps to refer the matter for investigation by the relevant enforcement authority until the conclusion of the COI (Letter Attorney General to the COI dated 12 November 2021).
[107] AG's Submissions paragraph 13. The submissions do not say from whom she ought to have sought advice. The Attorney General herself would have had a clear conflict of interest; and, if the Registrar's obligation of confidentiality was as the Attorney now submits, that would cause obvious practical (and, possibly, legal) difficulties in obtaining legal advice and issuing proceedings. It is unnecessary for me to consider these difficulties further here.
[108] AG's Submissions paragraph 14.
[109] AG's Submissions paragraph 15.

> 12. No doubt that request of the former Governor placed the Registrar in an invidious position. Indeed, it is submitted that the officially encouraged practice of the Registrar in communicating confidential information about her duties to successive Governors illuminates a misunderstanding of the nature of her role, which is to be independent of *all* other institutions of Government, including the Governor. The former Governor's actions, in particular, undermined the independence of the Registrar and the rule of law in the Virgin Islands.
>
> ...
>
> 16. It is precisely in the development of such genuinely and fearlessly independent local institutions that the good governance of the Virgin Islands significantly depends. The practice of encouraging the Registrar to resort in secret to the Governor to apply ineffectual political pressure, thus compromising her independence and the observance of both her statutory duty and her oath of office, let alone contrary to both secretly requesting her to provide confidential information, was fundamentally opposite to that which good governance required."

Indeed, this "request" made by Governor Jaspert was one of just two express criticisms made of him by the elected Ministers[110].

4.72 As a Member of the House of Assembly herself (and on behalf of the elected Ministers and, at least indirectly, the other elected Members, some of whom are persistent defaulters), the Attorney General therefore submits that, on the true construction of section 13 of the 2006 Act, the Registrar must keep the fact of non-compliance by any Member(s) secret, on pain of criminal sanction.

4.73 In all the circumstances, it is ironic that the Attorney General relies upon a submission that good governance is dependent upon the development of "genuinely and fearlessly" independent BVI institutions such as the Registrar, given the disdain for the role of the Registrar (and, as we will see, of the Auditor General and IAD too) shown by Members of the House of Assembly including the elected Ministers she represents in this COI. On any view, these submissions are inherently unattractive. Some submissions that are unattractive can, of course, nevertheless be made good. However, in my respectful view, these do not fall into that category[111].

4.74 Section 13(1)(b) proscribes the Registrar from disclosing "information (i) relating to any declaration or matter in the Register; or that he has acquired in the course of or in relation to his duties or in the exercise of any powers or performance of duties under this Act". The Act does not define "information"; but an understanding of its true meaning and scope comes both from the context and from the wording of the oath of confidentiality in Schedule

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[110] Elected Ministers Table of Criticisms dated 13 September 2021 paragraph 2. The actual criticism is in more guarded terms than the submissions:

> "The former Governor requested information from the Registrar of Interests, which could at least arguably be considered as a breach of her Oath of Office and of section 13(1) of the [2006] Act. Such a request risked conveying the impression that the laws of the Virgin Islands do not apply in full to the office of the Governor."

The other criticism of Governor Jaspert was that his statements and actions led to a perception of disrespect for the elected Government, e.g. in relation to his announcement that he was bringing forward the Integrity in Public Life Bill without referring to Cabinet's approval of the Integrity in Public Life policy. The elected Ministers also criticised successive Governors before Governor Rankin (including Governor Jaspert) for neglecting their responsibility for Public Service reform. These are dealt with in Chapter 13 below.

[111] Alex Hall Taylor QC made written legal submissions on the construction of section 13 of the 2006 on behalf of the Governor, with which both former Governor Jaspert and former Registrar Mrs Romney-Varlack allied themselves, to the effect that section 13 proscribes the Registrar from disclosing information about the interests of Members but does not prevent him or her from making public whether Members are or are not compliant with their statutory obligations. As will appear below, I broadly agree with the thrust of those helpful submissions.

3. The context is that the Constitution has made plain that, while the interests themselves are to remain confidential to the Registrar, it is in the public interest for Members of the House of Assembly to register those interests. It is in the public interest that the public are aware whether Members are or are not compliant. The oath of confidentiality refers to the Registrar keeping "confidential all declarations and other information in connection with or relative to Members of the House of Assembly and the Register of Interests which has come to my knowledge in my capacity as Registrar of Interests…". On its ordinary wording and in the context of the phrase as a whole, "information" there means information concerning the interests not the fact of declaration[112].

4.75 Given the wider context, that is also in line with the purpose of the registration provisions. Whilst there may be some purpose in keeping confidential the interests of Members, there can be no (proper) purpose in keeping secret the fact that Members generally (or a specific Member) has or has not complied with his or her constitutional and statutory obligation to register whatever interests he or she has. It is clearly in the public interest, in enhancing public confidence in elected officials, to know that they have complied with these obligations. It is clearly in the interests of good governance that whether Members have or have not complied is made public. The argument adopted by the Attorney General that, in seeking to encourage recalcitrant Members to comply with their obligations, the Registrar and Governor acted against the interests of good governance and the rule of law, appears to me to be on its head.

4.76 In my view, the submissions made by Alex Hall Taylor QC on behalf of the Governor (with which former Governor Jaspert and Mrs Romney-Varlack expressed their agreement) are essentially correct[113]; and neither the former Governors nor Mrs Romney-Varlack have directly or indirectly breached or encouraged a breach of section 13. However, ultimately, the question of whether an offence has occurred is a matter for the criminal courts, not me; and whether the offences which the Attorney General submits have occurred should be investigated and/or prosecuted are matters for the appropriate authorities, notably the DPP, not me. What concerns me is that elected public officials, who are in clear and persistent breach of their constitutional and statutory obligations, have sought to defend their position in part by attacking the Registrar of Interests (an independent office holder entrusted with the task of keeping the Register) and successive Governors (notably former Governor Jaspert) who have merely sought to encourage them to comply with those obligations. It seems to me to be an example of the lengths that elected public officials will go to avoid legitimate controls – in this case, controls imposed by the Constitution – on their behaviour.

4.77 I found the attack on the Registrar of Interests particularly inappropriate. From 2008, the Registrar assiduously attempted to get the Members to comply with their obligation to make declarations. Until 2016, she was frustrated by the absence of a Register of Interests Committee: she said (and I accept) that, had there been a Committee, she would have made default reports to it. In 2016, a Committee was established, but it contained serial defaulters (notably as Chairman) and failed to take any steps even to approve a format of Register. Whilst of course, as Sir Geoffrey submitted, a public servant should not "give up" in respect

[112] It is noteworthy that that is how the Attorney General appears to have construed the Registrar's confidentiality requirement when she gave her evidence in relation to the registration of interests (see T10 14 June 2021 page 84).

[113] This argument put forward by Governor Jaspert is referred to by the elected Ministers as a "flimsy apologia"; and, they say, "to have invited the Registrar secretly to act in breach of her oath is a very serious matter indeed. If it were done knowingly, it could surely amount to serious misconduct" (Elected Ministers' Response to Governor Position Statement paragraphs 106-111, the quotations coming from paragraphs 107 and 110 respectively). It seems to me that the elected Ministers are not only wrong in law and disrespectful towards the perfectly reasonable (and, in my view, legally correct) position of the former Governor, the current Governor and the former Registrar, but deeply insensitive to their own position as defaulters in respect of their constitutional and statutory obligations to provide declarations of interests which the Registrar (through the Governor) simply wished to encourage, in the face of persistent defaults in some cases over years. It is, in my view, an example of the disdain that the elected Ministers hold for the constitutional pillars of governance.

of statutory obligations, I can understand that the Registrar might have been doubtful that reports to the Committee would result in any better compliance – the Committee, of course, is not required to report any breach to the House of Assembly – and did not make reports as section 7 required her to do. I did not hear evidence from Mrs Romney-Varlack; but I cannot see that any real criticism should be made of her. Indeed, rather than threatening her with possible criminal proceedings for trying to do her job, it seems to me that she should be commended for her efforts – entirely in the public interest – to get elected officials to comply with their constitutional and statutory obligations. For 13 years, she attempted to make the scheme of the 2006 Act work, to be frustrated at every turn by Members of the House of Assembly who owed the primary obligations under the Act[114]. Given the interpretation of section 13 of the Act put forward by Sir Geoffrey on behalf of the Attorney General, any judicial review claim made by the Registrar would have been fraught with legal and practical difficulty; and I do not accept the Attorney's bold assertion that such proceedings would "quite probably [have] administered the shock necessary to evoke a wider compliance with the Act".

4.78 With the greatest of respect to the Attorney General, I cannot see her submissions in respect of section 13 of the 2006 Act as anything more than diversionary. The focus of the proper criticism here is not on the Registrar, or the current or former Governors. All of the delay in establishing a scheme of registration of interests as required by the Constitution from 2000 lay at the doors of the Members of the House of Assembly themselves who were informed as to the relevant issues as and when they arose. In the 2006 Act, the Legislative Council chose to adopt a self-policing scheme; and then, for the next 15 years, the House of Assembly has chosen to frustrate that scheme. As the evidence clearly shows, virtually every stage of the process required for the establishment of a working scheme has, in turn, been frustrated. Although of course the self-policeman is the House of Assembly, the elected Government has a majority there. The purpose of the requirement for a Register of Interests "is to strengthen public trust and confidence in the parliamentary process"[115]. In frustrating the intent of the Constitution to have a functioning and effective scheme for the registration of interests, in my view the confidence in the parliamentary and thus the democratic process in the BVI can only have been undermined.

[114] Indeed, when it was established, the Committee had an inherent difficulty in seeing whether Members were complying with their obligations because they could not be shown the Register: Hon Neville Smith T11 15 June 2021 page 79.
[115] Sir Geoffrey Cox QC for the Attorney General on behalf of the Ministers: T15 21 June 2021 page 229.

Table 9
Schedule of Breaches of Section 112 of the Constitution and Sections 3 and/or 7 of the Register of Interests Act 2006

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Sharie de Castro	12 March 2019	10 July 2019	10 July 2019	Yes	Yes (T10 14 June 2021 page 115 line 7)	Yes	Yes (T10 14 June 2021 page 115 line 7)
	12 March 2020	12 May 2020	12 May 2020	Yes	Yes (T10 14 June 2021 page 121 line 21)	No	N/A
	12 March 2021	12 March 2021	11 May 2021[116]	No	N/A	No	N/A
Hon Archibald Christian	23 June 2015	14 July 2015	11 August 2015	Yes	Yes (T13 17 June 2021 page 88 line 3)	No	N/A
	23 June 2016	23 June 2016	21 June 2016	No	N/A	No	N/A
	23 June 2017	19 June 2017	N/A	No	N/A	No	N/A
	23 June 2018	20 September 2018	N/A	Yes	Yes (T13 17 June 2021 page 90 line 2)	No	N/A

[116] Registrar unavailable at the due date.

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Andrew Fahie	23 June 2015	19 July 2017	19 July 2017	Yes	Yes (T14 18 June 2021 page 99 line 11 and page 103 lines 12 and 15)	Yes	Yes (T14 18 June 2021 page 99 line 15 and page 103 line 15)
		19 July 2017	19 July 2017	Yes	Yes (T14 18 June 2021 page 103 line 12 and 15)	Yes	Yes (T14 18 June 2021 page 103 line 12 and 15)
	23 June 2017[117]	19 July 2017	19 July 2017	Yes	Yes (T14 18 June 2021 page 104 line 17)	No	N/A
	23 June 2018	4 February 2021	5 May 2021	Yes	Yes (T14 18 June 2021 page 108 line 25)	Yes	Yes (T14 18 June 2021 page 104 line 17)
	12 March 2019	4 February 2021	5 May 2021	Yes	Yes (T14 18 June 2021 page 110 line 9)	Yes	Yes (T14 18 June 2021 page 110 line 9)
	12 March 2020	4 February 2021	5 May 2021	Yes	Yes (T14 18 June 2021 page 111 lines 3-4)	Yes	Yes (T14 18 June 2021 page 111 lines 3-4)
	12 March 2021	15 March 2021[118]	5 May 2021	Yes	Yes (T14 18 June 2021 page 111 line 19)	No	N/A
Hon Shereen Flax-Charles	12 March 2019	8 July 2019	8 July 2019	Yes	Yes (T10 14 June 2021 page 178 line 18 and page 180 line 23)	Yes	Yes (T10 14 June 2021 page 178 line 18 and page 180 line 23)
	12 March 2020	26 May 2020	2 June 2020	Yes	Yes (T10 14 June 2021 page 187 line 14)	No	N/A
	12 March 2021	12 March 2021	11 May 2021[119]	Yes	Probably (T10 14 June 2021 pages 188-190)	No	N/A

[117] Another form for 2017 was filed in error on 4 February 2021.
[118] Registrar unavailable at the time; but the declaration in any event three days late.
[119] Registrar unavailable at the due date: Hon Shereen Flax-Charles said that the date on the form was not in her writing but her Private Secretary would have filed it on some date before 11 May 2021 when the Registrar stamped it (T10 14 June 2021 pages 188-190).

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Julian Fraser	8 December 2014	8 December 2014	12 April 2017	Yes	Yes (T12 16 June 2021 page 53 line 6 and page 58 line 9)	Yes	Yes (T12 16 June 2021 page 58 line 17
	23 June 2015	23 June 2015	12 April 2017	Yes	Yes (T12 16 June 2021 page 53 line 6 and page 58 line 9)	Yes	Yes (T12 16 June 2021 page 58 line 17
	23 June 2016	23 June 2016	12 April 2017	Yes	Yes (T12 16 June 2021 page 53 line 6 and page 58 line 9)	Yes	Yes (T12 16 June 2021 page 58 line 17
	23 June 2017	8 June 2017	23 February 2021	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)
	23 June 2018	8 June 2018	23 February 2021	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)
	12 March 2019	8 June 2019	23 February 2021	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)
	12 March 2020	13 March 2020	23 February 2021	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)	Yes	Yes (T12 16 June 2021 page 65 lines 10-13)
	12 March 2021	12 March 2021	26 May 2021	No[120]	N/A	No	N/A

[120] Registrar was unavailable at the due date.

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Alvera Maduro-Caines	23 June 2015	23 June 2015	13 October 2015	Yes	Yes (T11 15 June 2021 page 13)6	Yes	Yes (T11 15 June 2021 page 13) [121]
	23 June 2016	6 September 2016	8 September 2016	Yes	Yes (T11 15 June 2021 page 14 line 8)	No	N/A
	23 June 2017	30 June 2017	11 July 2017	Yes	Yes (T11 15 June 2021 page 14 line 20)	No	N/A
	23 June 2018	11 August 2018	19 September 2018	Yes	Yes (T11 15 June 2021 page 15 line 6)	No	N/A
	12 March 2019	27 May 2019	29 May 2019	Yes	Yes (T11 15 June 2021 page 16 line 6)	No	N/A
	12 March 2020	16 March 2020	26 May 2020	Yes	No[122]	No	N/A
	12 March 2021	15 March 2021	25 May 2021	Yes	No[123]	No	N/A
Hon Carvin Malone	12 March 2019	30 April 2019	7 May 2019	Yes	Yes[124]	No	N/A
	12 March 2020	8 March 2021	19 April 2021	Yes	Yes (T15 21 June 2021 page 29 line 19)	Yes	Yes (T15 21 June 2021 page 29 line 19 and page 42 line 25)
	12 March 2021	19 April 2021	19 April 2021	Yes	Yes[24]	No	N/A

[121] Hon Alvera Maduro-Caines said that she could not explain the difference between the date the form was purportedly signed and the date it was received by the Registrar: but she did not dispute that latter date (T11 15 June 2021 page 13).
[122] Hon Alvera Maduro-Caines said that the Registrar was unavailable at the due date (T11 15 June 2021 page 17).
[123] Registrar was unavailable at the due date.
[124] Hon Carvin Malone accepted that the declarations were filed after the due date, but not that they were late or that he was in breach: he contended that a Member was only in breach of the 2006 Act if he or she made a declaration more than three months after the due date (T15 21 June 2021 pages 13-30).

APPENDIX A

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Ingrid Moses-Scatliffe	8 December 2014	14 January 2015	21 January 2015	Yes	Yes (T15 21 June 2021 page 122 lines 11-19)	No	N/A
	23 June 2015	30 June 2015	7 July 2015	Yes	Yes (T15 21 June 2021 page 123 line 13)	No	N/A
	23 June 2016	6 July 2016	13 June 2016	Yes	Yes (T15 21 June 2021 page 124 line 1)	No	N/A
	23 June 2017	27 June 2017	27 June 2017	Yes	Yes (T15 21 June 2021 page 124 line 11)	No	N/A
	23 June 2018	27 June 2018	25 August 2017	Yes	Yes (T15 21 June 2021 page 125 line 2)	No	N/A
Dr the Hon Hubert O'Neal	23 June 2015	14 March 2017	14 March 2017	Yes	Yes (T12 16 June 2021 page 146 line 4)	Yes	Yes (T12 16 June 2021 page 146 line 13)
	23 June 2016	14 March 2017	14 March 2017	Yes	Yes (T12 16 June 2021 page 147 line 15)	Yes	Yes (T12 16 June 2021 page 147 line 15)
	23 June 2017	11 Jul 2017	N/A	Yes	Yes (T12 16 June 2021 page 148 line 7)	No	N/A
	23 June 2018	22 January 2019	N/A	Yes	Yes (T12 16 June 2021 page 148 line 23)	Yes	Yes (T12 16 June 2021 page 148 line 25)

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Marlon Penn	8 December 2013	21 February 2017	21 February 2017	Yes	Yes (T13 17 June 2021 page 115 line 8)	Yes	Yes (T13 17 June 2021 page 115 line 11)
	8 December 2014	21 February 2017	21 February 2017	Yes	Yes (T13 17 June 2021 page 116 line 2)	Yes	Yes (T13 17 June 2021 page 116 line 2)
	8 December 2015	21 February 2017	21 February 2017	Yes	Yes (T13 17 June 2021 page 116 line 15)	Yes	Yes (T13 17 June 2021 page 116 line 15)
	8 December 2016	21 February 2017	21 February 2017	Yes	Yes (T13 17 June 2021 page 117 line 3)	Yes	Yes (T13 17 June 2021 page 117 line 3)
	23 June 2017	16 February 2021	16 February 2021	Yes	Yes (T13 17 June 2021 page 119 line 25)	Yes	Yes (T13 17 June 2021 page 119 line 25)
	23 June 2018	16 February 2021	16 February 2021	Yes	Yes (T13 17 June 2021 page 120 line 11)	Yes	Yes (T13 17 June 2021 page 120 line 11)
	12 March 2019	16 February 2021	16 February 2021	Yes	Yes (T13 17 June 2021 page 120 line 24)	Yes	Yes (T13 17 June 2021 page 120 line 24)
	12 March 2020	16 February 2021	16 February 2021	Yes	Yes (T13 17 June 2021 page 121 line 12)	Yes	Yes (T13 17 June 2021 page 121 line 12)
	12 March 2021	25 May 2021	25 May 2021	No[125]	No	No	N/A
Dr the Hon Kedrick Pickering	8 December 2014	7 January 2015	7 January 2015	Yes	Yes (T13 17 June 2021 page 60 line 13)	No	N/A
	23 June 2015	29 August 2016	31 August 2016	Yes	Yes (T13 17 June 2021 page 61 line 17)	Yes	Yes (T13 17 June 2021 page 61 line 21)
	23 June 2016	5 April 2017	5 April 2017	Yes	Yes (T13 17 June 2021 page 62 line 11)	Yes	Yes (T13 17 June 2021 page 62 line 15)
	23 June 2017	Not submitted[126]	N/A	Yes	Yes (T13 17 June 2021 page 63)	Yes	Yes (T13 17 June 2021 page 63)
	23 June 2018	Not submitted15	N/A	Yes	Yes (T13 17 June 2021 page 63)	Yes	Yes (T13 17 June 2021 page 63)

[125] Registrar was unavailable at the due date.
[126] Letter Registrar to Dr Kedrick Pickering 8 January 2019: Dr Pickering did not suggest that he made any declaration thereafter before he lost his seat at the February 2019 election.

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Kye Rymer	12 March 2019	25 September 2019	None	Yes	Yes (T11 15 June 2021 page 141 line 1 and page 146 line 25 to page 147 line 3)	Yes	Yes (T11 15 June 2021 page 147 lines 18-19)
	12 March 2020	27 January 2021	27 January 2021	Yes	Yes (T11 15 June 2021 page 152 lines 3-10)	Yes	Yes (T11 15 June 2021 page 152 lines 3-10)
	12 March 2021	12 March 2021	19 April 2021[127]	No	N/A	No	N/A
Hon Ronnie Skelton	23 June 2015	5 October 2015	7 October 2015	Yes	Yes (T15 21 June 2021 page 203 line 6 and page 205 line 2)	Yes	Yes (T15 21 June 2021 page 205 line 2)
	23 June 2016	8 June 2016	26 July 2016	Probably[128]	N/A	No	N/A
	23 June 2017	3 June 2017	1 August 2018	Probably[25]	N/A	No	N/A
	23 June 2018	17 July 2018	18 July 2018	Yes	Yes (T15 21 June 2021 page 207 line 5)		
Dr the Hon D Orlando Smith	23 June 2015	25 June 2015	7 July 2015	Yes	Yes (T13 17 June 2021 page 39 lines 3-6)	No	N/A
	23 June 2016	13 June 2016	6 July 2016	No[129]	N/A	No	N/A
	23 June 2017	26 June 2017	27 June 2017	Yes	Yes (T13 17 June 2021 page 40 line 7-8)	No	N/A
	23 June 2018	4 September 2018	19 September 2018	Yes	Yes (T13 17 June 2021 page 40 line 25)	No	N/A
Hon Dawn Smith	1 October 2019	1 October 2019	22 February 2020	Yes	Not specifically put[130]	No	N/A

[127] Registrar of Interests form disclosed by Hon Kye Rymer via email on 16 June 2021.
[128] Mr Ronnie Skelton said that he filled in the form but often failed to send it in promptly (T15 21 June 2021 page 206 lines 2-12): but no breach was put to him.
[129] It was accepted that Dr Orlando Smith submitted it on time (T13 17 June 2021 page 39 lines 15-19).
[130] The dates upon which the declaration was due and submitted were set out by Hon Dawn Smith in a letter to the COI dated 12 March 2021. In that letter, she said that she was not presented with a form until the Registrar wrote to her on 15 December 2019, and she then completed it and lodged it on 22 February 2020. That she was in breach/default was not specifically put to her.

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Neville Smith	12 March 2019	12 March 2019	9 April 2019	Yes	Probably[131]	No	N/A
	12 March 2020	12 March 2020	13 May 2020	Yes	Probably6	No	N/A
	12 March 2021	4 March 2021	None	No	N/A	No	N/A
Hon Melvin Turnbull	23 June 2015	7 July 2015	7 July 2015	Yes	Yes (T12 16 June 2021 page 90 line 14)	No	N/A
	23 June 2016	13 June 2017	27 June 2017	Yes	Yes (T12 16 June 2021 page 91 lines 5-10 and page 94 line 1)	Yes	Yes (T12 16 June 2021 page 94 line 1)
	23 June 2017	27 June 2017	27 June 2017	Yes	Yes (T12 16 June 2021 page 94 line 16)	No	N/A
	23 June 2018	23 June 2018	2 June 2020	Yes	Yes (T12 16 June 2021 page 95 line 25)	Yes	Yes (T12 16 June 2021 page 95 line 25)
	12 March 2019	4 June 2019	4 June 2019	Yes	Yes (T12 16 June 2021 page 97 line 8)	No	N/A
	12 March 2020	12 March 2020	2 June 2020	Yes	Yes (T12 16 June 2021 page 98 line 2)	No	N/A
	12 March 2021	17 May 2021[132]	N/A	Yes	Yes (d.12 p.99 l.3)	No	N/A

[131] Hon Neville Smith accepted the dates: the breaches were not formally put to him (T11 15 June 2021 pages 75-76).
[132] Wrongly written as 17 May 2020, but in fact completed and dated on 17 May 2021 (T12 16 June 2021 page 98 line 24 to page 99 line 1).

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Hon Mark Vanterpool	8 December 2011	Not submitted	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	8 December 2012	Not submitted	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	8 December 2013	Not submitted	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	8 December 2014	Not submitted	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	8 December 2015	Not submitted	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	23 June 2016	20 February 2017	N/A	Yes	Yes (T14 18 June 2021 page 187 line 18)	Yes	Yes (T14 18 June 2021 page 187 line 18)
	23 June 2017	4 July 2017[133]	N/A	No	Yes	No	N/A
	23 June 2018	N/A[134]	N/A	N/A	N/A	N/A	N/A
	16 July 2019	17 July 2019	3 September 2019	Yes	Yes (T14 18 June 2021 page 183 line 14)	No	N/A
	16 July 2020	7 September 2020	15 September 2020	Yes	Yes (T14 18 June 2021 page 182 line 18)	No	N/A
Hon Myron Walwyn	23 June 2015	9 September 2016	5 October 2016	Yes	Yes (T15 21 June 2021 page 155 line 1)	Yes	Yes (T15 21 June 2021 page 155 line 3)
	23 June 2016	14 December 2016	14 December 2016	Yes	Yes (T15 21 June 2021 page 155 line 18)	Yes	Yes (T15 21 June 2021 page 155 line 20)
	23 June 2017	29 September 2017	18 September 2018	Yes	Yes (T15 21 June 2021 page 156 line 16)	Yes	Yes (T15 21 June 2021 page 156 line 18)
	23 June 2018	15 August 2018	28 August 2018	Yes	Yes (T15 21 June 2021 page 157 line 5)	No	N/A

[133] Another form for the 2017 declaration, dated 20 February 2017, was produced by the Registrar – for which Hon Mark Vanterpool could not account – but the copy he produced was dated 4 July 2017. No breach was in the event put (T14 18 June 2021 page 184).

[134] No declaration has been produced; but no breach put.

Witness	Date declaration due	Date declaration signed	Date declaration received by Registrar	Apparent breach of s112 and s3	Accepted late/ Admitted breach of s 112 and s 3	Apparently more than 3 mths late	Accepted more than 3mths late/Admitted breach of s7
Dr the Hon Natalio Wheatley	12 March 2019	3 September 2019	6 September 2019	Yes	Yes (T12 16 June 2021 page 185 line 7)	Yes	Yes (T12 16 June 2021 page 185 line 14)
	12 March 2020	2 March 2020	10 June 2020	Yes	Probably[135]	No	
	12 March 2021	13 June 2021	13 June 2021	Yes	Yes (T12 16 June 2021 page 188 line 1)	Yes	Yes[136]
Hon Vincent Wheatley	12 March 2019	21 November 2019	21 November 2019	Yes	Yes (T11 15 June 2021 page 220 line 11)	Yes	Yes (T11 15 June 2021 page 220 line 15)
	12 March 2020	25 February 2021[137]	6 March 2021	Yes	Yes (T11 15 June 2021 page 223 line 23)	Yes	Yes (T11 15 June 2021 page223 line 23)
	12 March 2021	16 March 2021	12 May 2021	Yes	Probably[138]	No	N/A
Hon Julian Willock	12 March 2019	22 January 2020	28 January 2020	Yes	No[139]	Yes	No16
	12 March 2020	18 March 2020	11 August 2020	Yes	No[140]	Yes	No17
	12 March 2021	2 March 2021[141]	N/A	No	N/A	No	N/A

[135] Dr the Hon Natalio Wheatley said that he completed the form on 2 March 2020, but did not know when it was sent in. It appears to have reached the Registrar on 10 June 2020.
[136] Dr the Hon Natalio Wheatley said he wished to check, but later accepted the breach in correspondence (Letter IRU to the COI dated 17 June 2021).
[137] Hon Vincent Wheatley said that he filed his 2020 declaration, but accepted that it was filed not before 24 February 2021, i.e. at least 11 months late (T11 15 June 2021 page 223 line 17 and page 225 line 12). Form later disclosed via email on 16 June 2021
[138] Hon Vincent Wheatley accepted that he signed the form on 16 March 2021 (T11 15 June 2021 224 lines 9-13). The Registrar was not available at that time; but, in any event, the form was due on 12 March 2021. The breach was not formally put to him.
[139] Hon Julian Willock did not accept this breach. Documents which he produced after the hearing showed that he wrote a letter to the Registrar dated 12 March 2019 (the day he was sworn in) with a list of some of his interests. The Registrar received the letter on 15 May 2019. She responded to him on 21 May 2019 saying that the declaration had to be made in statutory form and sending him another form. That was completed on 22 January 2020. On these documents, it seems that he was in breach of section 3 and in breach for more than 3 months. Given my terms of reference, it is however unnecessary for me to make any specific finding.
[140] Hon Julian Willock did not accept this breach. Documents which he produced after the hearing showed that he wrote a letter to the Registrar dated 12 March 2020 (the due date day) saying there was no change. The Registrar replied on 17 March 2020 saying that the statute required him to complete the mandatory form. Hon Julian Willock has disclosed a memorandum dated 19 March 2020 enclosing the completed form; but the Registrar did not receive it. She wrote a reminder on 22 July 2020, referring to a conversation that they had had. He resubmitted the completed form dated 18 March 2020 on 29 July 2020. On these documents, it seems that he was in breach of section 3. Given my terms of reference, it is however unnecessary for me to make any specific finding.
[141] The Registrar appears to have no declaration for 2021. However, Hon Julian Willock said that he completed and filed it on 2 March 2021.

Sections 66 and 67 of the Constitution

4.79 Section 66 of the Constitution provides for certain categories of person (e.g. anyone who holds any public office, is bankrupt or has been sentenced to a term of imprisonment of 12 months or more in the last five years) to be disqualified from being an elected Member of the House of Assembly.

4.80 A particularly relevant category is that set out in section 66(1)(f):

> "No person shall be qualified to be elected as a member of the House of Assembly who—
>
> …
>
> (f) is a party to, or a partner in a firm or a director or manager of a company which is a party to, any contract with the Government of the Virgin Islands for or on account of the public service, and has not, within fourteen days before his or her nomination as a candidate for election, published in the Gazette or in a newspaper circulating in the Virgin Islands a notice setting out the nature of such contract and his or her interest, or the interest of such firm or company, in it".

This provision does not disqualify someone who is in some way a party to a government contract from running for elected office, merely those who have not publicly declared such an association, in the required form, prior to election.

4.81 Section 67 provides that, in certain circumstances (other than at a dissolution), a Member of the House of Assembly must vacate his or her seat in the House, including:

> "(3) An elected member of the House of Assembly shall… vacate his or her seat in the House—
>
> …
>
> (e) subject to subsection (7), if he or she becomes a party to any contract with the Government of the Virgin Islands for or on account of the public service or if any firm in which he or she is a partner, or any company of which he or she is a director or manager, becomes a party to any such contract, or if he or she becomes a partner in a firm, or a director or manager of a company, which is a party to any such contract."

The section further provides (so far as relevant):

> "(7) If in the circumstances it appears just to the House of Assembly to do so, the House may exempt any elected member from vacating his or her seat under subsection (3)(e) if such member, before becoming a party to such contract as there described, or before or as soon as practicable after becoming otherwise interested in such contract (whether as a partner in a firm or director or manager of a company), discloses to the House the nature of such contract and his or her interest or the interest of any such firm or company in it.
>
> (8) Any request by an elected member for exemption under subsection (7) shall be made by way of motion, which shall be placed on the Order Paper for a decision of the House of Assembly.

(9) In any case in which the House of Assembly, under subsection (7), decides not to exempt an elected member from vacating his or her seat, the member may appeal to the High Court against the decision, and subsections (4), (5) and (6) shall apply in the same manner as they do in the circumstances there specified."

4.82 Sections 66 and 67 are in materially the same terms as sections 29 and 30 of the 1976 Constitution and have therefore been enshrined in the Constitution since at least 1 June 1977. They complement and strengthen those other provisions and safeguards that act as a check on conflicts of interests that are considered elsewhere in this chapter.

4.83 The requirements of sections 66 and 67 are on their face draconian; but there is an in-built flexibility. So, as noted above, a candidate will only be disqualified from election to the House of Assembly under section 66(1)(f) if he or she fails to declare publicly an interest of the identified type prior to election. Similarly, though the general rule in section 67(3)(e) is that a Member must vacate his or her seat upon becoming party to a government contract, that is subject to the exemption in section 67(7). The rationale for this exemption is clear: it assists with stability of tenure and takes account of local circumstances. As the Attorney General submitted[142]:

> "Without an exception of this nature, there would be obvious practical difficulties, particularly in a jurisdiction such as the Virgin Islands, where because of the population size, there is a relatively small pool of potential candidates for elected office. Any such candidates who have significant business interests and experience (characteristics which may be attractive to the electorate) may be unwilling to seek or remain in elected office if to do so would exclude them from being able to compete for government business".

4.84 There are, however, issues of construction and interpretation in relation to both sections, the implications of which are potentially wide-ranging and of some constitutional significance.

4.85 Before turning to these issues, it may help to clear the decks of matters which are less controversial.

(v) In respect of these provisions, "contract" should be given its natural and ordinary meaning[143]. Although certain Members have in practice not treated purchase and/or works orders as contracts for these purposes[144], as a matter of legal construction, all forms of legally binding and enforceable agreement fall within the scope of sections 66 and 67, including petty contracts[145] and contracts based on work orders and/or purchase orders[146].

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[142] Attorney General's Submissions regarding the meaning of sections 66 and 67 of the Constitution Order 2007 dated 13 September 2021 paragraph 29. In this section, "Attorney General's First Submissions" is a reference to these submissions.

[143] Attorney General's First Submissions paragraphs 4-5; and Silk Legal's undated submissions regarding the meaning of sections 66 and 67 of the Constitution Order 2007 on behalf of the Members of the House of Assembly who are not Ministers page 3. In this section, "Silk Legal's Submissions" is a reference to these latter submissions.

[144] See, for example, T37 21 September 2021 pages 85, 118-121, 124-125 and 163 (Hon Neville Smith); and Hon Neville Smith Affidavit dated 16 August 2021 paragraph 7. See also the evidence of the Hon Alvera Maduro-Caines, who appeared to suggest that a contract is related to the financial value of the particular service that is being provided (T11 15 June 2021 pages 43-45).

[145] Attorney General's First Submissions paragraph 7; and Silk Legal's Submissions pages 3 and 4.

[146] Attorney General's First Submissions paragraph 6. In their written submissions (page 4), Silk Legal argued that purchase orders and work orders should not be included due to the lack of an intention to create legal relations. However, at the hearing on 21 September 2021, Mr Fligelstone Davies of Silk Legal changed that position and confirmed that: "A purchase order, for us, is naturally a contract" (T37 21 September 2021 pages 163-164).

(vi) A "party" to a contract is an individual or corporate entity who has rights and/or obligations under the contract, who is legally entitled to enforce the contract and against whom the contract may be enforced[147].

(vii) The "Government of the Virgin Islands" comprises the Governor, the executive (including Cabinet, Ministries and government departments), the legislature, the judiciary. A contract falls within the scope of sections 66 and 67 if any government entity is a party to it provided, of course, that it was acting "for and on behalf of the public service" (as that term is defined in section 2(1) of the Constitution)[148]. Sections 66 and 67 do not apply to a contract between two entities acting in a purely private capacity and not on behalf of the BVI Government.

(viii) The purpose of section 66(1)(f) is to give the electorate full details of any contracts that the candidate has with the BVI Government. This is achieved by publishing a notice in the Gazette or other appropriate newspaper setting out the nature of the contract and the candidate's interest in it. However, there is no prescribed form for the notice. There is some confusion as to what a notice should contain[149] and no consistency as to the disclosure made.

(ix) The procedure for obtaining an exemption under section 67(7) is time-consuming and cumbersome. It involves the Member alerting the Clerk of the House of Assembly, who instructs the Attorney General to draft the Motion which the Premier then brings to the House. The process can take several months[150].

(x) When it comes to the exercise of the discretion in section 67(7) there are no guidelines. Whilst the statutory preconditions must be satisfied, if they are, then whether an exemption application is allowed or disallowed is a matter for the House of Assembly whose discretion is unfettered. Individual Members may request further details about the contract and the Motion is debated in the House of Assembly. Such Motions are rare, and are usually passed[151].

4.86 In the course of the submissions I heard, two issues arose in relation to the construction of sections 66 and 67.

Issue 1: The Exemption in Section 67(7) of the Constitution

4.87 The first issue concerns the circumstances in which the House of Assembly can properly exercise its power under section 67(7) to exempt a Member from vacating his or her seat as otherwise required by section 67(3)(e).

4.88 These provisions have historically been applied in practice so that a Member whose firm or company enters into a contract of the type described in subsection (3)(e) is able to disclose the interest and seek an exemption "as soon as practicable" after the contract has been entered into[152].

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147 Attorney General's First Submissions paragraphs 13-14.
148 Attorney General's First Submissions paragraphs 11-12.
149 Attorney General's First Submissions paragraph 15; Silk Legal's Submissions page 5 paragraph (1)(e); and T37 21 September 2021 pages 137-140.
150 T37 21 September 2021 pages 58-59, 71-72, 81 and 89-90. See also T14 18 June 2021 page 160.
151 See T11 15 June 2021 pages 201-203 (Hon Kye Rymer); T11 15 June 2021 pages 271-274 (Hon Vincent Wheatley); T12 16 June 2021 pages 77-79 (Hon Julian Fraser); T12 16 June 2021 pages 125-128 (Hon Melvin Turnbull); T13 17 June 2021 pages 99-101 (Mr Archibald Christian); T13 17 June 2021 pages 145-147 (Hon Marlon Penn); T14 18 June 2021 pages 159-160 (the Premier); and T15 21 June 2021 pages 191-192 (Mr Myron Walwyn).
152 T37 21 September 2021 pages 156 and 159 (Sir Geoffrey Cox QC). See also the evidence of Hon Neville Smith at T37 21 September 2021 pages 37-38.

4.89 However, there is a construction of these provisions into which this practice would not fall, namely that the House of Assembly's power to exempt only arises if one of two conditions is satisfied:

(i) the relevant Member, before becoming a party to a contract of the type described in section 67(3)(e) ("a government contract"), discloses to the House of Assembly the nature of the contract and his or her interest (or the interest of any relevant firm or company) in it ("the first limb"); or

(ii) the relevant Member, before or as soon as practicable after becoming otherwise interested in a government contract, discloses to the House of Assembly the nature of the contract and his or her interest (or the interest of any relevant firm or company) in it ("the second limb").

The first limb covers all circumstances in which a Member becomes a "party" to a government contract (be that as an individual, as a partner in a firm, or as a director or manager of a company). A condition precedent to the exercise of discretion in section 67(7) is that these contracts (and the relevant interest) are disclosed before the contract becomes legally binding. The second limb, by contrast, covers any other circumstances in which a Member becomes interested in a government contract, i.e. any circumstances other than those covered by the first limb. Those interests still need to be disclosed (as a condition precedent to the power to exempt arising), but they do not need to be disclosed prior to obtaining the interest provided they are disclosed "as soon as practicable" thereafter[153].

4.90 Sir Geoffrey Cox QC, for the Attorney General, initially acknowledged that this construction has at least "a superficial appeal"[154]; or, if not appeal, force. He also accepted that there are two limbs to the exemption[155], and that those Members caught by the first limb must make the relevant disclosure prior to becoming a party to the contract if they are to benefit from the exemption[156]. However, upon reflection, he did not consider the construction to be correct. He submitted that the provisions draw a distinction between an individual Member who enters into a contract with the BVI Government (who falls within the first limb, and is required to disclose his proposed interest and obtain an exemption prior to entering into the contract), and a Member who is a part of a company or firm which contracts with the BVI Government (who falls within the second limb, and does not have to obtain an exemption prior to the contract but only "as soon as practicable" afterwards). Sir Geoffrey's argument, in short, was that the key words in section 67(7) are "before becoming a party": a director of a corporate entity or a partner in a firm does not become a "party" – the company/partnership does – and that, in these circumstances, the Member is only "otherwise interested" in the contract[157].

4.91 I accept both that the interpretation favoured by Sir Geoffrey has considerable force, and also that it is consistent with long-held practice. However:

[153] This construction was first raised at T37 21 September 2021 pages 149-155, and was then the subject of further, undated written submissions by Withers on behalf of the Attorney General ("Attorney General's Second Submissions") and further debate at T50 19 October 2021 pages 3-15.
[154] T37 21 September 2021 page 156.
[155] He accepted that this must follow from the use of a comma after the words "as there described" in section 67(7).
[156] T50 19 October 2021 page 4.
[157] Attorney General's Second Submissions; and T50 19 October 2021 pages 5-6.

(i) This interpretation introduces a distinction between a Member who trades in his or her own name, and one who trades through a company or partnership. It is arguable that that distinction is artificial and arbitrary. Sir Geoffrey speculated that the rationale for this distinction may be to deal with those circumstances in which a director/partner/ manager is not involved in day-to-day operations, and therefore may be unaware of the existence of the contract[158]. However, for example, a company might be the Member in corporate form, and a partnership might comprise the Member and a sleeping partner. It is a somewhat strained use of language to import a subjective element of knowledge into the requirement to disclose an interest "as soon as practicable", and to do so would potentially render sections 66 and 67 toothless. It would be extremely difficult for the House of Assembly to consider whether a Member did or should have had knowledge of a particular contract[159]; and, in practice, they do not seem to be subject to searching enquiries.

(ii) The words "as there described" in section 67(7) appear to link directly back to section 67(3)(e) and the circumstances that are set out there. It is arguably significant, therefore, that section 67(3)(e) does not distinguish between contracts entered into by a Member in his or her own right, and contracts entered into by a firm or company of which the Member is a partner or director. If the distinction is not made in section 67(3)(e), then it raises the question as to the rationale for making it in section 67(7). It is arguable that the more natural construction is that no distinction should be made, that both individual and corporate entities are covered by the first limb and that the second limb deals with something else entirely.

4.92 I do not need to resolve this issue of construction for the purposes of this Inquiry. I seek only to emphasise that there are respectable alternative interpretations of section 67, on one of which the long-standing practice (and, consequently, the continuance of certain individuals as members of the House of Assembly) would be unlawful. This would have significant constitutional implications. There is no evidence that any current Members have become a party to a contract as individuals[160]; but, if the current practice is not in accordance with section 67 as properly construed, Hon Neville Smith, for example, would be caught by section 67(3)(e) as the director of a company that is party to government contracts for which no exemption was obtained prior to contract – and he would be unable to now avail himself of the exemption in section 67(7)[161]. This is consequently a matter that would benefit from clarification. I shall make a recommendation accordingly.

Issue 2: Statutory Bodies

4.93 The second issue can be put quite shortly: does "the Government of the Virgin Islands" in sections 66(1)(f) and 67(3)(e) include statutory bodies?

4.94 It is quite clear from the evidence that the prevailing practice assumes that it does not, and therefore a Member need not vacate his or her seat under section 67 (or seek an exemption) if they become party to, or otherwise interested in, a contract with a statutory body[162].

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[158] T50 19 October 2021 page 6; and T37 21 September 2021 pages 151- 152.

[159] For example, Hon Neville Smith did not disclose his interests in several government contracts until a considerable time into his tenure as a Member because, he said, he was simply unaware these contracts existed (see, e.g., T37 21 September 2021 page 37).

[160] T50 19 October 2021 pages 7-8.

[161] Hon Neville Smith Response to COI Warning Letter No 1 undated pages 3-6. See also Resolution No 10 of 2021 and Resolution No 11 of 2021 both appended to Hon Neville Smith Affidavit dated 16 August 2021.

[162] See T11 15 June 2021 pages 127-128 and 202; T13 17 June 2021 page 144; T15 21 June 2021 pages 191-192; and T37 21 September 2021 pages 13, 18, 20-21, 34-35, 109 and 111-112.

This view appears to be based on advice given by the former Attorney General Hon Baba Aziz in March 2015, which indicated that statutory bodies were not within the scope of section 67 because:

> "A statutory corporation is a distinct and separate juridical entity apart from the Government of the Virgin Islands, as that latter term is used and understood under the Constitution and laws of the Virgin Islands"[163].

The Constitution distinguishes between a statutory body and the BVI Government and, if the former were intended to be caught by section 67, it would have expressly said so. This construction (the advice says) is reinforced by a line of authority[164] to the effect that statutory bodies generally enjoy a separate and independent status to that of the Government, and by the language of the enabling legislation[165] which established the BVI Health Service Authority[166] as a distinct legal entity from the BVI Government.

4.95 The analysis in the advice is powerful, particularly in circumstances where the relevant statutory body is truly independent and autonomous[167]. However:

(i) The advice was given by the former Attorney General some time ago. It is unclear if the law may have developed in the intervening years, or whether it is a view that is shared by the current Attorney General[168].

(ii) The interpretation of the former Attorney General has not always been applied. A former Speaker vacated his seat for contracting with a statutory board, as confirmed by the Attorney General[169]:

> "I believe that, around late 1995/early 1996, the Hon Speaker at the time, Mr Keith Flax, demitted office on account of a failure or refusal to seek a Legislative Council exemption for entering into a contract with the Government. I understand that this matter involved a lease whereby Mr Flax rented/leased his building or part of it to the Tourist Board (a statutory body) without seeking an exemption from the Legislative Council. The 1976 constitution would have been in force at the time"[170].

(iii) In any event, an Attorney General cannot make an authoritative pronouncement on the law. A request by the then Leader of the Opposition, Hon Andrew Fahie, to refer the matter to the Eastern Caribbean Court of Appeal[171], was rejected by Attorney General Hon Baba Aziz in 2017[172]. The mere fact that this request was made indicates the position is far from settled, and the tone of the request suggests there are strong alternative views. This is reinforced by the current Attorney General's letter of 15 October 2021, which refers to the matter as a "live issue" amongst Members[173].

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[163] Advice on Interpretation of Section 67(3)(e) of the Virgin Islands Constitution Order 2007 dated 24 March 2015 ("the Advice"), the quotation coming from page 2.
[164] Set out at pages 5-7 of the Advice.
[165] British Virgin Islands Health Services Authority Act 2004.
[166] The statutory authority that was under consideration.
[167] T37 21 September pages 21-22.
[168] The Attorney General, when asked whether any advice had been given on the subject, referred to the advice provided by her predecessor (see Letter to COI from Attorney General dated 15 October 2021 paragraph 3).
[169] Letter to COI from Attorney General dated 15 October 2021 paragraph 2.
[170] The letter goes on to say that: "Members also recognise that the former Speaker (Flax) had vacated his seat because of a contract with a statutory body" (see Letter to COI from Attorney General dated 15 October 2021 paragraph 5).
[171] Under section 3 of the Attorney General's Reference Act 2017 (No 2017 of 2011). See paragraph 1.90 above.
[172] Letter Attorney General to Hon Andrew Fahie dated 24 January 2017 and letter Hon Andrew Fahie to Attorney General dated 4 January 2017.
[173] Letter to COI from Attorney General dated 15 October 2021 paragraph 5.

4.96 Again, although of some real importance, this is an issue which it is not necessary for me to determine under my Terms of Reference. However, it is again an issue that would benefit from clarification; particularly in the context of the evidence I have heard which casts serious doubt on the independence and autonomy of certain statutory boards[174]. It is enough simply to point out that this has been a long-standing issue that is still not settled and that has potentially significant constitutional ramifications[175]. Again, I shall make a recommendation accordingly.

Declarations of Interests in Cabinet

4.97 Paragraphs 2.23-2.25 of the Cabinet Handbook 2009[176] concern the declaration of interests by Ministers for the purposes of Cabinet discussions and decisions. They provide:

> "2.23 Ministers and Members of Cabinet attending meetings in relation to matters in which they have an interest must declare their interest or members of their family interest. Interests, whether private, pecuniary or non-pecuniary of Ministers, Members of Cabinet or their immediate family must be declared prior to discussions, if their participation is likely to give rise to a conflict.
>
> 2.24 Declaration of interest should be recorded by the Cabinet Secretary. Following the declaration of interest it is then for Cabinet to excuse the Minister or Member or for that Minister or Member to excuse himself or for Cabinet to allow that Minister or Member to participate in the discussions thereafter. Ministers or Members should excuse themselves from the discussions where a close relative is being appointed to a position in government or a statutory body. Once a declaration is made on a particular matter, it is not necessary for that Minister or Member to declare his interest in subsequent discussion on that particular matter. However, if the colleagues of the Minister or Member are not aware of the interest due to the passage of time, the Minister or Member is advised to reiterate his previously declared interest.
>
> 2.25 Ministers or Members having doubts or uncertainty about their interest in a Cabinet matter should inform the Premier in advance of the matter coming up for Cabinet discussion."

4.98 As with the declarations of interests under the Register of Interests Act, there is no guidance as to the application of these provisions; and there was again, a wide divergence in views as to the circumstances in which a member of Cabinet should recuse himself or herself[177].

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[174] See Chapter 7: Statutory Boards.

[175] The Hon Neville Smith, for example, is the director of a company that contracts with a statutory board (see Hon Neville Smith Response to COI Warning Letter No 1 undated pages 7-8).

[176] Cabinet Handbook published November 2009 page 8.

[177] The Cabinet Secretary Sandra Ward said there was no guidance as to what constituted "family" or "close relative", but she considered "family" covered spouses, siblings and "we have done it to cousins as well" (T1 4 May 2021 pages 90-95). Hon Carvin Malone said that he would declare an interest of a sibling, aunt/uncle, niece/nephew and stepfamily (T15 21 June 2021 pages 108-112). Hon Kye Rymer said that he considered it was a matter for the Minister's own judgment: but he recused himself in respect of the decision to appoint his mother-in-law Ms Patsy Lake to Deputy Chair of the SSB, and to appoint his aunt to be Vice Chair of the Virgin Islands Festivals and Fairs Committee (T11 15 June 2021 page 192-193). Hon Vincent Wheatley said it depended on what the public would think: but, in respect of a decision concerning a sibling or first cousin, "you must recuse" (T11 15 June 2021 page 256-257). Hon Mark Vanterpool said that he would recuse himself if his brother was involved in a contract, but for appointment to a statutory board: "one has to use judgment" (T14 18 June 2021 page 203). Mr Ronnie Skelton said that he would recuse himself from decisions in which his family members were concerned ("wife, probably brothers and sisters, depending in what is happening") and "close associates" where there was monetary remuneration but not for statutory boards (T15 21 June 2021 pages 223-224).

4.99 The Premier said that there had been discussion in Cabinet as to the extent of the conflict of interest provision as applied to family members when the Cabinet Handbook had been prepared[178]. He did not recall ever recusing himself from any Cabinet discussion/decision[179]. He accepted that, even if the Cabinet Handbook did not require it, those who live in the BVI might perceive a conflict of interest where a particular Minister were to be involved and voted upon the appointment of his or her uncle or aunt to a position on a statutory board[180].

4.100 It is clear from the evidence that there is currently no consistent approach to declaring interests prior to Cabinet discussions, a proposition accepted by the Premier[181]. Given the confusion and ambiguity as to what interests/relationships should be declared, it is remarkable that no proper guidance has been issued; and, according to the evidence, no Cabinet Member has ever sought clarity or guidance from the Premier as provided for in paragraph 2.25 of the Cabinet Handbook[182].

4.101 At a practical level, there are no mechanisms in place to check whether the appropriate declarations have been made. It is essentially a trust-based system. That was the evidence of the Cabinet Secretary Sandra Ward who said that the responsibility for declaring a conflict falls to the individual Cabinet Member, and she was unable to speak to how potential conflicts are identified[183]. The general attitude appears to that most interests will happen to be known and somehow picked up by other Cabinet members due to the small size and closeness of the population. Hon Carvin Malone, for example, was confident that he would be "reminded" by the Premier or the Attorney General were he to forget to declare an interest[184]. The Cabinet Secretary accepted that the system could be strengthened by requiring Cabinet members to provide a list of their interests to the Cabinet Secretary prior to a Cabinet meeting[185].

4.102 In terms of governance, recusals from Cabinet are not reported: so the public do not see the system (such as it is) working[186].

Section 81D of the Criminal Code

4.103 Finally, for completeness, I should refer to section 81D of the Criminal Code (as inserted by the Criminal Code (Amendment) Act 2006)[187]. Under the heading "Conflicts of Interest", section 81D provides:

> "(1) Where—

[178] T33 14 September 2021 pages 149-150.
[179] T14 18 June 2021 pages 158-159. The Premier said that there was some doubt as to whether, even if a Premier declared an interest, it was open to him or her to leave a Cabinet meeting (T33 14 September 2021 pages 150-151).
[180] T33 14 September 2021 pages 151-152.
[181] T33 14 September 2021 pages 183 and 188.
[182] Premier Response to COI Request for Information/Documents No 1 dated 12 March 2021. It appears that the Attorney General is also available to advise should that be necessary; but again, she has not been required to do so (T10 14 June 2021 page 106. See also T11 15 June 2021 pages 185-186 (Hon Kye Rymer); T13 17 June 2021 page 48 (Dr Orlando Smith); T13 17 June 2021 page 139 (Hon Marlon Penn); and T33 14 September 2021 pages 191-192 (Premier).
[183] T1 4 May 2021 pages 92-95. The Attorney General also confirmed that Members "typically disclose them themselves" (T10 14 June 2021 page 105).
[184] T15 21 June 2021 page 102.
[185] T1 4 May 2021 pages 94-95.
[186] T11 15 June 2021 pages 257-259 (Hon Vincent Wheatley); and T11 15 June 2021 page 196 (Hon Kye Rymer).
[187] No 8 of 2006. In written submissions dated 7 June 2021, the Attorney General identified this provision as section 90 of the Criminal Code. She did so by reference to a revised edition of the Criminal Code prepared by the Law Revision Commissioner (a role performed by the Attorney General) and showing the law as of 30 June 2013. This revision renumbered various sections of the Criminal Code without adopting the numbering introduced by 2006 Act. Given that the revised edition does not appear to be used in practice, I have used the numbering as introduced by statute.

(a) a public body in which a public official is a member, director, manager or other senior officer proposes to deal with a company, partnership or other undertaking in which the public official or his or her relative or associate has a direct or indirect interest; and

(b) the public official or his or her relative or his or her associate holds more than 10 per cent of the total issued share capital or of the total share equity participation in the company, partnership or other undertaking, the public official shall forthwith disclose, in writing, to the public body the nature of such interest.

(2) Where, in relation to subsection (1), a public official or his or her relative or associate has a direct or indirect private interest in a decision which a public body is to take, the public official shall not vote or take part in any proceedings of the public body relating to such decision.

(3) A public official who knowingly contravenes subsection (1) or (2) commits an offence….

(4) For the purposes of this section in relation to the relative of a public official, proof by the public official that he or she did not know the interest of the relative is a defence."

4.104 The definition of "public official" is considered above[188]. "Public body" includes the Cabinet, the House of Assembly, a ministry or government department, and a statutory board or corporation. "Relative" means a spouse, child, sibling, parent, grandparent of a person, or the brother or sister of the spouse of that person[189].

4.105 There is no evidence of any action ever having been taken under this provision.

Proposed Reforms

4.106 In recent years, there have been various expressions of purported political intent to review how elected public officials declare their interests, each of which seems to have run into the sand. In March and September 2018, the previous (NDP) government announced that it would be reviewing the 2006 Act[190]. I have not seen any evidence that that announcement was followed up. On 18 June 2019, the current Premier Hon Andrew Fahie wrote to Ben Merrick, Director Overseas Territories FCDO, that the "Register of Interests of Ministers will be made public immediately following further consultation with the Governor"[191]. Such a step would, of course, not have applied to all Members of the House of Assembly. In any event, the interests of neither elected Ministers nor other Members of the House are yet public.

[188] Paragraph 2.3 and footnote 1.
[189] Section 79(1) of the Criminal Code defines all of these terms, and also gives further definitions of "spouse" and "child".
[190] Speech from the Throne: Building BVI Stronger, Smarter, Greener, Better through Legislation delivered by Governor Jaspert at the First Sitting of the Third Session of the Third House of Assembly, 1 March 2018; and Speech from the Throne: Building BVI Stronger, Smarter, Greener, Better through Legislation delivered by Governor Jaspert at the First Sitting of the Fourth Session of the Third House of Assembly, 13 September 2018.
[191] Letter from Premier to Ben Merrick FCDO: Ben Merrick Follow-Up dated 18 June 2019.

4.107 In a Cabinet meeting held on 7 November 2019, Governor Jaspert introduced a paper on the Integrity in Public Life policy[192]. Cabinet approved that policy and decided that a review of the "Bill entitled Integrity in Public Life, 2003" would incorporate a review of the Register of Interests[193].

4.108 On 18 September 2020, the Deputy Governor instructed the Attorney General's Chambers to prepare a Register of Interests (Amendment) Bill, which was duly drafted and sent to the Deputy Governor for review on 4 November 2020. On 3 December 2020, the Deputy Governor sent new instructions to the Attorney to prepare a draft Bill for the repeal and replacement of the 2006 Act[194]. At the time of hearing evidence on Members' interests (14-21 June 2021), what is now the Register of Interests Bill 2021 was still being drafted[195]. As of 10 February 2022 (when the Attorney General provided an update to the COI), it had still not been finalised or introduced to the House of Assembly[196].

4.109 If enacted in its current form, this Bill would repeal the 2006 Act in its entirety, although it generally replicates the provisions of that Act. For example, it does not change the interests to be declared and, save for some minor amendments, the form of declaration is the same[197]. However, the following aspects of the Bill mark proposed changes:

(i) It extends the obligation to make a declaration to all those "in public life", i.e. not only Members of the House of Assembly, but all other public officials and members of statutory boards and the governing body of any other public body (clause 3 and Schedule 1).

(ii) It provides for public inspection of the Register of Interests (clause 5(3))[198]. If enacted and implemented, this would clearly be an important step forward.

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[192] The way in which this policy progressed proved to be controversial. I deal with it below: see paragraphs 11.100-11.115, 13.114-13.123 and 13.131ff.

[193] Extract from Minutes of Cabinet Meeting No 30 of 2019 on 7 November 2019 pages 3-9. This was not the first time it had been proposed that public officers should be the subject of the registration of interests regime: see paragraph 4.50 above. In the event, the earlier proposal was never implemented.

[194] The Deputy Governor said that he believed that the BVI Government could draw on the discussion of the scheme for registration of Members' interests that had taken place in the COI hearings, to ensure that the Registrar had the necessary powers to implement, monitor and manage the requirements of the Constitution (T17 23 June 2021 page 265).

[195] Hon Julian Fraser, who has been a Member of the Legislative Council/House of Assembly since 1999, said that there had never been a previous initiative to open the Register to the public; and, indeed, he was unaware of this initiative to do so (T12 16 June 2021 page 13).

[196] Attorney General's Response to Enumerated Questions in Mr King's Letter of 19 May 2021 in respect of the Legislative Programme on Governance dated 3 June 2021 updated 10 February 2022 ("Attorney General's Memorandum on Governance Measures") paragraphs 56-73. A draft had been provided to the Governor and Deputy Governor. The former had commented on it, and the Attorney General was waiting for comments from the Deputy Governor.

[197] The draft of the Bill provided to the COI on 10 February 2022 also still contains reference to the guidance pamphlet on Registration and Declaration of Interests. Given the evidence to the COI nine months before as to the confusion engendered by the form and the fact that there was in fact no guidance, detailed earlier in this chapter, the failure to address either the form or this guidance seems quite remarkable.

[198] Most witnesses gave evidence purporting now to support making the Register more available, but not all wholeheartedly supported making it available to the public. An application was made on behalf of Hon Mark Vanterpool to have the hearing in relation to his interests held in private, on the basis that requiring him to disclose his assets breached section 19 of the Constitution (respect for private life) (although that application was in the event withdrawn on the day of the hearing). Mr Ronnie Skelton said that he had not supported making the Register public through fear of "kidnapping" (T15 21 June 2021 page 200). Dr the Hon Natalio Wheatley said public access needed to be discussed more (T12 16 June 2021 pages 174-175). Dr Orlando Smith said that, during his time as Premier (2011-19), he considered the House of Assembly were unanimously in favour of the Register not being public (T13 17 June 2021 page 20). His Deputy Premier, Dr Kedrick Pickering, said that initially it being private was the correct approach: he did not say whether it was now time for it to be made public (T13 17 June 2021 page 54). The Premier Hon Andrew Fahie said that, when it came into force in 2008, "there was an overriding thought by all the elected Members at that time that it should not be a public document…", but he said he is now a proponent of the Register being public or publicly accessible "with a safety net" (T14 18 June 2021 page 91). Mr Archibald Christian, an NDP Member and Junior Minister in Dr Orlando Smith's government, said that he was not averse to the Register being public "to a certain point" T13 17 June 2021 pages 81-82; and Hon Marlon Penn said he had never had any difficulty in the Register being public subject to further consideration (T13 17 June 2021 pages 107-108).

(iii) It allows the Registrar to refer "any matter related to integrity to the [Integrity] Commission for advice" (clause 9). The Integrity Commission is to be established under the Integrity in Public Life Act 2021, to which the Governor assented on 11 February 2022[199]. It is not yet in effect, and the date for when it will come into force has yet to be announced.

(iv) It imposes a fine of $500 on a person in public life who submits a declaration late (clause 4(4) and schedule 3). Further, it will be a criminal offence for a person in public life to fail:

(a) to file a declaration at all (clause 4(5)); or

(b) to notify the Registrar of a change to the declaration within one month of that change occurring (clause 5(7)); or

(c) to submit a new declaration within 28 days of the Registrar serving a notice that an entry in the Register is the result of that person making a fraudulent or materially misleading declaration (clause 6(5)); or

(d) to comply with a notice from the Registrar given for the purpose of examining a declaration and requiring further information or records (clause 7(5)).

With one exception, these offences would be punishable on summary conviction with a fine the value of which is yet to be indicated, but may be in the thousands of dollars. The exception is the offence under clause 7(5). There, summary conviction results in a fine not exceeding $10,000 or imprisonment for a period not exceeding two years or both.

(v) It envisages a different enforcement procedure in relation to Members of the House of Assembly. It dispenses with the Register of Interests Committee and removes the ability of the House of Assembly to fine a Member or suspend him or her from sitting. Instead, where a Member is convicted of an offence under this statute then, in addition to any other penalty the court would have the power to suspend that Member from sitting and voting in the House of Assembly for such period as the court considers appropriate. The present draft indicates that such suspension should not exceed a period of years but does not specify the term of such period (clause 8).

Conclusion

4.110 Registration of interests provides a very good example of where elected public officials have deliberately and persistently overridden constitutional controls on their behaviour. This has not simply been a case of elected officials failing to comply with their individual obligations. Collectively, they have deliberately, persistently and successfully undermined the system of controls imposed by the Constitution and statute, to the extent that the controls have been effectively "spiked" for more than two decades. It is a measure of their success that, over 20 years after the 1976 Constitution was amended to require declarations of interests to be put into a Register, there is still no Register.

4.111 There is no excuse. This cannot be placed at the door of anyone else, such as the UK Government. The elected officials were well aware of their constitutional and statutory obligations. There is no question of a deficiency in the Public Service contributing to this state of affairs: the policy in place is clear and set out in the Constitution. Even though the Register under the current scheme is not publicly accessible, the position taken by elected officials in successive administrations has been to avoid putting in place and operating a mechanism to give effect to the constitutional imperative for a functioning system to register interests

[199] See paragraphs 11.100-11.115 below.

of Members of the House of Assembly. It was (rightly) accepted on behalf of the elected Ministers[200] that what has been put in place, such as it is, is systemically hopeless: no serious attempt has been made to establish a system of compliance and enforcement. Indeed, there has been a consistent – and, in my view on the evidence, a quite deliberate – course of undermining attempts to establish such a system.

4.112 The general approach of the elected officials is reflected by the fact that the Attorney General (acting for the elected Ministers in this COI) has reserved her position as to whether to take steps towards prosecuting the former Registrar for her (clearly bona fide and, in my view, clearly lawful) attempts to (i) get a system established as required by the Constitution and the 2006 Act and (ii) encourage individual elected public officials to comply with their constitutional and statutory obligations to make declarations of interests. As I have described, whilst she was Registrar, Mrs Romney-Varlack's efforts to fulfil her important governance role were treated with disdain. In all the circumstances, for the former Registrar to have even the faintest shadow of possible criminal proceedings hanging over her in her retirement is, with all respect to the Attorney General, unforgivable.

4.113 That the system of registration of interests has never been taken seriously is reflected in the fact that there is currently no consensus as to what needs to be disclosed. That no attempt has been made to clarify the requirements, even in the current Register of Interests Bill, is, in my view, indicative of the lack of any political will to ensure that those in public office are in any way open about their interests and possible conflicts. On the evidence, the concept of conflicts of interest is barely recognised in some quarters; and each elected official currently required to disclose interests has a different view as to what interests should be disclosed and when.

4.114 There is the new Bill. Whilst I know that instructions were given to the Attorney General to draft a new Register of Interests Bill at the end of 2020, prior to the calling of this COI, the history of registration of interests in the BVI can give neither the people of the BVI or me any confidence that, but for the work of the COI, a Bill with provision for a publicly accessible register, would have been progressed. Given the position taken by elected officials prior to the COI doing its work, I regret that I have concluded that, without the eye of the COI being cast upon this area of governance, it would have been unlikely that any new provisions would have been progressed even as far as they have been.

4.115 It is said on behalf of the elected Ministers that the Bill, bolstered by the Integrity in Public Life Act 2021[201], signals a new beginning for governance. However, I have grave doubts as to the effectiveness of any scheme set up under this measure if enacted in its present form. The oath required of a Registrar (which is in the same terms as found in the 2006 Act) would present him or her with practical and legal difficulties in obtaining advice from an Integrity Commission (assuming one were in place and functioning). There is no sanction for persistent late declaration, nor would the public be easily made aware of such shabby conduct. The Bill imposes a freestanding obligation on a person in public life to make a declaration. Yet there does not appear to be any sanction for someone who makes a fraudulent or materially misleading declaration: that only arises if the individual is notified that the Registrar is examining their declaration, is asked to provide further information and knowingly or recklessly provides information that is false or materially misleading (clause 7(5)).

[200] A view to which the other Members of the House of Assembly, represented by Silk Legal, did not demur.
[201] See paragraphs 11.100-11.115 below.

4.116 Clearly, more needs to be done to the Bill. There is no proper form in which declarations are to be made. There are no regulations as yet prescribing the format of any Register (clause 14). Given the evidence of former and current Members of the House of Assembly, the declaration form needs to be revisited and guidance promulgated. Where it is suspected that one of the offences set out in the Bill has been committed, there is a need for clarity as to how the complaint would be progressed.

4.117 However, I have a more fundamental concern about the Bill. It imposes on the Registrar of Interests the burden of maintaining the Register (clause 5(1)), satisfying himself or herself that its entries are full and accurate (clause 6(1)), and taking steps to obtain further information (clause 7(1)). Those important tasks would not only have to be carried out in relation to elected public officials but, among others, all public officers, i.e. many hundreds or even thousands of people[202]. Without proper resources, it would be impossible for any Registrar of Interests to carry out his or her statutory duties in a way that could give the BVI public confidence in the scheme and preserve the constitutional independence of the Registrar of Interests. The obvious (and, in my view, high) risk is that, without adequate support, the scheme envisaged by this Bill would be nothing but another paper tiger.

4.118 A registration of interests scheme has been a constitutional requirement since 2000: the people of the BVI are entitled to its establishment without further delay. Whilst the progress with the Bill, late and tepid as it is, is to be welcomed, on the evidence I have received, it is impossible to have confidence that there will be the political will to implement and enforce an effective system of registration unless steps are taken to improve its prospects of success.

4.119 Addressing that issue, in respect of the scope of the scheme, there is nothing wrong in principle with a scheme that seeks to capture the declarations of all those in public life including public officers. However, it is simply unrealistic to replace a system in which the Registrar had oversight of declarations for 15 public officials but was constantly frustrated by a lack of cooperation with one in which she is expected to have oversight of declarations for hundreds or thousands of individuals without (so far as I am aware) any proposed increase in resources or enforcement resources. Without proper resourcing, a new scheme that applied across, not just the House of Assembly, but the whole of the Public Service, is likely to be as ineffective as the current scheme has been over the last two decades.

4.120 In my view, the establishment of a new registration scheme must be approached in stages. I shall therefore recommend that a system of registration of interests is established, that implements the requirements of the Constitution insofar as it requires the declaration and registration of interests by elected officials, gives clear guidance as to what must be disclosed and when, and has effective provisions (involving sanctions where appropriate) to require compliance. However, the system that is established should not merely satisfy the minimum requirements set by the Constitution: it needs to be effective, which requires a new and frank approach to registration of interests and engenders a new approach to conflicts of interest in the BVI more generally. For example, subject only to any restrictions that are truly necessary, the register should be open to public access; and the scheme should be the subject of independent monitoring and enforcement.

4.121 Only once that system is embedded, and its effectiveness has been properly evaluated, should it be extended to encompass others such as public officers. In the meantime, a properly formulated and costed plan for such an enterprise should be prepared, with a commitment that resources will be made available to ensure that such an ambitious new scheme is efficient and effective.

[202] Governor Rankin gave the size of the Public Service as 3,000 (T50 19 October 2021 page 198).

4.122 Whilst the Bill, in my view, has considerable issues which I have outlined, it is a start, and may at least provide a vehicle for the reforms I propose. However, it clearly requires more thought and, indeed, more action. It certainly needs to be pursued with more endeavour than hitherto.

Recommendations

4.123 I deal with overarching recommendations below[203]. However, with regard to the registration of interests, I make the following specific recommendations.

Recommendation B2

I recommend that a system of registration of interests is established, that implements the requirements of the Constitution insofar as it requires the declaration and registration of interests by elected officials, gives clear guidance as to what must be disclosed and when, and has effective provisions (involving sanctions where appropriate) to require compliance. Subject only to any restrictions that are truly necessary, the register should be open to public access.

Recommendation B3

I recommend that, before the introduction of a registration of interests system designed to cover all persons in public life, a properly formulated and costed plan should be produced for the implementation of such a system, and a commitment made to ensure that it is, and will continue to be, funded and resourced so that the system is efficient and effective.

Recommendation B4

I recommend that, once the registration of interests system for Members of the House of Assembly has been established, evaluated and its extension costed, then consideration should be given to its extension to other public officials on an incremental basis. For example, the first tranche of public officers to be covered could be the most senior officers such as the Permanent Secretaries, the Financial Secretary and the Cabinet Secretary (or those acting in such roles); the second tranche could be members of statutory boards; and so on, until all public officers intended to be included are covered.

Recommendation B5

I recommend that sections 66 and 67 of the Constitution are amended to make clear the circumstances in which a person seeking election to the House of Assembly or a Member of that House who (either personally or through a dba, partnership or company with which he or she is associated) contracts with the BVI Government needs to declare such an interest, how such a declaration should be made and the consequences of him or her not doing so.

Recommendation B6

I recommend that sections 66 and 67 of the Constitution are amended to make clear whether, having regard to the purpose of these provisions, the term "Government of the Virgin Islands" is intended to encompass statutory bodies whether engaged in commercial or non-commercial activity. It is my view that they should include such statutory bodies.

[203] See Chapter 14.

CHAPTER 5:
ASSISTANCE GRANTS

APPENDIX A

ASSISTANCE GRANTS

The BVI has a welfare benefits scheme, administered by the Social Development Department within the Ministry of Health and Social Development.

However, in addition to that scheme, money is made available for distribution by Members of the House of Assembly and Ministries by way of discretionary assistance grants. During the COVID-19 pandemic, as well as the money being available for such grants being increased, grants were also made available through a number of programmes designed to assist with the economic consequences of the virus and the lockdowns and other restrictions imposed to combat it. In this chapter, I look at how these grants have been made and administered.

Introduction

5.1 The BVI has both a welfare benefits system and a social security scheme.

5.2 The Social Development Department ("the SDD"), within the Ministry of Health and Social Development ("the MHSD"), has described itself "as a compassionate, accountable and responsive organisation that will effectively and efficiently deliver the highest level of social services and improve the quality of life of every resident and citizen of the BVI". It administers the Public Assistance Programme which "provides a wide cadre of services to meet the holistic needs of its service population"[1]. Under the scheme, following appropriate assessments, assistance can be provided for (amongst other things) medical needs, medical equipment and pharmaceutical needs, emergency food relief, housing repairs, utilities, burial costs and day care; and can also be provided in the form of monthly financial or food grants. Assistance is granted following an evaluation of income, expenditure and assets, and any required assessments of need from (e.g.) social workers. The Ministry of Education, Culture, Youth Affairs, Agriculture and Fisheries[2] ("the MEC") administers a separate programme which provides miscellaneous grants to students, and educational organisations and committees[3].

5.3 The Social Security Act 1979[4] established a Social Security Fund to be administered by a Social Security Board ("the SSB") under the portfolio of the then Minister for Health and Social Services[5]. There are several sources of funds, but generally social security works as a compulsory insurance plan to which employers, employees, self-employed and voluntary

[1] Both quotations are taken from the SDD page of the BVI Government website http://www.bvi.gov.vg/departments/social-development-department.

[2] Formerly the Ministry of Education and Culture. In this Report, I refer to the Ministry of Education, Culture, Youth Affairs, Agriculture and Fisheries, and its predecessors, as "the MEC".

[3] The MEC Scholarship Programme for tertiary scholars as it operated in the period 2003-08 was the subject of an audit by the IAD, and a consequent IAD report, Ministry of Education and Culture Scholarship Administration 2003-2008, dated March 2009. It concluded that "the integrity of awarding scholarships has been compromised by lack of appropriate guidelines, selection criteria, monitoring and management of scholarships… We are also of the opinion that the Scholarship Programme lacks objectivity and transparency in its operations…" (paragraphs 11.1 and 11.2). It recommended (amongst other things) that a policy and procedural manual be implemented urgently (paragraph 9.2): a recommendation with which the Management Response agreed. The IAD Follow-up Report, IAD Follow-up Report Ministry of Education and Culture Scholarship Administration 2003-2008 dated September 2010, indicated that the Scholarship Policy had undergone revision, although it was still in draft form. Follow-up recommendations were made for reasonable timeframes to be put in place to ensure that the policy and procedural manual can be implemented. That specific programme was not investigated by the COI.

[4] Cap 266: No 17 of 2009.

[5] Sections 3 and 4.

contributors make contributions (largely governed by the Social Security (Contributions) Regulations 1980); and insured persons are protected from financial distress by way of partial income replacement when certain contingencies arise (e.g. sickness, maternity, employment injury, invalidity surviving the death of an insured person and becoming 65 years of age) (largely governed by the Social Security (Benefits) Regulations 1980). The Board is responsible for the management of the organisation, but the Act specifically charges a Director with the responsibility for the management of the Fund, in particular the collection of the contributions and the payment of benefits. In June 2020, the BVI Government announced a COVID-19 Unemployment/Underemployment Benefit for those who had been in insurable employment for at least a year and had been financially impacted by COVID-19, calculated at 50% of insurable earnings up to a maximum of $1,000, and a minimum of $500 a month, for a maximum period of three months.

5.4 However, in addition to these programmes, money is made available for distribution by Members of the House of Assembly and Ministries by way of discretionary "assistance grants". Further, during the COVID-19 pandemic, grants have been made available through various new programmes. This chapter of the Report considers the governance and propriety of these grants.

House of Assembly Members' Assistance Grants[6]

The Scope of the Grants and Process

5.5 Since 1997, each Member of the House of Assembly (until 2007, the Legislative Council) has received an annual sum for distribution. Initially, "the money was distributed to cover the cost of minor District/Territorial projects submitted by Elected Members"; but it is now used by Members to provide a wide variety of financial assistance to individuals and organisations and, by some, to finance constituency offices[7].

5.6 The House of Assembly makes an annual supply vote in respect of these grants, and that sum is then appropriated out of the Consolidated Fund[8]. The amount has varied over time; it was initially $60,000 per District Member and $75,000 per Territorial Member, but the usual allocation is currently $125,000 per District Member and $150,000 per Territorial Member (i.e. a total allocation of $1.725 million[9]). However, the Cabinet may approve additional amounts in respect of assistance grants during the year by way of a supplementary appropriation, which is then approved by the House of Assembly in a Supplemental Appropriation Act[10]. A supplementary appropriation can be made before or after the money has, in fact, been

[6] The means by which assistance grants are distributed by Members of the House of Assembly are sometimes referred to as a "programme" – the IAD reports, referred to below, use that word – but, given the lack of coherence in the grants, I have generally avoided using the term. As will be apparent from the narrative of this section, in reality, these grants are simply distributed by Members in their (effectively, unfettered) discretion.

[7] A number of witnesses dealt with assistance grants (and, notably, the process involved) in their evidence, particularly the Acting Financial Secretary Jeremiah Frett in his Third Affidavit dated 9 July 2021 who also spoke to them in his oral evidence T25 13 July 2021 pages 31ff. The former Deputy Financial Secretary and former IAD Director Wendell Gaskell dealt with them in his oral evidence T27 15 July 2021 pages 10ff; and the Clerk of the House of Assembly Phyllis Evans dealt with them in her Second Affidavit dated 25 June 2021 and exhibits and spoke to them in her oral evidence T26 14 July 2021 pages 126ff. Mrs Evans said that, when she was first appointed as Clerk of the House in 2009, she did not know the original purpose of the grants: she learned about it "some years down". She had been told the purpose changed in the period 2003–07 (T26 14 July 2021 page 136).

[8] Jeremiah Frett Third Affidavit dated 9 July 2021 paragraph 6.

[9] Jeremiah Frett Third Affidavit dated 9 July 2021 paragraph 9. The amount is determined by Cabinet in a policy then approved by the House of Assembly (T25 13 July 2021 page 46).

[10] Jeremiah Frett Third Affidavit dated 9 July 2021 paragraphs 11-13 and Exhibit JF5. At page 102 of the exhibit, there is a table which sets out the amounts made available to Members to distribute as assistance grants in the last three years from which the figures in the Report are taken. The table has been prepared by Mr Frett from documents which have been disclosed to the COI.

spent[11]. In 2019, an election year, the newly elected government allocated $2,741,610 for assistance grants, which exceeded the normal initial allotment of $1,725,000 by just over $1 million[12]. In November 2020, an additional $100,000 was given to each Member to help with the consequences of the COVID-19 pandemic[13]. In 2020, the BVI Government allocated a total of $6,974,663 to Members including £3.9 million exceptional allocation for "Coronavirus Prevent Exp"[14].

5.7 The grants are administered through the Clerk of the House of Assembly: as the relevant Accounting Officer, she is responsible for funds that are disbursed by, or on behalf of, the House of Assembly and its Members acting as such[15]. The allocation is released by the Treasury Department (i.e. available for spend) in four equal quarterly lots[16].

5.8 Having received an application, a Member will decide whether to use the funds allocated and available to him or her to meet the request in whole or in part. Insofar as he or she decides to make a grant, the Member then sends the application with any supporting documents to the Clerk of the House as the relevant Accounting Officer. He or she considers the application, and ensures that the documentation is complete[17]. The application is then passed to the Accounts Department via the Deputy Clerk. The Clerk accesses the allocated monies by issuing a purchase order under the PFMR[18], which he or she sends to the Treasury Department with a voucher (which he or she issues and signs off) and any supporting documents requesting payment to the applicant. Neither the Ministry nor the Treasury Department approves the

[11] T25 13 July 2021 page 52. The Clerk of the House of Assembly Mrs Phyllis Evans said that she did not know of any occasion when a Member had gone over his or her allocation, nor when additional sums have been allocated to assistance grants as a whole (T26 14 July 2021 pages 148-149). However, whilst generally payments cannot in fact be made before there is a sufficient allocation (because they are made by way of purchase orders, which will only be met if the Treasury Department is persuaded that there are allocated funds available), (i) sums might be committed (even if not paid) without an allocation, and (ii) the Treasury Department may be persuaded that a payment should be made even where there is no current allocation (on the basis that a supplementary allocation will later be made). There clearly have been significant supplementary allocations in some years, sometimes a considerable time after the money has been spent (T26 14 July 2021 pages 55-56).

[12] Jeremiah Frett Third Affidavit dated 9 July 2021 paragraph 13. Mr Frett explained in later correspondence with the COI (his letter dated 6 August 2021) that the BVI Government operated on a provisional budget for the first four months of 2019, when Members (including Members who had lost their seats in the February 2019 election) spent or committed a total of $626,610. Following the election, the Minister of Finance agreed to allocate a further $1,725,000 (which appears to have been allocated between Members in the usual way), so that $2,351,610 was allocated for Members' grants. However, a further $390,000 was approved in a Supplementary Appropriation, so the total allocated for the year was $2,741,610.

[13] Phyllis Evans Second Affidavit dated 25 June 2021 paragraph 12.

[14] See paragraphs 5.62–5.80 below, which concern the allocation of the additional $3.9 million for distribution by Members of the House of Assembly.

[15] See paragraphs 1.48 and 1.165. The Speaker plays no part in the administration of this programme, or any other assistance programme operated through the House of Assembly: that role falls to the Clerk of the House as the relevant Accounting Officer (T15 21 June 2021 page 145 (Ingrid Moses-Scatliffe, the former Speaker)).

[16] Although the Financial Secretary, or some other senior public officer, can override the automatic postponement of payments into the next quarter when the quarterly limit is met: T25 13 July 2021 page 71 (Acting Financial Secretary Jeremiah Frett). To go over the annual provision, a decision of Cabinet on a supplementary provision is required to enable payment to be made (T25 13 July 2021 pages 72-73 (again, Mr Frett)).

[17] In her evidence to the COI, the Clerk of the House Phyllis Evans said that she considered "the merits of the application" (T26 14 July 2021 page 131). However, she went on to make clear that she looks at the form of the application only, i.e. to ensure that the documentation is complete etc, not at whether a particular applicant should be granted assistance on the merits (see, e.g., T26 14 July 2021 pages 133-134). When the application passes over his or her desk, her Deputy equally does not look at the merits; although he or she may pick up something which has been omitted in terms of the documentation etc, which the Clerk has missed (T26 14 July 2021 page 133). If something is found to be missing, the application is remitted to the relevant Member's secretary (T26 14 July 2021 page 134).

[18] Mr Frett explained that, although not procuring goods or a service (and so not, on the face of it, triggering regulation 172 of the PFMR), using a purchase order is a mechanism recognised by the J D Edwards financial software system used by the BVI Government which enables such payments to be made (T25 13 July 2021 pages 34-36).

purchase orders[19]: the Accountant General (who heads the Treasury Department), or someone on her behalf, simply issues a cheque payable to the applicant, which is sent to the applicant via the Clerk and the relevant Member.

5.9 Members of the House who gave evidence to the COI accepted that governance in respect of this programme was restricted to the checks made by Clerk of the House and the Treasury Department[20]. There is no requirement, on individual Members or otherwise, to disclose to whom, or otherwise how, the funds are distributed; and, in practice, records are not kept (and, certainly, records are not kept that would enable a full audit to be performed).

5.10 A set of guidelines has been used since at least 2006[21]. These are scant. In short, they:

(vii) prohibit assistance being given to the Member himself or herself, spouse, parents, offspring and their spouses, and siblings and their spouses; any company in which the Member has a majority interest; any organisation not registered in the BVI or for projects outside the BVI where there is no BVIslander as a beneficiary; or members of staff of the House of Assembly[22];

(viii) require the setting up of a tracking system by the Clerk of the House to track duplicate requests[23];

(ix) require the lodging of a completed application form with the Clerk of the House for consideration under the Head and Subhead of Estimates approved by the Legislative Council (now, of course, the House of Assembly) and within the guidelines themselves, with the Clerk to inform the Member in writing of any further information required[24];

(x) require supporting documents with each application, with specific documentation for financial, education and medical assistance, respectively[25];

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[19] As their job is simply to process the payment, neither the Ministry nor the Treasury consider the merits of the application; but they may become involved if, e.g., there is a quarterly overspend, and they will return the submission to the Accounting Officer if there is an anomaly or something of concern, e.g. if the payment appears to be contrary to legislation or internal policies: Jeremiah Frett Third Affidavit dated 9 July 2021 paragraph 7; and T25 13 July 2021 pages 37-46. Glenroy Forbes, Mr Frett's predecessor as Financial Secretary, said that the Treasury Department could return a request to the Clerk of the House if it considered that it is "not a proper charge"; and the MoF (the first stop being the Budget Coordinator, but with the possibility of it being escalated up to the Financial Secretary) could be called upon to resolve any dispute: but Mr Forbes could not recall that ever happening in his time as Financial Secretary (T25 13 July 2021 pages 120-122).

[20] Some Members said they thought that these checks may go beyond merely checking that the documentation was complete, e.g. Hon Sharie de Castro T10 14 June 2021 page 166:

> "…[A]s from my understanding, the accounts team and the Clerk of the House of Assembly would inspect the request, and decide whether it is prudent that it moves forward…. [I]t is within the remit of the office that if it does not fall within the current construct of what is expected, that it can be denied".

Similarly, Hon Shereen Flax-Charles said that due diligence was made through the Clerk and Treasury checks (T10 14 June 2021 page 215). Hon Vincent Wheatley also suggested, although somewhat vaguely, that the Clerk of the House and Treasury had some role in considering the merits of an application when they process it against "the criteria" (presumably the criteria set out in the guidance referred to below) (T11 15 June 2021 pages 263-264). However, as indicated, the evidence of those involved (i.e. notably the Clerk and the Financial Secretaries) was clearly to the effect that no substantive checks are made.

[21] The Clerk of the House produced a copy of the guidelines: her Second Affidavit dated 25 June 2021 Exhibit PE2 pages 1-2. She said the guidelines and accompanying application form were in existence when she was appointed Clerk in 2009, the only change she had made being to add the box for a photographic identification on the application form (T26 14 July 2021 page 130). The distribution of the guidance to Members appears to have been somewhat hit-and-miss: Dr the Hon Natalio Wheatley said that he did not know that such a document existed, although he said that some of the guidance had in fact filtered through to him from the Clerk of the House and more experienced Members (T12 16 June 2021 page 213).

[22] Paragraphs 1, 2, 11 and 13.

[23] Paragraph 14.

[24] Paragraphs 15 and 16. Although the guidelines say that the application form as submitted to the Clerk should show that the application is within the guidelines themselves, as indicated above, the evidence was that the Clerk only checks the form, and not the substance, of the application.

[25] Paragraphs 3-8, and 17.

(xi) limit grants of monthly living allowance to $400, with a request that serious consideration be given to liaison with the SDD to ensure that (e.g.) a person is not left without any assistance in the event of a change of administration[26];

(xii) allow district office expenses of up to $24,000 for rent, staff and operating costs[27]; and

(xiii) allow district projects (apparently the original purpose), subject to those valued at over $7,000 being accompanied by Bills of Quantities approved by the Public Works Department ("the PWD")[28].

5.11 Whilst an applicant is able to apply to any District or Territorial Member, the overwhelming focus is upon a Member giving assistance to his or her constituents, so most successful applications are those made to the Member in whose District the applicant resides or to a Territorial Member. As the Clerk of the House put it: "[T]he funds are placed there for Members to assist their constituents where they can…"[29].

5.12 On the evidence given by Members to the COI, within the very wide discretion they are given to distribute the funds, it is clear (but unsurprising) that the approach is not consistent. Some referred to the burden placed on them to choose appropriate beneficiaries given the number of applicants and the amounts they seek (far greater than the money available), the width of the available discretion and the very limited guidance[30]. Most have a particular, personal focus to the grants they give[31]; but the examples provided show the wide (almost limitless) nature of the recipients and their requests[32]. In respect of the distribution of these grants, the discretion afforded to Members is, for all intents and purposes, unfettered.

The 2009 IAD Report

5.13 In May 2009, the IAD (then the Internal Audit Unit) produced an audit report in respect of the assistance grants made by Members of the House of Assembly, for the period 2006–2008[33]. The report had the following objectives:

> "5.1 To determine and define the purpose of the Assistance Grant Programme.

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[26] Paragraph 9.
[27] Paragraph 10.
[28] Paragraph 12.
[29] T26 14 July 2021 page 145.
[30] See, e.g. Hon Shereen Flax-Charles T10 14 June 2021 page 223; and Hon Alvera Maduro-Caines T11 15 June 2021 pages 59-60. On the other hand, Hon Neville Smith said that, in distributing his funds, he worked with other organisations, and did not consider it difficult (T11 15 June 2021 pages 120-121). There are also other examples of grants being awarded to an inmate at HM Prison to appeal his conviction and another grant being awarded to pay a court imposed fine for a criminal conviction. Both examples illustrate the unrestrained use of funds, as both awards were made on the basis of "financial hardship" (T22 6 July 2021 pages 69-70).
[31] See, e.g., T10 14 June 2021 page 164 (Hon Sharie de Castro), and T10 14 June 2021 page 214 (Hon Shereen Flax-Charles). Hon Shereen Flax-Charles said her focus is on young people (T10 14 June 2021 page 214); and Hon Alvera Maduro-Caines said her priorities are healthcare and education (T11 15 June 2021 page 61).
[32] In the evidence given to the COI, examples included trophies for school pupils (Hon Shereen Flax-Charles T10 14 2021 page 158), funeral grants (given by Hon Vincent Wheatley to the families of all those who die in his district: T11 15 June 2021 pages 260-262), school projects (Hon Neville Smith T11 15 June 2021 page 118), a pantry to feed hungry persons, a programme for single mothers, a programme to encourage people to be healthy, community garden and assistance with medical needs (Dr the Hon Natalio Wheatley T12 16 June 2021 page 211). Dr the Hon Natalio Wheatley also used the funds to pay for his constituency office (T12 16 June 2021 page 211). The 2009 IAD Report (referred to below) included an analysis of the distribution of the funds in the period 2006-08, and referred to the following further examples, namely grants to pay the costs of an appeal against conviction and (distinctly) a fine on a criminal conviction (both paid on the basis of "financial hardship": paragraph 7.10 of the IAD Report and footnote 30 above), and grants to pay debts owed to the BVI Government for water and income tax (paragraph 7.11 of the IAD Report).
[33] IAD Report, Assistance Grant Programme 2006-2008, dated May 2009. In this section of the Report, references to "IAD Report" are to this report. The current IAD Director Dorea Corea spoke to this report in her oral evidence at T22 6 July 2021 page 55ff; as did Wendell Gaskin, the Director of the IAD at the time of the report, at T27 15 July 2021 page 10ff.

5.2 To give assurance to the adequacy of the control systems in place to safeguard the programme from abusive practices.

5.3 To identify area or purpose for which the programme funds are most widely used.

5.4 To identify and assess the adequacy of the process of distributing funds from the programme."

5.14 The main conclusions of the IAD Report were as follows:

(i) In terms of purpose, the IAD Report said:

> "Based on the assistance offered by… already established programmes, the audit team is at a loss as to what necessitated the evolution of this programme from its original intent of facilitating minor district projects, to one whereby Elected Members are solely responsible for deciding who is granted funds from the programme."[34]

Other government agencies administered assistance programmes that were more objective and transparent[35]. In response to the question as to whether the scheme for Members' grants had simply evolved/changed without any real guidelines or criteria or review of what its purpose was, the IAD Director said: "It was dramatically so, yes. That was the situation[36]."

(ii) The guidelines, as agreed by the Members of the House (referred to above[37]), were "… grossly inadequate and therefore difficult to enforce, contradictory, and vague in most instances. As a result, necessary controls to ensure transparency and consistency within the programme are deficient"[38]; and, in any event, "[i]n [the] majority of cases, the guidelines are not enforced…"[39].

(iii) Although the guidelines required substantiating documentation, in most instances requests were not substantiated[40]. Of a sample of 2,912 applications, only 169 were found to have supporting documentation sufficient to justify the request[41].

(iv) There were examples of "unrestrained use" of the funds by Members, i.e. it was down to each individual Member to interpret the guidelines and use their discretion as to whether they would award a grant or not[42]. In terms of amounts granted:

> "The manner in which assistance is granted to applicants appears to be very subjective, in that it is not clear how Representatives determine the amount to be awarded to applicants requesting assistance".

In short:

> "… [I]t is the discretion of the [Member] to determine if the person will receive and how much the person will receive. It's at the [Member's] discretion"[43].

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[34] IAD Report paragraph 7.1.3: the programmes referred to are those in the SDD and MEC referred to in paragraphs 7.1.1 and 7.1.2 of the same report.
[35] IAD Report paragraph 1.1.6.
[36] T22 6 July 2021 page 58.
[37] See paragraph 5.10.
[38] IAD Report paragraph 1.1.1.
[39] IAD Report paragraph 7.5.
[40] IAD Report paragraph 1.1.2.
[41] IAD Report paragraph 7.8.
[42] T22 6 July 2021 page 70.
[43] T22 6 July 2021 page 76. The IAD Director said "Minister", rather than "Member"; but she later said that she meant "Member": T22 6 July 2021 pages 76-77.

(v) The Clerk of the House of Assembly was the relevant Accounting Officer[44]. However, she played no part in ensuring that the money was used properly[45]. As the IAD Report put it[46]:

> "The Clerk is the Accounting Officer for the House of Assembly. However, the Clerk lacks the necessary authority to make expenditure from this subhead without the express consent of the elected representative. This begs the question, as the Accounting Officer for the House of Assembly, where does the Clerk's responsibility and accountability end?"

The IAD clearly considered that, in practice, the express consent of the Member was both necessary and sufficient for payment to be made[47]. The report concluded that it had become the norm for Members of the House to approve requests without there being any real role for the Clerk of the House: the Clerk could not question approvals and the IAD Director considered that it was important that the Clerk understood his or her role as Accounting Officer as prescribed by the PFMA regime, and remained accountable for the funds for which he or she is entrusted as the relevant Accounting Officer. The Clerk was placed in an impossible position because, as Accounting Officer, she was accountable for the payments made; but, in practice, she was unable to question any payment which a Member required to be paid[48].

(vi) The budget for this subhead was determined by Members of the House of Assembly: there was no discernible correlation between funding and needs[49], e.g. by reference to historical trends. It was simply driven by the current administration's wishes: "… [N]eed isn't brought into the picture"[50].

5.15 The IAD Report recommended that consideration be given to transferring the funding for this programme to agencies which had already established assistance programmes that would be able to give the necessary level of transparency and consistency, with an appropriate distinct budget prepared for this programme with a view to it returning to its original purpose[51].

5.16 As shorter-term measures, eight further recommendations were made[52], including:

> "It is recommended that the present guidelines be revised by an independent body to eliminate any inconsistencies which may exist. It is further recommended that such guidelines be formally adopted by Cabinet to better regulate the use of this subhead in the long term[53]."

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[44] In accordance with the PFMA and PFMR (see paragraphs 1.48 and 1.165 above).

[45] T26 14 July 2021 page 142. In oral evidence, the Clerk confirmed that she was the Accounting Officer. She was aware that the IAD had recommended that the Clerk's role should be formalised and guided by the provisions of the PFMA and PFMR, but the Clerk confirmed that she had never been given further training as to her role as the Accounting Officer. That reinforces her earlier evidence above that she looks at the form of the application only, i.e. to ensure that the documentation is complete etc, not at whether a particular applicant should be granted assistance on his or her merits (see, e.g., T26 14 July 2021 pages 133–134).

[46] Paragraph 7.14, read into the COI record at T22 6 July 2021 page 71.

[47] Paragraph 7.18.2, read into the COI record at T22 6 July 2021 page 73. See also T22 6 July 2021 page 72.

[48] T22 6 July 2021 pages 73-74, and page 82. See also the IAD Follow-up Report, Follow-Up Audit Review Assistance Grant Programme 2006-2008 dated March 2011, which recommended that the Attorney General's advice be sought in relation to the perceived conflict that existed for the Clerk of the House of Assembly who was accountable for these payments over which she had no authority or control (dealt with by the IAD Director at T22 6 July 2021 pages 81-82). In this section of the Report, references to "the IAD Follow-up Report" are to this report.

[49] Paragraph 7.19, read into the COI record at T22 6 July page 74.

[50] T22 6 July 2021 pages 74-76, the quotation being from T22 6 July 2021 page 76.

[51] IAD Report paragraphs 8.1 and 8.2. The IAD Director said that she considered "it would be more beneficial and effective if you do that" (T22 6 July 2021 page 77).

[52] IAD Report paragraphs 8.3-8.10. The Director said that proving that the requests are legitimate by having applicants substantiate their need for assistance was key (T22 6 July 2021 pages 24-35).

[53] IAD Report paragraph 8.3.

5.17 The overall conclusions of the report were, in terms of governance, excoriatory:

> "9.1 The Assistance Grant Programme facilitated by the House of Assembly may prove to be a very effective tool in executing small district projects as originally intended. However, in its present state, the programme does little to develop the district but serves to provide general financial assistance to individuals for varied purposes. The programme is largely administered based on the individual will of Elected Officials. Being such, the need for accountability and transparency is greatly heightened. In its present state this programme is void of an adequate control framework, which leaves the programme susceptible to abusive and fraudulent practices, by both applicants and Elected Officials.
>
> 9.2 The funds disbursed from the assistance grants programme form a part of Government's budget each year, therefore any expenditure from this subhead must maintain the same level of documentary evidence as any other expenditure and must be accounted for in the same manner as expenditure for other subheads as per Public Finance Management Regulations 2005. As a matter of fact, because Elected Members are the sole determinants as to who is rewarded from this subhead, the level of accountability and transparency must be augmented to do away with any perception of malfeasance or impropriety. As it now stands, the manner in which the programme is administered leaves room for much speculation and possible incorrect perceptions about the programme. If one was to review the documentation on which assistance is given, and hold it against the most liberal of standards for transparency and objectivity, it would fail miserably. As a result, one can perceive the programme as one to provide legitimate assistance to constituency or equally a programme to compensate cronies and voters for their support and also to win over the electorate for the next election. Such perception left unchecked can seriously undermine the programme, as well as the Government."

This made clear that, in the view of the IAD, the level of governance in respect of these grants was minimal, so that they were "susceptible to abusive and fraudulent practices, by both applicants and Elected Officials", with the result that, although the grants could provide "legitimate assistance to constituency", they could equally be perceived as "a programme to compensate cronies and voters for their support and also to win over the electorate for the next election"[54]. Of course, in the absence of any sensible checks or records, it was impossible for the IAD to say whether particular grants were, in fact, dishonestly claimed and/or distributed.

5.18 The Management Response from the Clerk, on behalf of the House of Assembly[55], recognised the seriousness of the issues raised by the IAD Report. Whilst it did not agree to the recommendation that the relevant funds be transferred to programmes with established transparent and open procedures, it did agree that "clearly defined guidelines that would allow for transparency and consistency in administering the funds must be developed and

[54] That is, "political particularisation" or, as widely referred to in the US, "pork barrel" measures. In the US, a number of features of pork barrel measures have been identified as characteristic, e.g. that funds are allocated through the appropriations process into the control of a (usually, elected) public official who is given sole and broad discretion in determining how the funds are expended, with guidelines on how the funds should be spent being either non-existent, or vague and/or very broad. Projects or schemes so funded are intended to benefit a particular constituency or otherwise assist the political aspirations of the dispensing official and/or his political allies. As the term is popularly used in the US, it often involves collusion between the legislature and the executive arm of government to appropriate public funds to determine its distribution as political largesse using unchecked discretionary powers.

[55] T26 14 July 2021 page 137.

implemented. Also… allowing monitoring to be done consistently and transparently". It was also agreed that an independent body would be set up to redraft the guidelines. That was all to be done by the Clerk of the House with an expected completion date of 10 months[56].

5.19 The Clerk of the House, therefore, appears to have appreciated the validity of the serious concerns raised in the IAD Report, including the inherent risk of abuse and fraud given the manner in which the grants were distributed. However, when the Clerk raised these issues at an informal meeting of the Members of the House of Assembly, she said that the Members were unwilling to reform the programme as the IAD Report recommended (or, it seems, at all). The Members regarded the money allocated to each of them as "their" money: the Clerk said the response by Members was, "[E]ven though she's the Accounting Officer responsible for the funds, the Clerk does not dictate what I do with my money"[57]. Glenroy Forbes[58] said that, during his time as Financial Secretary, he encouraged Members of the House of Assembly to set up better guidelines as to how this money should be disbursed, but without any reform of the guidelines being instigated[59].

5.20 There was a follow-up report by the IAD in March 2011[60], which reported that, of the 10 recommendations in the earlier report, none had been implemented. The only reason given was that addressing the weaknesses in the current guidelines "has not been accomplished due to lack of cooperation from some Members of the Assembly"[61]. As the report said: "Such an environment increases the likelihood of impropriety"[62].

5.21 The follow-up report pressed hard (in the form of a renewed "high" recommendation) for the recommendations provided in the original report to be implemented expeditiously[63]. Other recommendations in this further report included:

(i) that the Clerk of the House establish documentation standards and requirements, and that a system be put in place to verify the information provided by an applicant[64]; and

(ii) that, in respect of the Clerk's position, (a) the Clerk be guided in her role as Accounting Officer by the relevant provisions of the PFMA and the PFMR[65], and (b) the advice of the Attorney General be sought in respect of the apparent conflict that exists where the Clerk of the House as Accounting Officer does not, in practice, have authority over the assistance grants funds[66] (a tension which the Clerk herself appreciated[67]).

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[56] Memorandum Clerk of the House to the IAD Director dated 8 September 2009 enclosing the Management Response.
[57] T26 14 July 2021 page 144.
[58] Mr Forbes has had a long career in the Public Service beginning with his qualifying as a teacher. His time in the Public Service has been interspersed with periods of study and working in the private sector. He holds a degree in Social Sciences and a Master's Degree in Economics, and is also a Barrister. Mr Forbes was appointed Deputy Financial Secretary in 1986. He has served as Financial Secretary three times, from 1992 to 1998, 2002 to 2005 and most recently from 2017 to 2020 (T25 13 July 2021 pages 110-111).
[59] T25 13 July 2021 pages 119-120. Mr Forbes recalled having discussions with Members in respect of "issues as to whether a Member can give assistance to his immediate family" (T25 13 July 2021 page 123) which perhaps also reflects the more general approach of Members to assistance grants and the recommendations of the IAD Report.
[60] That is, the IAD Follow-up Report (see paragraph 5.14(v) and footnote 48 above).
[61] IAD Follow-up Report page 3, reiterated by the IAD Director in her oral evidence at T22 6 July 2021 page 80 and confirmed by the Clerk of the House in hers at T26 14 July 2021 pages 7-10. As the IAD Director said in her evidence, as there was no IAAC in place at the time, so there was no way in which the IAD recommendations could, in practice, be pursued (T22 6 July 2021 pages 84 and 89-90).
[62] Paragraph 1(c).
[63] IAD Follow-up Report page 5 (paragraph 1).
[64] IAD Follow-up Report page 4.
[65] IAD Follow-up Report page 5 (paragraph 3).
[66] IAD Follow-up Report page 5 (paragraph 2).
[67] T26 14 July 2021 page 143.

5.22 The then Speaker of the House of Assembly, Hon Roy Harrigan, responded to the IAD Follow-up Report by a letter to the IAD Director Wendell Gaskin dated 19 May 2011. He expressed concern about the IAD performing an audit of the accounts of the House at all; but, leaving that to one side, the substance of the response was as follows:

> "In 2005, the Assistance Grant Programme was expanded to include persons experiencing certain hardships. Along with this expansion, Members felt that they have a good idea of what happens in the community. Members reported that they use their discretion to give funds after hearing from the applicants. Furthermore, Members said they are at a loss to perceive what mischief is being corrected by the recommendations in the reports.
>
> There is general sentiment among Members that there is no impropriety as far as they are concern[ed] and that the assistance Grant Programme is being handled the way they want it done…".

Thus, the Members of the House of Assembly were, at least, insensitive to the lack of governance in respect of these grants of which they were made fully aware by the IAD Report. Having been made aware of them, they deliberately closed their eyes to the risks of the dishonest application of grants.

5.23 The IAD Director responded by letter dated 27 May 2011, saying that:

> "Contrary to the Members' assertion that disbursements from the fund are discretionary, this assertion is invalid since disbursements should be guided by the guidelines produced by the House of Assembly…
>
> The most troubling aspect of your letter is that Members believe that the 'Assistance Grant Programme is being handled in the way that they [the Members] want it done'. We staunchly disagree as the disbursement of public funds is governed by the Public Finance Management Act and Regulations. Although the law does not explicitly bind the Members of the House, the Accounting Officer for the House of Assembly, who approves the disbursements, is bound by the standard set forth therein…".

He concluded:

> "In closing, it would be enlightening to know what conditions must exist that would warrant an overhaul of the Assistance Grant Programme? Would it not be more prudent to correct the issues as identified by being proactive rather than reactive? We hope that this letter is received with the sentiment in which it is sent and that it clarifies any misconception that the Members may have as it relates to our authority and to the Audit of the Assistance Grants Programme. It is our hope that the recommendations provided will now be accepted and implemented."

5.24 There was no further correspondence between them on these issues[68]. The fact that Members failed to cooperate with the Clerk of the House to address her concerns over the weaknesses in the guidelines meant that the absence of transparency, effective control or other principles of good governance was entrenched into the system[69].

[68] T27 15 July 2021 page 29 (Wendell Gaskin).
[69] IAD Follow-up Report page 3, reiterated by the IAD Director in her oral evidence T22 6 July 2021 at page 80 and confirmed by the Clerk of the House in hers T26 14 July 2021 pages 7-10. As the IAD Director said in her evidence, as there was no IAAC in place at the time, there was no way in which the IAD recommendations could in practice be pursued.

5.25 It remains entrenched. There was no evidence that the way in which the assistance grants are allocated by Members of the House of Assembly, and are administered, has changed since the IAD Report. Indeed, despite the COI raising these issues, neither the elected Ministers nor the other elected Members of the House of Assembly suggested that they were willing to consider any changes or review the way in which these grants are distributed.

Concerns

5.26 On the basis of the evidence, assistance grants are distributed by Members of the House of Assembly in a legally arbitrary and unlawful manner. There are almost none of the basic rudiments required for a lawful scheme. For example, there is no adequate policy guidance for the exercise of discretion by Members of the House in respect of the distribution of grants. As the IAD Report concluded, the guidelines that do exist are not published and are clearly inadequate – no one has suggested otherwise – but, in any event, not all Members were aware of the guidelines and, for those who were aware of them (the vast majority of Members), the guidelines are not always complied with, and, where they are, they are applied in different (subjective) ways. No sensible records are kept of the applications, or specifically of the grounds on which an application is made. Many applications are made without adequate supporting documentation. No reasons are given for granting or refusing an application. There is no mechanism for reviewing or otherwise challenging the refusal of an application. The Clerk of the House, as Accounting Officer, is responsible for the public expenditure under the PFMA regime; but is left unable to ensure that the grants are even compliant with the relevant guidance (such as it is) and are for the public good. The lack of records makes the grants largely unauditable, in the sense of checks being made as to how public money has been used. Information is not shared with government departments, which are responsible for other assistance programmes.

5.27 Thus, on the evidence, the discretion in Members as to whom the recipients are, and how much they should receive, appears to be effectively unfettered.

5.28 These apparent deficiencies in the scheme are systemic, in the sense that they have been maintained by various administrations over the years; and, although the Clerk to the House of Assembly has apparently failed to comply with her PFMA obligations, the deficiencies cannot be said to lie at the door of specific elected public official(s). Members of successive Houses of Assembly, and of successive elected Governments, knowing of these deficiencies and the risk that they posed, have singularly and quite deliberately failed to address them (and have failed even to seek to do so).

5.29 Consequently, the concerns were raised in a COI letter to the Attorney General dated 21 September 2021[70], as follows:

> "On the available evidence, it appears that:
>
> 25. The uses for which elected members have and can award grants are now far outside the programme's original intention.
> 26. The guidelines being applied are not fit for purpose.
> 27. Elected members have refused to amend or even review the guidelines, despite having had their limitations and deficiencies identified to them.

[70] Letter COI to Attorney General dated 21 September 2021. The concerns quoted were set out in an appendix to the letter, with the evidence upon which each concern was based.

28. Following the Internal Auditor's Follow-Up Audit Review of 2011, elected members failed to cooperate with the Clerk of the House to address her concerns over the weaknesses in the guidelines, with the consequence that the absence of effective control or transparency was entrenched into the system.

29. The result is that elected members have in effect complete discretion as to the sums they award and the use to which they put the sums allocated to them. Some elected members have made grants without even appreciating that guidelines exist. Such an approach does not make for consistent or even lawful decision making.

30. The interests of individual members and the absence of effective guidance means that members may make decisions based on different (including subjective) criteria. Again that leads to inconsistent and potentially unlawful decision making.

31. The system does not operate in such a way as to promote accountability and transparency:

    (i) A substantial proportion of grants are made without any or, at least, any sufficient supporting documentation.

    (ii) No records or, at least, no adequate, records of the grants made are kept.

    (iii) No information is provided to the public as to the nature of the grants made by elected members.

    (iv) Information concerning the grants made is not shared with other bodies (for example Ministries) responsible for providing assistance.

    (v) Whilst it is possible for an applicant to apply to a Member who is not the Member for his or her District or a Territorial Member, in practice, a Member overwhelmingly makes grants to his or her constituents.

    (vi) There is no means of appeal against or independent review of the decision of a member to refuse an application for a grant.

32. The system does not require reasons for a refusal or grant to be given. Nor does it incorporate a viable mechanism (for example a means of appeal) for reviewing the decision making that leads to a grant being refused. There is therefore no disincentive to arbitrariness.

33. The system does not allow the Clerk to the House of Assembly to properly meet her obligations as the relevant Accounting Officer. In practice, her role and that of her staff (and indeed the Treasury when it issues the cheque) is limited to reviewing the form of an application and not its merits. Accordingly, the distribution of funds is driven solely by individual elected members. The Accounting Officer is left in the position where she is estopped or otherwise prevented from acting in accordance with the principles of the Public Finance Management Act.

34. Although each Member is granted a fixed amount to distribute for the year (allocated in quarterly tranches), if there is overspend, Cabinet can (and does) put forward a supplementary allocation which can be (and invariably is) voted through by the House of Assembly. There is consequently, in practice, no limit to the grants that may be made.

35. The sum available to elected members to distribute in 2019, an election year, was increased substantially.

36. Given the existence of various programmes established by the legislature (notably the Social Assistance Fund) which incorporate a proper and justifiable assessment process, there is no rational justification for the continuation for this programme.

37. Given the lack of effective guidance, the absence of any effective fetter on the exercise of discretion, the lack of transparency, the lack of a proper audit trail, that members can choose who or what to support, the system lacks sufficient safeguards to prevent abuse."

5.30 The letter emphasised that the overarching concern was not that these related to the actions or decisions of individual Members of the House of Assembly (whether past or current) or of individual Ministers (whether past or present); but, rather, it related to the system as it has been and is operated. Accordingly, the letter invited the Attorney General, as the legal adviser to the House of Assembly and to government bodies including Ministries, to make legal submissions on whether, having regard to the available evidence, it was accepted that the assistance grants programme operates in a manner which is legally arbitrary; and, if that proposition was not accepted, then the basis on which it was said that this programme is operated in a manner consistent with public law principles.

5.31 The Attorney General declined the opportunity to make any submissions on these issues[71].

5.32 Whilst, no doubt, most of the millions of dollars that are distributed in this way go to those whom the responsible Member believes are worthy, the lack of governance – including the lack of checks, balances and even records – is very troubling indeed, for the following reasons.

(i) Whilst, for some Members and in some circumstances, assistance grants are no doubt regarded as fulfilling some "need", this (however defined) is not a criterion; when considered, "need" is always subjectively assessed without consideration of any objective criteria; need is not always obviously present (e.g. in respect of Members who use a grant to fund their own office); an applicant does not have to evidence need; and no record is kept of the basis of the application and/or why a grant is awarded. Similarly, available wealth (in terms of income and assets), or ability to pay, is not a criterion. There is no guidance as to how these grants fit with assistance programmes such as the SDD's Public Assistance Programme, which is based on an assessment of need and income/assets. Whilst I am sensitive to the fact that conditions and circumstances in the BVI might make alternative ways of doing things appropriate, no one has suggested (either to the COI, or to the IAD Director as part of the IAD Report process or follow-up) a reason based on the public interest for allowing elected public officials to distribute public money as they wish by exercising what is tantamount to an unlimited discretion. Indeed, it is difficult to think of any such possible reason. Given the existence of various programmes established by the legislature which incorporate proper and justifiable assessment processes, there appears to be no rational justification for the continuation of this programme in the way it is currently operating. As I have indicated, the Attorney General declined the opportunity to suggest any possible legal justification. No one else suggested that there is any proper justification.

(ii) Given the lack of effective guidance, the absence of any effective fetter on the exercise of discretion, so that a Member can choose who or what to support and the amount of any support, the lack of any form of openness or transparency and the lack of any monitoring or proper audit trail, the system lacks any real safeguards to prevent abuse.

(iii) Whilst it is possible for an applicant to apply to a Member who is not his or her District Member or a Territorial Member, in practice, a Member overwhelmingly makes grants to his or her constituents, i.e. those who have the right to vote for him or her at an election.

[71] Nor did the Attorney General or the elected Ministers address any issue relating to these grants in their closing submissions (Summary of Submissions on behalf of the Attorney General and the Elected Government dated 22 November 2021 ("Elected Ministers' Closing Submissions")).

(iv) Although each Member is granted a fixed amount to distribute for the year (allocated in quarterly tranches), if there is overspend, the Cabinet can (and does) put forward a supplementary allocation, which can be (and invariably is) voted through by the House of Assembly[72]. There is, consequently, in practice, no limit to the grants that may be made.

(v) The sum available to elected Members to distribute in 2019, an election year, was increased substantially. That was, of course, well before the COVID-19 pandemic began.

(vi) The Clerk of the House, as Accounting Officer, has obligations of accountability under the PFMA regime, which she does not (and, in the light of the Members' attitude, cannot) fulfil. No one has suggested any good reason for this continuing default; but the Members of the House of Assembly, past and present, have put her in an impossible position, because of the imbalance of power in practice between them and her. The Clerk has made her wishes known that policy guidance should be adopted if the system is to continue; but she has given up trying to change the current way in which distribution of these grants is made. Sympathise with her as I do, it is clearly arguable that she is acting unlawfully, and has been knowingly doing so since at least the 2009 IAD Report. However, given my recommendations below as to auditing past grants and ceasing future grants, and the patently difficult position into which she has been placed by Members of the House, it is unnecessary for me to draw any definite conclusions in relation to the Clerk of the House; and I draw none. Whether any action against her in the circumstances would be in the public interest is a question I leave to the relevant BVI authorities to consider.

(vii) The deficiencies in governance – and the corresponding risk of abuse of the system – have been well known to successive Houses of Assembly and elected Governments for many years. The 2009 IAD Report made both lack of governance and the consequent risks very clear. Even in that knowledge, both Members of the House and elected Governments (who have a majority, and often a substantial majority, in the House) have persistently and steadfastly refused to take any steps to make assistance grants transparent and open. No argument has been put forward, to either the IAD in 2009-11 or to the COI, as to any legitimate public benefit that might accrue from the system as it currently stands. It has not been put forward in relation to discretionary assistance grants, but it would not be an argument in favour of the current system that the elected public officials know their constituents (or, alternatively, know everyone in the Territory). If anything, that is a point against the maintenance of a system reliant on the exercise of unconstrained discretion.

(viii) On the evidence, the system appears to be clearly unlawful; and successive Houses of Assembly and elected Governments have willingly and knowingly allowed it to continue as such. They are aware that, in so doing, the risk of dishonesty by applicants and/or elected Members themselves is vastly increased; and it is highly unlikely that any dishonesty would be detected, given that (i) the Clerk of the House of Assembly is denied any opportunity to perform her function under the PFMA regime to ensure proper expenditure of public money, (ii) there are no other checks of any substance, and (iii) the lack of an audit trail means that a full audit of the expenditure is impossible.

[72] See paragraph 5.6 above.

(ix) Whilst again it has not been suggested that this is the case, these grants are not arguably administered as they are because of any lack of capacity within the Public Service. Indeed, the consistent line taken by Members of the House of Assembly, informed of the deficiencies and the risks, is that they wish to continue to distribute money in this way; and by successive elected Governments that they wish to maintain this system and take no steps to change it. It has not been suggested, by the elected Ministers or anyone else, that these assistance grants should be abandoned, or the process by which they are distributed should be reconsidered/reviewed in any way.

5.33 Whilst it would be frankly surprising if some of these grants were not dishonestly sought and/or granted – there is simply nothing to prevent or discourage such conduct – the absence of records etc alone makes it impossible for me to say that any particular Member of the House has been guilty of dishonesty in public office. However, the risk of dishonesty is clear and obvious; it has been, and is well-known, to past and current Members of the House of Assembly; and they have steadfastly refused to take steps to address that risk. They appear to be content to allow the conditions that give rise to that risk to continue indefinitely.

5.34 That is particularly worrying. On the evidence that has been produced to the COI, no good reason has been put forward (or is apparent) for maintaining the system as it currently operates. However, as the IAD Report indicated, one reason why Members might wish to maintain this system of distributing money, predominantly to their constituents, is that this is a form of political particularisation[73] with money being distributed to reward and/or encourage political support. Whilst I hasten to emphasise that this is not a "burden of proof" point, the fact is that other than the mere assertions of Members, there is nothing before me – no evidence, and certainly no compelling evidence – to show that they are not so used, which is, of course, itself a result of a lack of governance procedures. That public money is given to all Members, irrespective of party, does not make the unconstrained and unmonitored grants of public money any the less concerning. Public money is allocated for the purpose in the budget by Cabinet, as then approved by the House. The system is maintained by an elected Government and a House of Assembly, which (particularly in recent years) has been dominated by the elected Government. A disproportionate benefit, therefore, accrues to the elected Government and its party.

5.35 In the circumstances, it is open to me to find (and I am driven by the evidence to find) that, in relation to these assistance grants, there is information before me that corruption, abuse of office or other serious dishonesty, in relation to elected public officials, may have taken place in recent years; and that the conditions that allowed any such dishonesty have not changed. It is unnecessary for me to identify any particular elected officials in relation to whom such dishonesty may have taken place.

5.36 This consequently falls within paragraph 1 of my Terms of Reference; and the conditions which allowed the relevant conduct to take place still exist. Unless steps are taken, I consider that those conditions are highly likely to continue indefinitely. As I have indicated, no one has suggested that any such steps will be taken without intervention. Indeed, the evidence is firmly the other way.

5.37 Looking constructively at the future, in my view, there should be a wholesale review of the BVI welfare benefits system. It seems to me that, insofar as these grants are used for welfare purposes – and, whilst many are made to those whom the Members consider have some sort of need, some are clearly not made for welfare purposes – then it is wrong, in principle, that

[73] See paragraph 5.17 and footnote 54 above.

a significant component of such a system is comprised of grants made by individual elected public officials in their (effectively unconstrained) discretion such that they are not required even to consider the need or available funds of any applicant.

5.38 If and insofar as that review concludes that there is some public benefit to having public funds allocated to local, district projects, then consideration should be given to (i) having clear and published criteria by which such potential projects are assessed for public assistance, (ii) an open and transparent process for the proper recording, assessment and monitoring of projects, and (iii) the assessment and monitoring being made, not by (or just by) elected public officers, but by a panel including members of the relevant district community. However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced by the change of system to one that is more open and transparent. Transitional provisions may be required.

5.39 In the meantime, there appears to be no proper basis for the continuation of discretionary grants by elected public officers in the form they are currently made. I therefore agree with the IAD Director that, without prejudice to any new scheme that may take its place following the review I have proposed, these grants should cease forthwith. The funds that have been allocated to such grants can be reallocated to the SDD for distribution, on application, in accordance with its criteria for the distribution of benefits (which it may wish to consider revising, in light of the proposed transfer of funds). The SDD should be able to make an assessment of individuals who claim that immediately to revoke discretionary assistance granted to them in the past by elected political officials would result in particular hardship and/or unfairness.

5.40 With regard to past grants, in my view, there should be an independent audit of all grants made by Members of the House of Assembly for the last three years. Whilst I appreciate the difficulties of such an audit in circumstances in which there is a dearth of documentation, an independent audit enquiry should enable any further appropriate steps, such as a criminal investigation, to be identified and taken.

Government Ministries' Assistance Grants[74]

5.41 In addition to the discretionary grants made by Members of the House of Assembly as described above, government Ministries and departments also make assistance grants.

5.42 These were the subject of a separate IAD audit of the five years to 2014 in a draft report dated August 2014[75]. Five Ministries (including the Premier's Office) then made such grants, with a total budget of about $3 million per year[76]. The objects of the audit were:

(i) to give assurance to the adequacy of control systems in place to safeguard disbursements from abusive practices; and

(ii) to assess the disbursement process for appropriateness, equity and efficiency[77].

[74] As with assistance grants distributed by Members of the House of Assembly (above), the means by which grants distributed by Ministers are sometimes referred to as a "programme"; but, again, given the lack of coherence in these grants, I have generally avoided using the term. As will be apparent from the narrative of this section, in reality, these grants are distributed by Ministers at their (effectively unfettered) discretion.

[75] IAD Report: Government Ministries – Assistance Grants Programmes dated August 2014. In this section of the Report, references to "IAD Report" are to this draft report.

[76] For example, in the 2009 Budget Estimate, $3,237,000 was allocated: see IAD Report paragraph 9.1.

[77] IAD Report paragraph 3.1.

5.43 The audit conclusions largely reflected those of the earlier audit in respect of the House of Assembly Members' assistance grants.

5.44 The report found that the purposes of the two types of grant (House of Assembly Member and Ministerial) coincided, except a Ministry's grants were, in most cases, based on the subject matter of that Ministry (e.g. the MEC administered assistance for educational and cultural purposes) whilst House of Assembly Members' grants encompassed all subjects (including, e.g., education and culture). For the most part, the report found that there appeared to be clear duplication between the "programmes"[78].

5.45 It concluded that there were more or less the same inadequacies in the control systems to safeguard against abuse as there were with House of Assembly Members' grants, with the unfettered discretion lying with the relevant Minister:

> "9.4 For each of the Assistance Grants Programmes reviewed, it was observed that Ministers have ultimate authority to approve requests for assistance. Permanent Secretaries/Accounting Officers although vested with the responsibility, by law, to manage and account for the funds allocated to the various programmes have little to no involvement in the approval or denial of the assistance. Unfortunately, this situation thrusts Permanent Secretaries in a compromising position whereby they are accountable for funds for which, in essence, they lack the necessary authority to approve or deny expenditure without the Minister's approval. This, in turn, misrepresents the role of the Accounting Officer.
>
> 9.5 The audit revealed that there are no formal procedures in place within the Ministries for requesting assistance. Letters are accepted by all Ministries to substantiate requests for assistance. However, these letters are generic in nature and provide little documentation/information to support the request. Some Ministries, depending on the request, indicated that they would require individuals to submit additional information. However, this does not occur in all cases and is not mandatory, as was evident from the documentation reviewed. Therefore, the Audit could not find any objective basis on which assistance was being approved and denied[79].
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> ....
>
> 9.12.2 Grant award amounts are determined on a discretionary basis…
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> …
>
> 9.13 Assistance Grants Programmes are not monitored or evaluated to determine their effectiveness and efficiency. Goals and objectives were not created for any of the programmes and as such monitoring of their performance in the achievement of such objectives is not conducted. Similarly, no performance measures have been developed, such as processing time, to rate the efficiency of the programme.
>
> …
>
> 9.16 From interviews conducted, it was revealed that the amount of assistance to a single applicant is left to the Minister's discretion. The Minister determines the amount deemed suitable based on the need for the assistance and the amount

[78] IAD Report paragraph 9.2.

[79] Generally, an application was by way of letter, which was passed by the Permanent Secretary to the Minister who would make a decision which the Permanent Secretary would be required to effect (T22 6 July 2021 page 100). No objective basis on which assistance was granted or denied was found (paragraph 9.5 of the report, read into the COI record at T22 6 July 2021 page 99). The payments were, therefore, made entirely in the discretion of the Minister.

being requested. It was revealed during testing that some applicants received one hundred per cent (100%) of their requests while others received only ten per cent (10%) of the amount requested. No criterion was found being used to determine how much assistance would be awarded in response to each request. It was conveyed that at times meetings may be held between the applicant and the Minister to assist in understanding and determining an amount to approve in response to a particular request, but no documentation of these meetings was found on the files reviewed. The lack of such information removes transparency and equity with reference to the decisions made. Additionally, the absence of clear standards and criterion in approving assistance grants has the potential for the programme to be viewed as unfair and nontransparent."

5.46 In most cases, the IAD Director said, there was no documentation to support a request; and so, as to amount, you "unilaterally would have the discretion of the Minister being applied"[80], with the relevant Accounting Officer (in this case, the relevant Permanent Secretary) simply receiving an instruction to make payment[81]. In addition, there was no monitoring of repeat applications[82] or of progress[83]. There was no discussion in Cabinet as to how these various types of grant should be administered[84].

5.47 Furthermore, the discretion was, at times, exercised to circumvent the Ministry's own policies. An example is given of a student who failed to maintain an adequate grade point average so his regular scholarship from the Ministry was withdrawn; but a request for assistance by way of a discretionary grant was made and approved in the sum that the student would have received under a scholarship ($9,000)[85].

5.48 The IAD Report concluded:

> "11.1 The Assistance Grants Programme administered by various Ministries is largely administered at the sole will of the respective Minister. In their current state these programmes lack adequate controls to safeguard them against abusive practices….[86]
>
> …
>
> 11.3 These programmes provide a necessary support for individuals who may not be able to obtain the services without their assistance. However, Ministries need to exercise special care to ensure that the process is fair of biases and provides all eligible persons with the opportunity to obtain the help they require. We are aware that due to the limited availability of funds it will not be possible for Government

[80] T22 6 July 2021 page 110.
[81] Thus being in a similar position to the Clerk of the House of Assembly in respect of the Members' assistance grants (T22 6 July 2021 pages 98-99; and paragraph 5.14(v) above). Dr Orlando Smith, Premier and Minister of Finance 2011-19, said that, before a grant was made, a Minister would always discuss it with the relevant Accounting Officer (usually the Permanent Secretary) (T24 8 July 2021 page 29). As with House of Assembly grants, there was no system to measure the extent (if any) to which the objective of the programme was being met (T22 6 July 2021 page 103).
[82] IAD Report paragraph 9.10. As a result, students even received grants from different programmes within the same Ministry, and repeat grants (some in the same year). Dr Orlando Smith confirmed that, although there were informal discussions between Ministers, there was no process in place to avoid duplication (T24 8 July 2021 page 30).
[83] IAD Report paragraph 9.11.
[84] T24 8 July 2021 page 31 (Dr Orlando Smith).
[85] IAD Report paragraph 9.12.5, also considered at T22 6 July 2021 pages 107-109 as showing the consequence of not monitoring the programme in operation.
[86] In the IAD Director's view, the result was that, as with assistance grants by Members of the House of Assembly, it is up to the Minister's unfettered discretion as to who gets an award and how much on the basis of criteria which are unpublicised (T22 6 July 2021 page 110). The process was consequently "not transparent and not auditable" (T22 6 July 2021 page 111). The IAD Director considered that, as with the Members' grants, the better course would be to have "a single transparent process to apply across all grants programmes" (T22 6 July 2021 pages 100-101).

to assist all persons, ensuring that processes are fair, lucid, and that guidelines are in place to guide decision makers in making decisions and add greater value to the programme and its administration will help to ensure that the programmes are guarded from abusive and fraudulent practices that can create negative perceptions in the public's eye."

5.49 The draft report was sent to all Ministries[87]. There was no Management Response from any of them. There was, at that time, no IAAC to seek a response or encourage compliance with the (10) recommendations. Therefore, despite ranging over five Ministries (including the Premier's Office), this report has been "shelved", i.e. it has been left "sitting on the shelf"[88].

5.50 Glenroy Forbes said that, when he returned as Financial Secretary in 2017, he was aware that concerns had been raised in respect of this grants programme, but he could not recall specifics[89]. He said that, once the appropriation had been made by the House of Assembly, it was for the MoF to become involved if there was an appearance of misappropriation, i.e. that the funds were being spent for purposes for which they were not intended[90]. There is, therefore, theoretically a mechanism by which the MoF can get involved; but there is no evidence that it has ever proactively taken steps (or even considered taking steps) to investigate or enforce this in order to ensure that Ministers use the programme either consistently or fairly.

5.51 There are therefore, in practice, no checks or balances in respect of the exercise of essentially an unfettered discretion in the hands of relevant Ministers to make grants.

Concerns

5.52 The concerns in respect of Ministries' assistance grants are essentially the same as those over the House of Assembly Members' grants described above[91], notably (i) grants are ultimately made at the unfettered discretion of the individual Minister, (ii) the grants are not administered effectively (e.g. little or no evidence is required to substantiate an application) with the consequent risk that the programme is open to abuse, and (iii) Permanent Secretaries are placed in difficulty in terms of fulfilling their obligations as the relevant Accounting Officers.

5.53 These apparent systemic deficiencies were addressed in the same letter dated 21 September 2021 to the Attorney General, as the legal adviser to the House of Assembly and to the Government, which dealt with the deficiencies in the House of Assembly Members' programme[92]. The Attorney was given an opportunity to make submissions on the legality and propriety of the Ministries' grants programme in the same terms as she was given in relation to the Members' programme. She declined to make any submissions[93].

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[87] T22 6 July 2021 page 115. The Premier at the time, Dr Orlando Smith, said that he did not see the report: he said it was for the appropriate public officer (usually the Permanent Secretary) to respond to the draft (T24 8 July 2021 page 26), although he could not explain why it was not at least brought to his attention (T24 8 July 2021 page 27, and page 31).

[88] T22 6 July 2021 page 114. As with regard to the concerns raised in relation to the House of Assembly Grants, the IAD Director said in her evidence, as there was no IAAC in place at the time, there was no way in which the IAD recommendations could, in practice, be pursued (T22 6 July 2021 pages 84 and 89-90).

[89] T25 13 July 2021 page 124.

[90] T25 13 July 2021 page 125.

[91] Paragraphs 5.26-5.40.

[92] See paragraphs 5.29-5.31 above.

[93] Neither were submissions made by the Attorney General in the Elected Ministers' Closing Submissions.

5.54 On the basis of the evidence received, as the IAD Report found, there are no formal procedures or criteria in place in respect of these grants, which risks decisions being made on an inconsistent and unlawful basis utilising variable subjective criteria[94]. These awards, too, are ultimately at the unfettered discretion of the individual Minister without any sensible internal or external checks or balances to prevent the risk of abuse[95]. The inadequate records of these grants make them, too, effectively unauditable.

5.55 For the same reasons as set out above in respect of administration of House of Assembly Members' assistance grants, on the evidence, it appears equally clear that the process in respect of the Ministerial grants is unlawful; and successive elected Governments have willingly and knowingly allowed it to continue as such. They are aware that, in so doing, the risk of dishonesty by applicants and/or Ministers themselves is increased and, given that grants cannot be sensibly audited, it is unlikely that any dishonesty will be detected.

5.56 Again, the absence of records etc. makes it impossible for me to say that any particular Minister has been guilty of dishonesty in public office. However, on the evidence, it is open to me to find (and I do find) that, in relation to Ministerial assistance grants, there is information before me that corruption, abuse of office or other serious dishonesty in relation to elected public officials may have taken place in recent years; and that the conditions which allowed that corruption, abuse of office or other serious dishonesty to take place may still exist.

5.57 As for steps which I consider should be taken, these very much coincide with those I have made in relation to the House of Assembly Members' Assistance Grants. In my view, Ministerial Grants should form part of the wholesale review of the BVI welfare benefits and grants system to which I have already referred[96]. The fact that there has been considerable overlap between the scope of various grants has been something which the IAD pointed out some time ago: particularly in a territory with such a small population as the BVI, available public money for grants should (and can) be considered as a coherent whole. Again, it is wrong in principle that such a system has, as a significant component, grants made by individual Ministers in their discretion such that they are not required even to consider the need or available funds of any applicant.

5.58 The benefits of (e.g.) publicly funded scholarships – benefits not only to the individual recipients, but also to the BVI public at large – are obvious. I would fully expect that review to conclude that there is some public benefit to having public funds allocated to grants for educational scholarships etc. If, and insofar as, it does, then I recommend that consideration be given to (i) having clear and published criteria by which applications for such grants are assessed for public assistance, (ii) an open and transparent process for the proper recording, assessment and monitoring of applications and grants, and (iii) assessment and monitoring being made, not by (or just by) elected public officers, but by a panel including appropriate members of the community.

5.59 However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced in (e.g.) their education by the change of system to one that is more open and transparent. Transitional provisions may be required. Funds that have been allocated to such grants can be reallocated for distribution through such transitional provisions, before any new more permanent system is set up.

[94] IAD Report paragraph 9.5; and T24 8 July 2021 page 30 (Dr Orlando Smith).
[95] IAD Report paragraphs 9.4, 9.6 and 11.3; and T22 6 July 2021 page 110 (IAD Director).
[96] See paragraph 5.37 above.

5.60 In the meantime, there appears to be no proper basis for the continuation of discretionary grants by elected public officials in the form they are currently made. I, therefore, consider that, without prejudice to any new scheme that may take its place following the review I have proposed and/or any transitional provisions, these grants should cease forthwith.

5.61 With regard to past grants, as with House of Assembly Members' Assistance Grants, despite the challenges posed by the lack of documents etc, I recommend that there should be an independent audit of all grants made by Ministries for the last three years.

COVID-19 Assistance Grants: House of Assembly Members' Grants

The Scope of the Grants and Process

5.62 In addition to the assistance grants referred to above, the emergence of COVID-19 led to Members of the House of Assembly being allocated further funds in 2020. Over and above the additional sums allocated to the House of Assembly Members' Assistance Grants referred to above (including the additional sum of $100,000 per member allocated in November 2020)[97], on 28 May 2020, as part of a more general public statement on the initiatives which were to form Phase II of the BVI's Government's response to COVID-19, the Premier pledged that each Member would be given a separate allocation of $300,000 specifically to assist with the consequences of coronavirus. The use of this separate allocation was to be audited by the IAD on a monthly basis[98].

5.63 Glenroy Forbes, then the Financial Secretary, advised the Premier that guidelines were required in respect of the distribution of these funds, which Mr Forbes drafted. It appears that there were two meetings of all Members of the House of Assembly, held on 11 June and 16 June 2020, to "discuss the Stimulus package[99] intended to be shared among Members in the amount of $300,000 each for their constituents" at which these guidelines and a proposed application form were discussed and approved[100].

5.64 The application form[101] asked if the applicant had been "unemployed or underemployed as a result of the impact of COVID-19 on your place of work". The applicant had to identify their place of employment, their salary before 30 March 2020 and their current salary. In the event, the scope of the programme went beyond the consequences of COVID-19: the form required one, or more, of three reasons for the request for assistance to be identified, namely COVID-19 assistance, hurricane recovery and hurricane preparedness. The applicant was asked to provide documentary evidence falling within one of the following four categories: employment, medical, educational and financial hardship. An applicant was also asked to

[97] Phyllis Evans Second Affidavit dated 25 June 2021 paragraph 12. See paragraph 5.6 above.
[98] Statement by Premier: Phase II of the Economic Response Plan: Social Protection and Economic Stimulation in COVID-19 dated 28 May 2020 (https://bvi.gov.vg/media-centre/premier-fahie-statement-social-protection-and-economic-stimulation-covid-19).
[99] The phrase "stimulus package" or "stimulus programme" was sometimes used contemporaneously to describe the distribution of these grants; but they were not primarily intended to be a stimulus initiative, i.e. to stimulate the BVI economy. They were intended to be used primarily to alleviate hardship resulting from the COVID-19 pandemic; although the other heads of grant were (i) recovery from the 2017 hurricanes, and (ii) preparedness for future hurricanes (each of which, I accept, might possibly have a stimulus element).
[100] T25 13 July 2021 page 144; and letter from Clerk to the House of Assembly to COI dated 1 April 2021. As these were not formal meetings, there is no Hansard record of them. The Clerk to the House said that she was not involved in establishing the programme or determining the applicable criteria (T26 14 July 2020 page 151).
[101] House of Assembly of the Virgin Islands COVID-19 Assistance Application Form, undated.

confirm whether they had received any assistance in the last 12 months; and, if so, to give the reason for that assistance. Finally, the applicant was required to certify that the information submitted was true and correct.

5.65 The agreed guidelines[102] specified that any assistance given was to be limited to those "experiencing genuine and documented hardship brought on as a direct result of COVID-19, and/or hurricane recovery/preparation for which support had not been received under any of the other Government stimulus initiatives". The support provided was capped at $5,000, although higher grants could be made with the Minister of Finance's approval. There was a requirement that any request for assistance had to be substantiated with supporting documentation. The guidelines also included the following paragraph:

> "All programmes, initiatives, and projects under this programme will be developed and executed in keeping with ALL requirements of [the PFMA and PFMR]."

5.66 Under the guidelines, the Clerk of the House of Assembly, as the relevant Accounting Officer, was required to review all applications to assess whether an applicant's needs could be met through a different government agency. If they could be so met, then the Clerk was required to direct the applicant to that other agency. Any request for assistance was subject to the final approval of the Clerk; although she could, if appropriate, refer any matter to the Financial Secretary who would then advise the Minister of Finance who would make a decision. The Minister's decision was final. Where the application was for a grant over $5,000, the Clerk was required to refer the application to the Financial Secretary for a decision by the Minister of Finance, in any event.

5.67 Mr Forbes said he was not involved in the implementation of the programme, and did not (e.g.) go back to ensure that the funds had been distributed in accordance with the guidelines, it being a matter for the Clerk of the House as Accounting Officer to ensure that all expenditure against the programme was properly made[103]. The programme was funded by an over-commitment of $3.9 million, approved by the Premier, which was to be regularised in the 2020 Schedule of Additional Provisions to be taken to the House of Assembly[104].

The IAD Report

5.68 The IAD, in the event, did not audit the use of these funds on a monthly basis – it could not, because it was not provided with the information and documents to do so[105] – but the IAD did prepare a draft report on these assistance grants (as well as a number of the other COVID-19 programmes), dated October 2020 (when the audit began) but completed in May 2021[106]. In carrying out the audit, the IAD had access to the guidelines (described in the report as the programme policy document or policy paper[107]), and documentation obtained from the Treasury Department. Thus, while the audit was limited to those applications where a

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[102] Guidelines for Assistance Grants (COVID-19 Response, Pledge of $300,000 to each Elected Member) undated.
[103] T25 13 July 2021 pages 144-145.
[104] Memorandum from Financial Secretary to Clerk of the House of Assembly: Request for Over-commitment – Assistance Grant (COVID-19) dated 7 July 2020.
[105] IAD Report page 4, and T23 7 July 2021 pages 45-46, 54 and 65-66; and see paragraphs 5.279-5.315 below.
[106] IAD Report: COVID-19 Stimulus – Draft Audit Report dated October 2020. The IAD Director gave oral evidence as to the content of this report on 7 July 2021 and 15 October 2021. She explained that the report is described as a "draft" and remains so as it was finalised in the absence of a management response. She said that the Financial Secretary had sent a response only on the day before she gave evidence to the COI (T23 7 July 2021 pages 40-41). The IAD Director had seen the Premier's Office as the client, but a copy of the draft report had been sent to the MoF as initial instructions had come from there. The Premier's Office had yet to respond (T49 15 October 2021 page 59 and 61). In this section of my Report (and the sections on the COVID-19 Assistance Programmes following), references to "IAD Report" are to this draft report.
[107] IAD Report page 16.

grant was awarded (because the IAD did not have access to documents in respect of refused applications), the IAD did have the copy of the voucher on which the Treasury Department made payment, which would have had all the submitted documents attached to it[108].

5.69 The IAD Report correctly outlines the intended purpose of these grants, as follows[109]:

> "The Government of the Virgin Islands initiated this programme as a form of social intervention to assist residents of the territory experiencing financial hardship as a direct result of COVID and/or requiring assistance for hurricane recovery and preparation for the 2020 hurricane season. The programme was structured in a manner that allowed Members of the House of Assembly [to] be directly involved in the awarding of grants to their constituents. Support to individuals, households, and businesses was capped at $5,000 and each applicant was required to provide evidence of the type and amount of support being requested. Grant approvals are to be governed by a system of means testing and information is to be gathered on other types of assistance that have already been granted to applicants."

There were, thus, intended to be in-built checks and balances.

5.70 As with the grants made from the annual allocation, Members would make a recommendation for an award and that would then go to the Clerk of the House, who would approve it[110].

5.71 The IAD Report found[111]:

> "1. Although the programme policy document requires each applicant 'to provide evidence of the type and amount of support being requested', approximately one third of applications approved and paid were not supported by any evidence of the type and amount of the awarded assistance. For example, of the 257 applications classified as Unemployed/Underemployed, approximately twenty six percent (26%) were only accompanied by a letter from the applicant stating that they were unemployed or had had their work hours reduced as a result of COVID19. In addition, most applicants failed to report income on applications or show that income was affected and how this impacted their ability to meet their financial obligations. Although it is understood that the monies were given to the Members to expend to their constituents, the policy paper that guides the programme mandates that sufficient evidence be provided to support the request. Again, applicants would just state they were unemployed/underemployed and state the amount requested in assistance without indicating or providing evidence as to how the funds would be utilized. As a substantial number of the applications reviewed are only supported by a letter from the applicant claiming financial hardship due to COVID-19, we determined that such a letter does not meet the standard of sufficient evidence envisioned in the guidelines for the programme.
>
> 2. In reviewing the applications and subsequent awards, the methodology used by members to determine the amount of the grant awarded could not be identified. Grant awards appear to be arbitrarily determined, even when sufficient

[108] IAD Report page 16; and T23 7 July 2021 pages 76-77 and 88-89.
[109] IAD Report page 15; and T23 7 July 2021 pages 75-76.
[110] T23 7 July 2021 page 77 (IAD Director). The Clerk of the House said that this programme was essentially an extension of the House of Assembly Members' Assistance Grants (see paragraphs 5.5-5.40 above). She said: "It took the same principle as the regular Assistance Grants. The only thing that changed was they were given, you know, much more funds because of the situation of COVID-19 in 2020, but basically the same results": her role was the same. It was, again, down to individual Members to decide "who got what" (T26 14 July 2021 pages 151-152). The eligibility criteria for this programme, of course, also required the grants to be made for the specific purpose of COVID-19 assistance, or hurricane preparedness/recovery.
[111] IAD Report pages 16-18; and see T23 7 July 2021 pages 78-89.

documentation was submitted to justify the amounts requested by the applicant. In some instance, award amounts were significantly lowered even though there was sufficient documentation to justify a full award, while full amounts were awarded to some applicants without any documentation to justify the award. As a result, we found that there were no controls implemented to ensure an equitable disbursement of funds.

3. Although the programme requires coordination with other assistance programmes to avoid duplicity in awards to applicants, instances were found where applicants have received awards from multiple Members and assistance programmes across Government which we find to be abusive…[112].

4. Again, the Policy paper indicates that expenditure should be related or brought on as a result of COVID-19 and/or hurricane recovery/preparedness; however, based on applications reviewed, there are multiple instances where applicants have utilized the programme to settle obligations that pre-dated the pandemic…[113].

5. While it is not being mentioned to be frowned upon, there is a noticeable trend where Members have instituted a food voucher system to assist constituents. However, our concern lies in the absence of sufficient controls to ensure accountability within this programme. Members are approving large payments to supermarkets in exchange for vouchers, which will then be distributed to needy constituents; however, it is unclear what system is being used to determine who is assisted through this method. As COVID19 assistance was intended to be an application based programme, the execution of this programme in this manner diminishes both transparency and accountability[114].

6. There is a lack of consistency in the manner in which payments are made when the request involves monies owed to third parties by applicants. Although the guidelines dictate that payment be made directly to third parties and vendors where practicable, multiple instances where such payments were made to the applicant, even in instances where documentation was provided. However, the majority of such instances occurred when the applicant failed to provide documentation of the outstanding debt. The control of making direct payments to third parties was to ensure that the assistance awarded was utilized for the intended purpose.

7. A majority of the applications reviewed were incomplete, with comparative income information usually omitted. Consequently, assessment could not be conducted to determine the severity of the financial impact of COVID19 on applicants prior to and during COVID19. Additionally, numerous instances were observed where there was no change in reported income; however, applications were approved and grants awarded. Notably, among these applications were public officers whose salaries have not been affected by COVID19. This gives the impression that grants

[112] The IAD Report (page 17) refers to one example in which a single applicant for educational assistance obtained two COVID-19 House of Assembly Assistance Grants (for $5,000 and $4,000, respectively, the latter application made by the applicant's parents), as well as receiving a £20,000 scholarship through the MEC Assisted Grants Programme and a $20,000 grant through the Premier's Office Assisted Grants Programme, i.e. total grants of $49,000 for the year.

[113] The IAD Report gives as examples credit card payments that were in good standing and where the applicant's employment and income did not change, reimbursement for bills that were already paid, expenditure that was not related to COVID-19 (e.g. educational and long overdue income tax), and even the payment of a Member's District Office rent prepayment and maintenance (see also T23 7 July 2021 pages 83-84).

[114] The IAD Director explained that while she did not see a Member's decision to purchase food vouchers from a supermarket which would then be distributed to constituents as "something to be frowned upon", the concern was how an Accounting Officer could confirm that these vouchers were delivered to the intended recipients (T23 7 July 2021 pages 85-86). There was no evidence that all or any were.

were not based on the assessed financial impact of COVID19, but rather on a discretionary basis by each Member.

8. Although assistance for Hurricane Preparedness and Hurricane Recovery are permissible within the programme, sufficient guidance was not provided to guide members as to what constitutes as preparedness and recovery. Consequently, requests of a tangential nature are approved. When the standards (water tight) utilized by the Ministry of Health and Social Development's Housing Recovery Unit is applied in evaluating these awards, there is clearly a more liberal definition of what constitutes recovery in the HOA [House of Assembly] assistance programme. Within the HOA programme grants are awarded to purchase furniture and appliances as hurricane recovery and payment of insurance premiums and generators as Hurricane preparedness."[115]

5.72 Consequently, the IAD Report found that the scheme suffered from broadly the same governance issues as existed with the annual House of Assembly Members' Assistance Grants, including (i) the absence of supporting documentation; (ii) payments being made to applicants rather than third parties to whom the money was ultimately due; and (iii) the fact that the Clerk of the House of Assembly as Accounting Officer was accountable for the payments made but could not, in any practical way, assess or account for the payments made at the direction of a particular Member[116]. In March 2021, the COI wrote to each of the 11 Members allocated these funds seeking information on how they had been distributed. With the notable exception of Hon Julian Fraser, the Members either referred the COI to the Clerk of the House or failed to reply. Some documentation, containing limited detail, was received from the "COVID-19 Accounts Unit". None of the information undermined the findings of the IAD.

5.73 The IAD Report was scathing about the way in which the programme had been structured and implemented:

> "It is our opinion that this programme was not structured in a manner that promoted transparency in the decision making, nor equity in the distribution of funds. The programme was shrouded in ambiguity, which made it difficult to administer, which resulted in the broadest spectrum of assistance being offered. Even where there were some limitations, applicable guidelines were stretched to the fringes of applicability. Even the controls applicable for approval were farcical in that secondary and, when necessary, tertiary approvals were seemingly put in place to simply facilitate payment without any apparent authority in the decision making process."[117]

5.74 In effective conclusion (under the heading "Opportunities for improvement"), the IAD Report said:

> "1. Social services mechanisms must be enhanced to respond to social issues such as this. Systems must evolve to a degree where the social service apparatus can continually identify the most vulnerable in our society and deploy services that can meet their needs in an evidence-based manner. These systems should be employed in a way that removes subjectivity in the awarding of assistance, as is the case of the system currently employed by the House of Assembly.

[115] The IAD Director explained that the MHSD's Housing Recovery Unit had criteria for awards for Hurricane Recovery and Preparedness; but these are not applied to the discretionary grants made under this programme (T23 7 July 2021 page 90).
[116] T23 7 July 2021 pages 86-87.
[117] IAD Report page 19; and T23 7 July 2021 page 90.

2. Again, social service data need to be regularly collected and analyzed to better inform social policies. A more targeted approach must be employed to identify, assess, and assist the vulnerable segments of our population without such a heavy dependency on elected officials to determine who will be assisted and in what manner. Objective rather than subjective tests must be employed to present a more fair and equitable distribution of resources."[118]

Concerns

5.75 Although intended to relieve "genuine and documented hardship" as a result of COVID-19, and assist with hurricane recovery/preparedness, as with the annual grants referred to above, these grants were effectively distributed by Members of the House of Assembly in their unconstrained and unmonitored discretion.

5.76 The Clerk of the House accepted that payments of these grants were made, to her knowledge, without supporting documentation in many cases; and, although some applications were returned to Members as being incomplete, these were generally not picked up or challenged (she said) as a result of her staff at the time being overwhelmed. She said that there were only two people in the Accounts Unit to process the applications; and that she was the only person considering applications, and she "couldn't see everything". With the developing COVID-19 pandemic, there was, of course, a great deal else going on. The Clerk said people (i.e. members of the public) were "hurting", and Members of the House "hollering". She "tried [her] best to be humane and to ensure that persons… got assistance"[119]. One can only again sympathise with the Clerk for the position in which she was placed.

5.77 Given the absence of documentation, it would, in any event, be difficult (if not impossible) to assess the merits of individual cases in which applications have been made and/or granted. However, in the light of the concessions made by the Clerk of the House (that many applications were not documented nor the subject of any objective assessment), it is not necessary for the purpose of this Report to go into specific examples of the way individual Members of the House of Assembly approached and assessed applications submitted to them. These grants were essentially an extension of the long-standing annual House of Assembly Members' Assistance Grants considered above, albeit with the intended purpose of providing assistance in respect of those affected by COVID-19 and/or the 2017 hurricanes and those who required assistance with hurricane preparedness. Of course, I understand that, at least in relation to the adverse consequences of the pandemic, there may have been people who had urgent needs. However, as with the annual grants, these grants were distributed in a legally arbitrary and unlawful manner, on the basis of unsupported applications and without any proper record being kept of the grounds upon which applications were made or granted. The Clerk of the House did not ensure that grants made were properly supported, nor did she ensure that they were compliant with the relevant policy (e.g. that the money was in fact required to assist with the consequences of the COVID-19 pandemic or the 2017 hurricanes or with hurricane preparedness). Again, the lack of records meant that the grants were largely unauditable, and there is no proper record of how this money was used. "Need" was not a criterion on which distribution was in fact made. The discretion of the Members as to the distribution of these public funds, again, appears to be unfettered and unmonitored.

5.78 Again, there is no suggestion that the lack of governance resulted from any lack of capacity or capability in terms of policy, as opposed to a simple lack of administrative resources. The method of distribution of these grants reflected the deficient method used in the annual

[118] IAD Report pages 18-19; and T23 7 July 2021 pages 89-90.
[119] T26 14 July 2021 pages 150-155.

House of Assembly Assistance Grants with all of their defects as described above[120]. If the Clerk was overwhelmed by the pressures of the developing pandemic – which, of course, I understand, and with which I sympathise – then that would have been a good reason for a process which involved more, not less, rigour. That would not necessarily have required additional manpower. I well understand that, throughout the pandemic, considerable economic and financial hardship was suffered as the result of lockdowns and restrictions, including tight border restrictions. Nevertheless, whilst one has sympathy with the Clerk of the House who said she was asked to administer the scheme with patently insufficient resources, that increased general need does not explain or justify the distribution of substantial amounts on public money by Members of the House of Assembly at their effectively unrestricted discretion and without any checks or sensible form of control.

5.79 Once more, the absence of records etc makes it impossible for me to say that any particular Member has been guilty of dishonesty in public office. However, as with the annual grants and for essentially the same reasons, on the evidence, it is open to me to find (and I do find) that, in relation to these grants, there is information before me that shows that corruption, abuse of office or other serious dishonesty in relation to elected public officials may have taken place in recent years; and that the conditions which allowed that corruption, abuse of office or other serious dishonesty to take place may still exist.

5.80 As these grants were essentially an extraordinary one-off extension of the annual Members of the House of Assembly Grants, with the same governance deficiencies, they should be the subject of a similar independent audit which will identify whether any further steps (e.g. a criminal investigation) would be appropriate.

COVID-19 Assistance Programmes: Background

5.81 As part of its response to the COVID-19 pandemic, the BVI Government sought to implement programmes to assist various sectors of economic and civic society. Some were intended to provide support while others were for the purpose of stimulating the economy.

5.82 In this, and the following sections of the Report, I consider four programmes funded through a grant from the SSB, and then distributed through a budgetary head under the control of the Premier's Office. The initial funding of $10.5 million for these four programmes was later increased to $16 million[121]. As the Ministry responsible for coordination within central government[122], the Premier's Office played a key role in how these programmes were taken forward – even more so than the MoF.

5.83 I refer to the four programmes together as "the COVID-19 Assistance Programmes", and individually as follows:

(i) the Transportation Programme;

[120] Again, no submissions were made by the Attorney General in the Elected Ministers' Closing Submissions on the issues to which these grants give rise.

[121] It appears that the SSB agreed to $5.5 million of the overall grant it provided to the BVI Government being redistributed from other initiatives to the COVID-19 Stimulus Grants Programmes (see Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office dated 28 June 2021 at page 17). Glenroy Forbes, the then Financial Secretary, explained that, while Cabinet made the decision to redistribute the monies received from the SSB, it fell to him to liaise with the SSB to obtain its agreement to such a decision (T46 11 October 2021 pages 21 and 49-50).

[122] This is the description of the Premier's Office given by Dr Carolyn O'Neal Morton, then, as now, Permanent Secretary in that Office (T45 8 October 2021 page 162). Mr Forbes said that the MoF was not the agency leading on the implementation of any of these programmes (T25 13 July 2021 pages 141 and 145-148).

(ii) the Micro, Small and Medium Enterprise Programme ("the MSME[123] Programme");

(iii) the Farmers and Fisherfolk Programme ("the F&F Programme"); and

(iv) the Daycares, Schools and Religious Organisations Programme ("the Religious Institutions Etc Programme")[124].

5.84 While the evidence on all four programmes was lodged with the COI, there was a particular focus on the F&F Programme and the Religious Institutions Etc Programme.

5.85 The funds for these grants were made available by the SSB, which required comfort that the money would be distributed in accordance with the principles of good governance including openness, transparency and value for money. As we shall see, Cabinet required the IAD to audit the programmes as they were developed and implemented, with a requirement for monthly reports to Cabinet. The IAD was, however, largely frustrated by the refusal of the Premier's Office to provide information essential to its task, a matter to which I shall return[125].

5.86 In the event, the IAD Director prepared a single draft report on the COVID-19 Assistance Programmes ("the IAD Report") [126], dated October 2020[127] (when the audit began) but completed in May 2021.

5.87 The Auditor General produced two section 20[128] reports, both dated 21 June 2021, one on the F&F Programme ("the AG F&F Report")[129] and the other on the Religious Institutions Etc Programme ("the AG Rel Inst Report")[130]. In this section, I shall refer to these two reports together as "the Section 20 Reports"[131]. The express purpose of each of these reports was to provide independent information and advice on: (i) whether approved procedures were followed in the adoption and execution of the programme; (ii) whether the objectives of the programme were achieved; and (iii) whether the funds were applied with due regard to value for money principles[132].

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[123] Micro, Small and Medium Enterprises. Sometimes, the term "Small and Medium Enterprises" ("SME") is used. Irrespective of technical differences there may be between these two terms in other contexts, in relation to COVID-19 packages, the terms appear to have been used more or less interchangeably.

[124] Individually or collectively, these programmes are referred to in some documents as "Stimulus Programmes". However, it is clear that some were not intended to stimulate the economy, but rather mitigate the adverse effects of the pandemic. I have consequently referred to them as "Assistance Programmes". The papers and reports disclosed to the COI concerning economic support under these four programmes use varying terminology for the different programmes. I have uniformly used the terms set out here.

[125] Paragraphs 5.279-5.315 below.

[126] See paragraph 1.118 above. The IAD Director explained that the report is described as a "draft" and remains so as it was finalised in the absence of a Management Response. The IAD Director said that the Acting Financial Secretary had sent a response on the day before she gave evidence to the COI (T23 7 July 2021 pages 40-41). Mr Frett, the Acting Financial Secretary, told the COI that, having received the IAD Report, he had shared it with Dr O'Neal Morton and written to the IAD Director to tell her that he would follow up on the issues raised in her report (T25 13 July 2021 page 89). As she explained, the IAD Director had seen the Premier's Office as the "client", but a copy of the draft report had been sent to the MoF as initial instructions had come from there. The Premier's Office had yet to respond (T49 15 October 2021 pages 59 and 61).

[127] IAD Report: COVID-19 Stimulus – Draft Audit Report dated October 2020. The IAD Director gave oral evidence as to the content of this report on Day 23 7 July 2021 and Day 49 15 October 2021. In this section of the Report, references to "IAD Report" are to this report.

[128] See paragraphs 1.105-1.106 above.

[129] Auditor General's Report: COVID-19 Stimulus Grants to Farmers and Fisherfolk dated 21 June 2021. In this section of the Report, references to "the AG F&F Report" are to this audit report.

[130] Auditor General's Report: COVID-19 Stimulus Grants to Religious Institutions, Civic Groups, Private Schools & Daycares dated 21 June 2021. In this section of the report, references to "the AG Rel Inst Report" are to this report.

[131] The Auditor General first gave oral evidence about the content of these reports on Day 18 28 June 2021 and Day 19 29 June 2021. At that point, each report was in final form but had not been laid before the House of Assembly. The Auditor General returned to give further oral evidence on these reports on Day 49 15 October 2021 and Day 51 20 October 2021.

[132] AG F&F Report paragraph 2; and AG Rel Inst Report paragraph 2.

5.88 Shortly after the Auditor General first gave oral evidence on the content of the Section 20 Reports, the Attorney General lodged, with the COI, a document entitled "Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021" ('the Preliminary Report")[133,134]. The purpose of the Report was said to be to provide a preliminary account for the funds dispersed under the supervision of the Premier's Office in relation to the four programmes which are considered in this section[135].

5.89 Subsequently, on 7 September 2021, the Attorney General served an undated 34-page document prepared specifically for the COI as a response from the Premier's Office to the reports issued by the IAD Director and Auditor General[136,137]. It was accompanied by a bundle of 81 documents running to 851 pages[138].

5.90 The author or authors of this document are not identified on its face. It is a concern that no one (be it lawyer instructed by the Attorney General or witness) was able and willing to say who authored the document[139]. Further, on the evidence that emerged, I consider this document must be approached with some caution[140]. In the absence of anyone owning to authorship, it can only properly be treated as a submission from the Attorney General[141]. The COI raised a number of queries concerning the Response of the Premier's Office with the Attorney General, which were addressed in an undated Supplemental Response[142].

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[133] Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021 dated 28 June 2021. With appendices the Preliminary Report runs to 96 pages. Asked to explain why the report was expressed to be "Preliminary", Dr O'Neal Morton said, "because the exercise is not complete" (T45 11 October 2021 page 108).

[134] The authors of the Report are not identified. Dr O'Neal Morton could not name the authors, but said the document was the product of a team effort within the Premier's Office. She confirmed that she was instrumental in its preparation (T45 8 October 2021 pages 15, 125 and 148-149).

[135] Preliminary Report page i. The Preliminary Report purports to serve as an addendum to the Auditor General's two Section 20 reports, and it says it should, therefore, accompany those reports whenever they are circulated or referenced. I consider this later in this section (paragraphs 5.365ff).

[136] The document is entitled "The Response of the Office of the Premier to the evidence to the reports of the Auditor General and the Internal Auditor concerning the farmers and fishers and schools and churches grants programme." The reference to the Office of the Premier is a misnomer. Dr O'Neal Morton distinguished between the Premier's Office (of which she is the Permanent Secretary) and the Office of the Premier which is the latter's private office (T6 18 May 2021 pages 33-34). References in this section to "the Response of the Premier's Office" are to this document.

[137] The first notice that such a document was going to be submitted came in a letter dated 6 September 2021 from the IRU. That letter was in response to a letter from the COI notifying the Attorney General of the need to raise criticisms of others in accordance with the COI's published Protocol concerning Potential Criticisms dated 27 August 2021.

[138] Referred to in this section of the Report as "the Bundle of documents accompanying the Response of the Premier's Office".

[139] Asked directly who had been responsible for preparing the document, Hussein Haeri on behalf of the Attorney General was only willing to confirm that it was a submission on behalf of the Premier's Office which "has had input from the lawyers" (T31 8 September 2021 pages 11-15). For a legal representative to deliberately avoid answering such a question is illustrative of the limits to which the Attorney General (and, of course, those who instructed her) were willing to assist the COI. Both Dr O'Neal Morton and the Premier adopted the Response as part of their own evidence to the COI. Dr O'Neal Morton said it was the product of an investigation she had facilitated which was carried out by public officers assisted by the IRU (Carolyn O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021 paragraph 2). Yet, she could not or would not name either a public officer or a member of the IRU who had been involved in preparing the document (T45 8 October 2021 pages 64-67). The Premier said that he had only been involved at "the higher level", and that the document was the product of the work of the Premier's Office and the IRU. Asked if he knew who had prepared the document, the Premier responded: "I can't go into that with you" (T47 12 October 2021 pages 34-35). The position was thus left in a most unsatisfactory state.

[140] Further to COI Order No 20 dated 8 September 2021, the Attorney General confirmed that the Premier and Dr O'Neal Morton agreed with the contents of the Response of the Premier's Office and had nothing further to add to it. There were instances during her oral evidence, however, where Dr O'Neal Morton could not fully speak to matters contained in this document and, on at least one occasion, where she plainly did not agree with its content (T45 8 October 2021 pages 59-62 and 66-67).

[141] The document, however, contains a mixture of submissions and evidence. Despite the voluminous quantity of accompanying material, it contains unevidenced assertions of fact. Similarly, the accompanying material contains extracts from documents which had not previously been disclosed to the COI and/or which were only disclosed in partial form. Further, while it purports to emanate from the Premier's Office, the response makes copious reference to the views and position of the Government. Dr O'Neal Morton said the document "speaks to the Government's Position" (T45 8 October 2021 page 172) which suggests the document was intended to reflect the position of the elected Ministers. I have treated it as such.

[142] Supplemental Response of the Premier's Office to the Reports of the Auditor General and the Internal Auditor, undated.

5.91 The Response of the Premier's Office was severely critical of the Auditor General and the IAD Director. At my direction, the Response and the accompanying bundle of documents were provided to the two auditors, and they were invited to submit a written response, which they did[143]. I deal with these criticisms below[144].

5.92 As will become apparent from the evidence set out in this section, the decisions in relation to each of the four COVID-19 Assistance Programmes overlapped in time. However, before dealing with the individual programmes, it would be helpful to set out the initial steps which were common to them all.

5.93 Upon the World Health Organisation declaring the COVID-19 outbreak to be a global pandemic on 11 March 2020, the BVI Government established the Coronavirus Economic and Fiscal Stability Task Force ("the Task Force")[145]. Its remit was "to critically analyse the potential impact of COVID-19 to various economic and social sectors and advise on the Government's possible economic and fiscal policy response"[146]. The Task Force was chaired by Glenroy Forbes, the then Financial Secretary[147].

5.94 On 12 April 2020, Cabinet approved a policy paper[148] ("the April 2020 Task Force Paper") which, it decided, would "serve as the interim framework to guide the Government's social, economic and fiscal response to the immediate and short-term needs of the Territory"[149]. The paper, drafted by the Task Force[150], presented an initial analysis of the fiscal impact of various policies implemented by the BVI Government and outlined possible actions that could be adopted to provide "immediate relief to affected employees and businesses and economic stimulus policy initiatives that could be implemented if the crisis persists"[151]. It proposed an Immediate Relief Package ("IRP") valued at approximately $39.3 million[152]. Among the initiatives recommended were an SME subsidy programme for businesses and self-employed persons costed at $9 million, and $2 million in assistance to the "Agriculture and Fisheries sector (economic stimulus for COVID-19 crisis)". The sources of funding identified for these initiatives included the reserve and consolidated funds[153].

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[143] T31 8 September 2021 pages 14-19; and COI Order No 20 dated 8 September 2021. The concerns and potential criticisms in respect of the COVID-19 Assistance Programmes arising from the information before the COI, and in particular from the Response of the Premier's Office, were put to the Auditor General and IAD Director in separate COI warning letters both dated 29 September 2021 to which they respectively responded fully in writing on 4 October 2021 and 7 October 2021, and at oral hearings (Day 49 15 October 2021 and Day 51 20 October 2021).

[144] See paragraphs 5.111-5.239 passim, and 5.249-5.278.

[145] The Premier said that the Task Force was established by the Premier's Office (T47 12 October 2021 page 51-53).

[146] Cabinet Memorandum No 117/2020: Policy Response to COVID-19 dated 12 April 2020 paragraph 1. Dr O'Neal Morton said she attended meetings of the Task Force as Permanent Secretary Premier's Office but said it was led by the MoF. She described the purpose of the Task Force as to "do a situation analysis of the economic situation in the Territory so to determine where we are and in terms of economic status, how do we move forward" (T45 8 October 2021 page 9).

[147] T25 13 July 2021 page 137; and see paragraph 5.19 and footnote 58 above. Mr Forbes said that, upon the establishment of the Task Force, he set up a "focus group" to act as a secretariat and gather information with the intention of identifying those in need.

[148] BVI Government's Policy Response to the Coronavirus Crisis: Policy Paper dated 7 April 2020. References in this section of the report to "the April 2020 Task Force Paper" are to this document.

[149] Revised Expedited Extract of Cabinet Minutes on Cabinet Memorandum No 117/2020: Policy Response on COVID-19 dated 12 April 2020.

[150] The Task Force comprised representatives of the public and private sectors, including technical experts and senior public officers as "resource persons" (T25 13 July 2021 page 138; and T46 11 October 2021 page 7). Its members are listed at page 11 of the April 2020 Task Force Paper. The Task Force is said to have met regularly from 13 March 2020. Mr Forbes identified Ms Patlian Johnson, described as a Recovery and Development Coordination Specialist in the Premier's Office as one of the main authors of the April 2020 Task Force Paper (T46 11 October 2021 pages 9-10).

[151] April 2020 Task Force Paper page 2.

[152] April 2020 Task Force Paper page 6.

[153] Revised Expedited Extract of Cabinet Minutes on Cabinet Memorandum No 117/2020 dated 12 April 2020 paragraph 11; and April 2020 Task Force Paper page 26. Mr Forbes' responses, when asked whether the focus at this point was on assisting the commercial agriculture and fisheries sector, were vague. He said that, throughout, his consistent advice had been that, wherever possible, any initiative should have an element of employee retention (T46 11 October 2021 page 11).

5.95 Cabinet also decided that Mr Forbes, as Financial Secretary, would instruct relevant Ministries, statutory bodies and public corporations to implement the IRP, and to deliver bi-monthly reports to the Minister of Finance for submission to the Cabinet. Mr Forbes, in collaboration with these various bodies, was also to develop a "Phase 2 economic and social response programme". This was to be submitted to the Minister of Finance within 30 days.

5.96 Mr Forbes submitted a "pre-report" dated 30 April 2020 to the Minister of Finance[154] ("the Pre-Report"). Its stated purpose was to provide an update on the impact of COVID-19 on the BVI economy for the period 13 March to 19 April 2020, and on the steps taken to begin implementation of the recommendations made in the April 2020 Task Force Paper as approved by Cabinet. The Pre-Report explained that the Task Force had created an implementation framework under which Mr Forbes had established the Immediate Relief Implementation Committee ("the IRIC") to coordinate the implementation of the IRP[155]. The IRIC was to continue coordination of the implementation process over the following 10 days[156]. Appendix 2 to the Pre-Report listed the work the IRIC had completed as of 30 April 2020. It indicated that the IRIC would shortly commence working on a policy initiative for an SME subsidy and that a draft Cabinet paper had been prepared addressing the framework and criteria for assistance to the agriculture and fisheries sector[157].

5.97 The Pre-Report referred to the Task Force completing a full report by 11 May 2020[158]. That full report, seemingly the second issued by the Task Force, appears to be the report submitted by Mr Forbes and dated 15 May 2020[159]. It noted that a separate report on the IRP was being finalised and would be presented separately[160]. It seems this separate report is the undated "Update Report" produced at some point later in May 2020[161]. The Update Report notes that one of the tasks for the IRIC was to ensure that, consistent with Cabinet's decision, Ministries and other public bodies prepared bi-monthly reports[162] and that a consolidated report was prepared for the Financial Secretary to enable him to report to Cabinet[163].

5.98 The Update Report set out progress in various areas including assistance to the agriculture and fisheries sector. In that regard, citing the importance of food security were the pandemic to persist, the Update Report explained that the $2 million economic stimulus approved by Cabinet was reserved for "commercial fisheries and agriculture/farming only". It continued to say that a "Rapid Response Fishing and Farming Programme" had been developed to fulfil the requirements of the policy, and "even further for the overall development of the agricultural and fishing industries in the Territory". By this point, a registration form had been

[154] Pre-Report to the Minister of Finance – Update on the Impact of the Coronavirus on the BVI economy and follow-up on the recommendations of the COVID-19 policy response paper submitted by Chairman of the Coronavirus Economic and Fiscal Stability Task Force Financial Secretary Glenroy Forbes dated 30 April 2020.

[155] During the public hearings, some witnesses referred to this as simply "the Implementation Committee".

[156] Pre-Report page 2. Mr Forbes said it was his decision to establish what he called the Implementation Committee. He described it as an ad hoc committee set up to work with and advise the various bodies which would have the responsibility for implementing the stimulus programmes. Mr Forbes could not say if this Committee was effective in offering guidance to these bodies, as he experienced difficulties in obtaining information from the bodies themselves (T25 13 July 2021 pages 140, 143 and 146; and T46 11 October 2021 page 7).

[157] Pre-Report Appendix 2 page 8.

[158] Pre-Report page 2.

[159] Task Force Paper: Economic Stimulus Package in Response to the Impact of COVID-19 on the economy of the British Virgin Islands dated 15 May 2020. In this section, references to "May 2020 Report" are to this paper.

[160] May 2020 Report page 15.

[161] Implementation of the Immediate Relief Package – Update Report. This report is described as a bi-monthly report which had the primary objective of facilitating the Financial Secretary in providing an update to the Minister of Finance. Page 3 lists the membership of the IRIC.

[162] The Response of the Premier's Office referred specifically to this element of Cabinet's decision of 12 April 2020. Asked to disclose these reports, the Premier's Office provided the COI with two spreadsheets from the "Accounts Team". I do not consider these to be the reports which were required by Cabinet, or which IRIC were tasked to ensure were produced.

[163] Update Report page 3.

"administered to farmers and fisher-folk", the data from which would be used to identify the main challenges confronting farmers and fishermen and to rank their immediate needs. The Update Report referred to a draft Cabinet paper and a policy paper, which had been prepared so that Cabinet could approve the implementation mechanisms including eligibility criteria[164].

5.99 As to the SME subsidy, the Update Report explained that the Department of Trade and Investment Promotion and Consumer Affairs ("the Department of Trade") had drafted a policy document and the IRIC would be working with the Department to finalise various policy features. The costing of grants/subsidy to SMEs was to be guided by surveys and polls conducted in March, April and May 2020[165].

5.100 As the work of government continued, there was a development in how the IRP was to be funded.

5.101 On 28 May 2020, the SSB confirmed its approval of a request made on 25 May 2020 by Mr Forbes, as Financial Secretary, for a grant of $40 million from the Social Security Fund for specific elements of support during the pandemic. The SSB approved a different distribution of the overall sum from that sought by the BVI Government[166]. The $40 million included a grant of $2 million to the agriculture and fisheries sector to be administered by the Premier's Office; grants of up to $6.5 million to local businesses affected by COVID-19 to be administered by a team comprised of representatives of the MoF, the Premier's Office and the Department of Trade; grants of up to $1 million as assistance to churches, daycares and private schools, to be administered by the SDD[167]; and $1 million for a transportation initiative[168]. In his letter of 25 May 2020 requesting the $40 million grant, Mr Forbes referred to his understanding that the SSB's assistance would be directed towards the "Immediate Relief measures" recommended to Cabinet by the Task Force[169].

5.102 It was always the case that good governance, in respect of the distribution of the money provided, was an important condition of the grant. Whilst understanding the need for drastic measures in the face of the pandemic, the SSB wanted assurance that its money would be spent by the BVI Government in a proper manner in accordance with the principles of good governance. Therefore, in the same letter of 25 May 2020, Mr Forbes wrote that he had been directed by the Premier and Minister of Finance to "work with your Board to ensure the proper accountability, transparency and good governance of all funds that are so granted".

5.103 In another letter, also written on 25 May 2020 and addressed to the Chairman of the SSB, the Premier and Minister of Finance set out in a table how the $40 million grant would be allocated to a number of "priority areas"[170]. These were said to have been identified and submitted to the Government by the Task Force. The letter contained the following assurances:

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[164] Update Report page 10.
[165] Update Report page 13.
[166] In oral evidence, the Premier suggested that $17.5 million of this grant was not actually received by the BVI Government. That sum includes $7.5 million to pay an outstanding bill for National Insurance and $10 million to establish a fund for "Unemployment and Business Interruption Relief" to be administered by the SSB. The Premier contended that it was, therefore, wrong to suggest that the BVI Government had received $40 million. That ignores, however, that the SSB had to give the Government $7.5 million to pay the National Insurance bill, and that the correspondence refers to a request for and approval of a grant of $40 million (T47 12 October 2021 pages 69-71 and 74).
[167] This Department falls under the MHSD.
[168] Letter SSB Director Antoinette Skelton to Financial Secretary Glenroy Forbes dated 28 May 2020: Government Request (Annex 13 in bundle of documents accompanying the Response of the Premier's Office).
[169] Letter Financial Secretary Glenroy Forbes to SSB Director dated 25 May 2020: COVID-19 Grant from the BVI Social Security Board (Annex 11 in bundle of documents accompanying the Response of the Premier's Office).
[170] The same table appears in the letter written by Mr Forbes. He said its contents mirror the announcement made by the Premier on 28 May 2020 (T46 11 October 2021 page 19).

> "Additionally, accountability, transparency and good governance are of utmost importance. The Government has set an overall objective that funds applied in the Territory's COVID-19 response strategy, regardless of the source, must reach the core of our people and businesses in the BVI who are in need and should, as far as possible, have a meaningful impact on the economy. The [MoF] is also charged with ensuring that the funding received is properly managed based on all financial regulations and laws that apply to public funds.
>
> Also to ensure accountable and transparent application of these funds, the policy position is that, except in the case of the business grant, all cheques must be paid directly to the providers of the relevant goods or services, and not to the recipient of the grant. In the case of business grants, there must be clear guidelines for due diligence and monitoring to ensure that these businesses make reasonable efforts to sustain employment in this COVID-19 era.
>
> The Financial Secretary, who is copied here, will ensure that the aforementioned approach is adhered to"[171].

This was an assurance by the Premier that the money would be distributed in accordance with the principles of good governance[172]. As to the final sentence of the quote above, Mr Forbes accepted that it referred to ensuring that the funds were used in a manner which was accountable, transparent and in accordance with good governance[173].

5.104 The SSB grant featured in the Premier's public statement on 28 May 2020 where he announced Phase II of the BVI Government's response to the COVID-19 pandemic[174].

5.105 The Premier's statement explained that part of the SSB grant would be used to fund $1 million in support to daycares, private schools and religious organisations adversely affected by COVID-19, and said that details of how those who qualified could apply would be published shortly.

5.106 $2 million was to be allocated to stimulate the agriculture and fisheries sector. As the Premier explained:

> "Through this grant, farmers can get assistance such as cutting of access roads to their farms and fencing for their properties, among others, that will boost their food production.
>
> Fisherfolk who need engines, nets and other equipment can get the help they need to spring forward from this initiative, thereby also boosting their production."[175].

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[171] Letter Premier and Minister of Finance to SSB Chairman dated 25 May 2020: COVID-19 Grant from the Virgin Islands Social Security Board (Annex 12 in bundle of documents accompanying the Response of the Premier's Office).

[172] Shown the correspondence with the SSB, the Premier struggled to give a direct answer as to how he was able to give the assurances that he did to the Chairman of the SSB. By reference to the various lockdowns and curfews imposed in the BVI between March and September 2020, the Premier said that the processes and procedures adopted "shifted" and were "fluid". He said that pandemic measures such as lockdown left people "crying out for help". In what were not normal times, the pressure "caused us to continue to shift" (T47 12 October 2021 pages 43-47, 48-50 and 61-62). According to the Premier, the mechanisms whereby the assurances he gave to the Chairman of SSB would be achieved were for the Premier's Office, albeit the Financial Secretary was bought in to negotiate with the SSB. However, when it came to distribution of the grants, the Accounting Officer was to be the Permanent Secretary in the Premier's Office rather than the Financial Secretary (T47 12 October 2021 pages 62-67).

[173] T46 11 October 2021 pages 21-22.

[174] Statement by Premier and Minister of Finance: Phase II of the Economic Response Plan Social Protection and Economic Stimulation in COVID-19 dated 28 May 2020 (https://bvi.gov.vg/media-centre/premier-fahie-statement-social-protection-and-economic-stimulation-covid-19).

[175] Dr O'Neal Morton accepted that this represented the policy in relation to support for farmers and fishermen (T45 8 October 2021 pages 13-14).

5.107 Mr Forbes said that the measures announced by the Premier on 28 May 2020 did not correlate precisely with those on which the Task Force had been working and which it had recommended. Accordingly, once the Premier had made his public statement, Mr Forbes' attention turned to the implementation of the measures as announced[176].

5.108 However, his evidence was that, from about this time, the role played by the IRIC was significantly reduced[177]. Had his advice been sought, Mr Forbes said he would have wanted the IRIC to continue to work with all the various agencies involved in implementing the COVID-19 Assistance Programmes packages including the Premier's Office. It was, he considered, ready, willing and able to do so. That would have better provided for "the finance component", given that the programmes involved the expenditure of public funds[178]. However, once the Premier's Office became the lead ministry and the SSB grant had been made, the IRIC (he said) "hardly existed". Mr Forbes understood that he still had an obligation to provide reports to Cabinet; but he struggled to obtain the necessary information to do so[179]. He was getting oral reports from public officers in the MoF who were on the IRIC that the Premier's Office was ignoring their advice, and that these officers were not being provided with information so that they could make informed decisions[180].

5.109 Given his position at the time, Mr Forbes could be viewed as having some responsibility for ensuring that the COVID-19 Assistance Programmes were administered properly[181]. Mr Forbes stressed that he was not "recoiling from my responsibilities as Financial Secretary". He put those responsibilities as "to ensure that our public funds are spent in accordance with, first, the Appropriation Act, and then with all due consideration to accountability, transparency, and good governance". However, as we shall see, matters did not evolve as he had envisaged. He maintained that he did "what any reasonable competent Financial Secretary would have done in terms of trying to ensure that the money was spent in accordance with the existing rules and regulations"[182].

5.110 Therefore, certainly after May 2020, Mr Forbes was excluded from – and had, at most, a very limited involvement with – these programmes. Accordingly, on the evidence available to me, I do not consider that the involvement of Mr Forbes in the development of the COVID-19 Assistance Programmes raises concerns that would lead to him being personally criticised or warrant further examination of his conduct.

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[176] T25 13 July 2021 pages 150-151; and T46 11 October 2021 pages 15-16.
[177] T46 11 October 2021 pages 33-34.
[178] T46 11 October 2021 pages 35-36.
[179] Mr Forbes said that the manner in which the various committees reported was not as he had originally envisaged. His recollection was of a change by which the committees were reporting back to Cabinet and Dr O'Neal Morton (rather than to him). He was still required to report to Cabinet on the impact of the stimulus packages which required information (T46 11 October 2021 pages 26-27). It appears that it was not until about November 2020 that Mr Forbes appreciated that he might no longer be required to report to Cabinet on the implementation of the COVID-19 Assistance Programmes, although he was never formally told this (T46 11 October 2021 pages 41-45).
[180] T46 11 October 2021 pages 38-40. The advice rejected included recommendations as to the use of objective criteria for the distribution of funds to daycares, schools and churches (T46 11 October 2021 page 57).
[181] The concerns and potential criticisms in respect of the COVID-19 Assistance Programmes arising from the evidence before the COI were put to Mr Forbes in a COI Warning Letter No 2 dated 24 September 2021. He did not take the opportunity afforded to him to provide a written response. However, the concerns and potential criticisms set out in the warning letter were put to Mr Forbes at an oral hearing on 11 October 2021 (T46 11 October 2021 pages 46-58). He, therefore, had an opportunity to address them as fully as he wished.
[182] T46 11 October 2021 pages 55-56.

The Transportation Programme

5.111 On 27 May 2020, Cabinet made decisions in relation to this programme, including a decision that it would receive funding of $900,000 through the Premier's Office; that the programme would be overseen by a committee jointly chaired by Dr O'Neal Morton (as Permanent Secretary in the Premier's Office) and the Chairman of the Taxi and Livery Commission; that this committee would establish the guidelines under which the programme would be administered and monitored; and that the Premier's Office would ask the IAD to conduct monthly audits of the programme and submit reports to the Cabinet[183]. This was to ensure that the funds would be distributed in accordance with the principles of good governance, as required by the SSB on grant.

5.112 The Preliminary Report produced by the Premier's Office and dated 28 June 2021 records that the total outlay on this programme between July 2020 and May 2021 was $1,301,162. The report gives a breakdown of that expenditure across the various elements which comprised the programme and by month[184]. It is not clear how the programme was funded once it exceeded the $1 million allocation provided by the SSB.

5.113 The degree to which the IAD Director was able to audit this programme was very limited. The IAD Report noted the absence of a policy document, that no programme data were being collected, and that the programme had been expanded without any proper analysis[185].

5.114 The Response of the Premier's Office does not take issue with the findings of the IAD Report, limited as they were. There is no dispute that the IAD Director was unable to conduct monthly audits in respect of this or any other COVID-19 Assistance Programme. I discuss the reasons for this below[186].

5.115 The COI did not undertake any substantial enquiries into this programme. However, through no fault of the IAD Director, this programme was not, and still has not been, audited to any sensible or satisfactory degree. Given the concerns raised about the COVID-19 Assistance Programmes as a whole, I consider that this programme should be the subject of a full independent audit.

The MSME Programme

5.116 On 17 June 2020, Cabinet considered Cabinet Memorandum No 211/2020, brought before it by the Minister of Finance. Cabinet duly approved a "Small Business Sector Grant Programme" (i.e. the MSME Programme) funded by a $6.5 million part of the SSB grant and distributed through the Premier's Office. A committee chaired by a representative from the Premier's Office[187], and with representation from the MoF and the Department of Trade, was to be established and take responsibility for structuring and administering the programme. The IAD Director was to carry out monthly audits of the programme with reports being provided to Cabinet[188].

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[183] Revised Expedited Extract of Cabinet Minutes on Cabinet Memorandum No 175/2020: COVID-19 Stimulus Package dated 9 December 2021.
[184] Preliminary Report pages 51-56.
[185] IAD Report pages 13-15.
[186] See paragraphs 5.279-5.315.
[187] This was the only one of the four committees set up to work on these programmes that was not chaired by Dr O'Neal Morton (T45 8 October 2021 page 12).
[188] Expedited Extract: COVID-19 Economic Stimulus – Small Business Sector Grant Programme (Cabinet Memorandum No 211/2020) dated 17 June 2020. Again, this was to ensure that the funds would be distributed in accordance with the principles of good governance, as required by the SSB.

5.117 Subsequently, a policy brief dated 7 July 2020 was prepared setting out the framework for the management and administration of this programme. This, together with the draft of an online application form, was approved by Cabinet on 15 July 2020[189].

5.118 On 11 September 2020, the Minister of Finance brought a further paper to Cabinet[190]; and, on the basis of it, Cabinet decided that a list of identified businesses would receive specified awards in "accordance with Government's financial management policy procedures". The awards were to be paid directly to the businesses concerned, and from a budget controlled by the Premier's Office[191].

5.119 On 14 September 2020, the Premier announced the launch of payments under the MSME Programme[192].

5.120 The Preliminary Report explains that applicant businesses were required to provide financial information which was used to calculate a "value loss figure" to assist in determining the grant to be awarded to a particular business[193]. The programme had awarded 1,226 grants with a total value of $7,406,521. It had received 1,268 applications of which, ultimately, only 17 were rejected[194]. A need to extend the programme to ameliorate the hardship on businesses "that were unable to access the programme based on the earlier criteria" or who could not be accommodated within the original budget was identified. The Preliminary Report is silent as to how the criteria were changed and when[195]. Similarly, there is no detail as to the outcome of any monitoring and evaluation undertaken, including whether grants were awarded to businesses that had not provided financial information[196].

5.121 The IAD Director was able to undertake some analysis of this programme[197]. The IAD Report notes that it had begun with extensive application, eligibility and approval criteria, which had been "stripped away" leaving only whether the applying business had a trade licence, employed less than 20 people, and its profit or loss as reported by the owner. The IAD Director considered that the use of a wider and better range of criteria would have had the benefit of producing more reliable economic data by which to measure the effectiveness of the programme. The IAD Report noted that the programme failed to identify those businesses best able to provide the greatest economic return for funds granted. Thus, businesses such as DJs, entertainers and vehicle rental companies received funds in a climate where they would struggle to operate. For businesses such as these, the programme was a means of social support rather than economic stimulus[198].

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[189] Cabinet Memorandum No 267/2020: COVID-19 Economic Stimulus – Small Business Sector Grant Programme with appendices dated 15 July 2020; and Expedited Cabinet Extract dated 16 July 2020.
[190] Cabinet Memorandum No 343/2020: COVID-19 Economic Stimulus – Micro, Small and Medium Enterprise (MSME) Businesses Grant Relief Awards dated 10 September 2020.
[191] Expedited Cabinet Extract on Memorandum 343/2020 dated 11 September 2020.
[192] Statement by Premier and Minister of Finance: Launch of the COVID-19 Stimulus Grant Payment for Qualifying Micro, Small and Medium Enterprises dated 14 September 2020 (http://www.bvi.gov.vg/media-centre/statement-premier-and-minister-finance-launch-covid-19-stimulus-grant-payment).
[193] Preliminary Report page 20.
[194] Preliminary Report page 24.
[195] Preliminary Report page 26.
[196] Preliminary Report page 22.
[197] IAD Report pages 7-12; and T23 7 July 2021 pages 58-70.
[198] IAD Report page 9; and T23 7 July 2021 pages 60-61. Whilst I see the force in the Auditor Generals' point, that to give money to businesses which were unable to operate might not have been the best way to stimulate the economy immediately, I am not sure the Auditor General was right to say that these payments were akin to welfare: it is arguable that, by supporting the proprietors of these businesses during the COVID-19 restrictions, it would enable the businesses to survive and, without delay, recommence their trade as soon as restrictions allowed. In that sense, such payments could be said to be in accordance with the BVI Government's stated policy.

5.122 The IAD Director could not say if the committee established to oversee the programme had been responsible for the change in criteria. On the information provided to the IAD[199], her report noted a lack of financial information to support the profit or loss claimed by a particular business[200]. The result was iniquity in the level of grant awarded, with businesses with different numbers of employees receiving the same level of grant. The IAD Report also noted 48 instances where grants were awarded without any information as to an applicant's financial position[201].

5.123 In the IAD Director's opinion, the MSME Assistance Programme had operated on the basis that, once an application was submitted, then some level of grant would be awarded. In her view, the programme had focused on accommodating businesses, rather than adopting a process that would optimise the allocation of grants in a fair and transparent manner to businesses that had shown that they were negatively impacted by COVID-19[202].

5.124 As with the Transportation Programme, the COI did not undertake any substantial enquiries into this programme. However, again through no fault of the IAD Director, this programme was not, and still has not, been audited to any sensible or satisfactory degree. Given the concerns raised about the COVID-19 Assistance Programmes as a whole, I consider that this programme, too, should be the subject of a full independent audit.

The Farmers and Fisherfolk Programme ("the F&F Programme")

The Original Cabinet Approved Scheme

5.125 As will be apparent from the above, consideration was being given by the BVI Government to provide economic support for the agriculture and fisheries sector, even before the SSB agreed to make a grant. On 20 March 2020, Cabinet considered Cabinet Memorandum No 97/2020[203] prepared by the MoF. The memorandum noted the need to assist "fishers and farmers during this critical time" both with any loss of income and to meet any increase in local demand that might result from a reduction in imports[204]. It quoted from an appended report on the impact of COVID-19 on the commercial farming and fishing industry in the BVI[205]. That report noted that the agriculture and fisheries sector made up a small share of the BVI economy,

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[199] The Department of Trade gave the IAD Director access to the database where it held online applications made under this programme. These applications were then reviewed by the Committee established to oversee the programme (T23 7 July 2021 pages 62-63).

[200] The policy paper approved by Cabinet further to Cabinet Memorandum No 267/2020 said:

> "Understanding the impact of COVID-19 on a business is therefore critical in determining the amount of the grant allocation. For the purposes of this programme 'loss in business revenue' as a measure of impact would result in a more targeted and equitable distribution of funds, with the greatest positive effect on the MSME sector and the overall economy".

The paper anticipated that applications would exceed the available funding ($6.5 million). Analysis of the financial data received from applications would, therefore, be used to determine how funds would be distributed (Economic Stimulus Micro Small and Medium Enterprise (MSME) Businesses Grant Programme Policy Brief dated 7 July 2020 page 4).

[201] The IAD Director's team was able to view completed online applications where supporting financial information was absent (T23 7 July 2021 page 62).

[202] IAD Report pages 7-12.

[203] Cabinet Memorandum No 97/2020: Economic Stimulus for Farmers and Fishermen (COVID-19) dated 20 March 2020. The index to the bundle of documents accompanying the Response of the Premier's Office identifies Annex 34 as Cabinet Memorandum No 97/2020. Annex 34 is incomplete; and, on its face, was authored by Ms Elvia Smith-Maduro, Deputy Secretary Premier's Office. Given its text matches that in Cabinet Memorandum No 97/2020, it suggests that the drafting of this paper began in the Premier's Office rather than the MoF.

[204] Cabinet Memorandum No 97/2020 paragraph 12.

[205] Expected Impacts of COVID-19 on the Agricultural and Fishing Industry of the Virgin Islands (the date and author of this report are not identified). Dr O'Neal Morton could not assist as to who had prepared this document (T45 8 October 2021 pages 180-182).

and set out some of the needs of the "commercial fishing and farming community". There were (it said) "currently 33 registered commercial fishing vessels and 20 pending vessel approvals for registration and licensing"; and that "[c]ommercial farmers are estimated at between 40 to 60". The report identified unlicensed fishermen fishing illegally as providing a competing market for licensed fishermen, and as presenting a health risk to the community. Its recommendations included that, if financial assistance were to be provided, then it would require a structured programme "carefully implemented to capture all commercial-scale farmers and licensed commercial fishers and avoid individual resource allocation disparity".

5.126 The MEC contributed to Cabinet Memorandum No 97/2020 noting, "Extreme care must be taken when determining the criteria for grants given past experiences with misuse of funds granted to fishermen and farmers. Additionally, emphasis must be placed on commercial fishing and farming to determine those eligible to receive assistance …"[206]. The MoF noted that "[d]evelopment of the criteria for grants is an important element of the process for transparency and good governance purposes"[207]. Yet again, in respect of this programme, the need for good governance principles to be applied was acknowledged.

5.127 Cabinet adopted the decision proposed in the memorandum, accepting the recommendations of the report appended to the memorandum; approving a $2 million stimulus package for farmers and fishermen to be paid from a budget controlled by the Premier's Office; and establishing a working group, chaired by Dr O'Neal Morton, to develop criteria for grants under this programme. As with the other COVID-19 Assistance Programmes, Cabinet was to receive a monthly progress report[208].

5.128 The references in the Pre-Report and the Update Report to work undertaken in relation to the agriculture and fisheries sector appears to be a reference to the efforts of the working group established under Cabinet Memorandum No 97/2020 to develop criteria for grants to farmers and fishermen. The result was Cabinet Memorandum No 179/2020[209], put before Cabinet on 27 May 2020. That listed the members of the working group chaired by Dr O'Neal Morton, including MEC Permanent Secretary Carolyn Stoutt-Igwe, the Director of the Department of Agriculture and Fisheries ("the DAF" [210]) Theodore James, and (as he then was) the Deputy Financial Secretary Jeremiah Frett.

5.129 The memorandum described food security as a "major priority". It explained that the funding available under this programme would be used to purchase the supplies necessary to "get our fisherfolks back in the water" and "our farmers back on their grounds", and to "ramp up production". It noted that farmers and fishermen interested in the stimulus payments had been encouraged to register with the DAF and to complete a survey used to identify the most common challenges faced and areas of need[211]. Payments were to be processed by the Premier's Office, with approval of individual grant amounts requiring the signature of

[206] Cabinet Memorandum No 97/2020 paragraph 16.
[207] Cabinet Memorandum No 97/2020 paragraph 17.
[208] Expedited Extract of Cabinet Decision on Memorandum 97/2020 dated 20 March 2020. The working group also had representatives from the Ministry, the Department of Agriculture and Fisheries ("the DAF") and the MoF. On 31 March 2020, Cabinet issued a revised expedited extract adding a decision to include one representative each of the farming and fishing industries on the working group. Dr O'Neal Morton said that there was initially confusion as to whether monthly reports should be provided to Cabinet by the working group or the Financial Secretary. This was resolved in favour of the working group; but, while there may have been periodic reports, Dr O'Neal Morton could not recall if reports were in fact submitted monthly (T45 8 October 2021 pages 10-12 and 230). On Mr Forbes' evidence, this occurred in November 2020 (T46 11 October 2021 pages 41-45).
[209] Cabinet Memorandum No 179/2020: Economic Stimulus – Farmers and Fishermen dated 27 April 2020. The memorandum was brought to Cabinet by the Minister of Finance, but its content and appendices clearly reflect tasks assigned to the working group.
[210] The DAF is a department within the Ministry of Education, Culture, Youth Affairs, Fisheries and Agriculture.
[211] The survey results were appended to Cabinet Memorandum No 179/2020 (Appendix G).

the Premier. The policy focus was, thus, upon invigorating the commercial agriculture and fisheries sector of the BVI economy by reimbursing capital expenditure to increase or re-establish businesses.

5.130 Cabinet noted the updated lists of registered commercial farmers and fishermen appended to the memorandum, which listed 36 commercial fishermen and 95 commercial farmers as being registered for the purposes of the economic stimulus[212]. Cabinet then duly approved the following (which again focused on invigorating the relevant business sector)[213]:

(i) The criteria by which applicants would be assessed for assistance through the "COVID-19 Economic Stimulus Response two million dollars ($2 million) facility" (i.e. the F&F Programme). An applicant farmer had to be registered with the DAF, depend on farming as his or her main source of income, and be engaged in commercial agriculture as defined within the document or have been engaged in commercial agriculture within the past five years. An applying fisherman had to be "an existing licenced commercial fisher as defined under the Virgin Islands Fisheries Act, 1997 and Regulations 2003"; or have held a commercial fishing licence within the past five years[214].

(ii) The application form for farmers and fishermen to apply for assistance[215]. This asked if the applicant farmed or fished commercially and was licenced. It asked the applicant to list their top three "immediate needs".

(iii) The "priority areas list" for farming and fishing[216].

(iv) A number of templates and production logs to be completed monthly by the DAF for reporting and accountability purposes[217].

5.131 Under the eligibility criteria, any application was to be accompanied by proof of status and a copy of a trade licence or fishing licence. Each applicant was to be assessed and verified by the DAF prior to approval. Where the application concerned repairs to a physical structure, then that request was to be assessed by the PWD or a certified contractor to determine needs and cost. Payments were to be made directly to suppliers on behalf of the farmer or fisherman. Payments of labour costs were to be verified by the PWD before payment was processed[218].

5.132 Therefore, on its face, the Cabinet clearly considered the criteria important, and considered them with care. To ensure appropriate monitoring, Cabinet also required the IAD Director to audit the initiative on an ongoing basis, and provide a monthly report to the Minister of Finance for provision to Cabinet. The Auditor General proceeded on the (not unreasonable) basis that the criteria applying to the F&F Programme were those approved by Cabinet.

5.133 While there is a lack of clarity as to the date when the expedited extract of this Cabinet decision was issued[219], the decision was circulated beyond Cabinet by 18 June 2020: Mr Forbes sent the IAD Director a memorandum that day headed "Economic Stimulus – Farmers and Fisherman – Memo No 179/2020"[220].

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[212] Appendices E and E1 to Cabinet Memorandum No 179/2020.
[213] Expedited Cabinet Extract on Cabinet Memorandum No 179/2020 dated 27 May 2020. The expedited extract appears to have been issued on 11 September 2020 (See Preliminary Report page 73).
[214] Cabinet Memorandum No 179/2020 – Eligibility Criteria – Economic Stimulus Farmers and Fishermen Appendix B.
[215] Appendix C to Cabinet Memorandum No 179/2020 – Application form.
[216] Appendix D to Cabinet Memorandum No 179/2020.
[217] Appendices F, F1 and F2 to Cabinet Memorandum No 179/2020.
[218] Appendix C to Cabinet Memorandum No 179/2020 page 2.
[219] The version of the Expedited Cabinet Extract exhibited to the Preliminary Report (at page 73) bears the date 11 September 2020.
[220] IAD Report Appendix I.

5.134 The qualifying criteria for farmers set out in the Preliminary Report mirror those approved by Cabinet per Cabinet Memorandum No 179/2020, save that the qualifying period was reduced from five to three years for both farmers and fishermen. Further, an unregistered farmer who provided a "notarised letter from a fit and proper person" or a person who provided "sufficient information of… engagement in commercial farming" could qualify[221]. Similarly, a fisherman who did not have an existing commercial fishing licence could provide a "notarised letter from a fit and proper person" verifying that the applicant has been engaged in commercial fishing for the past three years[222]. No definition of "fit and proper person" is given nor is there an explanation as to who was responsible for these changes in criteria. These criteria (which Dr O'Neal Morton could not recall if Cabinet had approved in amended form)[223] were advertised[224].

5.135 Applicants were assessed and verified by the DAF or "any other entity vetted and approved by the Premier [sic] Office"[225]. Applicants had to provide estimates for materials, work to be done or equipment required with photos where possible and a copy of a trade or fishing licence or notarised letter[226]. According to the Preliminary Report, "Payments were made directly to suppliers and contractors on behalf of the farmer or fisherman subject to the submission of proforma invoices"[227].

5.136 At this point, therefore, the policy driver was still the invigoration of the agriculture and fisheries sector, using the money from the SSB grant to reimburse capital expenditure to expand and/or re-establish the claimant's business. Good governance requirements, insisted upon by the SSB, were more or less in place. They formed part of the Cabinet's approval of the programme.

The Change in Policy/Scheme

5.137 However, whilst the Attorney General denied there was any fundamental change, the policy driver then appeared to change, in favour of a system in which every farmer or fisherman received a grant in one of several bands determined according to the "size" of their business. Was there such a change? And, if so, how and why did such a change occur?

5.138 The Attorney General submitted that, in certain circumstances, it is legitimate as a matter of policy to depart from principles of openness, transparency, value for money and public accountability. The provision of the IRP was, the Attorney submits, one such circumstance[228].

5.139 In describing the policy objective behind the F&F Programme, the Attorney General made the following points.

(i) It was intended to be an emergency response to generate economic activity in a low wage industry, create employment and increase food production[229].

[221] Preliminary Report page 35.
[222] Preliminary Report page 36.
[223] T45 8 October 2021 pages 182-185. No Cabinet decision in respect of these changes has been disclosed to the COI.
[224] Bundle accompanying written response of Auditor General to Response of Premier's Office at pages 1-3 and 7. The advertisement gives a deadline for applications of 3 July 2020.
[225] Preliminary Report page 37. Whether another entity was involved in vetting applicants, and, if so, the identity of that entity is not explained in the Preliminary Report.
[226] Preliminary Report page 37.
[227] Preliminary Report page 38.
[228] Response of the Premier's Office paragraphs 170-172.
[229] Response of the Premier's Office paragraphs 69 and 70.

(ii) Contrary to the impression given by the Auditor General in her report (to which I return below[230]), it was never intended to be confined to those who were already registered with the DAF[231].

(iii) When considering Cabinet Memorandum No 179/2020, Cabinet did not receive any "firm proposals" nor make any decisions as to how the amount to be awarded to an individual applicant would be determined. Thus, it is wrong to assume (as she suggests the Auditor General did) that it was "Government's intention that the amounts awarded should exactly equate to the demonstrated need for specified work or equipment"[232]. The Attorney therefore denied that there was a fundamental change of policy/approach to this programme.

5.140 As to the first of these points, I accept that the F&F Programme was part of the IRP, i.e. the *Immediate* Relief Package. The policy initially pursued was, however, one of economic stimulus; and the programme within that context was (the evidence suggests) intended to identify the challenges and needs of the commercial agriculture and fisheries sector, and respond to those needs with the aim of supporting the sector so that it could contribute to an increase in food security – something that clearly would not happen overnight[233]. In any event, it does not automatically follow from the fact that the programme was responding to an emergency that it would be justified to make a deliberate decision not to apply governance controls, particularly governance controls specifically approved by Cabinet whose members, when determining that such conditions should apply, were well aware of the emergency nature and circumstances of the assistance being provided.

5.141 As to the second point, it is wrong to say that the Auditor General proceeded on the basis that the programme was limited to already registered applicants. However, as Dr O'Neal Morton confirmed, the programme was never intended to assist those who were not farming or fishing commercially[234]. The application form approved by Cabinet asks whether the applicant is a licensed commercial farmer or fisherman but gives no information about registering as such[235]. Cabinet Memorandum No 179/2020 makes plain that applicants were expected to register, and that they had to meet the eligibility criteria[236].

5.142 The third point (i.e. that it is wrong to assume that Cabinet intended the F&F Programme payments to reimburse actual capital expenditure) is difficult to reconcile with the following:

(i) that Cabinet Memorandum No 179/2020 identified the purpose of the programme as purchasing supplies for farmers and fishermen;

(ii) that it specified that individual payments would be signed off by the Premier and Minister of Finance;

(iii) that it also specified that payments were to be directly to suppliers;

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[230] See paragraphs 5.160-5.183 below.
[231] Response of the Premier's Office paragraphs 70, 75 and 91.
[232] Response of the Premier's Office paragraphs 77-78.
[233] In support of her submission, the Attorney General relies on an incomplete version of the report appended to Cabinet Memorandum No 97/2020 (Expected Impacts of COVID-19 on the Agricultural and Fishing Industry of the Virgin Islands). The full version of the paper includes recommendations that the DAF give priority to commercial farming and develop a food production plan for the Paraquita Bay Estate with one-year leases being granted for commercial farming, and priority being granted to the passage of modernised agricultural and fisheries legislation. That, in a report adopted by Cabinet, is indicative of more than a short-term view. The Speech from the Throne, delivered by Governor Rankin on 18 January 2022 states that, to strengthen food security, the BVI Government will be taking forward the Virgins Islands Food Security and Sustainability Bill which will consolidate and revise most of the agriculture and fisheries legislation (https://bvi.gov.vg/media-centre/speech-throne-2022).
[234] T45 8 October 2021 pages 185-186.
[235] Appendix C to Cabinet Memorandum No 179/2020 – Application form.
[236] Cabinet Memorandum No 179/2020: Economic Stimulus – Farmers and Fishermen dated 27 April 2020 paragraphs 10 and 15.

(iv) that applicants were to be asked to identify their three immediate needs; and

(v) the Attorney General's own submission that the move to a banded system arose when "it became apparent that it would not be possible to award the grants based on a demonstrable need"[237].

On all the available evidence, I conclude that the intention of Cabinet as of 27 May 2020 was that grants under the F&F Programme were to be paid out on the basis of evidenced and assessed need. Indeed, on the evidence, it would be very difficult to draw any other conclusion. That, of course, pursued the identified policy objective.

5.143 The Attorney General, on (at best) scant evidence, submits that, in mid-September 2020, it was public officers who decided to adopt a banded system of standard grants. This was necessary (it is said) because of (i) the number of applications received; (ii) a failure to appreciate that payments over $10,000 would require a petty contract; (iii) a lack of relevant experience in designing such schemes; and that (iv) a lack of resources in the DAF[238] and the PWD meant that the programme could not be delivered within the desired timescale[239]. As I discuss in the following section of the Report, mid-September 2020 was also the time when it was decided to use a banded system for churches under the Religious Institutions Etc Programme.

5.144 Given that she adopted the Response of the Premier's Office, insofar as the decision to change policy and move to standard bands was that of public officers, Dr O'Neal Morton must be taken as accepting at least some responsibility for it.

5.145 However, the Response is silent as to the role of the Premier in this decision, and whether it was approved by Cabinet. But, when he came to give evidence on this topic, the Premier was not silent. He said – rightly – that policy was not a matter for public officers ("the technical people"), but for him as the relevant Minister[240]. While, with identified exceptions, he was not involved in the design and implementation of the COVID-19 assistance packages, he said he was involved in determining policy governing those programmes[241]. He gave "a general direction to public officers in [his] Office that the overriding policy priority was to distribute the immediate relief package *immediately* and to 'get the money to the people' without delay."[242].

5.146 Dr O'Neal Morton said that the Premier had told her and other public officers that the priority was for monies approved by Cabinet to be distributed urgently[243]. She agreed that the process of designing and administering the COVID-19 Assistance Programmes was left to public officers, but said that if there were any difficulties or challenges then the matter was taken to the Premier for advice[244].

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[237] Response of the Premier's Office paragraph 79.

[238] Dr O'Neal Morton queried why the DAF was able to assist the Auditor General and not her Ministry (T45 8 October 2021 139-141). However, while I accept the DAF's resources may have been limited, it appears they were willing to assist the Premier's Office as much as they could. For example, the scant evidence on which the Attorney General relies includes a request from the DAF Director to Deputy Secretary Smith-Maduro for phone numbers "for us to visit [farm and vessel locations] to verify status" (Annex 41 in bundle of documents accompanying the Response of the Premier's Office).

[239] The Response of the Premier's Office paragraphs 79-88.

[240] T46 11 October 2021 page 86.

[241] T47 12 October 2021 pages 36-40; and Premier Response to COI Warning Letter No 5 dated 4 October 2021 paragraph 3.

[242] Premier Response to COI Warning Letter No 5 dated 4 October 2021 paragraph 6 (emphasis in the original).

[243] Carolyn O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021 paragraph 3.

[244] T45 8 October 2021 pages 7-8.

5.147 Dr O'Neal Morton acknowledged that Cabinet had imposed specific controls that were to be applied to the distribution of money under the programmes; but said that, in retrospect, some of the controls imposed by Cabinet were "very ambitious". Because it was a priority to disperse monies as quickly as possible, a view was reached that some of these controls were impractical. These challenges were discussed "verbally" with the Premier[245].

5.148 The Premier and Dr O'Neal Morton both gave the decision to pay suppliers direct as an example of an impractical control. Suppliers were reluctant to accept purchase orders, apparently because payments by the BVI Government were likely to be slow or otherwise unreliable. Accordingly, the Premier decided payments should be made to applicants, with the intention of going back to Cabinet to ratify after the event once the grants had been distributed[246]. The decision (which was never committed to writing, being communicated orally by the Premier to Dr O'Neal Morton) arose not only from the reluctance of businesses to accept payment because of the time it took to be paid, but also because, according to the Premier, the changing circumstances of the pandemic meant the Government had to "pivot" and decide to give "a shot in the arm to wake back up the economy"[247]. The Premier appeared ambivalent as to whether the decision he made to make payments to applicants rather than directly to suppliers was reflective of a change in process or policy – although eventually accepting the description of this particular change as one of mechanism. In any event, however it is properly described, the decision to make the change was his.

5.149 As to a banding system for the F&F Programme, Dr O'Neal Morton confirmed that she would not have proceeded without the Premier's approval[248]. Asked about his role in this – which reflected a substantial change in policy, as it undoubtedly was – the Premier appeared to struggle to answer direct questions. However, he did confirm that he, alone, authorised this policy change[249]. Again, it was never committed to writing, the Premier telling his Permanent Secretary of the change informally and orally. He referred to a number of factors which he considered relevant to that change in policy: the concern of supplying businesses over payments, the volume of applications made, the time taken to conduct a means assessment, the need to "get the money out" and to "get that injection into the economy", and potential food shortages. The Premier pointed to the last of these factors as justifying the expansion of the F&F Programme from one which was just a scheme for the reimbursement of capital expenditure[250].

5.150 How the bands were fixed in respect of the F&F Programme is not clear. Dr O'Neal Morton, whose evidence on both the development and the implementation of this whole programme was particularly unclear, could not direct me to the evidence in the Preliminary Report showing how applicants were vetted nor explain the connection between the information an applicant was required to produce and the bands[251].

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[245] T45 8 October 2021 pages 18-22. Dr O'Neal Morton said that her discussions with the Premier as to the COVID-19 Assistance Programmes were not minuted (T45 8 October 2021 pages 245-246).
[246] T45 8 October 2021 pages 18-22; and Carolyn O'Neal Morton Response to COI Warning Letter dated 4 October 2021 paragraph 4. This was a verbal direction from the Premier that was not documented (T45 8 October 2021 page 247).
[247] T47 11 October 2021 pages 74-79 and 85-86; and Premier Response to COI Warning Letter No 5 dated 4 October 2021 paragraph 4.
[248] T45 8 October 2021 pages 205-206.
[249] T47 11 October 2021 pages 87 and 96. Mr Forbes said that he was not consulted about the use of a banding system (T46 11 October 2021 page 57).
[250] T47 11 October 2021 pages 87-102.
[251] T45 8 October 2021 pages 129-139.

5.151 However, it seems that the band into which an applicant fell was determined by a formula intended broadly to reflect the size of the business enterprise, based on an estimated number of employees each working an eight-hour day over a 25-week period at minimum wage[252]. That formula appears in a report prepared by SS Accounting and Consulting Services Limited ("SSAC"), a company through which Wendell Gaskin offers consultancy services. The Attorney General asserts in her closing submissions that the "allocation of grant money to applicants was the responsibility of the Technical Team under the guidance of Mr Gaskin"[253]. In an affidavit dated 1 November 2021, Dr O'Neal Morton explained that Mr Gaskin was contracted as a "specialist consultant", and led a team of three in dealing with the F&F Programme. She considered that Mr Gaskin was an appropriate choice given his background as a former IAD Director and Deputy Financial Secretary, and that he had a good knowledge of the farming and fishing community[254]. This was the first occasion on which the Premier, other elected Ministers or any other arm of the BVI Government represented by the Attorney General had chosen to explain – or even reveal – the role said to have been played by Mr Gaskin[255]. However, there is neither dispute nor doubt that Mr Gaskin and SSAC would, in any event, have been answerable to Dr O'Neal Morton as Permanent Secretary[256].

5.152 The Attorney General said that, in retrospect, it became apparent that the bands adopted were too high, in the sense that their application had resulted in aggregate payments out exceeding the sum approved by Cabinet, so requiring the approval of further funding[257]. Given that the grants were made, not on the basis of need, but on the basis of size of business, it seems to me quite remarkable that the sum allotted by Cabinet for this programme was exceeded. It is unclear how the bands were assessed, but they could – and should – have been fixed so that the aggregate amount expended fell within the Cabinet authorisation. It is no answer to say that the Premier's Office lacked policymaking and implementation capacity: to fix bands that would not have exceeded the authorised funding would not have required any great calculation; and, as the payments were not correlated with need, a conservative approach could, and should, have been properly taken.

5.153 Asked about the need to increase the funding to $3.5 million, Dr O'Neal Morton referred to a different point. She said that an increase in funding, after the deadline for applications had closed, was deemed necessary because the Premier's Office considered that some farmers and fishers known to be "legitimate" (i.e. presumably, farming or fishing commercially) had been missed by the programme in the sense that they had made no claim. So, she said, some individuals were given monies on the basis that they had been identified by others as, or were well-known (presumably by those in the Premier's Office administering the payments) to be, commercial farmers or fishermen. No enquiries were made as to whether they had any need, or wished to avail themselves of a grant. In my view, the unevidenced suggestion that the Premier's Office, late in the day, of its own initiative, identified commercial farmers and fishermen who had made no claim for a grant but were given one in any event (irrespective of need) does not begin to justify the overspend.

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[252] Response of the Premier's Office paragraphs 84 and 87; and extract of undated SSAC Report 2020 (Annex 43 in bundle of documents accompanying the Response of the Premier's Office).
[253] Elected Ministers' Closing Submissions paragraph 25.
[254] Carolyn O'Neal Morton Fifth Affidavit dated 1 November 2021 paragraphs 2.8 and 2.9. This affidavit was not made at the COI's request; and was provided after the formal conclusion of the COI's hearings on this topic.
[255] The Response of the Premier's Office annexes extracts from a report prepared by SSAC. It does not mention Mr Gaskin by name, nor did Dr O'Neal Morton refer to him during her oral evidence. The Attorney General first mentioned Mr Gaskin by name in the Supplemental Response, which simply said his company assisted in the delivery of the programme. Although requested to attend, neither Dr O'Neal Morton nor Mr Gaskin were available for the last hearing of the COI on 24 November 2021.
[256] Contract between Wendell Gaskin CFE dba "SS Consultancy Services" and the BVI Government. Mr Gaskin was engaged as a "Special Adviser to the Premier & Minister of Finance on COVID-19 Financial Matters".
[257] The Response of the Premier's Office paragraph 89. The submission is not evidenced; but what is said is that a submission was made to Cabinet to approve the reallocation of funding within the envelope of the global sum set aside for "the relief programme".

5.154 According to Dr O'Neal Morton, as at 1 November 2021, the Premier's Office did not have an application form for each of the 484 applicants under this programme. She said that many applicants did not complete a form because, for example, they were referred into the programme by Members of the House of Assembly, or they came in person to the Premier's Office[258]. She said that it would only be possible to confirm the recipients who were neither registered nor licensed nor had produced a notarised letter, "once we are finished clearing up the results"[259].

5.155 Dr O'Neal Morton could not say if Cabinet had been asked to "retroactively approve" the increase in funding[260]. We now know that, in December 2020, Cabinet approved an increase in expenditure to $3.5 million[261], although it is unclear the extent to which the policy change that made this increase necessary was made clear to Cabinet, if at all. In any event, (i) that approval was retrospective, at a time when a commitment to payment had been made (so that, in practice, Cabinet had little choice in the matter), and (ii) the eventual expenditure was not $3.5 million but about $5 million. The Preliminary Report stated that 201 grants were made to farmers totalling $2,881,500 and 207 to fishermen totalling $2,220,500. The total sum dispersed came to $5,102,000[262].

5.156 As I have indicated, grants were made, not on the basis of need, but on the basis of "size" of operation. However, recipients of grants were given a letter, which stated that, by accepting the grant, the recipient was agreeing to provide a full account of the expenditure of the funds awarded. It was said that that information would ensure that the grant "hits its target" and that "the Government is being prudent with the public's purse"[263]. The Premier placed particular weight upon the requirement that recipients would, after the event, have to account for monies received, and referred to a Cabinet decision requiring this. A system of "back-end accountability" was, the Premier said, appropriate in a pandemic. The Premier said that the requirement to account applied to the F&F Programme, but not to the Religious Institutions Etc Programme in which, the Premier said, the recipients of grants had not been required to apply[264]. While he expressed the hope that the process of back-accounting would cause more people to register as commercial farmers and fishermen, the Premier was unclear as to whether it would, in fact, confirm if payments had been made to applicants who met the eligibility criteria approved by Cabinet[265].

5.157 Dr O'Neal Morton explained that the intent of back-accounting was to make recipients account for monies spent and conduct an assessment and evaluation of the programme. The work on this, she said, had not yet begun but would be starting in due course. If a recipient could not account for the funds then, she said, the money would have to be repaid[266] . The point was reinforced in the Attorney General's closing submissions which state that this "review will ensure that (a) the recipient is entitled to the money, and (b) the money has

[258] Carolyn O'Neal Morton Fifth Affidavit dated 1 November 2021 paragraph 2.5. This affidavit was not made at the COI's request: it was provided after the formal conclusion of the COI's hearings on this topic.
[259] T45 8 October 2021 pages 189-190 and 209-210. That the Premier's Office does not have all the application forms in itself is likely to make it more difficult to "clear up the results".
[260] T45 8 October 2021 pages 32-33 and 163-166.
[261] AG F&F Report at paragraph 10. The Auditor General recorded that an "amendment to the grant agreement dated 15 December 2020 reallocated an additional $1.5 million from the SSB housing programme to the Farmers and Fishermen grants, increasing the total to $3.5 million". This would accord with the reference in the Response of the Premier's Office to the need to return to Cabinet for further funding.
[262] Preliminary Report page 39.
[263] Preliminary Report page 79.
[264] T47 11 October 2021 pages 78-79, 89, 101-102, 105-106 and 114.
[265] T47 11 October 2021 pages 119-122.
[266] T45 8 October 2021 pages 153-156 and 199. The extent to which farmers and fishermen who have been given significant amounts of public money two years ago will be willing to – or in a position to – repay the BVI Government is, at best, unclear. It would be unsurprising if, after this length of time, some will be unable to repay. No consideration appears to have been given to these issues.

been spent appropriately … if not, the recipient will have to pay the money back…"[267]. The closing submissions note that the IAD Director recognised an "ex-post facto review" as an "appropriate control method". However, that ignores that the IAD Director explained that such a course would only be helpful if done at the right time. Looking at her evidence as a whole, it is plain that the IAD Director was not going so far as to endorse the mechanism adopted by the Premier's Office[268].

5.158 Subsequent to the Premier and Dr O'Neal Morton giving oral evidence on these programmes, I was provided with a copy of Cabinet Memorandum No 325/2021[269] approved by Cabinet on 11 August 2021[270]. The memorandum sets out a three-phase plan to implement the monitoring and evaluation of all four COVID-19 Assistance Programmes. It is silent as to whether – and, if so, how – monies would be recovered from recipients who were either ineligible or could not, to the satisfaction of the Government, account for how grants were spent. Nor does it say that recipients will be required to repay monies, or address how such a requirement might be enforced.

5.159 Thus, a policy decision in relation to the F&F Programme was taken by the Premier to move from reimbursing actual or anticipated expenditure, to payments based on hypothetical income (using a system of bands) but then requiring recipients of any monies to account for monies received. That latter requirement, to be implemented at some unknown point in time, is strange in the circumstances of the changed policy, and is in any event subject to the political will and practicalities of recovering any monies that are found not to have been properly paid out and used under the programme. It is far from clear as to whether Cabinet, whilst approving the increase in funding to $3.5 million, did so on an informed basis with regard to the change in policy direction. The Cabinet certainly did not approve the change before the event. That policy change was made by the Premier. In making it, it seems that he did not seek the advice of the Financial Secretary, or the IRIC (the committee which had been set up to assist with the implementation of the COVID-19 Assistance Programmes), or indeed anyone else.

The Audits and the Response of the Premier's Office

5.160 Although Cabinet had required the IAD to perform an ongoing audit on the programme and report to it on a monthly basis, in the absence of the necessary information, the IAD Director was unable to conduct any analysis or perform any audit of this programme. The IAD Report simply records that, as of 9 March 2021, $4,989,500 had been paid out in support for agriculture and fisheries[271].

5.161 The Auditor General was able to do more. Her report on this programme records that it was open to any commercial farmer or fisherman registered with the DAF or licensed[272]. She appears to have obtained a copy of Cabinet Memorandum No 179/2020, including the accompanying lists of commercial farmers and fisherfolk appended to it ("the Cabinet List")[273].

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[267] Elected Ministers' Closing Submissions paragraph 33.
[268] T49 15 October 2021 pages 73-74.
[269] Cabinet Memorandum No 325/2021: Monitoring and Evaluation Policy of the Economic Stimulus Programmes dated 5 August 2021.
[270] Record of Cabinet Decision re Cabinet Memorandum No 325/2021 dated 19 August 2021.
[271] IAD Report page 20.
[272] AG F&F Report paragraph 9. The then Financial Secretary Glenroy Forbes had assumed that the lead, implementing authority for this programme would be the DAF (or its overarching Ministry, the MEC) – and the Auditor General appears to have made the same assumption (T19 29 June 2021 page 40). Mr Forbes said that he later learned that the Premier's Office had taken on this function (T25 13 July 2021 pages 138-139 and pages 147-148).
[273] AG F&F Report paragraph 6. The report refers to a policy document having been approved on 18 June 2020 and a list of "Registered Commercial Farmers and Fisherfolk" submitted to Cabinet on that date. Mr Forbes circulated Cabinet Memorandum No 179/2020 on 18 June 2020.

The Auditor General says that the programme had an initial budget of $2 million, which was increased to $3.5 million on 15 December 2020[274]. The publicised application period ran from 5 June to 10 July 2020, with payments to successful applicants commencing on 18 October 2020[275].

5.162 In the AG F&F Report, the Auditor General found the following.

(i) Treasury Department[276] records indicated that a total of $5,140,000 had been paid by 20 May 2021, $2,922,000 in 203 payments to farmers and $2,218,000 in 208 payments to fishermen[277], i.e. over $5 million compared with the Cabinet authorisation of $3.5 million.

(ii) The responsibility to assess applications and determine who and how much would be paid lay solely with the Premier's Office[278]. It was not monitored.

(iii) A substantial number of farmers registered as such only in the seven-month period after the announcement of the programme[279].

(iv) Of the 203 farmers to whom $2,922,000 was paid, 103 (to whom $1,437,000, i.e. 49% of the total, was paid) were not registered with the DAF. 42 of the 95 farmers on the Cabinet list were not registered. No information had been provided to the Auditor General as to how unregistered persons were granted payments: the DAF indicated that it was not involved in the grant process, which was handled by the Premier's Office where the responsibility for assessment lay[280]; and no evidence appears to have been submitted by the Premier's Office confirming that, although unregistered, these people were, in fact, commercial farmers[281]. The Auditor General was unable to find out from where the Cabinet list of farmers derived[282]. 22 properties were selected for site visits by the Auditor General's staff with the DAF: 11 could not be located, and two showed farming activity that did not meet the criteria for a commercial operation[283].

(v) Similarly, over half of the persons receiving fishermen grants were not registered on the fishing licence database: of the 208 fishermen to whom $2,218,000 was paid, 120 (to whom $1,235,000, i.e. 56% of the total, was paid) were not licensed as commercial fishermen. Four of the 36 fishermen on the Cabinet list were not licenced: two of the 25 persons on the list who were in fact paid a grant were not licensed[284].

[274] Dr O'Neal Morton said that an increase in funding, after the deadline for applications had closed, was deemed necessary because the Premier's Office considered that some farmers and fishers known to be legitimate had been missed by the programme. She could not say whether or not Cabinet had been asked to "retroactively approve" the increase (T45 8 October 2021 pages 32-33 and 163-166).
[275] Response of the Premier's Office paragraph 54; and AG F&F Report paragraphs 8 and 10. Dr O'Neal Morton accepted these dates (T45 8 October 2021 pages 16-17).
[276] As described above (paragraph 1.166), the Treasury Department, headed by the Accountant General, sits under the MoF. Its responsibilities include processing payments on behalf of Government. Vouchers submitted to the Treasury Department by accounting officers for payment will (or should) have all the relevant supporting documents attached.
[277] AG F&F Report paragraph 11.
[278] T18 28 June 2021 pages 158-159.
[279] AG F&F Report paragraph 75. 159 persons registered as farmers in 2020, 143 of whom registered in the period May to December 2020.
[280] AG F&F Report paragraphs 19-25; and T18 28 June 2021 page 158.
[281] T8 28 June 2021 page 157. The reference to affidavits is to notarised letters (AG F&F Report paragraph 46).
[282] T8 28 June 2021 page 156.
[283] AG F&F Report paragraphs 26-27; and T18 28 June 2021 page 160.
[284] AG F&F Report paragraphs 43-51.

(vi) In addition, (i) crew members were paid grants for equipment and material purchases for boats they did not own or operate; and (ii) in some cases, on the basis of the documents she had, multiple persons received grants for the same boat. Of a sample of 82 applicants, 30 were unlicensed and, of the rest, 40 were master/owner and 12 were crew[285]. Although the funds were approved as intended for equipment and materials, insofar as payments were made to crew, they appear to have been more akin to gratuitous payments to persons working on fishing boats[286].

(vii) The amounts requested by farmers were inflated by the Premier's Office[287] prior to payment. A sample of 70 farmers showed that the requests totalled $331,730.83, whereas the payments totalled £1,080,000 with a standard payment of $13,500 or £22,500 being made to each farmer irrespective of request or need. In one case, a request for $371.97 for a fence and $50.99 for a roll of barbed wire was met with a grant of $13,500[288].

(viii) The sample of fishermen was dominated by requests for funds for new engines, in respect of which there was no vetting. As with agricultural grants, standard payments of $9,000, $15,000 and $20,000 per applicant were made irrespective of need.

(ix) There was no accountability for how the awards were applied[289]. The policy approved by Cabinet included controls to ensure that grant funds were applied within the intention of the programme and value for money achieved. However, in respect of each of these controls, taken in turn:

(a) **Assessment and verification of applicants by the DAF or any other entity determined by the Premier's Office.**

On 29 July 2020, the Premier's Office sent a log of applications to the DAF of less than half the people to whom grants were made, indicating that the assessment process was, thereafter, taken over by the Premier's Office. The Auditor General asked the Premier's Office for information regarding all farmers and fishermen who obtained assistance but received no response[290]. The DAF had no further involvement. Nor did it have any involvement in the assessment of the fishermen's grants[291].

(b) **Assessment by the PWD, contractor or quantity surveyor approved by the Premier's Office where repairs to structures or physical works were requested.**

The PWD was not involved in any assessment.

(c) **Direct payments to suppliers and contractors with the presentation of a pro forma invoice.**

No such payments were made: all payments were made directly to applicants.

(d) **Monitoring of produce by the DAF to record growth and progress of the local industry after the programme.**

The DAF was not able to undertake any monitoring due to resource restrictions.

[285] AG F&F Report paragraphs 52-67.
[286] AG F&F Report paragraph 59; and T18 28 June 2021 page 117.
[287] T18 28 June 2021 page 160.
[288] AG F&F Report paragraphs 28-34 and Appendices 3 and 4.
[289] AG F&F Report paragraphs 35-42.
[290] T18 28 June 2021 page 156.
[291] AG F&F Report paragraph 67.

(x) There were instances where an individual received more than one stimulus payment under the programme, in respect of farming or fishing or both, only some of which had been reversed[292].

5.163 The Auditor General, having earlier referred to the Premier's statement of 28 May 2020[293], acknowledged the importance of pursuing the goal of food security, but concluded:

> "78. The failure to adopt Cabinet's mandated procedures for implementation and monitoring of this programme has resulted in the disbursement of a substantial amount of public funds without effective means of assessing how these were applied and measuring the impact, if any, on the agricultural and fishing industries.
>
> 79. The exclusion of the two key agencies [the MEC and the DAF] from this process demonstrates an absence of interest in achieving any real outcome with the payments, which for some served as needed assistance to advance their commercial fishing and agricultural undertakings, but for many were simply gratuitous, meritless awards at the expense of the public."

5.164 As to the usefulness of the DAF, on behalf of the Attorney General it was put to the Auditor General that her suggestion of building up the DAF was unrealistic during a pandemic. She responded by saying that, in the absence of other checks, the failure to put that department in a position to be useful meant that money was being spent which could not be accounted for[294].

5.165 The Auditor General set out her key conclusions in an Executive Summary, which the Response of the Premier's Office addressed paragraph by paragraph.

5.166 First, on behalf of the elected Ministers, the Attorney General accepted that $1.4 million in farmers' assistance grants was paid to persons who were not registered with the DAF,[295] but contends that the programme was not intended to be confined to those already registered. That proposition presumably relies on the fact that eligibility as a commercial farmer could be proved by other means, as approved by Cabinet (a notarised letter being the obvious example). The Attorney General cites the Auditor General's own statistic of 143 persons becoming registered within 7 months of the stimulus programme being announced showing, therefore, a 25% increase over the total of the previous 13 years[296].

5.167 The Auditor General noted that of the 143 newly registered farmers, only 34 received a farmers assistance grant. She accepted that there was an increase in the number of registered farmers, but said that it was not known if these were commercial farmers[297]. The Auditor General said that, in undertaking the audit, her office was aware of and did consider that some grant recipients may have been the beneficiaries of notarised letters[298].

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[292] AG F&F Report paragraphs 68-72.
[293] AG F&F Report paragraph 7.
[294] T51 20 October 2021 pages 207-209.
[295] AG F&F Report Executive Summary paragraph E-3, which says:
"A total of $1.4 million was paid in Farmers' Stimulus grants to persons who were not registered in the Agriculture database of registered farmers"
[296] The Response of the Premier's Office paragraphs 91-93. The Attorney General also asserts, but does not evidence, that it is likely that there has also been an increase in cultivated land and repaired boats.
[297] Auditor General's Response to the Response of the Premier's Office paragraph R-91 page 10; and T51 20 October 2021 pages 209-210.
[298] T49 15 October 2021 page 190.

5.168 Second, while accepting that some of the controls approved by Cabinet for the management and implementation of the programme were not adopted, the Attorney General disputed the Auditor General's conclusion that there was "an absence of accountability"[299], pointing to the fact that recipients had been made aware that they would have to account for monies received and that a plan was being developed to execute that intention[300]. The Auditor General was not comforted by this response, pointing out that a warning "does not amount to accountability"; and, at present, the Government does not seem to be able to explain how funds have been applied and what impact they have had[301]. Below, I discuss further the plan which the BVI Government has now developed in this regard[302].

5.169 Third, the Attorney General asserted that, as recipients were required to account for monies ex post facto (i.e. after the event), there was no basis for the Auditor General to conclude that the Government was left with no means to assess how funds were applied[303]. Further, duplicate payments, it was said, are being recovered. The Attorney argued that the Auditor General had failed to understand the policy, and chastised her for her use of language which was said to lack professional objectivity[304]. The Auditor General contends that this does not address the concern she has raised, which is that policy was changed without Cabinet's approval[305].

5.170 Sir Geoffrey Cox QC, on behalf of the Attorney General and elected Ministers, put to the Auditor General that the criticisms found in her report could apply to COVID-19 assistance schemes operating in the UK – the argument being that the Auditor General failed to take account of the fact that "when you are administering an emergency scheme, blunt-edge tools are inevitable". However, as the Auditor General pointed out, such an approach was not adopted by Cabinet: the criteria which Cabinet required to be applied were different from (and, in particular, more focused than) those, in fact, used[306]. Furthermore, the Attorney's submission ignores the fact that, even in an emergency, value for money principles (economy, efficiency and effectiveness) are not abandoned – indeed, although how they are applied might be affected, they remain vital – and the Section 20 Reports were required to consider the extent to which the two COVID-19 Assistance Programmes applied those principles.

5.171 Fourth, in response to the Auditor General's conclusion that more than half of the recipients of fishermen stimulus grants were not licensed, such recipients receiving a total of $1.2 million[307], the Attorney General appears to suggest that such payments were justified on the basis that there was a policy intention to encourage unregistered farmers and fishermen to become

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[299] AG F&F Report Executive Summary paragraph E-5, which says:
"There was an absence of accountability for how the grant amounts were issued and applied. The controls approved by Cabinet for management and monitoring of this programme were not adopted."

[300] The Response of the Premier's Office paragraphs 96-98.

[301] Auditor General's Response to the Response of the Premier's Office paragraphs R-96-R-98 pages 13-14.

[302] See paragraphs 5.186ff.

[303] AG F&F Report Executive Summary paragraphs E-8 and E-9. These read:
"E-8. Several instances were noted where individuals received more than one grant under this programme. In a few instances this manifested with duplicate grants for the same occupation (two farmers grants) but in most cases the individuals received both a farmer's grant and a fisherman's grant which together totalled from $22,500 to $42,500. There were also cases where individuals who received farmers/fishermen grants also received grants from other government stimulus programmes.
E-9. The absence of controls in the implementation and administration of this programme has left the Government without means of assessing how the funds were applied."

[304] The Response of the Premier's Office paragraphs 103-107. These criticisms are considered further below (see paragraphs 5.249-5.278).

[305] Auditor General's Response to the Response of the Premier's Office at paragraphs R-103-R-106 pages 16-17.

[306] T51 20 October 2021 pages 201-207.

[307] AG F&F Report Executive Summary paragraph E-6, which reads:
"More than half of the Fishermen Stimulus Grants recipients were not licensed as required by the Fisheries Legislation and Fisheries Regulations. A total of $1.2 million was paid to unlicensed fishermen."

registered[308]. However, given that this submission is unaccompanied by any compelling evidence showing that that was either a proper basis (as approved by Cabinet) for those who were bona fide but unlicensed commercial farmers and fishermen to receive a grant and/or that some among that cohort have now changed their status to licensed, that submission can have, at most, little force.

5.172 Fifth, while asserting, without apparent evidential support, that the point applied to other applicants identified in the Auditor General's report[309], the Attorney General focused on an example given by the Auditor General, where she concluded that the documents available to her suggested that a master and two crew each received a stimulus payment for the same vessel. The Attorney's position was that the Auditor General had made an assumption without carrying out basic checks; and, had she made proper enquiries, she would have discovered that the three persons concerned had claimed for engines for different vessels of which they were each master[310]. When asked about this, Dr O'Neal Morton said that each of two crew members were thought to have his own vessel which had not been seaworthy since the 2017 hurricanes. Following receipt of the report of the Auditor General, these persons were telephoned by the Premier's Office to confirm the position. Dr O'Neal Morton could not say, however, if an application had been received from them as masters of their own vessels[311].

5.173 When questioned, both by Counsel to the COI and Sir Geoffrey Cox QC on behalf of the Attorney General and elected Ministers, the Auditor General maintained that the records she had considered, held by the DAF, indicated that the three persons concerned were members of the same vessel and had requested grant awards for the same equipment. A fourth member of the vessel had been excluded, because the Auditor General had established from the documents she had that that person was the master of a separate vessel. She said, if the two crew members were "registered as captains, their vessels should be in the register". However, she had not found any record showing that the two crew members concerned had separate registered vessels. She queried what checks her office, as auditors, could and/or should have made[312].

5.174 Sir Geoffrey questioned the Auditor General on the basis that she had made an allegation that implied misconduct without making basic checks[313]. However, when I asked Sir Geoffrey if his position was that the two crew members were masters of registered vessels, he responded, "I'm not saying that. I'm saying they existed, but they hadn't been able to be used for years."[314]

5.175 Regrettably, the Attorney General did not disclose the relevant applications before the Auditor General was questioned[315]. Three applications, all made in late June 2020, were later disclosed. Those concerning the two relevant crew members do not give the name of the relevant vessel: and record one as an unlicensed fisherman and the other as exempt from needing to show proof of licence. They are not accompanied by a notarised letter. It seems that these documents were not made available to the Auditor General for the purposes of her audit.

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[308] The Response of the Premier's Office paragraph 99.
[309] The Response of the Premier's Office paragraph 102.
[310] The Response of the Premier's Office paragraphs 100-102.
[311] T45 8 October 2021 pages 210-216.
[312] T49 15 October 2021 pages 219-222; Auditor General's Response to the Response of the Premier's Office at paragraph R-100 page 15; and T51 20 October 2021 pages 212 and 216.
[313] T51 20 October 2021 pages 211-219 and 225-226.
[314] T51 20 October 2021 page 213.
[315] T45 8 October 2021 page 229; T51 20 October 2021 pages 222-223. Applications received were apparently held in a box in the Premier's Office (T45 8 October 2021 pages 105-106 and 187).

5.176 Thus, the true position with regard to these three applicants is still not entirely clear. What is clear, in my view, is that the criticism of the Auditor General by the elected Ministers and the Attorney General is unfounded.

5.177 Although of course the Auditor General would have a legitimate interest in establishing to whom the grants were made and in ensuring that the relevant financial information had been captured and satisfied international accounting standards, the audits of the COVID-19 Assistance Programmes which she conducted were, to a large extent, performance audits. But however they are most appropriately described, they were audits which comprised checking and analysing the information provided to the Auditor General by the relevant arms of the BVI Government. Leaving aside the continuing uncertainty about the true position with regard to the particular example of the multiple fisherman claims which the Attorney General chose to examine, it is no answer to the Auditor General's concerns that the true position is not reflected in the documents that were produced by the Premier's Office to her; or that, if requests for information made by the Auditor General to Dr O'Neal Morton as the Permanent Secretary Premier's Office had been complied with (which I address further below[316]) and/or further information had been obtained by the Premier's Office and disclosed to the Auditor General, then her report may have had different conclusions. With respect, that, troublingly, entirely misses the point of such an audit. It was clearly appropriate for the Auditor General to point out that, on the documents which had been disclosed to her, far from the possibility of multiplicated claims being dismissed, that risk was very real. The fact that the Premier's Office sought to obtain information after the audit to shore up a patently inadequate audit trail of papers in relation to that example is, itself, indicative of the deficiencies in the governance procedures – deficiencies which gave rise to a clear risk of public money being distributed on the basis of false claims or dishonest distribution.

5.178 Notwithstanding the content of the Response of the Premier's Office, the Premier and other elected Ministers, through the Attorney General, chose to submit just two criticisms of the Auditor General in accordance with the relevant COI protocol[317] – one in relation to each Section 20 Report. The criticism concerning the F&F Report related to the Auditor General's use of language. The complaint was maintained in the Attorney General's closing submissions on behalf of the elected Ministers[318].

5.179 The Attorney General took issue with the language used in two paragraphs of the report, describing it as "deplorable" and "lacking reasonable professional objectivity"[319]. These were paragraph E-4 in the Executive Summary where, of the payouts by the Premier's Office, the word "inflated" is used;[320] and recommendation 5, which refers to "falsifying the requests

[316] See paragraphs 5.316-5.380.
[317] Protocol concerning Potential Criticisms dated 27 August 2021.
[318] Elected Ministers' Closing Submissions paragraph 27.
[319] The Response of the Premier's Office paragraph 93 and 107. In accordance with the COI Protocol concerning Potential Criticisms dated 27 August 2021, the Attorney General set out her criticisms of the Auditor General in writing. The two criticisms made were incorporated in a warning letter to the Auditor General dated 29 September 2021. The Auditor General provided a written response to the warning letter, and gave further evidence at an oral hearing on Day 49 15 October 2021.
[320] Paragraph E-4 states:
"The funding requests submitted by farmers were inflated by the Ministry (Premier's Office) prior to payment. This resulted in individuals receiving payments that were substantially greater than what they had requested".

made by farmers that resulted in excess payouts"[321]. The Attorney General submitted that there was no basis for an assertion that public officers had "falsified" requests made by farmers. She submitted that it was not Cabinet's intention that grants should necessarily be distributed on the basis of need, and that the adoption of standard grants (i.e. a banded system) was, in principle, a legitimate approach[322]. This was a very serious attack on the Auditor General as an independent and impartial constitutional pillar of governance. On the application of the Attorney General, I allowed the Attorney, through Sir Geoffrey Cox QC, to cross-examine the Auditor General on this issue.

5.180 In both her written reply to the Response of the Premier's Office and in her oral evidence, the Auditor General maintained that her language was appropriate[323]. She said that it reflected that which her office had found upon inspecting documents obtained from the Treasury Department, but which must have originally emanated from the Premier's Office[324]. Her point was that the estimates submitted by applicants for material or supplies were increased so that they equalled the value of the band to which the applicant had been allocated (for example, $13,500). The increases did not match the actual value of the item claimed or local rates. That point is made in the body of the Auditor General's report[325], but is also supported by an appendix which lists named applicants, gives the amount requested for named items and then the amount approved for those items[326]. The Auditor General considered this inflation to have been done intentionally – indeed, there appears no doubt that it was intentional – and her language was meant to convey the message that such conduct was unacceptable[327].

5.181 The AG F&F Report was, of course, available to the Attorney General when she made the criticisms of the Auditor General, as were the documents that supported the Auditor General's findings, which she had obtained from the Treasury Department but which originated in the Premier's Office. The Auditor General annexed sample copies of those documents to her written reply to the Response of the Premier's Office[328]. I have considered that material, which can be correlated to the AG F&F Report. To give three examples:

(i) An estimate provided by a farmer for a weed eating machine in the sum of $285.99 (part of a total claim for $4,608.93) was increased to $4,085.99 (the applicant receiving a total of $13,500)[329].

(ii) An estimate for wire and rope of $377.40 (part of a total claim for $1,914.14) was increased to $6,162.26 (the applicant receiving a total of $13,500)[330].

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[321] Recommendation 5 reads as follows:

> "An assessment should be made as to whether there has been a breach of [PFMR] 73(b)(i) and (ii) in the administration of public funds especially as it relates to falsifying the requests made by farmers that resulted in excess payouts".

In her reply to the Response of the Premier's Office, the Auditor General said that the recommendation should have referred to regulation 73(a) and 73(b) of the PFMR. So far as relevant, these provide that an Accounting Officer or an officer authorised by an Accounting Officer who signs or authorises a payment instrument (a) shall certify the accuracy of each detail set out in the instrument and (b) shall ensure that the prices charged are either according to contract or approved scales or fair and reasonable according to current local rates.

[322] The Response of the Premier's Office paragraphs 93-5.

[323] Auditor General's Response to the Response of the Premier's Office dated 4 October 2021 paragraphs R93-R95 pages 11–13, and accompanying bundle pages 11-14; and T49 15 October 2021 pages 158–160.

[324] See, for example, AG F&F Report paragraphs 11, 12, 21 and 51. The Premier's Office itself, despite requests, of course did not provide any information or documents to the Auditor General (see paragraph 5.316-5.372 below).

[325] AG F&F Report paragraphs 33.

[326] AG F&F Report Appendix 4.

[327] T51 20 October 2021 pages 197-200.

[328] Bundle accompanying Auditor General's Response pages 8-13.

[329] Bundle accompanying Auditor General's Response pages 8 and 12; and AG F&F Report Appendix 4 entry 2.

[330] Bundle accompanying Auditor General's Response pages 9 and 13; and AG F&F Report Appendix 4 entry 4.

(iii) An estimate for fencing of $1,583.64 (part of a total claim for $4,032.54) was increased to $5,751.10 (the applicant receiving a total of $13,500)[331].

5.182 The sample material provided by the Auditor General shows that the criticism of her made by the elected Ministers through the Attorney General is unfounded. With respect to the Attorney, her reliance on the "legitimacy" of a banded system misses the point in two ways, each identified by the Auditor General. First, the documents submitted to the Treasury Department by the Premier's Office in support of payment were inaccurate. For example, in (i) above, the farmer did not claim $4,085.99 for a weed eating machine as the supporting documents sent to the Treasury said: he claimed just $285.99. It was submitted to the Treasury as a much higher valued claim because, had it not been, the Treasury would not have made payment on it in that higher sum. In any event, second, although, as the Auditor General said, the use of a banded system might well be legitimate if that had been Cabinet policy, she had not seen any such policy[332]. Indeed, as I describe above, there does not appear to have been any such Cabinet policy. As to the intention of Cabinet, the Attorney asserts that it was not its intention that need should be a criterion for a claim/grant. As I indicate above, I do not accept that as a proposition – but, in this context, it is sufficient here to note that the documents held and disclosed by the Treasury Department, but which must have been prepared in the Premier's Office, refer to "needs"[333].

5.183 I conclude that the Auditor General was not only justified in making the substantive conclusions she made, but also justified in using the language she did. The AG F&F Report alone was sufficient to put the elected Ministers, and the Attorney General and those she instructed, on notice of the enquiries that ought to have been made of material that was readily accessible to them. The Attorney General has not submitted any evidence to show that the Auditor General's report is wrong in its analysis of the records from the Treasury Department. In my view, it is unfortunate that, before choosing to pursue a point which, if accepted, would have reputational impact on an important independent pillar of governance, neither the elected Ministers nor the Attorney General appear to have thought it necessary or appropriate to make these basic enquiries and acknowledge the force of the Auditor General's conclusions drawn from them.

Concerns[334]

5.184 The F&F Programme raises several obvious concerns that were particularly canvassed with Dr O'Neal Morton[335,336]. The Premier indicated that she was the appropriate person to answer them.

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331 Bundle accompanying Auditor General's Response pages 8 and 12; and AG F&F Report Appendix 4 entry 8.
332 T51 20 October 2021 page 199.
333 Bundle accompanying Auditor General's Response page 12.
334 The concerns and potential criticisms in relation to the COVID-19 Assistance Programmes arising from the evidence before the COI were put to two public officials, namely the Premier and the Permanent Secretary Premier's Office, Dr Carolyn O'Neal Morton. They were put to the Premier in COI Warning Letter No 5 dated 24 September 2021, to which he responded fully in writing on 4 October 2021 and at an oral hearing on 12 October 2021 (T47 12 October 2021 pages 27-147). As part of that reply to the warning letter, the Premier adopted the Response of the Premier's Office (T47 11 October 2021 pages 27-28 and 35; and Premier Response to COI Warning Letter No 5 dated 4 October 2021). The criticisms of the Premier in relation to the COVID-19 Assistance Programmes in this Report are restricted to those in respect of which he has had a full opportunity to respond, as described. They were put to Dr O'Neal Morton in COI Warning Letter No 3 dated 24 September 2021, to which she responded fully in writing on 4 October 2021 and at an oral hearing on 8 October 2021 (T45 8 October 2021 pages 4-251). Again, as part of that reply to the warning letter, Dr O'Neal Morton adopted the Response of the Premier's Office (Dr O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021). The criticisms of Dr O'Neal Morton in relation to the COVID-19 Assistance Programmes in this Report are restricted to those in respect of which she has had a full opportunity to respond, as described.
335 T45 8 October 2021 pages 193-201, and 238-239.
336 The elected Ministers also responded to these concerns in the Elected Ministers' Closing Submissions paragraphs 24-38.

5.185 The programme began as a political initiative to stimulate the commercial agricultural and fisheries sectors of the BVI economy, thereby increasing domestic food output, by reimbursing capital expenditure on items needed to assist commercial enterprises re-enter the market or increase their capacity within the market. Although a very narrow sector of the BVI economy, it was, of course, a perfectly legitimate political decision to assist farmers and fishermen in this way. It was endorsed by Cabinet, which is solely responsible under the Constitution for policy in this (devolved) area. Cabinet approved the expenditure. On making the grant of the monies to be distributed, the SSB required comfort that the money would be spent in accordance with the principles of good governance; and the Cabinet approved the expenditure on the basis of quite rigid conditions to ensure that the money went to bona fide commercial farmers and fishermen and was spent on bona fide capital projects that would increase their business capacity. So far, so good.

5.186 However, after farmers and fishermen had made claims for the reimbursement of capital expenditure, the Premier unilaterally changed the policy and the criteria for inclusion. Instead of simple reimbursement, farmers and fishermen were each made a grant, the enterprises being categorised in bands on the basis of business "size". The conditions were abandoned, and (it is now said) replaced by "back-end accountability", i.e. a requirement to account for the money received by identifying upon what it had been spent after the event[337]. Given the change in policy, this new requirement is, in any event, somewhat strange. The criteria against which this accounting is to take place are unclear. This accountability has apparently not, as yet, started. No analysis appears to have been done on its likely effectiveness. The political will to enforce it appears to be faint. The practical difficulties of enforcement, some considerable time after the event, are obvious. It is said that this back-accountability was "presaged" in the letters sent to the F&F Programme applicants; but these would be explained in terms of being residual from the programme when it was under the initial policy[338].

5.187 On the evidence, it seems to me that the possibility of such an exercise taking place has been seized upon by the Premier and elected Ministers in a belated attempt to show that, in respect of this distribution of public funds, governance principles were not entirely abandoned. However, I have no confidence in the back-accountability exercise taking place, effectively or, indeed, at all.

5.188 The Premier and elected Ministers assert that the change in policy made by the Premier, and the failure to apply good governance and value for money principles in making that change, was necessary because the criteria set by Cabinet were impractical; and there was a deficiency in policy making and implementing capacity in the Public Service[339]. However:

(i) Whilst still referring to the importance of food security as a result of the pandemic, the change was made when the Premier decided to alter course from seeking to revive the agriculture and fisheries sectors by assisting with capital projects, to giving the BVI economy a general "shot in the arm" to "wake [it] back up". This was not a change in delivery method: it was a change in underlying policy.

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[337] The elected Ministers boldly submit that: "Neither accountability nor value for money were discarded, although it is accepted that substantial compromise in ordinarily applicable principles were made" (Elected Ministers' Closing Submissions paragraph 33). The only two nods to governance principles that are relied upon are (i) the use of the JDE system to flag and remove duplicated payments to ensure applicants were not paid twice, and (ii) back-accountability (ibid).

[338] The Elected Ministers' Closing Submissions suggest that back-accountability was also to be applied to the Religious Institutions Etc Programme (paragraph 33) but, as indicated above (paragraph 156), the Premier's evidence was that it is not to be applied to that programme as finally formulated. The inconsistency between the Premier's evidence and the submissions made on his behalf perhaps reflects a failure to focus on governance as it applied to these programmes. In any event, even if the Premier is wrong in his evidence and back-accountability is to be applied to the Religious Institutions Etc Programme, given the absence of criteria, it would be difficult to see how such accountability might be applied.

[339] Response of the Premier's Office paragraph 31. See also the Elected Ministers' Closing Submissions paragraph 28.

(ii) There is no correlation between the criteria used to fix the banding (based, very roughly, on enterprise "size") and either business need or the claim the business may have made. The banded system was based on hypothetical income, and ignored the needs of the applicant's business (including the applicant's claim). No assessment was made as to whether, or how, hypothetical income may be correlated to business need. Not only was that contrary to Cabinet's intention – which was that the F&F Programme was a focused stimulus not a benefits programme, that it should thus be based on business need, and payments should be made to reimburse capital expenditure – it also does not sit well with the later expressed intention of requiring successful applicants to account for the expenditure and repay any sums not spent legitimately on the business[340].

(iii) Whilst it is said that reimbursing capital expenditure required an assessment which the Premier's Office was not sufficiently resourced to make, there appears to have been no justification for (e.g.) making the bands fixed rather than being treated as a "cap" (which would not have required any substantial extra resources). Dr O'Neal Morton rejected the suggestion that a grant could be capped at the amount claimed. She said she did not see anything odd in a person who makes a claim for $500 receiving $13,500; nor did she explain why such a cap would have been problematic; nor why it would have caused delay to any significant extent. It would not have required any additional assessment by public officials, no matter how overstretched they were at the time. Although of course, in the absence of full data, it is impossible to audit the programme, such a cap would undoubtedly have significantly reduced the risk of public funds being wrongly spent.

(iv) Dr O'Neal Morton suggested that the original system created anomalies with applicants under- or over-claiming: she cited the example of a claim in the region of $400,000, which also appears in the Response of the Premier's Office[341]. However, one has to take care with relying on what appears to be an outlier example. The annexes to the Response of the Premier's Office include a spreadsheet listing claims made for grants under the F&F Programme, which are generally of a modest degree. On the available evidence, there is nothing on which it can be said that the system ultimately adopted produced fewer anomalies. That cannot be assessed until, to borrow Dr O'Neal Morton's words, "we are finished clearing up the results"[342].

[340] In paragraph 25 of the Elected Ministers' Closing Submissions, there is reference to a comment I made during the hearing that, in the circumstances of this case, I did not find bands used as they were here to be "rational" (and, thus, I did not consider them to be lawful) (see T45 8 October 2021 page 197). It is submitted that irrationality does not equate to serious dishonesty in public office. That is, of course, true; but the submission does not suggest that banding was not irrational. An irrational decision by the Premier to spend millions of pounds of public money on a policy which does not have Cabinet approval should be concerning. The submissions, however, do not appear to express any concern.

[341] Response of the Premier's Office paragraph 79.

[342] T45 8 October 2021 pages 189-190 and pages 209-210.

(v) Whilst I fully understand the pressures under which the Public Service were then working, the assertion that the change in policy was due, even in part, to deficiencies in the Public Service is not supported by the evidence. The Premier accepted that his decision to change the basis of the F&F Programme, from that approved by the Cabinet, was a change in policy. It seems to me that, despite the "back-accountability" condition, it was effectively a change of underlying policy agenda from one of enabling (and re-enabling) the agriculture and fisheries sectors to one of stimulation by getting money into the general economy with an element of welfare. Such a change is solely a matter for the executive: the Public Service could not properly have had input to it. But, even I am wrong to see it as a fundamental change to the underlying policy agenda, as I have described, insofar as the Public Service did have a role to play in relevant policy formulation and implementation, the Premier ignored those public officials who were on hand to give advice, such as the Financial Secretary and the IRIC (the committee that had been set up to assist with the implementation of the IRP). He does not appear to have sought the advice of anyone in the MoF and the DAF as to the wisdom, necessity and/or practicality of changing the policy as he did. Whilst, as I have said, I accept that those arms of the Public Service were very busy at the time, there is no evidence that they would not have responded to a request for advice on these aspects of the F&S Programme. Mr Forbes and the IRIC had already given a great deal of consideration as to how the F&F Programme might best be designed and implemented. He confirmed that they were ready, willing and able to assist again. The suggestion that lack of capacity and/or capability within the Public Service for policymaking and implementation drove the Premier to the extraordinary course that he took, therefore, rings very hollow.

(vi) In any event, under the Constitution, policy is a matter exclusively for Cabinet. The Premier indicated that he had discussed the F&F Programme with Cabinet members, but there is no record of any discussions. He also suggested that he would obtain retrospective approval from Cabinet. Although Cabinet appears to have authorised a reallocation of funds such that the total spend on the programme increased to $3.5 million[343], (a) Cabinet was not asked to approve the change to a banding system, (b) Cabinet was asked to approve the increase retrospectively, in circumstances in which it had little choice but to agree, the money having been, in large part, effectively already committed, and (c) the bands were fixed so that the eventual spend was over $5 million, well above the amount authorised by Cabinet.

5.189 As described below, the Premier's Office thwarted the wish of Cabinet (and of the IAD Director) to subject this programme to an on-going audit, which would have assisted it to have complied with good governance principles. Indeed, the programme has never been subject to any satisfactory audit in terms of finding out where this large amount of public money went and why. The Response of the Premier and other elected Ministers to the concerns I expressed about the F&F Programme – as well as the concerns the IAD Director and Auditor General have identified – was very lengthy; but it is entirely unpersuasive.

5.190 Therefore, whilst the Response of the Premier's Office (adopted by the elected Ministers) attacks the public officers who have the function of auditing public bodies in the public interest, it fails to answer the deep and troubling concerns about how this programme was administered. For the reasons I give in this section of the Report, I do not consider that the criticisms of the Auditor General to have any basis.

[343] This would have needed the agreement of the SSB: it is not clear whether such agreement was sought/given.

5.191 The Attorney General, on behalf of the elected Ministers, submitted that, even if the programmes, as implemented, were irrational, irrationality does not equate to serious dishonesty; and (she submits) I received no evidence to suggest that the programmes were motivated by criminal intent, or that those implementing the programmes received "some gift, advantage or gratification during the planning or execution stages"[344]. Thus, it is suggested, I cannot make a finding that there was any conduct here that falls within paragraph 1 of my Terms of Reference.

5.192 I do not agree. As I have described, overt bribery, in the form suggested in those submissions, is not the only way in which serious dishonesty in public office may occur. To take into account any factor which does not form part of the public interest is a potential abuse of public office; and it is accepted that, dependent upon degree, that may fall within paragraph 1 of my Terms of Reference.

5.193 I am required to look at the whole picture. The hurdle for making a finding in relation to paragraph 1 conduct is low. I accept that it is possible that the F&F Programme was the result of no more than, say, irrational and/or unlawful decisions very poorly implemented; and it may be that the main intention behind the programme was in the public interest and that the majority of the money expended under this programme was legitimately claimed and distributed. However, in my view there is a real possibility that some of these funds were dishonestly applied. For the reasons I have outlined above (notably the absence of the application of the principles of governance), the elected Government is unable to produce any compelling evidence that the programme has not been so used.

5.194 Given (i) the circumstances and way in which the F&F Programme was ultimately formulated and implemented, (ii) the lack of openness, transparency and any monitoring, and (iii) the approach of the lead arm of the BVI Government (the Premier's Office) to its obligations to give the IAD and the Auditor General access to information it holds to enable an audit to take place, I have sufficient information before me for me to conclude (as I do) that serious dishonesty in relation to public officials may have taken place in relation to this programme.

5.195 As to steps that I consider should be taken, as described below[345], neither the IAD nor the Auditor General was granted access to information in respect of the F&F Programme. Consequently, neither was able to perform a proper, full audit on the programme. Indeed, no proper analysis or audit of how this substantial amount of public money was spent has even yet been done. Deep public concern has been expressed in the BVI about this expenditure. Given the lack of openness and transparency – and given the refusal of the Premier's Office to cooperate with either of the audit agencies – that concern is understandable and justified. As I have already indicated, I am highly sceptical as to the effectiveness of the "back-accountability" exercise that has been promised by the Premier's Office, but which has yet to get underway.

5.196 In the circumstances, I consider that, as soon as practical, a full audit/investigation of this programme should be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. There should be a specific requirement for public officials to cooperate with that audit, including cooperating by producing documents and providing information promptly when requested by the audit team. The Auditor General is best placed to identify the terms and scope of the exercise. Without seeking to limit the ambit of her review, in my view, the terms of that exercise should include consideration of (i) the authorised programme criteria, (ii) the steps

[344] Elected Ministers' Closing Submissions paragraph 25.
[345] See paragraphs 5.279-5.380.

(a) required and (b) taken to ensure the principles of good governance were met, (iii) the extent to which grants were made to those who did not satisfy the authorised programme criteria, (iv) the extent to which (and why) bands were adopted without regard to the amount allocated by Cabinet to the programme and/or need, and (v) the extent to which the system of back-end accounting has been put into effect and the extent to which it has proved effective in recovering money inappropriately allocated. Whilst these are matters for the relevant BVI authorities (notably the RVIPF and the DPP), in my view further steps, including any criminal investigation and steps to recover public money (from those to whom it has been improperly distributed and/or from those public officials who distributed these grants improperly and without proper authority) can await the outcome of that audit.

5.197 I consider the possible obstruction of the work of the IAD and the Auditor General in relation to the F&F Programme (and other COVID-19 Assistance Programmes) discretely below[346].

The Daycares, Schools and Religious Institutions Programme ("the Religious Institutions Etc Programme")

The Original Cabinet Approved Scheme

5.198 On 8 July 2020, Cabinet considered Cabinet Memorandum No 236/2020[347], submitted by the MoF. This referred to the impact of COVID-19 on small businesses such as daycares, private schools and pre-schools. It also noted the emotional cost to those unable to attend church services. The memorandum continued by referring to the need for social distancing measures to be in place to allow such institutions to re-open so as to receive "students, participants and parishioners, once more"; and expressed the hope that the proposed grants would prepare them "for re-opening and getting through this pandemic"[348].

5.199 Cabinet approved a $1 million package of support for daycares, private schools and religious organisations, which was to be funded through the SSB grant and paid out via the Premier's Office ("the Religious Institutions Etc Programme"). Cabinet also decided to establish a committee, chaired by Dr O'Neal Morton, to take responsibility for structuring and administering the programme. Again, as with the F&F Programme, the IAD Director was required by Cabinet to audit the programme monthly and report to Cabinet[349].

5.200 A policy brief followed which set out further details of the programme[350]. Dated 14 July 2020, this gave the programme's focused objective as to help institutions "adversely affected by the COVID-19 pandemic crisis to prepare themselves for re-opening". The brief identified the impact of the cost of preparations to re-open on the operation of an institution as critical to determining the amount of any grant allocation. It referred to a survey of institutions which required them to provide financial information, for the pre-COVID-19 period and during the pandemic to date, along with their expenditure for preparing "for re-opening in accordance with the COVID-19 health and safety protocols". Eligible institutions had to have been in existence prior to 31 January 2020, and to have re-opened already. Given the latter criterion,

[346] See paragraphs 5.279-5.380.
[347] Cabinet Memorandum No 236/2020: COVID-19 – Economic Stimulus - Daycares, Pre-schools, Private schools, Churches and Religious Organisations dated 16 June 2020.
[348] Cabinet Memorandum No 236/2020 paragraphs 2-4 and 7.
[349] Expedited Cabinet Extract on Cabinet Memorandum No 236/2020 dated 8 July 2020.
[350] COVID-19 Economic Stimulus Schools and Organisations Programme Policy Brief dated 14 July 2020.

expenditure on re-opening would have already been made or, at least, be capable of accurate estimation. However, all such institutions that had re-opened would qualify for some level of grant, assessed by reference to a number of factors including "the value of re-opening expenditure". That factor, it was said, "would have the highest weighting in the computation of the final score". The Committee established by Cabinet would "review the list of beneficiaries before submission to the Minister of Finance for final review and approval"[351].

5.201 At this point, therefore, the policy driver was to assist daycares, schools and religious organisations to reopen after their closure as a result of BVI Government restrictions to combat the COVID-19 pandemic, using the money from the SSB grant to reimburse re-opening costs. As with the F&F Programme, good governance requirements were more or less in place, forming part of the Cabinet's approval of the programme.

The Change in Policy/Scheme

5.202 On 30 September 2020, the Religious Institutions Etc Programme was again before Cabinet in the form of Cabinet Memorandum No 342/2020[352]. Dated 8 September 2020 (and signed off by the Premier on 28 September 2020), this repeated details found in the policy document dated 14 July 2020 including the proposed eligibility requirements (particularly the need to have re-opened already). It noted that the MEC, assisted by the MoF, "will review the supporting documents" provided by institutions for "compliance with statutory obligations"[353]. The MoF was also to monitor and evaluate the monitoring of the programme[354]. As to the basis on which awards would be made, the memorandum simply says that the recommendations made will share the total grant award in a "fair and equitable manner"[355].

5.203 The MEC Permanent Secretary recorded the following cautionary note in the memorandum[356]:

> "I have noted that there is a monitoring component, but no timelines for compliance and reporting have been provided. While the process involved a fair and equitable distribution of funds, it is concerning that such a small percentage of churches and religious organisations responded to the survey, yet funds are being allocated to these organisations. Before funds are released, there needs to be a mechanism to determine whether some of these organisations are still in existence and whether they were actually impacted by COVID, given their purpose."

5.204 The memorandum may well have been informed by a draft information paper that bears the same date, which was emailed by the Premier's Office to the MoF on 8 September 2020[357]. The paper referred to the vital community role of daycares, pre-schools, private schools,

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[351] COVID-19 Economic Stimulus Schools and Organisations Programme Policy Brief dated 14 July 2020 pages 2-5. The paper refers to events which occurred after 14 July 2020. There is nothing to suggest this is a draft document, and I assume that the version disclosed to the COI was the final iteration updated to take account of developments, but with the original date unchanged.

[352] Cabinet Memorandum No 342/2020: COVID 19 Economic Stimulus – Pre-Schools, Day Cares, Private Schools, Churches and Religious Organisation Programme (Revised) dated 8 September 2020.

[353] Cabinet Memorandum No 342/2020 paragraph 4. The reference to "statutory compliance" appears to be to the requirement for daycares, private schools and pre-schools to have a trade licence, and for churches and religious organisations to have applied for a renewal of registration as a Non-Profit Organisation ("NPO") under the Non-Profit Organisation Act 2012 or to have a current NPO certificate (see Cabinet Memorandum No 342/2020 paragraphs 6-8).

[354] Cabinet Memorandum No 342/2020 paragraph 5.

[355] Cabinet Memorandum No 342/2020 paragraph 13.

[356] Cabinet Memorandum No 342/2020 paragraph 22.

[357] Draft Information Paper: COVID-19 Economic Stimulus – Pre-schools, Day Cares, Private Schools Churches and Religious Organisations Programme dated 8 September 2020 (Annex 49 in the bundle of documents accompanying the Response of the Premier's Office). The copy of this paper as provided to the COI is incomplete. It is, however, a document upon which the Attorney General, on behalf of the elected Ministers, placed specific reliance (see Response of the Premier's Office at paragraph 109).

churches and religious organisations, and the hope that the assistance would prepare these institutions to re-open and operate safely "in the COVID-19 era". It noted that the total grant allocation to churches was to be $211,346 and to schools $788,754. All institutions in the programme were to be required to sign a declaration which would bind them to using awarded funds solely for the purpose of supporting continued operations, and "to remain in compliance with the COVID-19 health and safety protocols for re-opening". Grants used for any other purpose would have to be returned[358].

5.205 However, in approving Cabinet Memorandum No 342/2020, Cabinet agreed that the programme should receive an additional $1,392,818 in funding[359]. It also approved recommendations set out in appendices to the memorandum for grants totalling $1,415,000 to 79 churches[360] (with the listed churches recommended to receive either $15,000 or $20,000), grants totalling $70,000 to 15 listed "Religious Church Groups"[361] (with each group recommended to receive $5,000), and grants totalling $907,818 to 32 "schools and daycares"[362] (with each organisation receiving various sums ranging from $15,000 to $37,615). The memorandum does not appear to offer any justification, such as need, for the huge increase in funding. The declarations which recipients under this programme were to be required to sign were also appended to the memorandum[363].

5.206 As I have already mentioned, further to Cabinet Memorandum No 325/2021[364] as approved by Cabinet on 11 August 2021[365], recipients of grants under this programme were to be monitored and evaluated as part of a programme to ensure the monies received could be accounted for. The memorandum, however, did not say that they would be required to repay monies if they could not account for them.

5.207 When considering the support provided by the programme, the Preliminary Report explains that "[i]n keeping with the already established criterion that was set out by the established committee", a banded approach (which, as described above[366], was also adopted in respect of grants under the F&F Programme) was adopted in relation to churches based on membership[367]. Asked to explain "already established criterion", Dr O'Neal Morton said that this came from a survey intended to identify the needs that various organisations would have to re-open[368]. The assessment of the grants to be made to daycares, pre-schools and private schools was based on "consideration of a number of factors including the number of students and staff"[369]. As I have indicated, these institutions were awarded varied amounts ranging

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[358] Draft information Paper dated 8 September 2020 paragraphs 2, 24 and 30.
[359] Expedited Cabinet Extract of Cabinet Minutes on Cabinet Memorandum No 342/2020 dated 30 September 2020.
[360] Cabinet Memorandum No 342/2020 Appendix C.
[361] Cabinet Memorandum No 342/2020 Appendix D.
[362] Cabinet Memorandum No 342/2020 Appendix E.
[363] Cabinet Memorandum No 342/2020 Appendix F. The declaration to be signed by daycares, pre-schools and private schools included the following:

> "I will only utilise the grant support for the continued operation of my school, and to remain in compliance with the COVID-19 health and safely protocols for re-opening, including through the payment of utilities, rent, mortgage, wages and salaries, purchase of supplies, small construction works, and payment of outstanding statutory fee obligations".

The declaration to be signed by churches and religious organisations included the following:

> "I will only utilise the grant support for the continued operation of my church, and to remain in compliance with the COVID-19 health and safely protocols for re-opening, including through the payment of utilities, rent, mortgage, purchase of supplies, small construction works, and payment of outstanding renewal of registration as an NPO".

[364] Cabinet Memorandum No 325/2021: Monitoring and Evaluation Policy of the Economic Stimulus Programmes dated 5 August 2021.
[365] Record of Cabinet Decision re Cabinet Memorandum No 325/2021 dated 19 August 2021.
[366] See paragraphs 5.137ff.
[367] Preliminary Report page 48. Churches with a membership between 1 and 9 received $7,000; between 10 and 30 received $10,000; between 31 and 50 received $15,000; and 51 and above received $20,000.
[368] T45 8 October 2021 pages 141-144.
[369] Preliminary Report page 48.

from $15,000 to $37,615[370]. There is no mention in the Preliminary Report of the "value of re-opening expenditure" as a factor in assessing grants nor any explanation as to when or how this may have ceased to be a relevant factor. It seems that the move to banding coincided with a significant change in policy direction.

5.208 The Preliminary Report did not identify who made the decision to move to banded awards in respect of churches or the basis on which 11 "Religious organizations" received $5,000 each. It does not record what, if any, steps were taken to address the concern raised by the MEC Permanent Secretary in Cabinet Memorandum No 342/2020.

5.209 Whether there was a change in policy – and, if so, what it was and by whom it was made – was the subject of the AG Rel Insts Report and the Response of the Premier's Office to that report.

The Audits and the Response of the Premier's Office

5.210 According to the Preliminary Report, a total of $2,337,818 was distributed under this programme with $1,370,000 going to churches, an additional $55,000 to "Religious Groups[371], and $912,818 to daycares and pre-schools[372].

5.211 As with the F&F Programme, the absence of information (which was denied to the IAD[373]) left the IAD Director unable to prepare any analysis or perform any audit of the Religious Institutions Etc Programme. The IAD Report simply recorded that, as of 9 March 2021, religious institutions, private schools and daycares had received $2,427,626[374].

5.212 The AG Rel Insts Report, reporting on the support provided to these institutions, explains that the purpose of the programme was to assist with costs relating to re-opening and compliance with health protocols[375]. The initial allocation of $1 million was increased by a later Cabinet decision to $2,392,818[376]. By May 2021, the total amount paid under this programme was $2,501.818[377].

5.213 The Auditor General referred to Cabinet's decision on 8 July 2020, and the policy document which followed it (both discussed above). Her report noted that institutions were asked to complete an application questionnaire with information on the institution's structure, operating expenditure, revenue and cost of implementing COVID-19 safety procedures. Based on the evaluations, the Committee determined how the approved funds of $1 million would be apportioned, with educational establishments being allocated 71% ($788,754.33) and religious institutions and civic groups 29% ($211,245.65)[378]. The Auditor General said that it was the intention that the recommendations of the Committee would be accepted by the Premier's Office "unless there was something drastically out of place"[379].

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370 Preliminary Report page 49.
371 The difference between a church and a religious group is not explained and, for the purposes of this Report, does not appear to be relevant.
372 Preliminary Report pages 48-50. The picture is somewhat confused as the figure given to churches is also recorded as $1,396,423 and $1,623,000.
373 See paragraphs 5.279-5.315 below.
374 IAD Report page 19.
375 Although the Auditor General said that the overseeing Ministries for this programme were, on the face of it, the MEC (for schools and daycares) and the MHSD (for religious institutions), it is plain that the Premier's Office was the lead, implementing Ministry (see, for example, T25 13 July 2021 page 148).
376 Expedited Cabinet Extract on Memorandum No 342/2020 dated 11 September 2020.
377 AG Rel Inst Report paragraphs 7-11.
378 These figures correspond to those set out in the draft information paper dated 8 September 2020 (see paragraph 5.204 above).
379 T19 29 June 2021 pages 36.

5.214 However, in her report, the Auditor General found the following:

(i) In respect of the religious institutions, the application form required an estimate of funds spent on preparation for re-opening and for safety procedures, but required no details to be given. Individual cost estimates ranged from nil to $123,000, without any explanation for the estimate being given[380].

(ii) The grants awarded to religious institutions were inflated by the Premier's Office by 662% over the recommended amounts: the $185,772.67 recommended by the Committee was increased to $1,415,000, and $1,554,000 was in fact paid out. This was despite the fact that 75 out of 94 religious institutions did not apply for assistance. Indeed, although the applicants showed a severe decline in income during April 2020, by the time the programme came into effect, most (62%) had more or less recovered to their pre-COVID-19 income levels. Of the 19 churches that applied, 16 had membership of below 200. No criteria were disclosed to the Auditor General that were applied to effect these changes; but the uplift appears to have been made without consideration of the financial effect of shut down, the costs of re-opening or the number of members, the non-applicants of course not having even made an application for a grant[381]. Nor was it clear why the Premier decided that religious institutions should be paid more than they had applied for, and more than Cabinet had approved[382].

(iii) The 19 religious institution applicants were assessed by the Committee on the basis of statutory compliance (40%) and cost per member (60%), resulting in recommended grants of $1,543.22 to $8,233.69, and a total of $74,617.83. The Committee recommended payment to those, which had made no application, of $1,287.51 (if they had not paid their non-profit organisation fee[383]) or $2,058.42 (if they had), a total of $111,154.84. These were increased by the Premier (endorsed, after the event, by Cabinet) to a total of $1,415,000. In fact, $1,609,000 was paid out in standard sums of $7,000, $10,000, $15,000 and $20,000, often sent out in amounts different from those approved by Cabinet. The declaration sent out with the payment indicated that the award was made to assist with operational costs (such as rent and utilities), as well as addressing COVID-19 compliance on re-opening.

(iv) A standard payment of $5,000 was made to 11 civic groups, although not approved by Cabinet: the decision appears to have been made entirely within the Premier's Office[384].

(v) 30 of 32 private schools listed on a Ministry database applied for assistance, and the Committee recommended that all 32 schools should be assisted with awards of $8,807.66 to $34,855.86. The grant of 11 schools was increased by the Premier (again endorsed, after the event, by Cabinet) to round up four awards and give another seven an additional $20,000. The adjusted total was $907,818[385].

[380] AG Rel Inst Report paragraphs 21-22.
[381] T19 29 June 2021 page 21 and 25-26.
[382] T19 29 June 2021 page 28. It seems that some religious institutions, which had not made an application, did not, in the event, collect their cheques.
[383] The Non-Profit Organisations Act 2012 requires an NPO to be registered. Applications for registration must be accompanied by the appropriate fee.
[384] T19 29 June 2021 page 38.
[385] AG Rel Inst Report paragraphs 33-36.

5.215 The Auditor General criticised the criteria by which the Committee made its recommendations: for example, as a result of particular weight being given to the institutional set up (rather than numbers of people), a church with eight members was recommended for an award of $6,175,27 whilst a church with 1,247 members for $3,602.24, despite the revenue of each having fallen. There were similar examples from the educational institutions[386].

5.216 However, for the purposes of this Inquiry, the Auditor General's conclusion with regard to the awards ultimately made to religious institutions is the most telling:

> "Religious institutions were affected by the restrictions, but with fewer overheads, appeared more resilient in the reported operational activity. The amounts allotted to religious institutions appear outside of reason, especially as many of the entities did not request funding and the awards were done without information to perform an assessment of needs (if any). Religious institutions perform important social and cultural roles which the government should support in appropriate ways. The application of public funds in the manner seen in this programme, with extravagant and unsupported increases in COVID-19 stimulus grant awards, create the impression of an inappropriate turn to influence these institutions' political independence."[387]

One of her recommendations was consequently:

> "In no instance should public spending compromise or appear to undermine the political independence or impartiality of non-government institutions."[388]

She considered that the impression of an inappropriate turn that affects the political independence or impartiality of non-government organisations "at all costs, … should be avoided"[389].

5.217 The Response of the Premier's Office strove to make the submission that from its inception – at least in relation to churches – the policy underpinning this programme was wider than merely supporting institutions with the costs of re-opening[390]. It states that the work of the Committee led to an adjustment in the monies allocated to schools such that there was an increase in the total sum to be awarded to them[391].

5.218 It then submits, without any supporting evidence being apparent, that in mid-September 2020, public officers became concerned that the proposals made by the Committee in respect of grants for churches were based on too restrictive a view of the policy "which [was] not merely to assist with the costs of re-opening but to support churches in performing their traditional social functions". Further, an element of the IRP, which was to be implemented by the SDD, had failed to materialise by that time[392]. The Response of the Premier's Office does not address whether the availability of support elsewhere, e.g. by way of grants available through Members of the House of Assembly, was taken into consideration.

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386 AG Rel Inst Report paragraphs 39-42; and T19 29 June 2021 pages 32-35.

387 AG Rel Inst Report paragraph 46. There was no suggestion of any impropriety by the institutions which (e.g.) received money for which they made no application, or more money than that for which they had applied (T19 29 June 2021 pages 26-27). They simply received an unrequested windfall. Indeed, it seems that, despite an unrequested grant being made, some institutions did not collect the relevant cheque from the Premier's Office (T19 29 June 2021 page 28).

388 AG Rel Inst Report Recommendation 4.

389 T19 29 June 2021 page 41.

390 Response of the Premier's Office paragraphs 108–110 and 121-127.

391 Response of the Premier's Office paragraph 12. However, this submission does not sit well with the evidence of the Premier to the effect that there was a significant change in policy direction from focusing on the costs of re-opening to using the churches etc. to assist with a broader welfare programme: see paragraph 5.222 below.

392 Response of the Premier's Office paragraphs 122-123.

5.219 Accordingly, in the interests of "urgent delivery", it was decided to adopt a standard system based on bands according to constitutional "size" of church. This (i.e. the use of banded awards) was recognised as a change in approach which required Cabinet approval. The matter was put before, and approved by, Cabinet on 30 September 2020[393].

5.220 The Response does not explain which public officers considered that the policy was too restrictive. It is silent as to the $5,000 paid to a number of civic groups, and the role of the Premier. Nor does it explain why papers put before Cabinet make no reference to the factors which had warranted a change in approach.

5.221 Asked if there had been a policy change from just providing support for re-opening, Dr O'Neal Morton said she read the papers put before Cabinet (beginning with Cabinet Memorandum No 236/2020) as indicative of a different, wider policy[394].

5.222 The Premier confirmed that, as with the F&F Programme, he had authorised the use of banded awards[395]. He accepted that "initially" the concept of the grants to religious organisations and schools, as approved by Cabinet, was simply to assist with re-opening. However, there was a significant shift in policy – a big shift, he said, but one that was required – such that grants to religious organisations were to take the form of welfare payments to allow those organisations to continue their own welfare programmes. As to schools, there was a change in policy so that grants were made to them because they were no longer receiving fees and had to pay staff. These changes, he said, were more or less at the time that banding was considered – although, he said, he did not get involved in the detail. He confirmed that it was not intended to do any back-accountability exercise in relation to the grants made[396].

5.223 Therefore, whilst the elected Ministers submitted that there had been no change in policy with regard to payment to religious institutions[397], the evidence clearly identifies a fundamental change of policy, in respect of both daycares and schools on the one hand and religious organisations on the other. In the case of the latter, it was a change from assisting with the costs of re-opening, to being a gift of public money to assist them with their general work including charitable welfare.

5.224 However, having considered the various Cabinet papers which have been disclosed, notably Cabinet Memorandum No 342/2020 and the decisions made on the basis of that paper, it is difficult to see where Cabinet approved this change in policy. It did authorise the large increase in the funds being made available for the Religious Institutions Etc Programme although, as indicated above, the memorandum upon which it did so does not seem to offer any justification for such an increase. "Need" was never a criterion. Certainly, it did not suggest that the churches were being utilised as another instrument for the distribution of welfare grants, as the Premier suggested to the COI; and the declaration which the institution was bound to sign as to use of the money did not suggest that it could be used for such a wide purpose[398].

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[393] Response of the Premier's Office paragraph 121.
Response of the Premier's Office paragraphs 124-125. This is a reference to Cabinet's decision in relation to Cabinet Memorandum No 342/2020. The Response of the Premier's Office gives the date of that decision as 28 May 2020; but the Expedited Extract records the Cabinet meeting on 30 September 2020.

[394] T45 8 October 2021 pages 217-223 and 226-228.

[395] T47 12 October 2021 pages 104-105.

[396] T47 12 October 2021 pages 104-114. See also paragraph 5.156 above.

[397] See paragraph 5.217 above.

[398] In context, "the continued operation of my church" in the declaration is clearly to keeping the church open, rather than any such wider welfare purpose.

5.225 The Auditor General set out her key conclusions in an Executive Summary. The Response of the Premier's Office addressed the conclusions by reference to the paragraphs of this summary.

5.226 In response to the Auditor General's finding that the grant award to religious organisations increased by 662% over the recommended amounts[399], the Response of the Premier's Office submits that this was a matter for Cabinet and approved by them on 30 September 2020[400] on the advice of public officers acting "in the accurate belief that the policy of Cabinet would not be fulfilled by the Committee's recommendations". The submission continues that the adoption of a system of banded awards was a necessary, if blunt, tool, and a legitimate decision in support of the Government's broader policy of providing "immediate relief and urgent stimulus" and to support for the economic and social functions of churches[401]. I take the reference to the policy in which public officers had believed to be one which, from the very beginning, at least in respect of religious institutions, was intended to support the social/ welfare activities of those institutions. That does not chime with the evidence of the Premier as to the "big shift" in policy towards churches etc being an instrument of welfare which, he said, he effected.

5.227 As to the Auditor General's conclusion that awards for private schools and daycares were made in an ad hoc manner[402], the Response of the Premier's Office asserted that the proposed awards to schools were adjusted because of identified anomalies. The effect was that the total sum to be granted to schools increased. The Response continues that to have adopted the suggestion of the Auditor General of returning the matter to the Committee would have resulted in delay[403]. Dr O'Neal Morton said that awards were not made in "an ad hoc manner": awards to churches were made on the basis of membership, and awards to schools were made on the basis of staff numbers and "other needs"[404].

5.228 In response, the Auditor General questioned why the matter could not have been returned to the Committee with a timescale for consideration, as all that was required was an adjustment to a mathematical formula to allow for grant amounts to remain within the (increased) approved budget[405].

5.229 The Attorney General only formally made a single criticism of the Auditor General in respect of the AG Rel Insts Report[406], namely that she exceeded the scope of matters within her function by expressing the conclusion that: "The issuing of unsolicited and extravagant public grants to religious institutions presents a threat to the political independence of these entities"[407]. The Response of the Premier's Office used stronger language, submitting that the Auditor General was proceeding on a misconception of the policy (to allow churches to carry out their wider

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[399] AG Rel Inst Report Executive Summary paragraph E-4. This paragraph reads:
"The grant award for religious institutions increased by 662% over the recommended amounts. No criteria was made available for this increase. Eighty percent of the religious institutions did not apply for assistance but were nonetheless approved to receive public grants totalling [sic] $1,060,000.00."

[400] The Response of the Premier's Office gives the date of 28 September 2020. The relevant extract of the Cabinet decision says it was made on 30 September 2020. I have used that date.

[401] The Response of the Premier's Office paragraphs 131-132

[402] AG Rel Inst Report Executive Summary paragraph E-5. This paragraph reads:
"The grant awards for private schools and daycares were amended in an apparent ad-hoc manner and without stated criteria".

[403] The Response of the Premier's Office paragraphs 121 and 133.

[404] T45 8 October 2021 page 145.

[405] Auditor General's Response to Response of Premier's Office at paragraph R-133 page 22.

[406] The criticisms raised by the Attorney General and the concerns and potential criticisms in respect of the two COVID-19 Assistance Programmes arising from the evidence before the COI and from the Response of the Premier's Office were put to the Auditor General in a COI Warning Letter dated 29 September 2021 to which she responded fully in writing on 4 October 2021 and at an oral hearing (T49 15 October 2021 pages 110-256; and T51 20 October 2021 pages 159-229).

[407] AG Rel Inst Report Executive Summary paragraph E-6.

social purpose) and expressing a political opinion. The response dismissed any suggestion that the award of grants under this programme was done for political advantage, or that the manner in which awards were made could create an impression or give the appearance of seeking to influence the independence of these organisations[408]. When giving his evidence to the COI, the Premier similarly rejected the suggestion of a political motive behind payments to religious bodies, pointing to the important wider role of churches in the BVI. When it was put to him that a majority of the funds went to religious institutions which had not made an application, the Premier replied: "However they did the scheme, that was there for them, but I know that we had to help them"[409]. He said that the change in policy, to give money to the religious institutions to distribute as welfare, was done "to save the social fabric of the country"[410].

5.230 In response, the Auditor General said that the unsolicited provision of $1,060,000 to entities that had not expressed a need for such funds raised a potential conflict of interest and issues of propriety. The Auditor General acknowledged the role that churches play in the BVI; but said that, in looking at the application of money, the issue that arose was whether these funds were being distributed in accordance with a policy approved by Cabinet. The Auditor General said that she had not been provided with any evidence which showed that Cabinet had approved a policy change from assisting with the costs of re-opening to assisting with providing a social function. She said that the receiving institutions had not even been asked what community work they in fact did[411].

5.231 The point links to another conclusion made by the Auditor General and addressed in the Response of the Premier's Office. The Auditor General concluded that grant awards were adjusted within the Premier's Office without any effort to keep within the approved budget[412]. The Attorney General submitted that such a conclusion falls outside the scope of the Auditor General's functions, given that the decision to grant the awards and increase the overall budget were policy matters for Cabinet alone[413]. In reply, the Auditor General, rightly in my view, said that the conclusion was directed to the actions of the Premier's Office rather than a comment on Cabinet's policy making function and process: under the Constitution, policy making is a matter for Cabinet, not the Premier or any other single Minister. Further, the Auditor General relied on the independence afforded to her role under the Constitution, and the powers she enjoys under section 14 of the Audit Act 2003.

[408] The Response of the Premier's Office paragraphs 134-137.
[409] T47 12 October 2021 pages 112-113.
[410] T47 12 October 2021 page 113.
[411] Auditor General's Response to the Response of the Premier's Office paragraphs R134-R137 pages 22-23; and T49 15 October 2021 pages 160-163.
[412] AG Rel Inst Report Executive Summary paragraph E-3, which reads:
"The grant awards recommended by the working committee were adjusted in the Premier's Office without any effort to maintain the apportionment within the available budget."
[413] The Response of the Premier's Office paragraph 130.

Concerns[414]

5.232 As with the F&F Programme, the Religious Institutions Etc Programme raises several obvious concerns that were canvassed with Dr O'Neal Morton[415].

5.233 I will focus on the limb of the programme that gave assistance to religious organisations.

5.234 That part of the programme began as a political initiative to assist such institutions to re-open after their closure as part of the COVID-19 restrictions. To the extent that the Attorney General suggested that, from the point when Cabinet approved Cabinet Memorandum No 236/2020, the policy was to support the social and welfare functions offered by religious organisations in the BVI, I do not accept that submission. On any sensible view of the relevant Cabinet papers, the intention of Cabinet was to assist with the costs of re-opening with the consequence that they could then resume, in a safe way, what are undoubtedly important functions. Further, the suggestion is inconsistent with the evidence of the Premier as to there having been a significant, later policy change.

5.235 The initial policy was endorsed by Cabinet, who approved a $1 million expenditure, which increased to about $2.4 million. On making the grant of the monies to be distributed, the SSB required comfort that the money would be spent in accordance with the principles of good governance; and the Cabinet approved the expenditure on the basis of claims for re-opening costs, which would be verifiable.

5.236 However, the Premier unilaterally changed the policy and the criteria for payment. Instead of a clear focus on re-opening costs on the basis of a claim for the reimbursement of such costs, grants for general purposes were to be made to all religious organisations categorised in bands on the basis of constitutional "size". The conditions were essentially abandoned.

5.237 The Premier said that this change was necessary for welfare purposes. However:

(i) On the basis of the information obtained by the Auditor General, the policy approved by Cabinet – to assist with the re-opening of churches etc, which play a particular important part in the social and civic (as well as religious) life of the BVI – required very little funding to achieve. Of the 94 religious institutions, 75 did not apply for assistance. By the time the programme came into effect, about two-thirds of these institutions had recovered their pre-COVID-19 income levels. The $1 million authorised by Cabinet for both daycares/ schools and religious organisations, was sufficient to meet the identified need: the Committee recommended an allocation of just $185,772.67 to these organisations. There is no compelling evidence that this was insufficient for the intended purpose.

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[414] As indicated above (see footnote 334), the concerns and potential criticisms in relation to the COVID-19 Assistance Programmes arising from the evidence before the COI were put to two public officials, namely the Premier and the Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton. They were put to the Premier in COI Warning Letter No 5 dated 24 September 2021, to which he responded fully in writing on 4 October 2021 and at an oral hearing on 12 October 2021 (T47 12 October 2021 pages 27-147). As part of that reply to the warning letter, the Premier adopted the Response of the Premier's Office (T47 11 October 2021 pages 27-28 and 35; and Premier Response to COI Warning Letter No 5 dated 4 October 2021). The criticisms of the Premier in relation to the COVID-19 Assistance Programmes in this Report are restricted to those in respect of which he has had a full opportunity to respond, as described. They were put to Dr O'Neal Morton in COI Warning Letter No 3 dated 24 September 2021, to which she responded fully in writing on 4 October 2021 and at an oral hearing on 8 October 2021 (T45 8 October 2021 pages 4-251). Again, as part of that reply to the warning letter, Dr O'Neal Morton adopted the Response of the Premier's Office (Dr O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021). The criticisms of Dr O'Neal Morton in relation to the COVID-19 Assistance Programmes in this Report are restricted to those in respect of which she has had a full opportunity to respond, as described.

[415] T45 8 October 2021 pages 217-218 and 239-240. The Elected Ministers' Closing Submissions paragraphs 24-38, again, also responded to these concerns.

(ii) The Premier's Office increased this amount to $1,415,000 (a 662% increase), for a purpose which was not that for which Cabinet had approved the expenditure. The Premier's Office appears to have made the awards without any real effort to keep within the budget approved by Cabinet further to Cabinet Memorandum No 236/2020. It is noteworthy that Cabinet approved a lump sum for distribution to religious institutions etc: the change in purpose did not, in itself, require any increase in that sum.

(iii) The grants were made to many organisations without their making any claim, and without any need being identified. There was no consideration, let alone assessment, of the extent to which a particular organisation would satisfy any policy objective of welfare. There is no correlation between the criteria used to fix the banding (based on constitutional "size" or complexity), and need/ability to make welfare payments.

(iv) The grants were made without any conditions as to how it should be used, or any monitoring as to how it was in fact used. The extent to which the payments were in fact used for welfare purposes is unknown. On the basis of the Premier's evidence, which on this point I am inclined to accept, there is to be no back-accounting exercise. Indeed, as the grants were for any purpose, there do not appear to be any criteria upon which such an exercise could sensibly take place.

(v) Cabinet Memorandum No 342/2020 (upon which an increase in the total spend on the programme was approved) makes no mention of the policy changes made by the Premier. Cabinet was asked to approve payments in circumstances in which it had little choice but to agree, the money having been in large part effectively already committed.

5.238 As with the F&F Programme, the Response of the Premier's Office (adopted by the elected Ministers) attacks the Auditor General and IAD Director, but it fails to answer the similarly concerning way in which this programme was administered. As described below, contrary to the Cabinet's wish, the Premier's Office refused to provide information to the IAD and the Auditor General so that no full and proper audit or analysis, which would have assisted it to have complied with good governance principles, was ever conducted. In respect of the F&F Programme, the Response of the Premier and other elected Ministers to the concerns which the IAD Director and the Auditor General expressed about this programme (including the suggestion that the deficiency in governance was the result of a deficiency in policymaking and implementing capacity in the Public Service) is unpersuasive. For example, as with the F&F Programme, any alleged deficiency in the Public Service cannot account for the failure to engage with the IAD Director who was ready, willing and available to assist with advice on the formulation and implementation of the relevant policy.

5.239 I do not doubt the sincerity and worthiness of the religious organisations to whom these grants were made. Although I have no evidence on the issue, I assume that most, if not all, have charitable status and so are committed to devoting any funds they receive to charitable causes. That is not the issue here.

5.240 The issue is whether, by gifting public money to such organisations in the circumstances I have described (including the lack of openness, transparency and any monitoring, and the approach of the Premier's Office to its obligations to give the IAD and the Auditor General access to information it holds to enable an audit to take place), there is sufficient information before me to conclude that serious dishonesty in relation to public officials may have taken place in relation to this programme.

5.241 The Attorney General, on behalf of the elected Ministers again submitted that, even if this programme as implemented was irrational, irrationality does not equate to serious dishonesty; and I received no evidence to suggest that the programme was motivated by criminal intent,

or that those implementing the programme received "some gift, advantage or gratification during the planning or execution stages"[416]. Thus, it is submitted, I cannot make a finding that there was any conduct here that falls within paragraph 1 of my Terms of Reference.

5.242 However, I do not find the narrowness of this submission compelling. The Auditor General concluded that the circumstances of the distribution of these funds "create the impression of an inappropriate turn to influence these institutions political independence". Even if it was considered that welfare might be distributed for the public good through the religious institutions etc, if such influence was a factor kept in mind, then that is sufficient for me to make a finding that this falls within paragraph 1 of my Terms of Reference. The hurdle for making such a finding is low.

5.243 As with the F&F Programme, I am required to look at all of the information before me. I, again, accept that it is possible that the Religious Institutions Etc Programme may have been the result of no more than irrational decisions very poorly implemented, and it may be that an intention behind the programme was in the public interest. However, in my view, there is a real possibility that these funds were applied, in part, for an improper purpose, i.e. to exert political influence.

5.244 Given (i) the circumstances and way in which the Religious Institutions Etc Programme was ultimately formulated and implemented, (ii) the lack of openness, transparency and any monitoring, and (iii) the approach of the lead arm of the BVI Government (the Premier's Office) to its obligations to give the IAD and the Auditor General access to information it holds to enable an audit to take place, as with the F&F Programme, I have sufficient information before me for me to conclude (as I do) that serious dishonesty in relation to public officials may have taken place in relation to this programme.

5.245 For the same reasons as set out above in respect of the F&F Programme[417], I consider that, as with the other COVID-19 Assistance Programmes, as soon as practical, a full independent audit/investigation of this programme should be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit to be presented to the Governor. Most of the defining criteria I have set out for the audit of the F&F Programme, which I have recommended, will apply equally to this audit. There should be a specific requirement for public officials to cooperate with that audit, including by producing documents and providing information promptly when requested by the audit team. The Auditor General is best placed to identify the terms and scope of the exercise. Without seeking to limit the ambit of her review, in my view, the terms of that exercise should include consideration of (i) the authorised programme criteria, (ii) the steps (a) required and (b) taken to ensure the principles of good governance were met, (iii) the extent to which grants were made to those who did not satisfy the authorised programme criteria, and (iv) the extent to which (and why) bands were adopted without regard to the amount allocated by Cabinet to the programme and/or need. Whilst these are matters for the relevant BVI authorities (notably the RVIPF and the DPP), in my view further steps, including any criminal investigation and steps to recover public money (from, e.g., public officials who distributed these grants improperly and without proper authority) can await the outcome of that audit.

5.246 I consider the possible obstruction of the work of the IAD and the Auditor General in relation to the COVID-19 Assistance Programmes below[418].

[416] Elected Ministers' Closing Submissions paragraph 25.
[417] See paragraph 5.196.
[418] Paragraph 5.279-5.380.

COVID-19 Assistance Programmes: Auditors' Issues

Introduction

5.247 I have already dealt with a number of issues that arose in respect of the role of the IAD Director and Auditor General in relation to the analysis and audit of the COVID-19 Assistance Programmes. For the reasons I have given, I do not consider that any of those criticisms are well-founded.

5.248 Two issues remain to be considered, namely (i) criticisms made by the Attorney General of the IAD Director's approach to these programmes, which I have not yet covered; and (ii) the apparent obstruction of the IAD Director by the Premier's Office, notably in refusing to give her access to information crucial to her task of auditing the programmes and reporting to Cabinet monthly (as Cabinet required her to do). There is a parallel issue with regard to the apparent obstruction of the Auditor General by the Premier's Office.

The Elected Ministers' Criticisms of the IAD Director

5.249 While the elected Ministers did not make any criticisms of the IAD Director in accordance with the relevant COI Protocol[419], the Response of the Premier's Office did raise matters which, if accepted, would amount to criticisms of her. As I have noted above, the IAD Director was given an opportunity to respond, which she did[420].

5.250 Generally, on the approach of the IAD, the IAD Director said this[421]:

> "The mere fact that the Premier's Office is justifying that foregoing controls and normal public financial standards to achieve speed and urgency, signals that there may be a breakdown in the understanding of Government's fiduciary responsibility and stewardship in managing the Public's Purse….
>
> What the [IAD] sought to do was not to pronounce failure on the Government's response to the pandemic but to evaluate what was done with the hope of offering recommendations that would reduce risks, inform future decision and improve programme outcomes."

5.251 With regard to particular issues, the Response of the Premier's Office includes points which go to the degree of cooperation afforded to the IAD Director in the performance of her audits. I consider these in the following section of this Report[422]. Two further, linked issues arose from the Response of the Premier's Office, each of which raises criticisms of the IAD Director for having failed to appreciate and take into account the full context in which the COVID-19

[419] COI Protocol concerning Potential Criticisms dated 27 August 2021.
[420] The concerns and potential criticisms in respect of the COVID-19 Assistance Programmes arising from the evidence before the COI and from the Response of the Premier's Office were put to the IAD Director in a COI Warning Letter dated 29 September 2021 to which the IAD Director responded fully in writing on 7 October 2021 and at an oral hearing (T49 15 October 2021 pages 47-109).
[421] IAD Director Response to COI Warning Letter dated 7 October 2021 pages 9-10.
[422] Paragraphs 5.279-5.315 below.

Assistance Programmes were designed and implemented, namely that the IAD Report showed insufficient appreciation of (i) the policy context within the BVI[423]; and (ii) the international context of the COVID-19 pandemic[424].

5.252 As to the former, the IAD Report sets out the approach adopted by the IAD Director and her staff in seeking to audit the COVID-19 Assistance Programmes. The programmes were listed in the IAD Report, as follows:

> "$6.5 million Small-to-Medium Enterprise (SME) grants [i.e. the MSME Programme] (E).
>
> $2 million support for agriculture and fisheries [i.e. the F&F Programme] (E).
>
> $2 million support for religious institutions, civic groups, private schools and daycares [i.e. the Religious Institutions Etc Programme] (S).
>
> $1 million traffic transformation and transportation (Park and Ride/quarantine bus service) [i.e. the Transportation Programme] (E)."

5.253 As indicated, the IAD Report designated each initiative as either a social protection programme (S) or economic stimulus programme (E)[425]. The report explains:

> "Although all programmes are hoped to have some level of economic impact, this distinction was made in order to better assess the desired outcome of each programme based on its intended function."[426]

5.254 To assess each programme, the IAD Director identified relevant criteria, as follows:

> "In fulfilling this mandate[427], the [IAD Director] formulated the following criteria by which to assess each programme:
>
> (1) Policy paper was developed and approved for each programme.
>
> (2) Each programme has established measurable outcome(s) or targets for the monies invested especially those geared toward economic stimulus as the primary purpose.
>
> (3) Each programme has established an eligibility criterion that was publicly distributed.
>
> (4) Each programme has established clear evaluation criteria to review applications.
>
> (5) Each programme has established mechanisms to communicate final decisions to applicants. (Whether approved or denied and reasons for denial, if necessary).
>
> (6) Eligibility and evaluation criterions were applied in a consistent manner, where deviations occurred, and such reasons are appropriately documented."[428]

5.255 Under the heading "Stimulus Overview", the IAD Report observed that, historically, the focus of government fiscal policy in times of economic downturn had been on whether provisions were timely (i.e. take effect while the economy is in a slump), targeted (focused on activities

[423] Response of the Premier's Office paragraphs 22–40, that section of the Response being headed "The IAD Director's View – Insufficient Appreciation of Policy Context".
[424] Response of the Premier's Office paragraphs 57-68.
[425] The IAD Director explained that these designations were based on the information provided to her department (T23 7 July 2021 page 43).
[426] The programme of social assistance delivered through the House of Assembly was designated as a social protection programme.
[427] To audit the four COVID-19 Assistance Programmes together with the programme of social assistance delivered through the Members of the House of Assembly.
[428] IAD Report pages 3-4, read into the COI Record at T23 7 July 2021 page 46.

that have relatively high economic multipliers) and temporary (expire when the slowdown is over)[429]. Those criteria also inform how the value for money principle can be applied in an emergency or crisis situation.

5.256 The IAD Report notes[430]:

> "As a small island nation with limited resources, this places significant constraints on the approach to fiscal stimulus. As a result of this constraint, the approach taken must ensure that the value proposition is maximized and every dollar spent or awarded directly contributes to both the economic prosperity of the territory balanced against combating the social fallout of the pandemic. The review incorporates a cursory analysis of these three provisions (timely, targeted and temporary) of fiscal stimulus against the government's approach."

5.257 In considering these three factors, the IAD Report stated that while there was "a significant lag in distributing funds", the initiatives could be considered as timely given the continued depressed state of the BVI economy[431]. While it was not possible to identify definitive reasons for this delay, the report suggested that "it was highly likely that the process was constrained due to inadequacies in resources to execute the volume of works required to properly administer each programme". Given the dearth of information that had been made available to the IAD Director, it is understandable why definite reasons could not be given.

5.258 As to whether the programmes were targeted, the IAD Report:

> "… assessed that the package was targeted towards specific initiatives as outlined in the Premier's statement[432], as well as outlined in the Grant Agreement[433]. What was lacking, however, was the absence of any specific strategy that quantified any multipliers effects to justify why these specific initiatives were chosen. This is further borne out by the fact that outcomes were not clearly articulated in the programme documents reviewed"[434].

5.259 The IAD Director explained that the reference to "outcomes [not being] clearly articulated" was directed to whether there were identified objectives and measures in place to ensure that those objectives were met[435].

5.260 The IAD Report noted that it had proved difficult to assess whether the initiatives were temporary. On the information available, there was the potential that these initiatives would be extended[436].

5.261 The IAD Report carried the following express limitation:

> "The audit approach was one that envisaged evaluating the initiatives on a more consultative basis, with the hopes that value added advice and recommendations could positively impact the overall administration of the programme before all the funds were expended. The multiple decisions of Cabinet to have the initiatives audited on a monthly basis support this approach.

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429 T23 7 July 2021 page 47.
430 IAD Report page 5.
431 IAD Report page 5.
432 A reference to the Premier's public statement of 28 May 2020.
433 A reference to the agreement with the SSB.
434 IAD Report page 6.
435 T23 7 July 2021 page 51.
436 IAD Report pages 5-6; and T23 July 2021 pages 47-52.

> This approach would have allowed for corrective actions to be taken by the executing agencies which would foster better programme outcomes as well as provide some level of assurance that the initiatives were executed in a transparent, accountable and equitable manner. However, this approach could not be utilized due to severe limitations on the timely access to information from the executing agencies. Despite multiple requests for information of a formative nature, pertinent to the administration of the programmes, such information was not provided in a timely manner or not at all. Information such as programme objectives, performance measures and eligibility and evaluation criteria were in most cases either absent from the documents presented or changed significantly from what was envisaged. Consequently, our review and final conclusions are based on the limited information accessible to the audit team. It is highly probable that if all information requested was made available, it may have yielded different opinions and conclusions."[437]

5.262 The reference to a "consultative" capacity was indicative of the approach the IAD Director intended to take, because that is how Cabinet appear to have approached the issue of auditing by her as reflected in the requirement for monthly reports[438]. Cabinet wished the development and implementation of the COVID-19 Assistance Programmes to be informed by her input. In her view, had her department been able to work collaboratively with the MoF and the Premier's Office, then they would have been better able to ensure that the programmes her department was tasked to audit were providing value for money and were targeted to those in need[439]. The question of the type of audit the IAD Director decided upon is further discussed below in the context of what information was provided to the IAD Director and when[440].

5.263 The Attorney General's argument on behalf of the elected Ministers, that the IAD Director gave insufficient regard to the policy context[441], is preceded by a summary of what that policy context is said to be[442]. It is unnecessary to repeat that here: the policy context is adequately set out throughout this chapter.

5.264 The argument itself is that the IAD Director, when considering the factors of timely, targeted and temporary, failed to appreciate (i) that there might be an inherent tension between those three factors; (ii) that balancing these factors is a matter of policy for Ministers; (iii) the unprecedented nature of the pandemic; and (iv) that there are occasions when the value for money proposition cannot be maximised[443].

5.265 The Response of the Premier's Office asserts, without referring to specific evidence, that the purpose of the COVID-19 Assistance Programmes was "intended not only to be a timely fiscal stimulus as in previous downturns, but to administer *immediate relief* by the urgent injection and circulation of money as broadly as possible into the relevant sectors of the economy"[444].

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[437] IAD Report pages 6-7.
[438] The IAD Director explained that this decision was reached after undertaking research on how a stimulus programme would be administered (T49 15 October 2021 pages 52-53; and Response of the IAD Director to COI Warning Letter No 1 dated 7 October 2021 pages 1 and 7).
[439] This view was echoed by the then Financial Secretary Glenroy Forbes who said the IAD Director "should have been working along with the various agencies, helping them put in place all those checks and balances that will need to be there to ensure transparency and accountability" (T46 11 October 2021 page 27).
[440] See paragraphs 5.279-5.315.
[441] Response of the Premier's Office paragraphs 22-40. This section of the submission is headed "The Internal Auditor's View – Insufficient Appreciation of Policy Context".
[442] Response of the Premier's Office paragraphs 1-21.
[443] Response of the Premier's Office paragraph 24-26.
[444] Response of the Premier's Office paragraph 27 (emphasis in the original).

5.266 In support of the argument, the Attorney General takes issue with the reference in the IAD Report to businesses such as DJs, entertainers and vehicle rental companies receiving funds[445]. Such businesses, the Attorney submits, needed "the life support" to enable them to resume their activities when conditions improved[446]. She submits that, in the case of the COVID-19 Assistance Programmes, the ability to deliver a timely response was affected by the need to secure funds and the capacity of an "unmodernised Public Service"[447] (a phrase which the IAD Director described, memorably, as an insult[448]). Further, the Attorney said that the "Government does not accept that refined targeting is always the answer to providing social or economic programmes". Here, it is said, to achieve timeliness and inclusivity (i.e. that it reached those it was intended to benefit), there had to be a trade-off. That justified the use of an approach of "making standardised and banded grants with very broad eligibility criteria"[449]. This then appears to be the justification for the change in approach in the MSME Programme in particular, and the COVID-19 Assistance Programmes more generally, noted in the IAD Report.

5.267 The IAD Director told the COI that the Response of the Premier's Office put her in an awkward position. In her letter dated 7 October 2021, read into the COI's record on 15 October 2021, the IAD Director noted that she was being asked to respond to criticisms prepared by "legal functionaries", set out in a document where the majority of issues raised were of a subjective nature. She considered that the Response of the Premier's Office implied that "there was some inherent unfairness in my reporting due to what the Premier's Office considers to be insufficient appreciation for policy and environmental context and deficiency in process". The IAD Director said she found it hard to quantify qualitative issues as raised in the Response of the Premier's Office. She noted that "internal audit" is a well-recognised, independent and objective function applying internationally recognised standards. That function would be undermined if it were to be affected by the opinions of third parties, particularly if they are associated with the arms of government that are the subject of the audit. The IAD Director was firm in her position that the audit she conducted in relation to the COVID-19 Assistance Programmes was carried out appropriately[450].

5.268 Responding to the Response of the Premier's Office, the IAD Director made the following points.

(i) There is a distinction between immediate relief and stimulus, the former having a welfare element. A challenge for the IAD was to determine into which category any programme predominantly fell[451].

(ii) Value for money here would have to be considered against the backdrop of the general principle that the intended relief gets to those in need and not just to anyone[452].

(iii) While she accepted that there was a tension between the three factors – timely, targeted and temporary – the value for money proposition must still be the primary consideration. The issue is how to achieve the maximum benefit within the constraints of needing to be timely, targeted and temporary[453].

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445 IAD Report Page 9.
446 Response of the Premier's Office paragraphs 28-29. I accept that, so far as it goes; but that does not equate with a welfare benefit.
447 Response of the Premier's Office paragraphs 30-31.
448 T49 15 October 2021 pages 69-70.
449 Response of the Premier's Office paragraphs 34-38.
450 T49 15 October 2021 pages 60-62 and 64-65; and covering letter to IAD Director Response to COI Warning Letter dated 7 October 2021.
451 T49 15 October 2021 pages 71-73.
452 IAD Director Response to COI Warning Letter dated 7 October 2021 page 1.
453 IAD Director Response to COI Warning Letter dated 7 October 2021 page 1.

(iv) The suggestion that she failed to appreciate the nature of the pandemic was based upon the wording of her report being taken out of context. She had kept the pandemic well in mind; but contended that there was a benefit in the approach to a stimulus programme being informed by historically proven approaches, whether monetary or fiscal. As an auditor, she had an obligation to consider factors such as the available resources and how long the pandemic might last. That was because the issue for her to consider was how best to utilise a limited resource (i.e. a fixed sum of money) to "achieve the maximum benefit towards the desired outcomes" . Thus, while $6.5 million available to the MSME Programme is a significant sum of money, it was important to make sure it was targeted to persons in such a way as to ensure "best value"[454].

(v) With specific reference to the MSME Programme, the IAD Director said she did have regard to the intention to provide immediate financial relief; but also to the statement of the Premier on 14 September 2020, made when payments under this programme began. That statement, the IAD Director said, clarified the policy decision. In her view, that position was consistent with the submission in the Response of the Premier's Office that "[t]he purpose of a stimulus in such circumstances is to keep the economy's heart beating, to enable businesses to survive and thereby to contribute to… the economic prosperity of the Territory"[455].

(vi) It was not the position of the IAD Director that businesses such as DJs, entertainers and vehicle rental businesses should not receive grants. Her point was that, given that government policy at the time was to close the borders, restrict large gatherings, impose curfews and close the types of industries that would support such businesses, then the desired effect of the MSME Programme may not be achieved by such support[456].

(vii) Neither the IAD nor the IAD Director herself was involved in the design of the programme. The IAD Director did not intend to imply that "refined targeting is always the answer". However, she considered that factors such as financial resource limitations, the desired outcome and how best to achieve such outcomes must be considered when designing a programme. Disregarding such parameters risks losing or missing the target[457].

5.269 The IAD Director said[458]:

> "What I think the Premier's Office failed to understand is that our function is to objectively review the programmes with a view to not only identify what went right but more so to be future focused by identifying deficiencies in programme design, implementation and outcomes, and offer recommendations that would minimize or eliminate those identified deficiencies, to better inform future programmes to improve the likelihood of achieving the desired outcome."

5.270 I have considered both the Response of the Premier's Office and the IAD Director's reply to that Response with particular care. Worded as it is, the Response of the Premier's Office suggests that the IAD report may be tainted by unfairness or a failure to consider relevant matters. I do not consider there is substance in any such suggestion. In drawing that conclusion, I have particularly taken into account the following:

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[454] IAD Director Response to COI Warning Letter dated 7 October 2021 page 2; and T49 15 October 2021 pages 80-81.
[455] IAD Director Response to COI Warning Letter dated 7 October 2021 pages 2-4; and Response of the Premier's Office paragraph 27.
[456] IAD Director Response to COI Warning Letter dated 7 October 2021 page 4; and T49 15 October 2021 page 78.
[457] IAD Director Response to COI Warning Letter dated 7 October 2021 page 4; and T49 15 October 2021 page 77.
[458] IAD Director Response to COI Warning Letter dated 7 October 2021 page 4.

(i) In support of the contention that the IAD Director gave insufficient regard to the policy context, the Response of the Premier's Office does not point to a policy document or Cabinet paper which, in terms, sets out the policy as now formulated by the Attorney General.

(ii) As I have indicated, the policy underlying these programmes as relied on by Cabinet when approving them, was subsequently changed by the Premier. The Premier frankly accepted that. In respect of some, the changes were endorsed by Cabinet (although in some cases without the changes being justified to Cabinet). In respect of others, it seems that Cabinet approval has still not been obtained, or indeed sought. Even where Cabinet approval has been given ex post facto, Cabinet was confronted by a situation in which the Premier had already committed the expenditure. Given the Premier's place within the Constitution[459], Cabinet, in practice, had little or no choice.

(iii) As the IAD Director rightly points out, the Response does not engage with the substance of her report, e.g. with her findings in respect of the MSME Programme.

(iv) The Response has no regard to the role of an auditor, including the fact that an auditor can only operate on the information provided to him or her.

(v) The Response does not set out how it is said the IAD Director breached the professional standards, which she is bound to apply.

5.271 I am unconvinced by the submissions made by the Attorney General on behalf of the elected Ministers. It seems to me that the Attorney's argument that the IAD Director gave insufficient regard to the policy context has no force; and served only as a distraction from the reality of policy changes being made by a single Minister (the Premier), inconsistent with policies (and approach) already approved by Cabinet, particularly in relation to the adoption of a "standardised approach with very blunt-edged eligibility criteria" for the COVID-19 Assistance Programmes rather than programmes based on open, justifiable and Cabinet-approved criteria with a mechanism for implementation that allowed for a full audit of public monies expended to ensure that they are properly expended on sound principles of good governance[460]. To seek to make such a point by criticising, by implication and inference, a public officer exercising an important independent governance function was, in my view, neither attractive nor compelling nor helpful. This part of the Response of the elected Ministers also has to be considered in the context of the abject failure of the Premier and his Office to cooperate with the IAD Director during the course of the programmes, which resulted in her inability to audit the programmes and report to Cabinet monthly as Cabinet wished and required, and to contribute to the formulation and implementation of the programmes to ensure they complied with the principles of good governance, including value for money[461].

5.272 As to the international context, the Response of the Premier's Office adopts the UK as the sole comparator[462]. The Response refers to the UK's use of standard grants in COVID-19 schemes directed towards supporting small businesses and the hospitality sectors. It notes that one such scheme prompted a UK Permanent Secretary to seek a "Ministerial direction" on the basis that it could not comply with the Treasury's Managing Public Money principles. A Ministerial direction is described as a formal instruction from a Minister telling a Department to proceed with a spending proposal, despite an objection from their Permanent Secretary.

[459] See paragraphs 1.71-1.78 above.
[460] Response of the Premier's Office paragraph 39.
[461] See paragraphs 5.279-5.315 below.
[462] Response of the Premier's Office paragraphs 57-68.

It gives a further example (the Bounce Back Loan scheme) where ordinary controls for managing public money were, it is said, "relinquished". This part of the Response concludes by suggesting that the BVI Government adopted the same policy approach as the UK:

> "Although, as its decisions show, the Virgin Islands Cabinet originally intended there to be substantial administrative controls on the relief programmes, it eventually became clear that the Public Service was simply not capable, in parallel, of formulating and executing the various relief programmes with the necessary speed and reach while observing those conditions. Therefore, the Government ultimately considered the same policy approach to be necessary in the Virgin Islands".

5.273 Insofar as the Response of the Premier's Office suggests that the IAD Director failed to take the international dimension to the pandemic into account, that is unjustified. In my view, she clearly took it into account, and to an appropriate degree.

5.274 On the assumption that this aspect of the Response of the Premier's Office was intended to make a wider point, I find the submissions on the international context set out in the Response of the Premier's Office to be of limited value, given that:

(i) no explanation is advanced as to why the UK is an appropriate, let alone the best, comparator;

(ii) it is not suggested that the BVI Government looked at the UK when designing its COVID-19 Assistance Programmes and/or changing its policy; and

(iii) the evidence shows that the changes which the Premier approved in relation to these programmes were not documented.

Further, having regard to my Terms of Reference, comparing the circumstances in the BVI to another jurisdiction which may have faced different challenges has little purpose. It might be suggested, as the Premier did in evidence[463], that the BVI Government is being judged by a different standard. That is wrong. The standards of good governance do not change. Their application, however, of course depends on the circumstances. Notwithstanding the global nature of the pandemic, my focus is on policies and processes adopted by the BVI Government in respect of the COVID-19 Assistance Programmes in the circumstances that appertained in the BVI at the relevant time(s).

5.275 There is a final matter to be addressed here. The Premier was called to give evidence on the COVID-19 Assistance Programmes. Regrettably, his evidence on this important topic was characterised by a tendency not to answer a question, the answer to which I considered might be helpful to the Inquiry; but to use it as a launchpad to make a series of unconnected points. These included references to statements attributed to the then Secretary of State the Rt Hon Dominic Rabb; and culminated in a lengthy pre-prepared speech, which included reading from a report of the UK House of Commons Public Accounts Committee and referring to the response of the UK Government to the COVID-19 pandemic. Such digression was, the Premier said, necessary to "give his evidence in his own way" and to respond to allegations and concerns about the BVI Government's handling of the pandemic crisis made outside the COI. It was done without any prior indication (either to me or, apparently to his own representatives[464]) that this was the Premier's intention.

[463] T47 12 October 2021 pages 78-79.
[464] T47 12 October 2021 pages 41-42, 92-93, 127-129 and 136-148.

5.276 I did not find the Premier's tendency to raise irrelevant issues, or to use a public hearing as a platform to make a political speech straying far beyond my Terms of Reference, to be useful. It was an unnecessary distraction, and unnecessarily extended the length of the hearing. Further, it ignored the fundamental point, of which I had cause to remind the Premier[465], that how the UK Government has dealt with the pandemic is not something that I can investigate as it falls outside my Terms of Reference. It is something that, no doubt, will be dealt with by someone else, at another time and in another place.

5.277 However, whilst the Premier went unhelpfully far beyond the scope of my Terms of Reference, those watching the live transmission or recordings of the COI's hearings, or reading the transcripts of the proceedings, will appreciate that, certainly, the Premier was given full opportunity to address the relevant issues that did fall within my remit, including my concerns about the COVID-19 Assistance Programmes, of which he was made aware.

5.278 Nevertheless, for the reasons I have given, I do not consider any suggested criticism of the IAD Director, that, in conducting her audits, she failed to take into account the proper policy context of the COVID-19 Assistance Programmes has any foundation.

Obstruction of the IAD Director[466]

5.279 The IAD Director did not provide monthly reports on the COVID-19 Assistance Programmes as Cabinet had directed because, despite requests to the Financial Secretary and the Permanent Secretary in the Premier's Office, her department received little or no information in relation to these programmes from the relevant arms of government (notably, the Premier's Office and the MoF)[467].

5.280 The IAD Director only became aware that her department would be involved in auditing the COVID-19 Assistance Programmes through the Premier's public statement of 28 May 2020[468]. She then met with Mr Forbes[469], who undertook to forward any documentation received

[465] T47 12 October 2021 page 146.

[466] The concerns and potential criticisms in relation to obstructive conduct towards the IAD Director (and her department) and the Auditor General in relation to the COVID-19 Assistance Programmes arising from the evidence before the COI were put to two public officials, namely the Premier and the Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton. They were put to the Premier in COI Warning Letter No 5 dated 24 September 2021, to which he responded fully in writing on 4 October 2021 and at an oral hearing on 12 October 2021 (T47 12 October 2021 pages 27-147). As part of that reply to the warning letter, the Premier adopted the Response of the Premier's Office (T47 11 October 2021 pages 27-28 and 35; and Premier Response to COI Warning Letter No 5 dated 4 October 2021). The criticisms of the Premier in relation to such conduct in this Report are restricted to those in respect of which he has had a full opportunity to respond, as described. They were put to Dr O'Neal Morton in COI Warning Letter No 3 dated 24 September 2021, to which she responded fully in writing on 4 October 2021 and at an oral hearing on 8 October 2021 (T45 8 October 2021 pages 4-251). Again, as part of that reply to the warning letter, Dr O'Neal Morton adopted the Response of the Premier's Office (Dr O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021). The criticisms of Dr O'Neal Morton in relation to such conduct in this Report are restricted to those in respect of which she has had a full opportunity to respond, as described.

[467] IAD Report page 4, and T23 7 July 2021 pages 45-46, 54 and 65-66. Such was the lack of information, the IAD Director even approached the Auditor General's Office; but was told that it had not been able to obtain information either (T23 7 July 2020 pages 99–100).

[468] T49 15 October 2021 page 50.

[469] That was the appropriate course given that the IAD sits within the MoF, and the IAD Director therefore reports "administratively and functionally" to the Financial Secretary, who in turn reports to the Minister of Finance (T49 15 October 2021 pages 50 and 55).

from Cabinet[470]. The first such information related to Cabinet Memorandum No 179/2020[471]. In reply, the IAD Director sent the Financial Secretary a memorandum dated 24 June 2020 seeking clarification of the F&F Programme[472]. There followed correspondence between the IAD, the MoF and the Premier's Office[473], which has been disclosed to the COI[474]. While it is not necessary to set out its every detail, the correspondence amply demonstrates that the IAD Director made repeated and concerted efforts to obtain the information she considered necessary to fulfil her role and the directions given by Cabinet.

5.281 Mr Forbes forwarded the IAD Director's memorandum of 24 June 2020 to his then Deputy, Jeremiah Frett, asking the latter to liaise with the Premier's Office to obtain a response[475]. At Mr Frett's request, the memorandum was sent to Dr O'Neal Morton as Permanent Secretary Premier's Office on 16 July 2020[476]. The MoF then sent the memorandum to Ms Elvia Smith-Maduro, Deputy Secretary Premier's Office, on 21 July 2020 asking for a response by 24 July. Ms Smith-Maduro said she would do "[her] best" to respond by that date[477]. On 11 August 2020, Mr Frett emailed Dr O'Neal Morton asking for an update as to when a response would be available[478].

5.282 Separately, the IAD made direct contact with the Premier's Office[479]. On 2 July 2020, following what must have been a telephone conversation on the same day, the IAD Deputy Director, Simba Todman, emailed Ms Smith-Maduro. The email attached several Cabinet papers concerning the F&F Programme, and explained that the IAD:

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[470] While he did not believe that there was a deliberate effort by the MoF to prevent the IAD Director obtaining the information she wanted and needed, Mr Forbes could not explain why the IAD Director was not provided with that information (T25 13 July 2021 pages 141–142). He considered that the lack of access encountered by the IAD Director also undermined his ability as Financial Secretary to understand what was going on (T46 11 October 2021 page 34). Mr Forbes candidly said that, by the time he received the IAD Director's request, he did not know what measures had been put in place in relation to the programmes (T46 11 October 2021 pages 27–28). Although he was tasked with providing monthly reports, he was unable to do so because he, too, struggled to obtain required information. Indeed, when he passed on the IAD Director's request to his deputy, Mr Frett, Mr Forbes said he requested a copy of any information that might be forthcoming so that he could use it prepare the reports he was required to submit to Cabinet (T46 11 October 2021 pages 24-25). Mr Forbes said he only provided one report to Cabinet (T25 13 July 2021 pages 146; and T46 11 October 2021 pages 13-14).

[471] T49 15 October 2021 pages 49-52; and IAD Director Response to COI Warning Letter dated 7 October 2021 page 7.

[472] Memorandum IAD Director to Financial Secretary: Economic Stimulus – Farmers and Fisherman – Cabinet Memorandum No 179/2020 dated 24 June 2021.

[473] The IAD Director explained that, once the Premier's Office had become the lead ministry, her department was asked to submit queries to the Premier's Office (T49 15 October 2021 page 55).

[474] Dr O'Neal Morton was insistent that she and others in the Premier's Office had undertaken an exercise of identifying all email correspondence with the IAD Director and the Auditor General, which was then sent to the IRU. While she was reluctant to confirm that there were no further documents which had not been disclosed to the COI, she did confirm that, so far as she was aware, the Response of the Premier's Office exhibited all the emails which had been identified and passed to the IRU (T45 8 October 2021 pages 25-56 and 29-30).

[475] Email Financial Secretary Glenroy Forbes to Deputy Financial Secretary Jeremiah Frett dated 25 June 2020 (Annex 16 in bundle of documents accompanying the Response of the Premier's Office). Mr Forbes said that it was only at this point, on having spoken to Mr Frett, that he learnt that the Premier's Office had responsibility for the F&F Programme. He had thought that the DAF would be the lead agency for the programme (T46 11 October 2021 pages 22-25; and see T25 13 July 2021 pages 88-89 (Jeremiah Frett)).

[476] Email MoF to Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton dated 16 July 2020 (Annex 18 in bundle of documents accompanying the Response of the Premier's Office).

[477] Email MoF to Deputy Secretary Premier's Office Elvia Smith-Maduro dated 21 July 2020, with Ms Smith-Maduro's response dated 22 July 2020 (Annex 17 in bundle of documents accompanying the Response of the Premier's Office). Dr O'Neal Morton was copied into the email from the MoF.

[478] Email from Deputy Financial Secretary Jeremiah Frett to Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton dated 11 August 2020 (Annex 18 in bundle of documents accompanying the Response of the Premier's Office).

[479] The submission in the Response of the Premier's Office (paragraphs 42-44) that the IAD Director's memorandum of 24 June 2020 did not reach the Premier's Office until 21 July 2020, and that there was not direct contact between the IAD and the Premier's Office until 9 September 2020, cannot be reconciled with the emails of 2 July and 16 July 2020.

> "… are tasked with monitoring this initiative and report to the Minister of Finance and ultimately Cabinet on a regular basis. We are aware that there are details in the process that are still being worked on and we will endeavor to work with your team towards achieving the best possible outcome."

The email asked for any further documents that were available, and concluded by saying that the IAD "look forward to collaborating with you on this initiative"[480].

5.283 On 9 September 2020, the IAD Director sent a memorandum to Dr O'Neal Morton seeking further information including a list of the COVID-19 initiatives implemented, an estimated expenditure budget for each such initiative, any policies/procedural guidelines for managing these programmes, any challenges which had arisen in administering the programmes and "any committee or group being used to evaluate/approve participants of the programme"[481]. Dr O'Neal Morton replied on 11 September stating that she was forwarding the email to her Finance and Planning Officer ("FPO") and Personal Assistant to facilitate the request.

5.284 On 21 September 2020, the IAD emailed the Director of Trade (copying in Dr O'Neal Morton) explaining that they had been given the responsibility of reviewing "all COVID-19 Immediate Relief and Economic Stimulus Initiatives/Programmes". The email noted that grants were being issued under the MSME Programme, and asked for information concerning that programme including the approved policy document, eligibility and approval criteria, a list of all applicants and "Any other information that you believe will be beneficial in our review"[482].

5.285 No information seems to have been provided in response to the IAD Director's email of 9 September 2020 despite further emails from her on 22 September (seeking "urgent assistance" by 25 September), 6 October and 15 October 2020[483].

5.286 On 29 September 2020, the Department of Trade gave the IAD access to information concerning the MSME Programme[484].

5.287 On 3 November 2020, Mr Todman emailed Ms Smith-Maduro explaining that the IAD were aware that awards had been made to farmers and fishermen and payments processed. The IAD wanted to "initiate our review of the administrative processes the Premier's Office has developed and utilized for the execution of" the F&F Programme. The email requested information including any guidelines used to execute the programme, lists of applicants registered for the programme, minutes of meetings held by the evaluation committee, details of the methodology to determine award amounts and "Any other documents/information related to the programme that you think might aid in our review". Mr Todman asked that this information be provided by 5 November 2020. On that date, Ms Smith-Maduro replied to Mr Todman that she would "[n]eed a bit more time". When Mr Todman immediately asked

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[480] Email IAD Deputy Director Simba Todman to Deputy Secretary Premier's Office Elvia Smith-Maduro dated 2 July 2020 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office at internal pages 4-5. Annex 67 is wrongly identified in the index to this bundle. It is a collection of various emails).

[481] Memorandum IAD Director to Permanent Secretary Premier's Office: COVID-19 Initiatives Expenditure dated 8 September 2020. (Annex 67 in bundle of documents accompanying the Response of the Premier's Office at internal page 6. This memorandum is wrongly indexed in the bundle as emanating from the Premier's Office, when, in fact, it was sent to that Office.)

[482] Email Rashida Glasgow IAD to Director of Trade Karia Christopher dated 21 September 2020 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office internal pages 15-16).

[483] Email correspondence between IAD Director and the Premier's Office dated from 9 September 2020 to 15 October 2020 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office internal pages 7-11).

[484] Email correspondence between IAD and the Department of Trade dated from 21 September 2020 to 29 September 2020 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office internal pages 15-16). The IAD Director confirmed that such access was provided (T23 7 July 2021 pages 62-63).

when the information would be provided, he does not seem to have received a reply. He sent a further email on 12 November 2020, asking for an update as to when the information would be available[485].

5.288 A memorandum from the IAD Director to the Financial Secretary dated 9 November 2020[486] illustrates the difficulties experienced by the former. She listed the five programmes she had been asked to audit, and expressed concern that there was a lack of guidance for the management of each programme "from application to payment". The IAD Director had reached this view because:

> "… from the issuance of the press release[487] until present, information has been sought from the agencies responsible, questions have been asked about the programmes and still this information has neither been provided nor seemingly forthcoming; even from the [MoF]."

Where there were guidelines, the stipulations had been ignored in favour of awards being made in "an ad hoc manner: with the institution of a calculated payment, tiers system". The memorandum concluded as follows:

> "Conclusively, the department has decided to issue one report with subsequent financial updates, as the processes and information available is not substantial to have the monthly reports as the Premier requested. This in itself is clear indication that due to the absence of clear policies and procedures to manage the various programmes, the probability of significant exposure to mismanagement and abuse of expending this quantity of fund is heightened, and exposure to maladministration is conceivable."

5.289 On 21 December 2020, the IAD emailed the FPO Premier's Office with a query over duplicate payments being made by the Treasury Department under the F&F Programme. Dr O'Neal Morton intervened in that correspondence to insist that such queries had to be directed to her as the Accounting Officer in the Premier's Office. The IAD Director then became involved explaining that the reason the matter had not been raised with Dr O'Neal Morton was because Dr O'Neal Morton had previously referred an initial request on the F&F Programme to the FPO. Dr O'Neal Morton repeated that she preferred to have the matter sent to her directly.

5.290 On 3 February 2021, in an email captioned "COVID-19 Stimulus Programme Grants", Mr Frett emailed Dr O'Neal Morton listing eight matters on which the IAD required information "urgently". These included policy documents, a description of "objectives and expected outcomes (performance measures) for each programme", a list of amounts awarded, the criteria used to evaluate each application, a description of the mechanisms established to assess the outcomes of each programme, and an explanation of any extraordinary circumstances which may have resulted in a deviation from the established guidelines. The final matter in the list upon which a response was sought was in respect of the query raised on 21 December 2020 relating to duplicate payments[488].

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[485] Email correspondence between IAD and the Premier's Office dated from 3 November 2020 to 12 November 2020 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office internal pages 17-20).
[486] Memorandum IAD Director to Financial Secretary: COVID-19 Economic Stimulus Initiatives dated 9 November 2020.
[487] This seems to be a reference to the Premier's public statement on 28 May 2020.
[488] Email correspondence between Deputy Financial Secretary Jeremiah Frett, Permanent Secretary Premier's Office Dr O'Neal Morton and the IAD Director dated from 3 February 2021 to 6 June 2021 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office at internal pages 26-29).

5.291 Dr O'Neal Morton responded by email on the same day stating that the FPO had provided a response to the first two matters listed (policy documents and description of objectives and expected outcomes (performance measures) for each programme) on 17 November 2020[489]. The email concluded, "Once the information contained in numbers 4 to 8 is completed, the information will be forwarded"[490].

5.292 On 1 April 2021, the IAD Director resubmitted the query about duplicate payments, first raised on 21 December 2020 to Dr O'Neal Morton[491] who forwarded it to the FPO that day[492].

5.293 On 30 April 2021 and 1 June 2021, the IAD Director sent emails to Dr O'Neal Morton asking when information would be available. Dr O'Neal Morton's reply on 1 June 2021 was brief. The IAD Director was told: "Working on it now. Will remind the FPO to work on it"[493].

5.294 The evidence of the IAD Director to the COI was that, despite requests, her department has still not been able undertake further audits, no further information having been provided by the Premier's Office[494]. Dr O'Neal Morton confirmed that this remained the case[495]. As discussed below, the Premier's Office did not provide any information to the Auditor General. Dr O'Neal Morton's view was that information should not go to the IAD Director before it had not been "verified" by the Premier's Office: she said she did not want the IAD Director to be given incorrect information. Her rationale for this was to guard against incorrect information entering the public domain[496].

5.295 Dr O'Neal Morton rejected any suggestion that she "obstructed deliberately or otherwise" the IAD Director[497]. Her position, and that of the Attorney General and elected Ministers, can be encapsulated as follows:

(i) Even by September 2020, there was little information available of the type being requested by the IAD Director in relation to the F&F and Religious Institutions Etc Programmes[498].

(ii) The Premier's Office provided some information to the IAD Director[499]. That, on the evidence, was the response to two of the eight items listed in Mr Frett's email of 3 February 2021, information on the MSME Programme coming from the Department of Trade.

(iii) The Premier's Office cooperated with requests for information concerning two assurance audits, which the IAD was also tasked to undertake. The IAD first requested information in respect of these audits on 5 October 2020 and 16 February 2021[500].

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[489] The Response of the Premier's Office paragraph 143 states that this occurred on 18 November 2020. The actual emails from the FPO were not disclosed to the COI.

[490] Number 3 on the list of eight matters set out by Mr Frett was a request for a list of all applicants for each programme. Dr O'Neal Morton appears to have overlooked this item in her email response.

[491] Email correspondence involving the IAD, FPO Premier's Office, Dr O'Neal Morton and the IAD Director dated from 21 December 2020 to 4 January 2021 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office at internal pages 21-24).

[492] Email Dr O'Neal Morton to FPO dated 1 April 2021 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office).

[493] Email correspondence between Deputy Financial Secretary Jeremiah Frett, Permanent Secretary Premier's Office Dr O'Neal Morton and the IAD Director dated from 3 February 2021 to 6 June 2021 (Annex 67 in bundle of documents accompanying the Response of the Premier's Office at internal pages 26-29).

[494] T49 15 October 2021 pages 48-49 and 89-90.

[495] T45 8 October 2021 pages 72-73. Dr O'Neal Morton said that as of 25 May 2021 (when she received the draft of the AG F&F Report), the IAD Director had not received information and that this remained the case as of 8 October 2021.

[496] T45 8 October 2021 pages 94-96.

[497] Carolyn O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021 paragraph 9; and T45 8 October 2021 pages 243-244.

[498] Response of the Premier Office paragraphs 48-50; and T45 8 October 2021 pages 178-179.

[499] T45 8 October 2021 pages 243-244.

[500] Response of the Premier's Office paragraphs 151-167; and T45 8 October 2021 pages 47-48.

(iv) Delivering the IRP was a priority which had to be achieved with overstretched resources and within the constraints created by the pandemic. There was poor coordination and communication between "the officials"[501].

(v) Public officers were not familiar with the IAD conducting a consultative audit rather than an assurance audit. The IAD did not set up an entrance meeting as would occur in an assurance audit[502]. There was a "clear lack of training in understanding the role of an IAD Director" in respect of such an audit[503]. The reliance on lack of training recurred in the Attorney General's closing submissions, which suggest that better training might have assisted senior public officers in this and similar functions they perform. I deal with the issue of training within the Public Service below[504].

5.296 In their Closing Submissions, in assessing the conduct of the Premier's Office, the elected Ministers invite me:

> "… to take into account the overwhelming pressure on public officers at the time, the disruptive effects of the pandemic, and a clear lack of training in, an understanding of, the roles of an Internal Auditor especially in respect of a consultative, as opposed to an assurance, audit…"[505].

5.297 In advancing the above arguments, neither the elected Ministers nor the Attorney General made any overt criticisms of the IAD Director or her staff. However, in dealing with the issue of whether the Premier's Office had obstructed the work of the IAD Director in auditing the COVID-19 Assistance Programmes and reporting monthly to the Cabinet upon them, the Response of the Premier's Office not only refuted the suggestion of obstruction, but it also criticised the way in which the IAD Director attempted to carry out her audits. These criticisms of the IAD Director by the Premier's Office were put to her in a COI warning letter, to which she responded both in writing and orally[506].

5.298 Having considered all of the evidence and submissions presented to the COI, I find the justification given by the Premier's Office for the way in which the IAD Director was starved of the information that she needed to perform the audit and provide the assistance in relation to these programmes which Cabinet required her to do, inadequate and unpersuasive.

5.299 The backdrop is provided by the statutory powers enjoyed by the IAD to require a public officer to give it access to property that is in that officer's power or control, and to request from any public officer any information or document including electronic data for the purposes of an internal audit[507]. Those are powers that are vital to enable the IAD to perform its internal auditing function, which is an important pillar of governance. Their importance is reflected in the fact that it is a criminal offence (with a maximum sentence of one year imprisonment upon conviction) without legitimate excuse not to provide relevant information or information required by the IAD Director or intentionally prohibit the provision of such an information; or deliberately to provide inaccurate information or evidence or by any means impede the IAD Director or any person involved in an audit in the performance of their duties under the Act[508].

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[501] Response of the Premier's Office paragraph 56; and the Elected Ministers' Closing Submissions paragraphs 34-35.
[502] Response of the Premier's Office paragraph 55.
[503] Elected Ministers' Closing Submissions paragraphs 34-35.
[504] Paragraphs 11.87-11.90; and see also paragraph 5.306(iv) and footnote 522 below.
[505] Elected Ministers' Closing Submissions paragraph 35.
[506] IAD Director Response to COI Warning Letter dated 7 October 2021 pages 10-11; and T49 15 October 2021 pages 47-109.
[507] Section 12 of the Internal Audit Act 2011 (No 1 of 2011) (see paragraph 1.116(vii) above).
[508] Section 23 of the Internal Audit Act 2011 (see paragraph 1.117 above).

5.300 In considering why the IAD Director was not able to produce monthly audits, the proper starting point is that the Premier, Dr O'Neal Morton and the Premier's Office were all aware that Cabinet had determined that the IAD Director should conduct monthly audits of the COVID-19 Assistance Programmes[509]. Mr Frett, the then Deputy Financial Secretary, said that the Premier had said to him and Mr Forbes in a meeting that the IAD Director "must be a part of this process"[510]. Whilst Cabinet did not expressly set out the parameters of the internal audit they had in mind – and labels are not always helpful – it is clear that the Cabinet required the IAD to have a role during the course of the COVID-19 Assistance Programmes. The role (which required monthly reports to Cabinet) was, clearly, not restricted to a backward-looking assurance audit to determine, with hindsight once the programmes had been concluded, whether it had matched up to the appropriate standards. Cabinet's decisions were only compatible with the IAD Director having a role in developing the programmes to ensure that they were complying with the principles of good governance as they proceeded. The IAD Director's role, in that sense, was "consultative" (as it has been termed in the COI) rather than one of "assurance". This is why she was required to conduct her audit during the term of the programme, and report to Cabinet on a regular and frequent basis. It is also the reason why she needed information relating to the process as it went along. That was, clearly and obviously, crucial to her task.

5.301 It is right, as the IAD Director acknowledged, that some information was provided to her department[511]. However, it was not much, and was certainly insufficient for her to undertake her task. She experienced a serious level of resistance in obtaining information which was, she said, consistent with her general experience as an internal auditor for the BVI Government[512].

5.302 The IAD Director explained that it was not the role of the IAD to request information that was not available, something which was communicated to the Premier's Office at the time. However, the IAD was told by the Premier's Office, not that the information was unavailable, but rather that the IAD would have to wait for it[513]. When her department had first requested information, they were told that, as matters were at "the policy stage", information would not be available until the programmes were "actually administered"[514]. Once the IAD noted that payments were being made, it again requested information. The response then was that the information was "being utilized and collected" and would be provided as soon as it was available[515].

5.303 On all the available evidence, there was a great deal of readily available information that could have been given to the IAD Director. While she recognised in her report that there were "inadequacies in resources" in the Premier's Office, that point was made in the context of a possible explanation for the delay in distributing grants[516]. The elected Ministers and other public officials represented by the Attorney General did not offer any evidence as to how the Premier's Office organised itself to deal with the COVID-19 Assistance Programmes[517].

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[509] T45 8 October 2021 pages 173-177. In respect of all four COVID-19 Assistance Programmes, the Preliminary Report notes under the heading "Accountancy and Transparency Framework" that the IAD Director would conduct monthly audits of each programme (Preliminary Report at paragraphs 3.1.2, 3.2.2, 3.3.3 and 3.4.1).

[510] T25 13 July 2021 page 90.

[511] T49 15 October 2021 pages 88-89.

[512] T23 7 July 2021 pages 52-54.

[513] T49 15 October 2021 pages 86 and 92; and IAD Director Response to COI Warning Letter dated 7 October 2021 pages 10-11.

[514] Whilst, of course, the IAD Director was not involved in the determination of policy, it was Cabinet's intention that she should be involved in ensuring that the implementation of the policy was in line with the principles of good governance. Her involvement only when the implementation had actually commenced might therefore be regarded as be somewhat late.

[515] T23 7 July 2021 pages 54-55.

[516] IAD Report at page 5.

[517] The role of Wendell Gaskin was first explained in Dr O'Neal Morton's affidavit of 1 November 2021 (Fifth affidavit of Carolyn O'Neal Morton dated 1 November 2021 at paragraphs 2.8 and 2.9). However, he was not the only consultant engaged on these programmes (April 2020 Task Force Paper at page 11).

However, (i) it might have been expected to organise those resources to comply with Cabinet's specific requirements as a priority; and (ii) in any event, to meet the IAD's requests, the Premier's Office simply had to allow the IAD access to information: it was not required to expend any significant resources in responding.

5.304 As to communication and coordination between public officers, the Attorney General is silent as to which officials it is said were communicating and coordinating poorly. The IAD Director explained that, during the periods of COVID-19 lockdowns and restrictions, her department was able to continue to conduct its work by email, telephone and through virtual meetings[518]. She said that her department did not expect to be communicating with the Permanent Secretary once liaison officers were appointed[519]. However, it is evident that Dr O'Neal Morton insisted that all requests for information should go through her.

5.305 The Attorney General suggested that the Premier's Office was, in some way, flummoxed by the fact that the audit was consultative rather than assurance. So, for example, Dr O'Neal Morton said that she was expecting an entrance meeting with the IAD which, it was submitted by the Attorney, might be expected in an assurance audit – but never happened here. She had not had any "training" in respect of consultative audits.

5.306 However, it is difficult to understand, without the application of lawyerly hindsight, why the distinction between the two forms of audit is now said to be important to Dr O'Neal Morton's or the Premier's Office's ability to comply with the requests for information by the IAD Director and the Cabinet decision.

(i) None of the correspondence contains an explicit reference to a "consultative" audit. Whatever label was or is given to it, for the reasons above, it was clear that Cabinet required the IAD Director to conduct her work on the COVID-19 Assistance Programmes as they were developed and rolled-out. Her audit was intended to contribute to the process.

(ii) As Dr O'Neal Morton accepted, the IAD Director knew her own role[520].

(iii) Given Dr O'Neal Morton's evidence that she had never had to deal with an audit before[521], she would not have been expecting an entrance meeting whatever label the IAD audit might have been given. The two separate assurance audits did not begin until many months after the IAD Director had begun seeking information on the programmes. They were not the prompt for Dr O'Neal Morton to ask why an entrance meeting had not been held.

(iv) The Attorney General submitted that a lot of public officers did not understand the concept of a consultative audit[522]. However, the IAD Director explained that her department had acted in a consultative capacity before which, in her view, had proved helpful[523]. Further, her department had previously come under the Premier's Office and worked with it in the past. The IAD Director considered that there would have been experience of her department's role in that Ministry[524].

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[518] T49 15 October 2021 page 84.
[519] Response of the IAD Director to COI Warning Letter dated 7 October 2021 pages 7-8.
[520] T45 8 October 2021 pages 166-170.
[521] T45 8 October 2021 page 28.
[522] To this end, the Elected Ministers' Closing Submissions paragraph 38 suggests better education about consultative audits would be useful. It notes that the Premier's Office has communicated with the IAD Director and the Auditor General to determine what procedures can be put in place to ensure a more collaborative approach. This is not something upon which I need to make a recommendation. What needs to change is not an understanding as to the type of audit that is being undertaken, but the current view as to supply of the statutory auditors with requested information (i.e. that it need not be supplied).
[523] T49 15 October 2021 page 68.
[524] T49 15 October 2021 pages 84-85; and IAD Director Response to COI Warning dated 7 October 2021 pages 5-6.

(v) At no time did Dr O'Neal Morton question the role of the IAD with the IAD Director or her team, and she was not so uncertain of it that she considered she ought to seek legal advice (as she did in respect of the Auditor General, which I consider below[525]).

(vi) This was not a case where any deficiency in the training of public officers possibly contributed to the failures within the Premier's Office. Given the instructions that Cabinet did issue, and Dr O'Neal Morton's view of the independent role of the IAD Director, it is difficult to envisage what training of public officers was necessary to give effect to Cabinet's decisions by complying with requests for access to information made by the IAD Director.

5.307 Accordingly, the suggestion which arises from the Response of the Premier's Office and the Elected Ministers' Closing Submissions that the IAD role in the audit of the COVID-19 Assistance Grants failed because of the IAD Director's failure to appreciate that there was no experience or understanding within the Premier's Office as to how the IAD could be effectively and urgently integrated into the consultative process, holds no water. I do not accept the premise that the Premier's Office (notably, the Permanent Secretary Dr O'Neal Morton) did not understand the nature of the IAD's role. Dr O'Neal Morton is an extremely experienced public officer; and, had she not understood the IAD role, she could (and, in my view, would) have asked or taken legal advice. She did neither. But, even if she had not understood the IAD's role, she accepts that the IAD Director would have done so. All that public officers in the Premier's Office were required to do was to accede to requests from the IAD to allow access to information which they held.

5.308 The suggestion made by the Attorney General in the Elected Ministers' Closing Submissions, that the IAD Director was willing to wait for information[526], can be easily rejected. It relies on an inaccurate and unfair characterisation of the IAD Director's evidence. The IAD Director persistently requested access to the information which she required to perform her internal audit function in respect of these programmes. The truth is that the IAD Director was left in a very difficult position where all she could do was repeat (to deaf ears) requests for information.

5.309 All of these submissions also ignore a central, if obvious, issue. The failure to provide information which the IAD Director deemed necessary was a failure to give effect to a decision of Cabinet. It meant that the mechanism which Cabinet intended to ensure that public funds were used in an accountable and transparent manner was not given effect. The failure undermined the assurances with regard to how the $40 million SSB grant was to be distributed that the Premier gave to the SSB itself and, in his message of 28 May 2020, to the BVI public.

5.310 Dr O'Neal Morton was, of course, the Permanent Secretary in the Premier's Office and the relevant Accounting Officer, and was at the heart of the refusal to provide the IAD Director with the information she requested and needed to enable her to conduct her audit. The Premier said he was not aware that the IAD Director was unable to get all the information she sought[527]. It is unfortunate that he did not ask to see the monthly audit reports which Cabinet had required be produced. In any event, under section 56 of the Constitution, the Premier is responsible for the management of the Premier's Office, including the management of that Office delegated to Dr O'Neal Morton.

[525] See paragraphs 5.328-5.330, 5.347 and 5.350-5.351.
[526] Elected Ministers' Closing Submissions paragraph 34.
[527] T47 11 October 2021 page 72; and Premier Response to COI Warning Letter No 5 dated 4 October 2021 paragraph 9.

5.311 I consider the obstruction of the IAD Director in performing her statutory function as extremely serious, particularly as it defeated Cabinet's decision that she report to Cabinet on the COVID-19 Assistance Programmes each month. It fundamentally undermined the necessary governance checks on the programmes.

5.312 As I have indicated above[528], it is a criminal offence to obstruct the work of the IAD.

5.313 On the information I have received, Dr O'Neal Morton, in full knowledge of what Cabinet had decided in respect of the involvement of the IAD and in respect of the COVID-19 Assistance Programmes, appears to have adopted the approach that she would control the IAD Director's access to information. In the event, she refused to allow the IAD Director access to much of the information which she (as Permanent Secretary Premier's Office) controlled in relation to these programmes. By so doing, she appears to have breached her statutory obligation to assist the IAD, undermined the decision of Cabinet, and undermined the IAD Director's ability to analyse these programmes and ensure that public funds were being managed in an accountable and transparent manner and in the best way possible to give effect to the purpose to which those funds were to be committed. It does not appear that such conduct could possibly have been in the public interest. Although this may be a matter to be considered by others in due course, I am thoroughly unimpressed by the reasons Dr O'Neal Morton gave for obstructing the IAD Director in this way.

5.314 The Attorney General submits that there is no evidence that the Premier or any other Minister was personally involved in any decision in connection with the auditors[529]. The Premier's role in respect of this obstruction is, on the evidence I have, unclear.

5.315 By whomsoever, there is clear evidence of serious obstruction of the IAD Director in the performance of her statutory duties. In the light of the information I received, in my view, consideration should be given by the appropriate authorities (namely the CoP and the DPP) as to whether a criminal investigation should be held into the conduct of the Premier's Office in obstructing the IAD Director in the way described above.

Obstruction of the Auditor General[530]

5.316 Paragraph 5 of each of the Auditor General's Section 20 reports reads:

> "The Auditor General's Office was unable to obtain the relevant files and information from the Premier's Office pertaining to the COVID-19 stimulus grants which were repeatedly requested by e-mail and telephone. This includes access to databases, documents, reports and other information relevant to policy development and implementation of the programmes."

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[528] Paragraph 1.117.
[529] Elected Ministers' Closing Submissions paragraph 34.
[530] As indicated above (see footnote 466), the concerns and potential criticisms in relation to obstructive conduct towards the IAD Director (and her Department) and the Auditor General in relation to the COVID-19 Assistance Programmes arising from the evidence before the COI were put to two public officials, namely the Premier and the Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton. They were put to the Premier in COI Warning Letter No 5 dated 24 September 2021, to which he responded fully in writing on 4 October 2021 and at an oral hearing on 12 October 2021 (T47 12 October 2021 pages 27-147). As part of that reply to the warning letter, the Premier adopted the Response of the Premier's Office (T47 11 October 2021 pages 27-28 and 35; and Premier Response to COI Warning Letter No 5 dated 4 October 2021). The criticisms of the Premier in relation to such conduct in this Report are restricted to those in respect of which he has had a full opportunity to respond, as described. They were put to Dr O'Neal Morton in COI Warning Letter No 3 dated 24 September 2021, to which she responded fully in writing on 4 October 2021 and at an oral hearing on 8 October 2021 (T45 8 October 2021 pages 4-251). Again, as part of that reply to the warning letter, Dr O'Neal Morton adopted the Response of the Premier's Office (Dr O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021). The criticisms of Dr O'Neal Morton in relation to such conduct in this Report are restricted to those in respect of which she has had a full opportunity to respond, as described.

5.317 It was the Auditor General's decision to audit the COVID-19 Assistance Programmes. She said that, in June 2020, the Governor made a non-specific request that her office look at expenditure related to pandemic spending; but her office had already determined that it would audit the programmes[531]. The Governor did not ever ask about the progress of the audits[532].

5.318 On 13 July 2020, the Auditor General sent a memorandum addressed to the Permanent Secretary in the Premier's Office (Dr O'Neal Morton) explaining that her office "will be performing ongoing reviews of the administration and application of the Government's COVID-19 stimulus programmes"[533]. The memorandum was not limited to particular programmes.

5.319 The memorandum continued that, "it is essential that controls are put in place at the onset to ensure accountability, transparency and fairness in the application of these funds". It requested "application forms, guidelines and other related documents"; and concluded:

> "While it is imperative that persons needing assistance are expeditiously provided with relief, we must continue to maintain public accountability and transparency in the application of all Government funds and ensure that the business of the Government is at all times carried out at the highest standards."[534]

5.320 The Response of the Premier's Office states that Dr O'Neal Morton responded positively to this request saying that her Ministry would "endeavour to provide the information requested"[535]. A copy of this reply was not disclosed with that Response[536].

5.321 On 30 November[537] and 10 December 2020[538], the Auditor General emailed Dr O'Neal Morton requesting interviews with key personnel, documents and that a liaison officer be appointed. The email of 10 December 2020 said that the audit would involve an examination of "all related documents, files and records". The Auditor General also attached extracts from the Constitution and Audit Act 2003, which, the Auditor General said, addressed her office's "mandate to access public property and information". Dr O'Neal Morton said she scanned this material so she could become aware of the requirements. She could not recall if she shared it with her staff as the Auditor General's email invited her to do[539]. The Auditor General said that Dr O'Neal Morton did not speak to her about the constitutional and statutory obligations on public officers[540].

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[531] T51 20 October 2021 pages 163-164.
[532] T51 20 October 2021 pages 167-170.
[533] Memorandum from Office of the Auditor General: COVID-19 Stimulus Grants dated 13 July 2020 (Annexes 73 and 74 in the bundle of documents accompanying the Response of the Premier's Office). The Auditor General said that this expenditure was considered be "high-risk spending" because it was largely discretionary. Accordingly, it was prudent for her office to conduct an early audit which allowed for the opportunity to make governance improvements early (T49 15 October 2021 pages 169-170).
[534] Dr O'Neal Morton confirmed that she did not disagree with the principles of good governance to which the Auditor General was referring (T45 8 October 2021 page 22).
[535] Response of the Premier's Office paragraph 171.
[536] Dr O'Neal Morton was clear that she and her staff had identified all relevant emails and provided them to the IRU (T45 8 October 2021 pages 29-30).
[537] T45 8 October 2021 pages 23-26; and Email from Kenrick Grant to Dr O'Neal Morton dated 30 November 2020 (Annex 75 in the bundle of documents accompanying the Response of the Premier's Office).
[538] T45 8 October 2021 pages 27-31. The email is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).
[539] T45 8 October 2021 pages 30-31.
[540] T49 15 October 2021 pages 244-245.

5.322 In between those two dates, on 2 December 2020, the Auditor General's Office contacted the Director of Trade (head of the Department of Trade) to seek access to the SME database. User accounts to allow such access were created on the same day (with Dr O'Neal Morton copied into the confirmation email)[541].

5.323 On 3 December 2020, the Auditor General was informed by her lead auditor that Dr O'Neal Morton had contacted him by telephone, objecting to access because:

> "1. The Program is ongoing. 2. Some of the information is highly confidential. 3. by 'law' the Audit Office can only examine the programs after they are completed. 4. They are already working with Internal Audit and the Audit Office will come in after"[542].

5.324 On 9 December 2020, the Auditor General's Office sought an interview with the Director of Trade about the MSME Programme. The Director replied that communications were to be directed to Dr O'Neal Morton but, provided she gave "the green light", the Director would be happy to assist. No interview followed[543].

5.325 On 15 December 2020, the Auditor General's Office emailed Dr O'Neal Morton seeking copies of all applications made under the F&F Programme[544].

5.326 On 27 January 2021, the Auditor General emailed Dr O'Neal Morton again asking for specified documents and "other relevant information that may assist this process". Dr O'Neal Morton replied on 29 January 2021 explaining that the stimulus programmes were "still **ongoing** and the IAD were advising and guiding [the Premier's Office] **during the process**"[545]. Asked during the COI hearing on what process the IAD was offering guidance, Dr O'Neal Morton referred to the request from the IAD for assistance on eight matters[546]. This must be a reference to the eight matters first notified to Dr O'Neal Morton in an email dated 3 February 2021 from Mr Frett. Dr O'Neal Morton told the COI that she had no idea as to when the process would be concluded[547].

5.327 The Auditor General replied on the same day explaining that the fact that the programmes were ongoing would not prevent her office undertaking its work; that her office and the IAD performed different functions; and that her office would ensure that it did not interfere with the processes in the Premier's Office. The Auditor General invited Dr O'Neal Morton to address any concerns to her, and concluded by saying that her request "involves Government information. This is within our Constitutional mandate".

5.328 Asked what she understood by "Constitutional mandate", Dr O'Neal Morton said, "It means the Constitution asks--requires that this should be done". However, she considered that the Constitution did not address the question in her mind, which was when the Auditor General could undertake an audit. She did not find the Auditor General's explanation reassuring and preferred to obtain legal advice[548].

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[541] Bundle accompanying Auditor General's response to the Response of the Premier's Office at pages 38 and 39.
[542] Bundle accompanying Auditor General's response to the Response of the Premier's Office at pages 38 and 39.
[543] Bundle accompanying Auditor General's response to the Response of the Premier's Office at pages 36 and 43.
[544] Bundle accompanying Auditor General's response to the Response of the Premier's Office at pages 36 and 42.
[545] Emphasis in the original.
[546] T45 8 October 2021 pages 34-37. The email is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).
[547] T45 8 October 2021 pages 41-42.
[548] T45 8 October 2021 pages 43-48. The email is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).

5.329 On 9 February 2021, some seven months after the Auditor General had first contacted her, Dr O'Neal Morton wrote to the Attorney General's Chambers asking for advice on:

> "… the sequential process for providing information to the Auditor General, in particular, whether the laws of the Virgin Islands allows the Auditor General to act prior to the Government's Internal Auditing process being complete"[549].

5.330 Dr O'Neal Morton told the COI that she sought legal advice having spoken to the Premier[550]. She considered that the Attorney General would provide a quicker response than the Deputy Governor[551]. Dr O'Neal Morton said that, in retrospect, she could have discussed her concern with the Auditor General, but thought approaching the Attorney General to be more appropriate[552].

5.331 The Premier's evidence is that, at some point in late January or February 2021, he became aware that the Auditor General had told Dr O'Neal Morton that she intended to audit the COVID-19 Assistance Programmes. Dr O'Neal Morton told him "that the Internal Auditor had already commenced doing [an audit] in line with the Cabinet's decision", the Premier's Office was under severe strain and Dr O'Neal Morton was unsure of whether the Auditor General could initiate an audit at this point.

5.332 The Premier said he advised Dr O'Neal Morton to seek the advice of the Attorney General. Other than that, the Premier's position is that he was neither aware of communication between the Premier's Office and the auditors nor did he make any decisions in relation to them[553].

5.333 On 17 February 2021, the Auditor General wrote to Dr O'Neal Morton asking when her office would receive the information requested and the name of a liaison officer. Dr O'Neal Morton replied on the same day pointing out that she was focused on addressing queries raised by the IAD with whom her office was working. Dr O'Neal Morton wrote that it was her aim to cooperate with the Auditor General but that "it will be quite challenging and unusual to deal with two audit bodies simultaneously". Her email concluded that she expected to conclude the stimulus packages "very shortly"[554]. Dr O'Neal Morton suggested that this email could have been interpreted as indicating her view that the Auditor General's audit should follow on from the IAD. She conceded that she had not shared that view with the Auditor General[555].

5.334 Dr O'Neal Morton explained that her reference to working with the IAD was to the eight matters raised in Mr Frett's email of 3 February 2021 (and on which work was still ongoing as of 8 October 2021). She said that, earlier, it had been optimistic of her to suggest that the stimulus packages would conclude "very shortly"[556].

5.335 On 22 February 2021, the Auditor General wrote to Dr O'Neal Morton explaining that her office could accept the same information as provided to the IAD and would request further information as necessary. Dr O'Neal Morton replied on 10 March 2021 to say, "We will supply

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[549] T45 8 October 2021 page 46. The email is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).
[550] Carolyn O'Neal Morton Response to COI Warning Letter No 3 dated 4 October 2021 paragraph 12.
[551] T45 8 October 2021 page 48.
[552] T45 8 October 2021 pages 50-51.
[553] Premier Response to COI Warning Letter No 5 dated 4 October 2021 paragraphs 9-10.
[554] T45 8 October 2021 pages 52-54. The emails are annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).
[555] T45 8 October 2021 pages 60-61.
[556] T45 8 October 2021 pages 52-54.

the information once it is ready". She explained that, by her response, she meant she would provide information once the entire process was concluded. Dr O'Neal Morton accepted that she had not shared this intention with the Auditor General, but said it was because it was unusual to deal with two auditors simultaneously[557].

5.336 On 10 March 2021, the Auditor General responded: "In the meantime can you please provide access to the trade (and other) databases as these do not need preparation. The Auditors can commence working with these immediately"[558].

5.337 The Response of the Premier's Office suggested that this email was indicative of the Auditor General being willing to wait. Dr O'Neal Morton's evidence was that she had not read the email in that way[559]. On the available evidence, in my view, Dr O'Neal Morton's view was right; and the retrospective suggestion has no force or merit. The Auditor General never suggested in any way that she was "willing to wait".

5.338 In her evidence to the COI, Dr O'Neal Morton said that no databases existed for the three programmes she was overseeing[560]. That is not a compelling point given that the Auditor General had not indicated that she was limiting her requests for information to specific programmes.

5.339 Dr O'Neal Morton did not refer the Auditor General to the Director of the Trade. When, during her oral evidence, it was pointed out to Dr O'Neal Morton that the Department of Trade had allowed the IAD access to its databases, she said that, even though that department was within the Premier's Office, allowing such access to the Auditor General was a matter for the its Director[561]. This does not appear to be consistent with the email exchanges between the Auditor General's Office and the Director of the Department of Trade considered above.

5.340 There was no further correspondence between Dr O'Neal Morton and the Auditor General between 10 March and 25 May 2021. Nor, during this period, did Dr O'Neal Morton have any communication with the Attorney General's Chambers[562].

5.341 On 19 March 2021, the Auditor General's Office asked the Director of Trade for information concerning trade licenses. A follow-up email on 23 March 2021 prompted a response that confirmation was being awaited from Dr O'Neal Morton. On 29 April 2021, the Director informed the Auditor General's Office that Dr O'Neal Morton had confirmed that all requests for information from the Department of Trade had to be submitted to her: she could not respond to a request directly to her[563].

5.342 It is the Auditor General's practice that her office will provide the relevant Ministry with an opportunity to respond to the draft of a report before it is finalised. Any information provided in a response, if accepted, can be incorporated in the final version of the report[564].

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[557] T45 8 October 2021 pages 54-56. The emails are annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter from Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).

[558] T45 8 October 2021 page 58. The email is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter from Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).

[559] T45 8 October 2021 pages 58-67.

[560] The Attorney General makes the same point (Response of the Premier's Office paragraph 185).

[561] T45 8 October 2021 pages 67-70.

[562] T45 8 October 2021 pages 70-71.

[563] Bundle accompanying Auditor General's response to the Response of the Premier's Office at pages 36, 44-46.

[564] T18 28 June 2021 pages 24 and 80-81. The Auditor General explained that she is not required to provide draft reports to a relevant Ministry: this is done as a courtesy, and to ensure a report is "reflective of the process" (T49 15 October 2021 pages 116-118 and 136).

5.343 By 25 May 2021, as Dr O'Neal Morton confirmed, the IAD Director was still waiting for information from the Premier's Office while the Auditor General had not received any information at all[565].

5.344 On 25 May 2021, the Auditor General provided, by email, a draft of the AG F&F Report to Dr O'Neal Morton[566] asking for a response by 8 June 2021. On 3 June 2021, the Auditor General emailed a draft of the AG Rel Inst Report to Dr O'Neal Morton[567] asking for a response to that report by 19 June 2021.

5.345 Those emails prompted correspondence between Dr O'Neal Morton and the Auditor General, with the former asking for more time to submit a response[568]. Dr O'Neal Morton relied on several factors, including her Office having to respond to requests from the COI and from the House of Assembly, the lack of staff, and that the internal audit of the COVID-19 Assistances Programmes had yet to be concluded. Dr O'Neal Morton also said that she had noted some inaccuracies in the draft AG F&F Report.

5.346 Dr O'Neal Morton did not inform the Auditor General that she believed that the Auditor General's audit could only follow on from the IAD audit, or that she had sought legal advice from the Attorney General. It was only upon receiving the Auditor General's email on 25 May 2021 that Dr O'Neal Morton decided to follow up with the Attorney General[569].

5.347 On 15 June 2021, Dr O'Neal Morton wrote again to the Attorney General stating:

> "The legal opinion is now urgent as the Auditor General draft report is stating the Premier's Office has refused to furnish information, when, in fact, the Premier's Office was under the notion that the Internal Audit, upon completion of the monthly audits, is directed by Cabinet would suffice until the initiative is closed off. Subsequently, the Auditor General would then proceed to do a post-audit." [570]

5.348 The Auditor General extended the time for a response to 15 June and finally to 21 June 2021[571]. On that day (21 June 2021), Dr O'Neal Morton wrote to the Auditor General that she would need until 28 June 2021 to provide a comprehensive response which would address errors detected in the draft reports. She also pointed out that her staff were working on "unaudited" records. Replying, the Auditor General asked for "your response with the information already compiled". Dr O'Neal Morton replied that it would be "professionally inappropriate to provide incomplete information, especially when dealing with unaudited data". She was confident that the full response would be ready by 28 June 2021 or before[572]. Asked about her use of the term "unaudited data", Dr O'Neal Morton suggested that the

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[565] T45 8 October 2021 pages 72-73.
[566] T49 15 October 2021 page 164.
[567] The email was also addressed to the Permanent Secretaries in the MEC and MHSD.
[568] T49 15 October 2021 pages 164-168; T45 11 October 2021 pages 73-80. The correspondence extended from 31 May to 21 June 2021. It is annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021.
[569] T45 8 October 2021 page 71.
[570] T45 8 October 2021 page 83-87. Memorandum: Request for Legal Advice dated 15 June 2021 (annexed to a letter dated 28 June 2021 from Dr O'Neal Morton to the Auditor General (Letter from Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021).
[571] T45 8 October 2021 pages 87-88.
[572] T45 8 October 2021 pages 88-97. Dr O'Neal Morton said that she believed an auditor must work on accurate information and that it would be unethical (on the Auditor General's part) to put inaccurate information into the public sphere (T45 8 October 2021 page 93). The Auditor General said she could not explain the phrase used by Dr O'Neal Morton (referring to "unaudited data"), because she could not understand it. The data provided by Ministry or Department were, of course, unaudited: they were provided to her to conduct an audit. Her reports were audited with any figures used referrable to documents that had been considered (T49 15 October 2021 pages 173-174).

information held by the Premier's Office would be checked by the Premier's Office before being handed over to the Auditor General; but, she accepted that by 21 June 2021 no such checking of information held by the Premier's Office had been done[573].

5.349 The Auditor General submitted her reports to the Governor on 21 June 2021. She considered that she had allowed sufficient time for a response from the Premier's Office[574]. Asked why she would not allow further time, the Auditor General said that, from the beginning, the relevant Ministries were aware of the audit; the audit reports were to be submitted to the Governor who may have had his own concerns; while the usual time allowed for a response is two weeks, she had given Dr O'Neal Morton a month; she had been seeking information from the Premier's Office for a year without any success; and her office had to conclude these audits so it could progress other work[575].

5.350 The advice which Dr O'Neal Morton had sought from Attorney General arrived in writing on 25 June 2021[576].

5.351 In short, the Attorney General advised that there was nothing in either the Internal Audit Act 2011 or the Audit Act 2003 that required the conclusion of an internal audit prior to the commencement of an audit by the Auditor General. The Premier's Office was reminded of the obligation under section 19(3) of the Audit Act 2003 on public officers to comply with requests from the Auditor General including requests for documents and information[577]. The Premier's Office was advised to "take immediate steps to comply with the Auditor General's request for information". However, having received this advice, Dr O'Neal Morton still did not provide any information to the Auditor General[578].

5.352 On 28 June 2021, Dr O'Neal Morton provided a copy of the Preliminary Report to the Auditor General. Her covering letter[579] referenced previous communications wherein Dr O'Neal Morton had indicated significant issues with the Auditor General's two draft reports, hence the need for a comprehensive response.

5.353 On 29 June 2021, Dr O'Neal Morton sent a second letter to the Auditor General rejecting, as untrue, the latter's account to the COI (given in evidence the previous day) that the Premier's Office had been uncooperative with the Auditor General's Office[580]. In support of her position, Dr O'Neal Morton annexed correspondence between her office and that of the Auditor General. Her letter continued that she had raised on several occasions the "numerous factual inaccuracies that were observed" in the two audit reports which would "be most efficiently clarified in a report that was being prepared by the Premier's Office on the COVID-19 Economic Stimulus programmes". Dr O'Neal Morton repeated a request made in her letter of 28 June that the Preliminary Report should be made an addendum to the two Section 20 reports to allow for "due process and fairness". She also requested that her letter of 29 June be made a further addendum. That letter appears to be the first time that the Auditor General would have been aware that advice had been sought from the Attorney General.

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573 T45 8 October 2021 pages 89-95.
574 T19 29 June 2021 page 16.
575 T49 15 October 2021 pages 164-172; and T49 15 October 2021 page 185.
576 T45 8 October 2021 pages 99-103, and Memorandum from Attorney General to Dr O'Neal Morton: Request for Legal Advice dated 25 June 2021.
577 See paragraph 1.103 above.
578 T45 8 October 2021 pages 103-106.
579 Letter Dr Carolyn O'Neal Morton to Auditor General dated 28 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021.
580 Letter Dr Carolyn O'Neal Morton to Auditor General dated 29 June 2021 and captioned Preliminary Report on the Expenditure of COVID-19 Stimulus Funds by the Premier's Office July 2020-May 2021.

5.354 The Auditor General's position, both in her reports and when giving evidence to the COI, was that, contrary to the principles of good governance and in breach of the Constitution[581] and section 19(2)(d) of the Audit Act 2003[582], in the course of her investigation, public officers did not provide her with the documents and information she requested: she was unable to obtain relevant files and information held by the Premier's Office, despite repeated requests by email and telephone over many months[583]. Nor was a liaison officer identified or responses provided to the draft reports, despite extensions[584].

5.355 The Auditor General did not characterise this as simply a lack of cooperation, but said:

> "… I believe there was a deliberate attempt to prevent [my] office from getting information in order to do this exercise… Another aspect of the Covid audit is the trade – Covid plans that were issued to companies, we were granted access to that database, and then told that the Premier's Office had instructed that that access be removed. So, from where we sit, there was a deliberate effort to prevent [my] office from having access to that information."[585]

Relying, in part, on Dr O'Neal Morton's decision to prevent access to the SME database, the Auditor General maintained that her conduct could only be seen as deliberate and suggested it was a delaying tactic[586].

5.356 The elected Government and Dr O'Neal Morton firmly rejected the Auditor General's contention that the Premier's Office had "refused or denied repeated requests for information"[587].

5.357 Dr O'Neal Morton emphasised that her actions were not intended to obstruct the Auditor General[588]. In evidence, she gave the following reasons for not providing information to the Auditor General:

(i) She took up the post of Permanent Secretary in the week that the pandemic[589] was declared and had never been involved in an audit before. She found having to deal with two auditors requesting information at the same time confusing [590].

(ii) The pressures of dealing with the pandemic and demands from the BVI public meant that this was not a "normal time in terms of public funds management"[591].

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[581] Section 109(4) of the Constitution provides: "In the exercise of his or her functions under this section, the Auditor General shall not be subject to the direction or control of any other person or authority".
[582] Section 19(2)(d) of the Audit Act 2003 provides that "… the Auditor has power to require a public officer to give or provide to the Auditor General any explanation or information the Auditor General considers necessary to enable him to perform his duties" (see paragraph 1.103 above).
[583] AG F&F Report paragraphs 5-6; AG Rel Inst Report paragraphs 5-6; T18 28 June 2021 pages 153-154; T19 29 June 2021 pages 7-13; and T49 15 October 2021 pages 226-228.
[584] T49 15 October 2021 page 243.
[585] T18 28 June 2021 page 153; and see T19 29 June 2021 pages 7-13.
[586] Response of the Auditor General to Response of the Premier's Office at paragraphs R-170-R-201 pages 24-30; and T51 20 October 2021 pages 177-178.
[587] Response of the Premier's Office paragraph 187.
[588] T45 8 October 2021 page 78.
[589] Dr O'Neal Morton said that she took up her post on 12 March 2020 (T44 5 October 2021 page 130; T45 8 October 2021 pages 4-5).
[590] T45 8 October 2021 pages 8-9, 13, 19, 28, 39, 47-48, 56 and 244.
[591] T45 8 October 2021 pages 18 and 244.

(iii) Some of the documents requested by the Auditor General, (e.g. contracts and access to databases) could not be provided, although Dr O'Neal Morton could not recall informing the Auditor General that the Premier's Office did not have any contracts[592]. There is no available correspondence in which Dr O'Neal Morton informed the Auditor General that material could not be provided. Furthermore, the requested information was not restricted to the documents that, Dr O'Neal Morton said, could not be provided. Asked whether allowing the Auditor General access to information would have been detrimental to the execution of the COVID-19 Assistance Programmes, Dr O'Neal Morton replied, "I don't think it would have"[593].

(iv) Her belief, gleaned from other officers, was that there should be a sequential approach with the Auditor General being provided with information after the IAD Director and after a programme had been concluded[594]. Dr O'Neal Morton said that it was this belief that led to her not giving information to the Auditor General[595]. However, (a) as seen above, Dr O'Neal Morton did not provide the IAD with the documents and information it needed to conduct its audit either; and (b) Dr O'Neal Morton conceded that she did not share this view with the Auditor General[596]. She sought legal advice from the Attorney General and accepted that, even in normal circumstances, she would have been uncertain as to the proper course[597].

5.358 The Attorney General also relied on what she characterises as "the regrettable delay" in her Chambers providing the legal advice which Dr O'Neal Morton had first requested in February 2020. The Attorney describes the view that the Auditor General should not audit when a programme was ongoing as a "misunderstanding within the Public Service" and relied on "the opinion" of Glenroy Forbes[598].

5.359 Mr Forbes referred to "cross-working" between the IAD and the Auditor General. He suggested that involving the IAD during a programme would ensure accountability, transparency and good governance. The Auditor General should be involved "post-Audit" because, if she became involved earlier, she would be auditing herself [599].

5.360 Asked on behalf of the Attorney General if she agreed with Mr Forbes' view that she "should not be involved during the currency … of a programme", the Auditor General said she did not. She said that her office and the IAD have different roles, and would not be looking at the same things or making the same recommendations[600]. Both the Auditor General and the IAD Director confirmed that their two departments had experience of working on a project at the same time and shared information with each other[601].

5.361 In any event, Mr Forbes recognised that it was a matter for the Auditor General as to when to conduct an audit, and he fully accepted that there was a legal requirement on a public officer to provide information to the Auditor General should she request it[602]:

[592] T45 8 October 2021 pages 22-26 and 42-44.
[593] T45 8 October 2021 pages 42-44.
[594] T45 8 October 2021 pages 28, 34-40, 52, 57 and 77.
[595] T45 8 October 2021 pages 79-80.
[596] T45 8 October 2021 pages 60-61.
[597] T45 8 October 2021 pages 77-79.
[598] Elected Ministers' Closing Submissions paragraph 35.
[599] T46 11 October 2021 pages 28-32 and 38.
[600] T51 20 October 2021 pages 179-180.
[601] T23 7 July 2021 pages 100-103.
[602] T46 11 October 2021 page 28.

> "The Auditor General, there are claims that any information that she asks for, she should get, and I agree. I couldn't agree more. 100 percent. That's what the law says and that's what should happen. So, any time she asks me for anything, I'll give it to her."

5.362 Despite the Attorney General's submission, Mr Forbes' evidence clearly does not support any assertion that there is a rule that the Auditor General cannot choose the timing of an audit. Such a stance would undermine the independence of that office. Further, a sequential approach would, even on Mr Forbes' evidence, be conditional on the IAD being able to audit an ongoing programme. That did not occur here, because the IAD Director was also frustrated in her attempts to get requested and required documents and information from the Premier's Office. Indeed, during his evidence, Mr Forbes cast a sequential approach as one that required the continued involvement of the IRIC[603]. As I have explained, the IRIC's involvement was brought to an abrupt end by the Premier's Office[604]. In any event, whatever the sequence of audits might be, Mr Forbes was clear beyond doubt: a public officer had an immutable obligation to provide each of the IAD and the Auditor General with the information and documents requested for any audit they might wish to conduct.

5.363 On all the available evidence, it is impossible not to conclude (as I do) that Dr O'Neal Morton took a deliberate decision not to cooperate with the Auditor General, particularly as she:

(i) mandated that all requests for information were to go through her and then provided no information over the course of almost a year;

(ii) took no steps to facilitate the Auditor General's access to information, such as appointing a liaison officer;

(iii) gave instructions that information should not be provided;

(iv) was provided with the relevant extracts from the Constitution and the Audit Act 2003, which clearly set out her obligations, and which she had opportunity to consider;

(v) formed an early opinion that the Auditor General should not be allowed to conduct an audit during an ongoing programme, yet took many months before seeking legal advice which (inevitably, given the statutory wording) confirmed that she was bound to comply with the Auditor General's requests for information – had she asked the Financial Secretary Mr Forbes, he would have confirmed that straightaway;

(vi) did not provide any information, even after that advice had been given;

(vii) gave the impression in correspondence that the IAD Director was conducting an audit when, in fact, the latter was still trying to obtain information from her Office;

(viii) could not have misunderstood the Auditor General's requests as limited to a particular type of information or a particular stimulus programme; and

(ix) ignored the fact that she could, quickly and straightforwardly, have provided access to information, including the same information as was being requested by the IAD, which would have required no extra effort on the part of herself and her staff.

5.364 There are two other matters that arise in relation to the exchange of correspondence between Dr O'Neal Morton and the Auditor General.

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[603] T46 11 October 2021 page 38.
[604] See paragraph 5.108 above.

5.365 First, Dr O'Neal Morton was emphatic when giving evidence that the publishing of the two Section 20 reports had had the effect of putting inaccurate data into the public domain[605]. That raises the question as to whether, as the elected Government had wanted, the Preliminary Report should be seen as an addendum to the Section 20 Reports and should have been treated as such by the Auditor General.

5.366 Dr O'Neal Morton wavered as to whether the Preliminary Report was prepared in response to the Auditor General or for another purpose, before eventually accepting that it had been drafted, at least initially, on a free-standing basis[606]. That does not, of course, mean that the Preliminary Report could not have coincidentally addressed the Section 20 reports. But, in fact, it did not do so.

5.367 I have already referred to the information contained within the Preliminary Report when dealing with the individual programmes. The Preliminary Report is organised as a series of chapters. Following an introduction, the first substantive chapter considers the global impact of COVID-19 followed by its impact on the BVI[607]. There follow chapters on the challenges to implementation, requirements for further action, recommendations for "continual improvement" and a conclusion[608].

5.368 Chapter 3 sets out information concerning the four programmes including in relation to qualifying criteria, the application process and the monitoring and evaluation of the programme[609]. It also makes passing reference to Cabinet decisions and policy briefs. There is copious use of tables, and bar and pie charts to show how funds were distributed. I have referred to the information in this chapter, as necessary, above.

5.369 The Auditor General said it would be unprecedented, but also irresponsible, for her office to append unverified material to a report. In her opinion, the Preliminary Report did not engage with the matters raised in the Section 20 Reports, which were specific. If the Premier's Office had provided verifiable evidence (e.g. a Cabinet paper showing a policy change) then that would have been useful for the purposes of her reports; but there was no such evidence[610].

5.370 Contrary to the impression created by Dr O'Neal Morton's letters of 28 and 29 June 2021, the Preliminary Report makes no reference to the Section 20 reports. Dr O'Neal Morton could not point to any part of the Preliminary Report which addressed perceived errors in the Section 20 reports; and, when she could not, suggested it was better to have regard to the Response of the Premier's Office[611]. Subsequent to her oral evidence, the IRU confirmed only that "the Preliminary Report does not directly address such errors"[612]. In my view, this is a thoroughly unsatisfactory response, and appears contrived, as it does not even attempt to identify any of the errors which Dr O'Neal Morton was referring to in her letters of 28 and 29 June 2021; that, even given additional time, Dr O'Neal Morton was not able to identify the errors she might have had in mind; and that the Preliminary Report does not support the implication which the IRU appeared to have been asserting, i.e. that it can be inferred that the Preliminary Report

[605] T45 8 October 2021 pages 93, 122-123 and 126.
[606] T45 8 October 2021 pages 109-116. That is also consistent with the amount of work that must have gone into preparing the Preliminary Report and that some of its cited documents were accessed in October and November 2020 (Preliminary Report page 63).
[607] Preliminary Report Chapter 2.
[608] Preliminary Report Chapters 4 to 7.
[609] In respect of all four COVID-19 Assistance Programmes, the report notes under the heading "Accountancy and Transparency Framework" that the IAD would conduct monthly audits of each programme (Preliminary Report paragraphs 3.1.2, 3.2.2, 3.3.3 and 3.4.1).
[610] T49 15 October 2021 pages 175-182.
[611] T45 8 October 2021 pages 124-126; and 146-147.
[612] Supplemental Response of the Premier's Office undated page 3.

at least indirectly addresses errors in the Section 20 reports. That inference cannot be drawn. In respect of Dr O'Neal Morton's attempt to deflect the focus towards the Response of the Premier's Office, it is telling that that response makes no reference to the Preliminary Report.

5.371 Leaving aside that there is no legal requirement on the Auditor General simply to append submitted material to a report, on the available evidence, there is no reasonable basis for the assertion that the Preliminary Report should (or properly could) serve as an addendum to the Section 20 reports. On Dr O'Neal Morton's own evidence, the Preliminary Report is not responsive to the Section 20 Reports.

5.372 There has never of course been anything to stop the Premier's Office from publishing the Preliminary Report. It would, however, be wholly misleading were it published still containing the statement that it should be seen as an addendum to the Section 20 Reports.

5.373 The second matter concerns the timing of the Section 20 Reports. This arose as follows. While the Premier was giving evidence on 12 October 2021, it was pointed out to him that the Auditor General would have been unaware of a policy change in respect of the F&F Programme, which appeared to have been the outcome of a verbal discussion between the Premier and Dr O'Neal Morton. Asked if that caused him to have any sympathy for the position of the Auditor General, the Premier referred to the world thinking he was a drug lord. He could not explain how the Auditor General might have been responsible for such a perception of him, but instead questioned the timing of her Section 20 Reports and why they had been provided to the COI before being put before Cabinet and the House of Assembly. This then segued into a criticism of the former Secretary of State, before the Premier continued by asserting that the Section 20 Reports were "rushed". He suggested matters would have been better handled if there had been dialogue[613]. Regrettably, this erratic and disparate response was not untypical of the Premier's evidence that day. It was not helpful.

5.374 By this date, the Attorney General had, in accordance with the relevant COI protocol, submitted the criticisms she was making of the Auditor General. I have addressed both already. Neither was directed to this point. The Attorney General did not seek to add to those criticisms. Nonetheless, Counsel to the COI, in fairness to the Auditor General, put to her the suggestion that her Section 20 Reports were rushed so as to make them available to the COI. The Auditor General rejected that proposition, explaining that, as she understood the position, the COI could request any information it wished, had requested copies of reports that her office had completed, and the Section 20 Reports were just two of a number of reports provided accordingly. If other reports on the BVI Government's response to COVID-19 had been available, they would also have been provided[614].

5.375 Notwithstanding that answer, the Attorney General applied, and was permitted, to cross-examine the Auditor General on this matter[615]. Sir Geoffrey Cox QC explained that those he represented were of the belief that Governor Jaspert may possibly have commissioned the Section 20 Reports in anticipation of the COI, and to ensure they were available at the

[613] T47 12 October 2021 pages 123-129 and see also pages 130-134.
[614] T49 15 October 2021 pages 184-185.
[615] I was ready to determine the Attorney General's application to question the Auditor General on the day on which she returned to give oral evidence on the content of the Response of the Premier's Office and her response to the COI Warning Letter. Regrettably in the absence of Sir Geoffrey Cox QC for the whole of the Auditor General's evidence, Martha Eker-Male, representing the Attorney General, said she was not in a position to make the application (T49 15 October 2021 pages 230-239). Sir Geoffrey was able to do so at the COI's next scheduled hearing. He set out the "concerns and criticisms" which the Attorney General and elected Ministers wished to be put to the Auditor General and was permitted to put all the matters raised (T50 19 October 2021 pages 32-41).

time it heard the evidence of the Auditor General. It was suggested that that may have played a part in the Auditor General's decision not to allow Dr O'Neal Morton until 28 June 2021 to respond[616].

5.376 I have already referred to the Auditor General's evidence that she had decided to audit the COVID-19 Assistance Programmes before the Governor made a request of her and that they had no discussions about the ongoing audit. In exploring the central concern that the Section 20 Reports were submitted by 21 June 2021 in advance of the Auditor General giving evidence on 28 June 2021, Sir Geoffrey made clear that he was not suggesting that this was other than coincidental. He accepted that it was open to the COI to deal with these reports at some later date if that was when they became available. When questioned on behalf of the Attorney General and the elected Ministers, the Auditor General remained firm in her evidence that she did not prepare these reports to suit the COI or anyone else. She had, in her view, given the Premier's Office sufficient time to respond and her office had other work to do[617].

5.377 I do not understand that, by exploring what was, as Sir Geoffrey put it, any more than a possibility, the elected Ministers are levelling a criticism at either the Auditor General or former Governor Jaspert (of whom there was no application to question). Nonetheless, the public manner in which the point was raised created the perception, whether intended or not, that a public officer whose role depends on her independence may have colluded with the Governor and that the latter may have acted with malign purpose in seeking to have the COVID-19 Assistance Grants audited.

5.378 Such a perception would lack any foundation. There is nothing sinister about the timing of the Section 20 Reports. Like many other individuals and entities, the Auditor General complied with the COI's requests for disclosure. She was not only bound to do so, but, throughout, she did everything she could to provide information and documents requested by the COI in a prompt and helpful way. It was fortuitous, but certainly helpful, that the Section 20 Reports were available. The Premier is right to say that dialogue is important; but that must not be allowed to obscure the central issue here. As is not disputed, the Premier's Office did not either provide the Auditor General with information which she properly required and requested, or even raise any concerns about such production with the Auditor General. At the time, the Premier's Office did not attempt any effort to cooperate with the Auditor General's Office.

5.379 Obstruction of the Auditor General is not a criminal offence. Nonetheless, having regard to all the information I have received, in my view consideration should be given by the appropriate authority (namely, the Governor) as to whether an investigation should be held into the conduct of the Premier's Office in obstructing the Auditor General in the way described above.

5.380 Furthermore, in my view, given the ease with which the Premier's Office defeated the Auditor General's attempt to audit the COVID-19 Assistance programmes, the sanctions for a failure to cooperate with an Auditor General's investigation and audit require strengthening. Consideration should be given to:

(i) amending the Audit Act 2003 so as to make a failure on the part of any person to cooperate with the Auditor General, without legitimate excuse, a criminal offence: that would bring this statute in line with that governing the work of the IAD Director; and

[616] T50 19 October 2021 pages 38-39.
[617] T51 20 October 2021 pages 162-178.

(ii) notwithstanding that obstructing the IAD and Auditor General should be criminal offences, treating a failure by a public officer or any employee of a statutory board to cooperate with either auditor, without reasonable excuse, as gross misconduct.

Recommendations

5.381 I deal with the overarching recommendations below[618]. However, with regard to the assistance grants, I make the following specific recommendations.

Recommendation B7

I recommend that there should be a wholesale review of the BVI welfare benefits and grants system, including House of Assembly Members' Assistance Grants and Government Ministries' Assistance Grants. Without seeking to limit the ambit of that review, it should seek to move towards an open, transparent and single (or, at least, coherent) system of benefits, based on clearly expressed and published criteria without unnecessary discretionary powers. Such discretionary powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. The review should be conducted by a body established for the purpose, drawing upon the experience and expertise within the BVI, with expert input with regard to (e.g.) the design of any new scheme. Whilst this review is a longer-term project and may be evolutionary in its process, it should be conducted as soon as practical. It need not and should not, for example, await the outcome of other proposed reviews (such as the proposed Constitutional Review).

Recommendation B8

I recommend that, without prejudice to any new scheme that may take its place following the review I have proposed, House of Assembly Members' Assistance Grants and the Government Ministries' Assistance Grants in their current form should cease forthwith.

Recommendation B9

I recommend that the funds that have been allocated to such grants in the past be reallocated to the Social Development Department for distribution, on application, in accordance with its criteria for the distribution of benefits. Those criteria can be reconsidered in the light of the increase in both funds and calls on its funds which that transfer will involve. Over and above any transitional provisions considered appropriate, the Social Development Department should be able to make an assessment of individuals who claim that immediately revoking discretionary assistance granted to them in the past by elected officials would result in particular hardship and/or unfairness.

[618] See Chapter 14.

Recommendation B10

If and insofar as the review I have recommended concludes that there is some public benefit to having public funds allocated to local, district projects then I recommend that consideration be given to (i) having clearly expressed and published criteria by which such potential projects are assessed for public assistance; (ii) an open and transparent process for the proper recording, assessment and monitoring of projects; and (iii) assessment and monitoring being made, not by (or just by) elected public officials, but by a panel including members of the relevant district community. However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced by the change of system to one that is more open and transparent. Transitional provisions may be required. Funds that have been allocated to such grants can be reallocated for distribution through such transitional provisions, before any new, more permanent system is established.

Recommendation B11

I would expect the proposed review to conclude that there is some public benefit to having public funds allocated to grants for educational scholarships etc. If and insofar as it does, then I recommend that consideration be given to (i) having clearly expressed and published criteria by which applications for such grants are assessed for public assistance; (ii) an open and transparent process for the proper recording, assessment and monitoring of applications and grants; and (iii) assessment and monitoring being made, not by (or just by) elected public officials, but by a panel including members of civic society. However, steps should also be taken to ensure that current or ongoing grants are not inappropriately interrupted by this proposed recalibration, and that recipients of grants are not unfairly prejudiced in (e.g.) their education by the change of system to one that is more open and transparent. Transitional provisions may be required. Funds that have been allocated to such grants can be reallocated for distribution through such transitional provisions, before any new, more permanent system is established.

Recommendation B12

With regard to past grants, I recommend that there should be a full audit of all grants made by Members of the House of Assembly (including COVID-19 Grants: House of Assembly Members' Grants) and/or Government Ministries/Ministers for the last three years, including applications which have not been granted, such audit to be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit presented to the Governor. Whilst I appreciate the difficulties of such an audit in circumstances in which there is a dearth of documentation, an independent audit enquiry should enable any further appropriate steps, such as a criminal investigation and the recovery of public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) to be taken. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps, including any criminal investigation etc, can await the outcome of that audit.

Recommendation B13

I recommend that, as soon as practical, a full audit of all four COVID-19 Assistance Programmes (i.e. the Transportation Programme, the MSME Programme, the Farmer and Fisherfolk Programme and the Daycares, Schools and Religious Organisations Programme) be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. There should be a specific requirement for public officials to cooperate with that audit, including by producing documents and providing information promptly when requested by the audit team. The Auditor General is best placed to identify the terms and scope of the exercise. Without seeking to limit the ambit of that review, I recommend that, in respect of each programme, the terms of that exercise should include consideration of (i) the authorised programme criteria; (ii) the steps (a) required and (b) taken to ensure the principles of good governance were met; (iii) the extent to which grants were made to those who did not satisfy the authorised programme criteria; (iv) where bands of grant were used, the extent to which (and why) bands were adopted without regard to the amount allocated by Cabinet to the programme and/or need; and (v) where there have been any proposals for back-end accounting, the extent to which the system of back-end accounting has been put into effect, and the extent to which it has proved effective in recovering money inappropriately allocated. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps, including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) can await the outcome of that audit.

Recommendation B14

I recommend that the appropriate BVI authorities consider whether a criminal investigation should be held into the conduct of the Premier's Office in obstructing the Director of the Internal Audit Department in respect of her audit of the COVID-19 Assistance Programmes.

Recommendation B15

I recommend that consideration should be given by the Governor as to whether an investigation, to be conducted by an independent person or persons, should be held into the conduct of the Premier's Office in obstructing the Auditor General in respect of her audit of the COVID-19 Assistance Programmes.

Recommendation B16

I recommend that consideration be given to amending the Audit Act 2003 so as to make a failure on the part of any person to cooperate with or otherwise impede the Auditor General, without legitimate excuse, a criminal offence.

Recommendation B17

I recommend that, notwithstanding the availability of any potential criminal sanctions for obstructing the Director of the Internal Audit Department and the Auditor General, a failure by a public officer or any employee of a statutory board to cooperate with either auditor, without reasonable excuse, should be treated as gross misconduct.

APPENDIX A

CHAPTER 6:
CONTRACTS

APPENDIX A

CONTRACTS

The BVI has had a regime for the procurement of services and goods, of some sophistication and detail so far as good governance requirements are concerned, since at least 2004. For example, it requires projects of more than $100,000 in value to be subject to an open tender process, other than in exceptional circumstances where there are very strong reasons for waiving that process when Cabinet can approve waiver; and, no matter what the size of the project, unless there is an open tender process, contractors must be selected from a pre-qualified list held by the Financial Secretary.

This chapter sets out the relevant procurement provisions, and then looks at how they are applied in practice with reference to a number of examples. Some of these projects have been audited by the Auditor General and/or the Internal Audit Department. The chapter also considers the results of the audits, and how the elected Government has engaged with those auditors and reacted to their conclusions and recommendations.

Contract Procurement: The Law[1]

The Regime under the Public Finance Management Act 2004[2]

6.1 Part 27 of the PFMR, made under section 44(1)(b) of the PFMA and headed "Procurement of Stores and Services", sets out the main framework for the procurement of goods, services and works by the BVI Government.

6.2 For services and works, the PFMR identify three types of procurement process by reference to contract value: major contracts, petty contracts and works orders[3].

[1] As well as setting out the relevant legal provisions, Dr Drexel Glasgow helpfully gave evidence on the practice in respect of the procurement of government contracts in the BVI in the form of his First Affidavit dated 10 June 2021, much of which was formally read into the COI Record (T18 28 June 2021 pages 5-13), and oral evidence on 8 July 2021 (T24 8 July 2021 pages 97ff). Dr Glasgow has worked in the MoF as the Director of Projects since February 2014 having previously worked in a variety of roles in the PWD and the Ministry of Transportation, Works and Utilities (formerly the Ministry of Communications and Works) ("the MTWU").

[2] This regime is still in place, although it will presumably be replaced at some stage by the Public Procurement Act 2021 which has been passed but not yet brought into force (see paragraphs 6.577-6.581 below).

[3] For goods, regulation 172 provides a scheme whereby goods up to the value of (i) $10,000, (ii) $20,000 and (iii) $75,000 are the subject of different required levels of approval. Dr Glasgow indicated that, where there is a works order for the supply of works or services valued at below $10,000, a purchase order under regulation 172 is also in practice raised as the mechanism by which payment is authorised and made (see below). Otherwise, for the purposes of this report, it is unnecessary to consider the section 172 scheme: the supply of goods did not feature in the evidence.

6.3 For the largest projects, an open tender process is generally mandated. Regulation 170(2) requires that, where the value of services or works exceeds a certain sum ("major contracts"), they shall be procured by tender in line with directions issued by the Financial Secretary and approved by the Minister[4], "unless the Cabinet otherwise directs"[5].

6.4 In respect of tenders, regulation 174 of the PFMR established a Central Tenders Board ("the CTB") comprising (a) the Financial Secretary as Chairperson, (b) the Attorney General, (c) the Director of the PWD, (d) the Permanent Secretary in the Ministry responsible for the subject matter of the particular tender, (e) the Permanent Secretary who is, for the time being, a member by virtue of regulation 174(3) which requires rotation among the Permanent Secretaries; or, in each case, the designate's representative. The powers and duties of the CTB are set out in section 175. Crucially, it is required to evaluate tenders and submit its recommendations to the Minister of Finance who is required to forward them to Cabinet[6]. Cabinet, however, has a discretion as to whether to accept any recommendation. Section 175(3) provides:

> "The Cabinet shall consider the recommendations of the [CTB] and make such decision as it thinks fit."

An ad hoc Procurement Unit has been established within the MoF, to assist with any procurements undertaken by way of tender.

6.5 Where a waiver of the tender process for a major contract is sought, the Minister of Finance brings a paper to Cabinet, usually drafted by the Ministry who will be responsible for the execution of the contract but with the approval of the Minister of Finance and in his name.

6.6 There is no guidance in relation to the exercise of the Cabinet's discretion in respect of waivers of the tender process[7]. However, on 25 October 2019, the then Attorney General Hon Baba Aziz sent a memorandum to the Cabinet Secretary headed "Waiver of the Tender Process" in which he said, of regulation 170(2):

> "At a purely textual level, it is evident that in respect of contracts, the value of which exceeds the threshold sum…, the tender process, which is mandatory, is the norm (the default position) rather than the exception. There is therefore a burden of proof in contradicting the norm by providing very strong reasons to displace the mandatory position stated in the Regulation.
>
> It must be pointed out that the tender process built into our regulations is intended to ensure that contracts are awarded on the basis of objective criteria, which ensures compliance with the principles of transparency, non-discrimination and equal treatment…
>
> …

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[4] The requirement for the tender to be in line with directions issued by the Financial Secretary and approved by the Minister derives from regulation 170(1)(a).

[5] The regime applies to all central government contracts. So far as major contracts involving statutory boards, there was evidence that the central government would enter into these under Regulation 170(2) (see, e.g., the Auditor General's Report on the Cruise Ship Port Development Project dated 31 January 2013 paragraphs 46ff: see paragraph 7.31 below). Others appear to enter into their own contracts adopting some form of parallel (but often less stringent) procedure. For example, Acting Managing Director of the Airports Authority Clive Smith provided a side schedule to his First Affidavit dated 25 June 2021 which stated:

> "The BVI Airports Authority's policy requires a minimum of two (2) quotations for the procurement of goods and services under $100,000.00. Any works over $100,000.00 is required to be undertaken by a tender process unless the waiver of a tender is approved by the Board of Directors."

In his evidence, Mr Smith said this policy was not written down, but had been the practice within the Airports Authority since he joined the operational side of the Authority in 2012 (T28 19 July 2021 pages 15-16).

[6] Section 175(2).

[7] T25 13 July 2021 page 85; and T24 8 July 2021 page 127.

> It is evident that the principles informing the tender process would almost invariably be compromised, unless there is sufficient justification, when contracts are awarded without using the tender process. There is available evidence in the Virgin Islands that the waiver of the tender process has in some cases caused loss to the Government of the Virgin Islands.
>
> Flowing from all of the above, it would seem to me that when a discretionary power (such as that contained in paragraph 170(2) above) is being exercised by Cabinet to waive the tender process, it is necessary that the power conform with the strictures of public law as regards the exercise of discretion…
>
> …
>
> Whether or not the discretionary power is properly exercised in a given case would depend on the sufficiency of the reasons put forward for the waiver of the tender process.
>
> …
>
> In the light of all the above, I would urge that decisions made by Cabinet to waive the tender process in any given case should and ought to be supported by very strong reasons since the default position under paragraph 170(2) and the Regulations is the tender process."

Therefore, for major projects, waiver of the open tender procurement process is an exceptional course, only justified by very strong reasons.

6.7 That view was shared by the current Attorney General Hon Dawn Smith, and other witnesses who gave evidence as to their understanding of regulation 170(2)[8]. The Premier has well-understood that to be the position since his appointment. On 18 June 2019, he confirmed to the Director FCDO Overseas Directorate Ben Merrick that one important issue they had discussed at their recent meeting was: "Tender waivers are exceptions to the normal tendering process that should only be done for legitimate reasons that are clearly explained in the decision [of Cabinet]"[9].

6.8 Originally, the "threshold", i.e. the value of services or works that triggered the regulation 170(2) tender process requirement, was $75,000. By regulation 4 of the Public Finance Management (Amendment) Regulations 2007[10], "$50,000" in regulation 181(2)(c) was replaced by "$75,000"; and (d) was amended "by deleting the words 'exceeds $50,000 and up to $75,000' and substituting therefor the words 'exceeds $75,000 but does not exceed $100,000'". It seems that regulation 170(2) was not amended then. However, Dr Glasgow explained that he believed it was the intention of the 2007 Regulations to amend "$75,000" to "$100,000" wherever it appeared in that section of the Regulations, including in

[8] The Attorney General said that that memorandum was current and still formed part of Cabinet papers where a waiver was sought (T16 22 June 2021 pages 64-65). She was clear that, in her view, "the position is still and still accepted to be that decisions made by Cabinet to waive the tender process in any given case should and ought to be supported by very strong reasons since the default position under paragraph [170(2)] of the Regulations is the tender process" (T16 22 June 2021 page 65). The Acting Financial Secretary (Jeremiah Frett) said that, where a waiver is sought, in his view, there should always be a justification or explanation as to why the procurement process (i.e. open tender) is being waived (T6 18 May 2021 page 124). He agreed that the standard identified by the previous Attorney General applied, i.e. the circumstances had to be exceptional for the tender process to be waived (T6 18 May 2021 pages 129-130): Mr Frett considered that that standard would also be imposed by the proposed Procurement Bill (ibid) (now the Procurement Act 2021: see paragraphs 6.577-6.581 below). Mr Myron Walwyn said that, in the two NDP administrations in which he served in the period 2011-19, an explanation and a business case for waiver was required: "It wasn't something we just did willy-nilly…. We gave great consideration to it." (T21 1 July 2021 pages 186-187, the quote being at page 187). This need for proper justification for tender waiver is in line with the need for such justification for contract splitting (see paragraph 6.214 and footnote 436 below). Indeed, tender waiver and contract splitting often go hand-in-hand (see, e.g., the School Wall Project paragraphs 6.178-6.259 below).

[9] Letter Premier to FCDO Director Overseas Territories Ben Merrick dated 18 June 2019, following their meetings on 3-6 June 2019.

[10] VISI 2007 No 28, which came into force on 24 May 2007 (see paragraph 1.151 and footnote 224 above).

regulation 170(2); and, despite the fact that the 2007 Regulations did not amend regulation 170(2), that was the announced policy and that is how the Regulations were in practice construed after 2007[11].

6.9 There was no change to the regulations until 2020. Regulation 2 of the Public Finance Management (Amendment) Regulations 2020[12], enacted primarily to deal with the procurement of goods and services during a public or health emergency such as the COVID-19 pandemic, provides that:

> "(2) Goods or services shall be procured by tender where the value of the goods or services exceeds $100,000.
>
> (3) Cabinet may dispense with the tender process in respect of the procurement of goods and services under subsection (1) where
>
> (a) a period of public emergency has been declared pursuant to section 27 of the [Constitution];
>
> (b) there exists a health emergency of local, regional or international concern in the territory, such as an epidemic or a pandemic, and health measures under the Public Health Act, the Quarantine Act, 2014 the Infectious Disease (Notification) Act or any other related enactment are or may be enforced; or
>
> (c) any other exceptional circumstances arises,
>
> and the procurement of such goods or services by way of the tender process would in the determination of Cabinet be inimical to the public interest if such goods or services are procured."

6.10 An executed major contract is a public document which is lodged at the High Court Registry, and is accessible to members of the public on payment of a small fee[13].

6.11 For contracts of lower value ("petty contracts"), regulation 181(2) provides that:

> "Subject to regulation 179 [which concerns merely who prepares and processes the relevant contract], if
>
> (a) tenders are not invited, received or accepted for the procurement of services, including constructions works, or
>
> (b) a contractor defaults in the performance of a contract,
>
> an Accounting Officer may select a suitable contractor for providing the services required from the list of pre-qualified contractors if
>
> (c) where the contract sum does not exceed $50,000, the approval of the Financial Secretary has been obtained; or
>
> (d) where the contract sum exceeds $50,000 and up to $75,000, the approval of the Minister has been obtained."

6.12 Finally, in respect of the third method of procurement, regulation 189(1) provides that:

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[11] T24 8 July 2021 pages 108-109, and 119-121.
[12] VISI 2020 No 110, which came into force on 24 September 2020 (see paragraph 1.151 and footnote 224 above).
[13] T18 28 June 2021 pages 51-52 (Auditor General).

> "A contract for work or a service not exceeding $10,000 in value may be entered into without the execution of a specific contract document by a works order signed by an officer authorised to do so by the Minister or person designated by him."

There is, in these circumstances, still a contract between the BVI Government and the person who is doing the work or providing the service; but it is evidenced by a works order without the execution of a specific contract document. The works order itself can set out the scope of the works the contractor is required to provide, and the contractor signs that document.

6.13 To prevent several works orders being issued to cover services or works of a higher value by "splitting" the project or contract, regulation 189(2) expressly provides that:

> "Two or more works orders shall not be issued for the same works or services."

Dr Glasgow said he considered this provision was "very ambiguous". In his evidence, he said that he considered it prevented works valued at (say) $15,000 being split with two works orders being issued for £10,000 and $5,000 respectively[14]; but later suggested that, on one interpretation of regulation 172, splitting might be used, although if it occurred, then the MoF "would require a full explanation of what's going on with something like that"[15]. In practice, multiple works orders are regularly used for projects of more than $10,000[16].

6.14 Dr Glasgow explained that, although the wording of regulation 172 refers to purchase orders being used only for the supply of goods, in practice, where there is a works order for the supply of works or services valued at below $10,000, a purchase order is also raised, which provides the mechanism for payment[17]. Under a works order, it is expected that the supervising Ministry will manage the progress of the works[18]; and regulation 189(3) provides that the officer who signs a works order "shall ensure that the works or services are performed and completed satisfactorily".

6.15 Some provisions of the regime apply to all methods of procurement.

6.16 For example, first, regulation 181(1) of the PFMR provides that:

> "The Financial Secretary on the recommendation of a technical committee appointed under regulation 177 shall maintain a list to be approved by the Minister, of pre-qualified contractors for the procurement of services including construction works".

Dr Glasgow said that this applies to all contracts: and, he said, under a works order, the contractor still has to be selected from the pre-selected list maintained under the regulation[19].

6.17 Dr Glasgow explained that, to his knowledge, the PWD had kept a list of contractors (because, at that time, most works were in fact performed through the PWD) which it shared with the MoF which had, he thought, at least at some stage, maintained a list itself; but the list had no details of (e.g.) the contractor's competence or experience[20]. Where there is no open tender process, he said:

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[14] T24 8 July 2021 page 114.
[15] T24 8 July 2021 pages 115-116, the quotation being at page 116 lines 19-20.
[16] See, e.g., the Beef Island Bridge Project at paragraph 6.48(ii) below; and the School Wall Project at paragraphs 6.178-6.259 below.
[17] See paragraph 6.2 and footnote 3 above; and T24 8 July 2021 pages 105, 109 and 111-113 especially at page 113 lines 9-16.
[18] Dr Drexel Glasgow First Affidavit dated 10 June 2021 paragraph 7.
[19] T24 8 July 2021 page 138.
[20] T24 8 July 2021 pages 144-146.

> "In practice, a supplier, service provider or contractor (collectively referred to as 'supplier[s]') may be selected in the following manner.
>
> b. A shortlist of suppliers is invited to submit a quotation or bid as the case may be. A supplier is selected following evaluation of the submissions.
>
> c. A supplier is invited to submit a price proposal. Once the proposal is assessed and determined to be reasonable, the supplier is selected through direct selection."[21]

6.18 However, the list does not appear to be well known to those Ministries who are required to refer to it. For example, in relation to the Elmore Stoutt High School[22] ("ESHS") Perimeter Wall Project ("the School Wall Project"), the Minister (Hon Myron Walwyn) said that he had never heard of any list of pre-qualified contractors and doubted whether one existed. Nor had his Permanent Secretary at the time heard of such a list[23].

6.19 In about July 2020, Financial Instruction No 1 brought into effect a policy paper on Procurement in Emergency, Disaster, Pandemic and Catastrophic Situation (Cabinet Memorandum No 227/2020) ("the Emergency Procurement Policy"), which was circulated by the Financial Secretary[24]. In the light of the COVID-19 pandemic, and in the absence of specific provision in the PFMA and PFMR, this policy, within the PFMA regime:

> "… sets out the requirements and procedures for the procurement of goods, works, and services during and/or as a consequence of ongoing impacts associated with an emergency, disasters (natural or man-made), epidemic, global pandemic, earthquakes, flooding, riots, war, or any other event that may have adverse effects on the social, economic, and physical infrastructure, which may result in a major disruption to the economy of the Virgin Islands (collectively referred to as 'Events'), which give rise to unforeseen and extraneous circumstances."[25]

In particular, it:

> "… provides a framework [for procurement during or following Events] that ensures Fairness, Transparency, Accountability, and Value for Money when procuring goods, works, and services during and following Events. It establishes a procurement framework which:
>
> a. promotes value for money,
>
> b. is subject to a transparent and auditable process,
>
> c. ensures funds are disbursed equitably (fairness),
>
> d. operates within a strong monitoring and evaluation framework (results focused), and
>
> e. is obligated to provide regular reporting to the Cabinet."[26]

6.20 In respect of regulation 181, it stressed the importance of the pre-qualification list, and provided for a categorisation of contractors listed, based on performance and training:

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[21] Dr Drexel Glasgow First Affidavit dated 10 June 2021 paragraph 9.
[22] Formerly the BVI High School.
[23] See paragraph 6.230 below.
[24] Dr Glasgow gave evidence in relation to this policy, and in particular its provisions relating to the regulation 181 list of contractors: T24 8 July 2021 pages 139-144.
[25] Paragraph 2.0.
[26] Ibid.

> "[Regulation 181] requires the Financial Secretary to maintain a list to be approved by the Minister, of pre-qualified contractors for the procurement of services, including construction works. In keeping with best practice, this list has been referred to as the Contractor Registration and Classification System ('CRCS'). The CRCS is a critical component of this Framework and therefore, it must be brought current. The CRCS will be used for all categories of procurement. Key to the success of any economy is the competency of the workforce in particular sectors. This policy recognizes and supports the need for continued development of personnel in the construction sector, and therefore it is designed to develop the competencies of contractors working in response to Events so that they are better poised to successfully compete and win bids, in order to implement projects at a high level. Contractors registered in the CRCS will be classified with 3 categories. Each contractor is required to participate in a training and development exercise prior to being awarded a contract, as follows (See Appendix I for details). Class A, Class B and Class C contractors will be required to attend development training in various areas depending on the level of know how that has been accessed to result in the classification process. Class A contractors will be given the most extensive training at the beginning, but the training programme of the Class B and Class C contractors respectively will extended over a longer period as they gain the know how to engage in increasingly more complex projects. Their capability to engage in more complex projects (advancement to a higher level) will be assessed on the completion of the training regime and any projects to which they are assigned. Successful completion of one training regime will be recognized with a certificate to be signed by Director of Projects, Financial Secretary and Premier, qualify them as being able to take on more complex projects. These certificates will bear significance in that they can be used as qualifying documentation for projects given by the Government in the future. Once the contractors are trained in their specific level, they will be placed on the rolling lists under the specific categories and allowed to participate in receiving contracts under [this policy]. The classification and reclassification of contractors will be subject to the approval of Cabinet and based on the recommendation of the Projects Unit[27] in the MoF."

Under the policy, all contracts of over $10,000 (although not necessarily works orders) would be procured from those listed.

6.21 The policy also expressly deals with contract splitting (or, as it calls it, "fractioning the works"), as follows:

> "Where the boundaries and scope of works for any project are such that the components are independent and allow for natural and separate implementation of each component, a procuring entity may be permitted under [this policy] to fraction the works and award separate contracts to execute each component under the following conditions:
>
> a. The Ministry secures the services of a dedicated construction manager to manage the day-to-day activities on site and to ensure that the quality assurance and control standards are maintained throughout the project. In addition, the construction manager must ensure that there is cohesion among the various components of the project. Further, the construction manager must ensure that VfM is promoted throughout the execution phase.

[27] See paragraph 6.151 and footnote 285 below.

b. No contractor may be awarded more than one contract to perform works on the same project.

c. The Project Management Team must be engaged to provide oversight of the project.

Fractioning of works may be associated with inherent risks related to project costs and consistency in the finished product. Therefore, it should only be applied in extraordinary circumstances, where expediency in the completion of the works is required, or this delivery method is part of a wider Government strategy to stimulate economic drivers during or following Events.

In all instances however, the approval of Cabinet is required to fraction a project that has a value exceeding $100,000. A procuring entity may be required to provide justification for using this method of delivery on a project, and to demonstrate how this method of delivery will be beneficial to the goals of the project. In addition, a procuring entity should identify potential risks associated with this method of delivery as it relates to a specific project and indicate how these risks would be managed and mitigated."[28]

It is noteworthy that this policy (i) acknowledges that contract splitting is inherently associated with the risk of increased costs and an inconsistent finished product; and (ii) provides that contract splitting should only be applied "in extraordinary circumstances", and only where expediency is required or contract splitting is part of a wider BVI Government policy to stimulate the economy during or after the emergency event.

6.22 Dr Glasgow explained that this policy of updating and categorising contractors on the regulation 181 pre-qualified list, in which he appears to have been instrumental, had been considered for a long time before it was adopted, first, in this Emergency Procurement Policy document in respect of procurement during the COVID-19 pandemic[29]. In his words: "[W]e found this a perfect opportunity get Section 181 of the Regulations in place"[30].

6.23 The second example of generally applicable provisions are regulations 179 and 180 of the PFMR under which, except for common user goods, the relevant Accounting Officer[31] is required to prepare and process the contact documents and send them to the Accountant General and the Auditor General; and regulation 188 requires all contracts to be recorded in a register within each Ministry. These provisions appear to apply to all contracts, including where projects are dealt with by way of works orders; and Dr Glasgow confirmed that that is how it is applied in practice[32].

6.24 Third, regulation 184 prohibits payments on account without the approval of the Financial Secretary. Dr Glasgow said that, in practice, this only applies to works orders or petty contracts, as major contracts would make express provision for any early payments[33].

6.25 Of course, other statutory provisions may also regulate the position where the BVI Government enters into contractual arrangements for services or works. For example, section 3(1) of the Business, Professions and Trade Licences Act 1990[34] provides that:

[28] Paragraph 4.4.2.3.
[29] T24 8 July 2021 pages 136-144.
[30] T24 8 July 2021 page 144.
[31] As the person responsible and personally accountable for the collection of revenue and expenditure of public money within the Ministry (see paragraph 1.165 above).
[32] T24 8 July 2021 page 125 lines 10-17, and pages 126-127.
[33] T24 8 July 2021 pages 125-126.
[34] Cap 200: No 10 of 1989.

> "Notwithstanding the provisions of any other Act, no person shall engage in any business, profession or trade as set out in the First Schedule, or otherwise, without first having obtained a licence for that purpose."

Category VII in the First Schedule to the Act is "Trades Construction/Contractor". On its face, that requires anyone who engages in construction as a trade (whether under a major contract, minor contract or works order) to have a trade licence. However, the evidence was consistently to the effect that, if a contractor is working under a works order, then in practice he or she does not have to produce a trade licence to the employer. Dr Glasgow said that, because production of a licence is not required, in practice a contractor who is working under a works order does not even need to have a trade licence[35].

[35] T24 8 July 2021 pages 131-132. That is evidenced in the School Wall Project (see paragraphs 6.178-6.259 below) in which, on a project worth well over $1 million, 40 of a total of 70 contractors (the large majority working under works orders) had no constructor's trade licence (see paragraph 6.235 below). The evidence of the main players from the relevant Ministry (the MEC) as to what they believed the requirement to be was inconsistent. Myron Walwyn (the Minister) said that he came to the Ministry knowing that, if you were working on a works order, you do not need a trade licence (T21 1 July 2021 page 164): he said, categorically, "If you're working under a Works Order, you don't need a contractor's licence" (T21 1 July 2021 page 162). He said that, if a contractor is working under a works order, his or her national insurance or social security are not checked either; and therefore he or she does not need to have either paid up (T21 1 July 2021 page 163). However, Ms Lorna Stevens, his Assistant Permanent Secretary in the Ministry from 2012, said that such a contractor would have to have a trade licence – any business operating in the BVI would have to have a trade licence – but would not have to show it if working under a works order (T28 19 July 2021 pages 73-74). Ms Carleen Scatliffe, the Ministry's Financial and Planning Officer ("FPO") in 2014, said that contractors merely did not have to show their trade licences if they were working under works orders (T28 19 July 2021 page 98). The Auditor General also said that Government did not require those engaged on a works order to produce a trade licence. She described this as a "policy rather than a regulation", and one which had risk attached (T19 29 June 2021 page 85). As set out in the narrative, the position seems to be that, at law, a contractor working on a works order has to have a relevant trade licence, but in practice does not have to show it to an employer; and so, in practice, contractors often do not in fact have such a licence at all.

Contract Procurement: Background

Introduction

6.26 The Auditor General, the IAD and, less frequently, the PAC[36] have consistently expressed concerns about the government contract procurement process over many years, notably in respect of the following aspects:

(iv) projects being driven by the political establishment rather than a properly formulated strategic development plan;

(v) political interference with procurement, e.g. in the selection of contractors;

(vi) the practice of avoiding the provisions of the procurement regime by contract splitting and waiver of the tender process[37], again often as a result of political interference;

(vii) "Ministerial overreach", i.e. Ministers engaging in activities outside their Ministerial remit;

(viii) use of government contracts for private purposes;

(ix) Ministerial interference in contract execution and management; and

(x) generally poor contract execution and management, including the absence of project management programmes, use of consultants and the making of advance payments without appropriate approval.

The IAD Report on Petty Contract Administration

6.27 An IAD Report in April 2012 on Petty Contract Administration in the period 2007-10[38] is a good starting point. It identified many of these concerns. Its main findings were set out in the Executive Summary, as follows (emphasis in the original):

> "1.1 **Overall, the review found significant control weaknesses in the administration of construction contracts. Control issues were identified within each phase of the project management cycle.**
>
> 1.2 The review revealed that the project inception process is highly driven by the political establishment and not by an overall strategically formulated plan for district and territorial development. It was found that the majority of minor projects are conceived at the district level with little consideration to the territorial development mandate. Such a segmented approach to project inception is believed to have significant adverse effects on the national development as district development may not coincide with national interest as projects may be conceived to promote political agendas.
>
> 1.3 Likewise, the review found the contractor selection process, across all Ministries, to be susceptible to abusive practices as it is generally influenced by Members of the House of Assembly. **The criteria or basis by Members to select contractors for the most part is unknown and for the other part lacks transparency**. After

[36] The main project in evidence to the COI in which the PAC played a major investigative role was the Cruise Ship Port Development Project (see paragraph 7.31-7.66 below).

[37] In response to a request from the COI, the MoF said that, of a total number of 113 contracts valued at over $100,000 in the period 1 January 2019 to April 2021, 74 (65.5%, i.e. about two-thirds) were exempted from the procurement process whilst the procurement process was not waived in respect of only 34 (34.5%, i.e. about one-third) (Withers Response on behalf of the MoF to COI Request for Information No 17 dated 29 April 2021).

[38] In this section, references to "IAD Report" are to this report.

further analysis it was observed that contractors, who were awarded contracts by Government for the period under review, mostly resided in the District for which the works were to be carried out. This practise limits the Government from acquiring the most competent contractor(s) at the best price.

1.3.1 Although the [PFMR] requires contractors to be selected from a pre-qualified list, some Ministries are unaware of this requirement. Furthermore, the majority of the Ministries do not utilize the list of pre-qualified contractors[39].

1.4 The review also found noticeable deviations or unwarranted restructuring in the manner in which the Ministries operates or executes its mandate. Most Ministries have undertaken projects that we found to be bluntly outside the scope of the Ministerial mandate. This practise, we find to be counterproductive as the Ministry's focus is detracted from its core objectives and its resources possibly utilised contrary to the intended purposes as authorised by the House of Assembly.

1.5 A similar trend exists in the project execution and management processes whereby each Ministry executes and manages its own construction projects without the internal capacity and technical competencies to adequately carry out this function. As such, Ministries have resorted to acquiring and engaging third party consultants to carry out multiple facets of the project management cycle, while neglecting basic control mechanism that are necessary to protect Government's interest and to ensure value for money on projects[40].

1.5.1 A well-established trend exists whereby Ministries issue advanced payments to contractors at the commencement of the contract without seeking approval from the Financial Secretary as required in Section 184 of the Public Finance Management Regulations 2005 as amended. This practise exposes Government to some level of risk as contractors may receive the advance payment and still not be financially capable of fulfilling the requirements of the contract while the Government did not receive any immediate value.

1.6 The audit found no evidence that final evaluations were conducted before final payments were made and there was no documentation of Government's formal acceptance/handover of the projects. Additionally, evaluation of contractor's performance is not performed at the end of the contracts.[41]

1.7 A practice has emerged whereby the tendering process, in most cases is either waived by Cabinet or the project is divided into multiple components valued less than the amount designated by law to require the project to be tendered, with a view of having these components awarded to multiple contractors.

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[39] The audit found that no such list had in fact been produced either by the MoF or any other Ministry (paragraph 9.6.2). As indicated above (paragraphs 6.17-6.18), evidence to the COI suggested that, at least, many public officials were unaware of any such list. For example, in respect of the School Wall Project (see paragraphs 6.178-6.259 below), the relevant Acting Permanent Secretary at the time (Ms Lorna Stevens) said she was unaware of any list being kept; and the Minister (Hon Myron Walwyn) said that he had never heard of the Ministry ever asking for such a list, and he doubted whether any such list existed (see paragraph 6.230 below, and the evidential references there set out). However, Dr Glasgow said that the PWD maintained a list of contractors between 2004 and 2012 (when he was involved in the PWD), and it was given to the Financial Secretary; although he could not say what the MoF did with it (T24 8 July 2021 pages 135-137).

[40] This is the conclusion of the more detailed paragraphs 9.9-9.12. The audit found a complete absence of project execution plans; and that, as a result of lack of capacity within the PWD, the project management had become decentralised with the FPO in the relevant Ministry being tasked to perform the function although in most cases he or she did not have the background or training to perform it competently; leading to the retention of consultants to design, price and manage projects, thereby eliminating the primary function of separation of duties.

[41] Of course, in the absence of objectives for a project, such an evaluation would be difficult if not impossible.

1.7.1 Instead of seeking permission to waive the tendering process for projects valued at over one hundred thousand dollars ($100,000), the review found that some Ministries opted, with a view to circumvent the legal requirement, to break into components that would have normally have exceeded the limit (value set) and that would require tendering. This practice usurps Cabinet's authority to waive the tendering of the project and circumvent the legal requirement since there is the thinking that the contract are to be waived and not the project.[42]"

6.28 More generally, in most cases no documentation was found indicating what the objectives of a project were, so that it was difficult to ascertain whether the objectives were achieved and whether value for money was achieved. There was an express audit limitation on the basis that there was a lack of documentation prior, during and after the execution of the projects, so that the audit team had to rely largely on interviews with personnel from the respective Ministries to determine project scope and objectives[43]. This reflected a "practice of poor documentation", at least in part stemming from a lack of human resources[44].

6.29 However, interviews also revealed that "the project inception process is highly driven by the political establishment and not by an overall strategically formulated plan for district and territorial development" and the majority of minor projects were conceived at district level with little consideration to the territorial picture[45]. The report continued[46]:

> "In addition, this segmented approach may be a direct consequence of the Territory's system of District based representation whereby nine (9) of the thirteen (13) representatives are elected at the district level. As such, the impetus for these representatives is to primarily satisfy the developmental needs and interests of their respective Districts rather than the needs of the Nation/Territory. This condition is further complicated when the District Representatives are appointed to a ministerial office. For example, during this exercise, we have found that Ministries have taken on projects that are outside the scope of their Ministerial mandate with the only seeming connection being that the Minister responsible for that Ministry is also the representative for the District in which the project is being undertaken. This practice was found to be counterproductive as the Ministry's resources are being distracted from achieving its core objectives."

In other words, the IAD considered that the audit revealed both political parochialism and ministerial overreach, in that some Ministries were engaged in activities which fell outside their remit, creating the perception that these projects were being done to promote a particular agenda rather than for a "good" (meaning, as I understand it, public-orientated) reason[47].

6.30 Furthermore, expanding on paragraph 1.3, the report said this about the selection of petty contractors[48]:

[42] Which the IAD Report considered to be unlawful as it circumvented the statutory requirement of the PFMR to have a tender process or waiver (paragraph 10.5).
[43] IAD Report paragraph 8.1, quoted at T23 7 July 2021 pages 21-22.
[44] T23 7 July 2021 pages 22-23, the quotation coming from page 22.
[45] IAD Report paragraphs 9.2-9.3.
[46] IAD Report paragraph 9.4.
[47] T23 7 July 2021 page 7.
[48] Paragraph 9.6.1.

> "Through interviews, it was determined that, in most cases, contractor selection is greatly influenced by the Members of the House of Assembly and in particular the Representative for the district for which the works are to be executed. The review again found no criteria for the basis of Member's selection of the contractor other than, in most cases, the contractor resides in the Member's constituency/district. The lack of a criteria based selection process was found to be of great concern as the risk is significant that unsuitable contractors may be selected to execute works that exceed their competency levels, resulting in inefficient and unacceptable project outcomes."

Again, in the area of contractor selection, it was suggested that there was political interference.

6.31 Given the risks arising from the political interference in contract procurement which had been identified, the report recommended (among other things):

> "11.8 Due to the potential risk created as a result of the political influence on the process the following recommendations are provided as mitigating controls:
>
> 11.8.1 Additionally, it is recommended that a 'right to audit' clause be developed and inserted in all construction contracts, with specific characteristics such as record retention standards, accessibility to staff and suppliers, timeliness of response to audit engagement announcements, availability of space for auditors on site.
>
> 11.8.2 Similarly, it is recommended than an 'anti-kickback' or 'non-bribery' clause be developed and inserted in all construction contracts. The clause may be similarly worded, 'No monetary payments were made or other services were rendered to influence the evaluation or contract award process'.
>
> 11.8.3 It is further recommended that 'conflict of interest disclosure(s)' be required that would obligate the contractor to disclose any potential conflict that they might have in the execution of the contracts."

6.32 The draft IAD Report was sent to all Ministries for comment[49]. The Management Response from the Financial Secretary dated 11 May 2012 agreed all of the recommendations made; although it added the comment against paragraph 11.8.2 (kickbacks and bribery): "Inclusion of this admits there is a problem".

6.33 The IAD also recommended that the Government seek a legal opinion as to the legality of splitting projects into smaller components and awarding petty contracts without first seeking and receiving Cabinet's approval[50]. The Management Response was to "Agree", the Financial Secretary adding the note: "This is already established."

6.34 This IAD Report, although focusing on petty contracts, made observations of procurement for major projects too. It found contract inception to be highly driven by the political establishment, and politicians continued to interfere with the procurement process. It does not appear to have regarded contract splitting or waiver of open tenders as resulting from anything other than the wish of elected public officials to interfere with the procurement process.

[49] T23 7 July 2021 page 21.
[50] Paragraph 11.12.

Auditor General's Reports

6.35 These concerns were also consistently reflected in the Auditor General's Annual Reports[51].

6.36 In her 2008 Annual Report, she said:

> "**Government Contracts**
>
> …
>
> 64. Of ongoing concern is the practice of splitting major contracts into smaller parts to facilitate issuing petty contracts[52]. This was seen on projects involving road development, construction of retaining walls and ghut training in 2008. The rationale which has been provided for contract splitting is to allow for work to be shared and promote development of skills among local contractors. The result is frequently work that is of inconsistent quality or engagement of individuals who are not sufficiently qualified or experienced to perform the contract.
>
> 65. In addition, contrary to the stated objective of sharing works, instances were seen where the same contractor was awarded two or more parts of the split contract, which together exceeded a major contract sum of $100,000. The selection of contractors on a split contract is particularly susceptible to cronyism, nepotism, favoritism and has to a large extent become heavily politicized. This is all made easy by the fact that no formal competitive bidding is required and the works are now divided and costed in the budget by district. More needs to be done to regulate and monitor petty contracts if the Government is to achieve value for money on these agreements.
>
> **Petty Contract Usage**
>
> 66. The issue of using public funds to develop private property was first reported in the 1997 Audit Report. The Government has a policy whereby retaining walls and roads are constructed on private property either to compensate persons who give up land to accommodate expansion or improvement of public roads or to prevent erosion of soil onto public roads or the erosion of private property after the construction or widening of a public road.
>
> 67. During 2008 there were a number of petty contracts for building of private estate roads and retaining walls which did not qualify under the above criteria. This type of activity continues to be commonplace and a substantial amount of the [PWD's] time and resources is consumed in performing assessments, costing, preparing petty contracts and monitoring works carried out on private property. Cases have also been observed where individuals (or their companies) were given contracts to perform jobs on property in which they have an interest."

[51] The Auditor General's Annual Reports insofar as they dealt with government contracts (and especially the use of petty contracts) were covered in the Auditor General's oral evidence at T18 28 June 2021 pages 51ff.

[52] The Auditor General also spoke of a trend to split projects into contracts of under $10,000 and then to use works orders: "What we're seeing is an evolution of the works orders becoming more significant because they're easy and they don't have a lot of requirements" (T19 29 June 2021 page 87). Like contract splitting and using petty contracts, this inevitably gives rise to the risks that the statutory requirements for contracts of larger value are designed to assuage, e.g. an increase in cost and a decrease in quality/ consistency in the finished works (see paragraphs 6.39 and 6.48 below; and see, by way of example, the School Wall Project at paragraphs 6.178-6.259 below).

Substantively identical observations were made in each of the Annual Reports 2009-12[53]. The Auditor General explained that, by "heavily politicized", the report meant: "The Ministers determine who gets the contracts"[54].

6.37 In 2013, the form of the Annual Report changed, with a number of specific "Audit Issues" being identified. As Audit Issue 5, under the heading "Procurement Weaknesses", the Auditor General's concern was put as follows[55]:

> "The regulations in place for public procurement are insufficient to ensure transparency and value for money is achieved for contract letting. Soft provisions allow for circumvention of regulations which can be bypassed or otherwise disregarded with the splitting of contracts and waiver of tender. The regulations for public tender need to be reviewed for improved management transparency and economy in public procurement."

6.38 This was repeated in similar terms in the 2014, 2015 and 2016 Reports[56]. The 2015 Report used this as an example:

> "One extreme example of the procurement regulations being circumvented was observed in the Ministry of Communications and Works where a contract valued in excess of a million dollars ($1.05 million) was split into twelve petty contracts (varying in amount from $72,960 to $97,200) which were all issued to the same contractor. There was no tendering for this project or waiver from the Cabinet…".

6.39 Of contract splitting generally, in her evidence to the COI, the Auditor General said (the emboldened paragraphs are questions from Counsel to the COI):

> "It's significant because it circumvents the rules for procurement, and in circumventing the rules for procurement, it creates a risk that a number of things can go wrong. Some of those risks were highlighted in the earlier text that you read, cronyism, favoritism, not get value for money, inexperienced contractors, and essentially not being comfortable or comfortably aware of exactly what is happening with the Government money, the Government spending, insufficient transparency.
>
> So, contract-splitting is the very basic form of circumvention of the tendering requirements, and it's not being regulated, and it's continuing as we speak."[57]
>
> "**Would you say that there was an upward or a change in the trend of using petty contracts? Over time, have petty contracts become more popular, or has it been always the same? Can you comment?**
>
> I think over time they have become more commonplace. We've seen fewer and fewer major contracts for substantial work.
>
> And the practice is that it's relatively easy to get a Cabinet waiver, and even where you don't have a Cabinet waiver, we can within the Ministry – the example that you – about – I actually have it here because I found it to be so appalling where

[53] 2009 Report paragraphs 58-61, 2010 Report paragraphs 57-60, 2011 Report paragraphs 63-66 (paragraphs 63-64 now under the subheading "Splitting") and 2012 Report paragraphs 62-65.
[54] T18 28 June 2021 pages 55-56. This of course reflects the conclusion of the IAD Report paragraph 9.6.1 (see paragraph 6.30 above).
[55] Auditor General's Annual Report 2013 page 16.
[56] Auditor General's Annual Report 2014 at Audit Issue 6 page 19; Auditor General's Annual Report 2015 at Audit Issue 6 page 18; and Auditor General's Annual Report 2016 at Audit Issue 3 page 19.
[57] T18 28 June 2021 page 55. The Auditor General went on to explain that the practice had not been seen so much since 2017, but only (in her view) because the level of funds available to perform projects had diminished after the 2017 hurricanes.

there were several petty contracts totalling over $1 million that went to one person. This was just done within the Ministry. It was basically something, they're going to do this, and it was done.

That wasn't something that even needed to get to Cabinet?

It should it should have gone to Cabinet, and it didn't go to Cabinet, not to my knowledge. We asked for information on the Cabinet paper to which this was approved, and we got nothing back."[58]

6.40 She said that she considered the use of petty contracts for private purposes to occur, and to be an abuse:

"**Do you consider that petty contracts being used in this way amounts to an abuse of the system?**

It does. I do consider that is, in fact, the case.

And this is a practice that continues even as we speak. And I'm sitting here with the knowledge that I can witness a retaining wall that was done on private property close to where my home is, and this was something that happened this year. So, it's a practice that continues basically.

And in my view, the public deserves to have priority--the public expects and deserves to have priority--priority given to public roads which are generally in disrepair, and it's beyond comprehension how we can be spending money on private property when we are, in fact, ignoring the main obligations of the Government, which is to ensure that infrastructure is up to standards, and this is what--this actually speaks to the priority needs to be given to public roads as opposed to spending on public property.

In fact, I'm of the view that Government money, Government funds should not be used on private property, and I think that is the acceptable, good standard practice locally. Public funds are for public purposes."[59]

6.41 The issue of ministerial overreach, or "Ministerial Portfolio Infringement", was raised in the Auditor General's Annual Report 2011:

"67. A practice has developed whereby ministerial budgets are adjusted to allow ministries to undertake work on projects outside their defined portfolios.

68. The Premier's Office, which is charged with coordinating government activities, and implementing policies and programmes to promote the territory's sustainable development, executed contracts for laying pipes, paving roads, extending an airport runway, school maintenance and maintaining a basketball court.

69. Similarly, the Ministry of Natural Resources and Labour engaged contractors for work on ghut training and road paving which properly fall under the purview of the Ministry of Communications and Works. It also infringed on the Ministry of Health and Social Development's portfolio by undertaking construction of a community center in the sixth district.

70. The Ministry of Finance, which is responsible for developing the government's fiscal strategy and implementing policies that support and promote good governance and public accountability, has become the executing agency for the new hospital's

[58] T18 28 June 2021 pages 58-59.
[59] T18 28 June 2021 page 57.

major contracts. It has, in addition, executed several petty contracts for works at schools within the East End area, work on the Greenland field[60], construction of a retaining wall and road paving.

71. Amending the ministerial portfolios in the manner described gives the appearance of a ministry that has shifted focus from addressing the needs of the territory to catering to the needs of an electoral district, where the minister is also the district representative.

72. When the Ministry of Finance becomes involved in the execution of projects the accountability principle of separation of functions is eroded. In this instance the executing agency for the project is also the body that reviews, assesses, and recommends funding requests to the Cabinet. This practice compromises the accountability process and should be discontinued."

These observations and recommendations were repeated in similar terms in the Auditor General's 2013 Annual Report[61].

6.42 In her 2013 Annual Report, the Auditor General put her concern in this way[62]:

> "Several instances have been observed where ministerial budgets adopted allow for ministries to undertake work on projects falling outside of their defined portfolios.
>
> This give the appearance of a ministry that has shifted focus from addressing the needs of the territory to catering to the needs of an electoral district, where the minister is also the district representative. This practice need to be discontinued."

6.43 She also expressed concern at the absence of subledgers in ministerial accounts, to enable projects being undertaken and the budgeted amount/expenditure to be identified; a concern reiterated in later Annual Reports[63,64]. This meant:

> "Essentially, we were seeing money being spent, and we did not know what it was being spent on. And without the subledgers and being able to tie in the spending to a particular project, essentially, the expenditure could be for anything or anybody or for any progress."[65]

This was an issue which had not been addressed by 2016, the date of the last Annual Report to have been prepared[66].

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[60] The Greenland Field Project, which was implemented in the period 2008-13 through a myriad of petty contracts, was the subject of an IAD Report produced in June 2013. One issue was "an absence of an adequate criterion to select contractors" (paragraph 1.1.7). The report concluded (at paragraph 9.3.3):

> "Effectiveness involves delivering a better service or getting a better return for the same amount of expense, time or effort (doing things right. This element again emphasises the fact that there were duplications in works due to the absence of competitive bidding for the works to be conducted. The use of a competitive bidding process could have resulted in lower costs for the same quality of work received on the project and much of the difficulties, challenges and duplications could have been avoided in rehabilitating the field."

[61] Auditor General's 2012 Report paragraphs 66-71.

[62] Audit Issue 6 page 16.

[63] 2013 Report Audit Issue 7 page 16; 2014 Report Audit Issue 7 page 19; 2015 Report Audit Issue 7 page 18; and 2016 Annual Report Audit Issue 4 page 19. There has been no Annual Report since 2016.

[64] Under the heading "Records relating work to cost", regulation 11 of the PFMR requires the keeping of separate accounts to enable control to be maintained over each service or project, as follows:

> "(1) If expenditure covers a variety of services or projects, the Accounting Officer shall maintain appropriate departmental accounts to enable him to control the progress of each service or project. Records relating work to cost.
>
> (2) An Accounting Officer shall maintain a separate account for each service or project."

[65] T18 28 June 2021 page 70.

[66] T18 28 June 2021 page 71.

6.44 An example the Auditor General gave was the School Wall Project[67], where the Ministry was given a budget of over $800,000, but no separate account was set up – it was simply treated as part of the Ministry's development account, i.e. lumped in with money assigned to other things so that there was no straightforward way of managing what was happening to spending on the wall project as against the budget. The result was that total spending could have been exceeded without the Ministry being aware of the excess, or that it was approaching the limit[68].

6.45 She also from time-to-time expressed concern that, contrary to the statutory obligation to provide information to the Auditor General upon request[69], from time-to-time public officers were guilty of evasiveness or deliberate withholding of information from her[70].

6.46 In respect of the concerns the Auditor General had expressed over the years, successive governments have failed to offer any positive response:

> "**And we can track it through the reports, if necessary, but the issues of contract-splitting and of petty contract usage, are issues that on the Reports, the Audit Office has raised for a substantial period of time. What was the response of the governments, and it spans more than one Government? What was the response of the Government to those concerns?**
>
> We haven't gotten any significant response to those concerns.
>
> The Governor, I know--more than one Governor--several of them, actually, would raise it from time to time in Cabinet, to my knowledge with my discussion with them, but we haven't seen any changes with respect to the usage of petty contracts.
>
> And to be clear, there are instances where petty contracts are relevant and can be useful, but the extent to which we see the Contract splitting, the types of projects that are being brought in and being used for petty contracts, it basically amounts to an abuse. It's a circumvention of the regulations, it's a convention of transparency, that the regulations that prescribe transparency and in some cases it's nothing short of an abuse of the system."[71]

6.47 The 2016 Report said:

> "At the time of writing the Ministry of Finance was advancing draft legislation to update the public procurement process and related issues."

No financial statements have been prepared by the Treasury Department of the MoF – and, hence, there has been no Auditor General's Annual Report – since 2016[72]. The relevant new procurement provisions are referred to below[73].

6.48 Prior to the specific contracts upon which she reported that are dealt with below, the Auditor General highlighted where procurement controls had been bypassed in the following further section 12 reports:

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[67] See paragraphs 6.178-6.259 below.
[68] Auditor General's Report on Elmore Stoutt High School Perimeter Wall Project (24 August 2018) paragraphs 81-82, and her evidence at T19 29 June 2021 pages 91-92. The budget limit as authorised by Cabinet was, of course, in fact well exceeded (see paragraphs 6.178-6.259 below).
[69] Section 19(2) and (3) of the Audit Act 2003 (see paragraph 1.102 above).
[70] Auditor General's Report on BiWater (July 2011) paragraph 41.
[71] T18 28 June 2021 page 59.
[72] See paragraph 1.168 above.
[73] See paragraphs 6.577-6.581. The Auditor General was not privy to any of the discussions which led to the new legislation (T18 28 June 2021 page 60).

(i) Little "A" Race Track Rehabilitation (18 August 1998): Tendering procedures intended to provide the Government with competitive bids and promote value for money on major projects were not followed and, indeed, no formal contractual arrangements were signed with those who worked on the project, "leading to severe threats to achievement of value for money on this project"[74].

(ii) Beef Island Bridge Project (6 January 2003): The manner in which the project was implemented "led to numerous delays, persistent uncertainty and ultimately cost increases", the contract sum being $2.37 million and the costs ultimately exceeding $8.3 million. The Auditor General recommended (amongst other things):

> "Government regulations and policies with regards to contracts should be complied with. Petty contracts should be issued for all works in excess of $10,000 and works which are estimated to cost in excess of $60,000 [the then current criteria for major contracts] should be tendered."[75]

(iii) Contracts for Review of Education System (Dolores Kirk Consultancy) (18 February 2011): The Auditor General concluded that the MEC had "…severely compromised its ability to secure suitably qualified resources by failing to solicit competitive submissions from qualified quarters or seek the assistance of agencies capable of managing a project of this scope and nature." In her recommendations, she said:

> "Competitive submissions are essential to the attainment of Value for Money when engaging major contractors."[76]

(iv) New Incinerator Project (2 March 2011): The Auditor General recommended (amongst other things):

> "6. The tendering process should be used with more regularity large projects. Only a small percentage of the works on this multi-million dollar project were put to open/public tender.
>
> …
>
> 8. Large projects require project management with proven ability to get results within a stipulated timeframe. An open arrangement, such as the one entered into with the initial project manager allows for a drawn out project without adequate provision for remedy."

(v) BVI Port Authority[77] – Port Development Project (June 2011): The Auditor General recommended:

> "1. All major projects should be put to public tender to ensure full transparency and to promote the attainment of value for money.
>
> 2. The Port Authority needs to develop and document a clear process for awarding contracts on small and large contracts.
>
> 3. Where a decision has been made to waive the tender process, the reasons for this should be fully documented along with the authority through which the decision was made.

[74] Paragraph 43.
[75] Paragraphs 72 and 73(v).
[76] Paragraph 60 and Recommendation 1.
[77] The authority is correctly called "The British Virgin Islands Ports Authority", as established by section 3 of the British Virgin Islands Ports Authority Act 1990 (No 12 of 1990).

4. All major engagements should, be accompanied by a comprehensive written contract document stipulating the agreed costs, terms and obligations.
5. Instructions received from the Government with respect to section 19 of the British Virgin Islands Port Authority Act should be issued by the Minister in writing as stipulated in the Act.[78]"

(vi) IAD Project Review Report on the Renovation of the Multi-Purpose Sports Complex (2 January 2013): It was recommended that properly executed contracts are in effect prior to commencement of the works.

6.49 In line with the IAD Report on Petty Contract Administration in 2012, these reports therefore appear generally to have concluded that interference by elected public officials in the procurement process (e.g. by contract splitting, by waiver of open tenders and in selection of contractors) was simply a matter that the elected officials chose to do.

6.50 Before the COI, the Auditor General summarised her evidence on procurement as follows[79]:

> "… I have served in the Audit Office for almost 30 years, and what I've seen over that period of time is a willingness in public officers to basically bypass the rules and make excuses for having bypassed the rules. And the concern is that with that over a period of time, it's becoming the culture within the Government that it's acceptable to disregard the procurement requirements, to disregard certain processes that have to be done.
>
> And I think there needs to be an understanding that those rules are put in place to protect the Government. They're put in place to protect transparency. They're put in place to protect this Territory because without them, it's a slippery slope, and my concern is that we are becoming used to what is happening, and if it doesn't stop, it's going to be a very costly exercise for the Territory in the long run."

Sea Cow Bay[80] Harbour Development Project

Introduction

6.51 From 2007 to 2011, $1,157,088 of public money was spent on the Sea Cow Bay Harbour Development Project[81] before the project was abandoned. No public benefit resulted from that expenditure.

6.52 On 27 August 2014, the Auditor General produced a section 12 special report[82] on the project, in particular "to provide independent information and advice on whether efficiency, economy and effectiveness were achieved in the development and implementation of the

[78] Section 19(1) of the Ports Authority Act 1990 provides that:
"The Minister may give the Authority general directions *in writing* as to the performance of its powers under this Act on matters which appear to him to affect the public interest and the Authority shall give effect to such directions" (emphasis added).

[79] T19 29 June 2021 pages 143-144.

[80] The relevant bay is referred to variously as "Sea Cow Bay", "Sea Cows Bay", "Sea Cow's Bay", and "Sea Cows' Bay". "Sea Cow Bay" appears to be both the historical and current predominant usage, and is generally used in this Report.

[81] Paragraph 6 of the Auditor General's Report on the Sea Cow Bay Harbour Development Project dated 27 August 2014. In this section of the Report, references to "Auditor General's Report" are to this report; and paragraph numbers in this section are to that report, unless otherwise indicated. See also T18 28 June 2021 page 132.

[82] See paragraph 1.104 above.

project"[83]. The report concluded that the implementation of the project lacked transparency, and contracts were issued without relevant approvals. It also raised issues about related party transactions[84].

Background

6.53 A plan to develop Sea Cow Bay Harbour on partly reclaimed land was initiated in the early 1990s. Over the years, the coastline had been adversely affected by arbitrary reclamation activity, often without appropriate approval. The purpose of the plan was to secure better planning and uniformity in the development of the coastline, whilst protecting the marine environment and ecosystems[85].

6.54 In November 1991, a steering committee was established by the Ministry of Natural Resources (now the Ministry for Natural Resources, Labour and Immigration, "the MNRLI"[86]) to develop a reclamation plan for the area. In July 1993, the steering committee recommended that the development should be limited to the western side of the bay and all reclamations should be bulkheaded with landbased fill[87]. However, the costs of bulkheading were considered prohibitive for local development; and so a compromise was proposed by the steering committee that the BVI Government would pay for the necessary works with the costs being passed on to the developers in a subsequent lease for the seabed[88].

6.55 In September 2001, the Ministry of Natural Resources and Labour (as it had become, under its Minister, Hon Julian Fraser, who was the House of Assembly Representative for the Third Electoral District which covers the Sea Cow Bay Harbour area) engaged Smith Arneborg Architects Limited to produce a conceptual development plan for the area.

6.56 In May 2002, Hon Julian Fraser became the Minister for Communications and Works; and, as such, he presented that plan to the Executive Council on 30 October 2002 when it was adopted. At the same meeting, the Executive Council agreed that the tendering process be waived to allow the Ministry of Communications and Works (now the Ministry of Transportation, Works and Utilities, "the MTWU"[89]) to engage contractors to procure material for bulkheading; and carry out further dredging and to bulkhead the harbour through a series of petty contracts and, if necessary, by a major contract provided that the Executive Council's approval was sought before any major contract was awarded[90].

6.57 The work was to commence on the project immediately by use of funds already appropriated to the MNRLI, but it was intended that further development of the harbour would be performed using funds to be provided with the approval of the MoF but through the MTWU either within their budget appropriation for 2003 or by way of supplementary provision[91]. In fact, the relevant funds had already been allocated to the MNRLI, which continued to hold them; but that Ministry worked in conjunction and in consultation with the MTWU[92].

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[83] Paragraph 7, and T18 28 June 2021 page 132.
[84] Paragraphs 1-7.
[85] Paragraphs 2 and 3.
[86] In this Report, I shall refer to the Ministry of Natural Resources, Labour and Immigration and its predecessors (including the Ministry of Natural Resources and Labour) as "the MNRLI".
[87] Paragraph 5.
[88] Paragraph 15.
[89] In this Report, I shall refer to the Ministry of Transportation, Works and Utilities and its predecessors (including the Ministry of Communications and Works) as "the MTWU".
[90] T26 14 July 2021 page 9; and Record of the Minutes of Meeting of the Executive Council held on 30 October 2002.
[91] T26 14 July 2021 page 10.
[92] T26 14 July 2021 page 17.

6.58 In February 2003, a firm called A R Potter & Associates ("A R Potter") was contracted to produce development drawings for the whole project and to administer the bulkheading. It estimated the cost of the project at $1.35 million[93]. Six test piles were driven to assess soil conditions; but they did not achieve sufficient resistance to determine the design parameters without a full geotechnical study.

6.59 A change in administration following an election in July 2003 meant that Hon Julian Fraser ceased being Minister. The change in government resulted in a hiatus in this project until 2006, when (i) the Permanent Secretary in the MTWU met with the Director of Public Works and the Chief Planning Officer and agreed a plan which included securing outline planning approval and eventually planning approval, and the appointment of a project manager (none of which was, in the event, done)[94]; and (ii) Geotech Associates Limited was engaged to conduct the geotechnical study required for the bulkheading[95].

6.60 Following a further election, in August 2007, the VIP returned to government, and Hon Julian Fraser was again appointed as Minister for Communications and Works.

6.61 Two petty contracts were issued by the MTWU to Systems Engineering Limited ("Systems Engineering") in December 2009 for engineering services and structural design services[96], under which a total of $123,000 was paid. Systems Engineering built on the A R Potter design, and Bills of Quantities were produced for the project with an estimated project cost of $6.65 million (compared with the earlier figure provided by A R Potter of $1.3 million).

6.62 In the meantime, in October 2008, a parcel of reclaimed land at Sea Cow Bay was leased by the BVI Government to Earl Fraser, Hon Julian Fraser's brother. In December 2010, an application to construct two jetties and 30 commercial moorings was made by Earl Fraser in respect of this land[97]. On 18 May 2011, Cabinet approved this application which would require further land reclamation to comply with the Sea Cow Bay Harbour Development Plan and further dredging. It also required the necessary bulkheading to be completed in two years[98].

6.63 In December 2010, Hon Julian Fraser was also arranging for petty contracts (each for just under $100,000) to be issued for concrete sheet piles for bulkheading the whole of the western side of Sea Cow Bay[99]. He said in his evidence to the COI that usually the relevant District Representative would make recommendations for petty contractors to the relevant Minister, based on the response of constituents and "qualifications". Unless a District Representative is from a different party from the party in government (when Hon Julian Fraser accepted that he or she may not be consulted), he said that "99.9 percent of the time the people working on those projects are from the District…. You'd get crucified if it were different". The District Representative is "supposed to make that sure that the maximum benefits are derived by his constituents, and that's why it's within the District". So, he said, "When there is work happening in your District, the Ministry would tell you about it, and if it's eight Petty Contracts, they might hold five and tell you give them five names or something to that effect". The Ministry then, it seems, approves the recommendations, prepares the

[93] In his evidence, Hon Julian Fraser said that he did not recall ever seeing the estimate; and that A R Potter was only involved in the conceptual design, and therefore could not properly have made an estimate of the project costs because that was outside the scope of design development (T26 14 July 2021 pages 22-24).
[94] Paragraphs 25 and 44.
[95] Paragraph 12, and T18 28 June 2021 pages 136 -137.
[96] Letter from Systems Engineering to Hon Julian Fraser dated 12 February 2010 in relation to drawings for the Sea Cow Bay Bulkhead and Docks and specifications for their construction and costing sheets for petty contracts for the bulkhead slabs and piles, and letter from Systems Engineering to the Ministry of Communications and Works dated 11 November 2008 in relation to services it could provide.
[97] Paragraphs 34-35.
[98] Paragraphs 36-37.
[99] Paragraph 39.

contracts with the PWD, and sends them to the Minister of Finance for signature. Hon Julian Fraser was insistent that the final decision on who got petty contracts was the person who signed them on behalf of the BVI Government, i.e. the Premier as Minister of Finance. However, he said, "the only reason [a person put forward by a Ministry for a petty contract] would not get a contract is if… the Premier refused to sign it"[100]. Hon Julian Fraser explained that this procedure happens throughout the BVI and in all arms of government[101]. However, none of this, he said, is in a written policy: it is all a matter of long-standing practice which has been in operation ever since the district system has been in existence[102].

6.64 In this case, generally, that procedure was followed. The work was to be done in the area of Hon Julian Fraser's constituency. He said he held a meeting at which constituents came forward offering to work on the project, and he selected from those. An assessment was made of the candidates, but only on the basis that "familiarity with their work between the representative and the [PWD] would know that these people are capable"[103]. There were no formal criteria, and no further assessment made.

6.65 Seven contracts were issued in December 2010 and January 2011, with an aggregate value of just under $700,000, to be commenced in January and be completed within three months. Each contractor was paid a 10% deposit.

6.66 Two of the contractors selected for petty contracts for the bulkheading fabrication were Kenneth Fraser and Earl Fraser (Fraser Incorporate), Hon Julian Fraser's brothers[104]. Hon Julian Fraser said that these contractors were not selected by him. He said his brothers knew that they could not get work from him, so they were advised by someone to go directly to the then Premier himself; because, although generally the Minister selects petty contractors (subject only to the Premier as Minister of Finance actually signing the contracts), the Premier could in practice give directions to Ministries including directions as to whom to use as petty contractors thereby by-passing section 56 of the Constitution which, at law, makes a Minister responsible for the conduct of his or her Ministry. Hon Julian Fraser indicated that this was an example of what he described as an "elected dictatorship"[105]. Thus, Hon Julian Fraser said that he played no part in selecting his brothers to have petty contracts.

6.67 Ultimately, only two of the contractors completed their contracts, and were fully paid[106]. Day workers were also engaged to prepare the staging area, including the fencing of the reclaimed area leased/owned by Earl Fraser (1.25 acres) and James Fraser (1.5 acres), also a brother of Hon Julian Fraser. No effort had been made to secure approval for the project from the planning authority; no plans were submitted for approval to the requisite authorities; and no project manager to oversee implementation was appointed[107]. Furthermore, persons continued to reclaim land in the bay before securing approval to do so and failed to report and register the amount of land reclaimed, exceeding the authorised reclaim areas without penalty or correction[108]. The deposits paid to contractors who did not complete the work (including Kenneth Fraser and Earl Fraser) were not recovered[109].

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100 T26 14 July 2021 pages 61-64, and T34 16 September 2021 pages 32-33.
101 T26 14 July 2021 page 60.
102 T26 14 July 2021 pages 61-62, and T34 16 September 2021 pages 25-26.
103 T26 14 July 2021 page 62.
104 T26 14 July 2021 page 80, and T34 16 September 2021 pages 25-35.
105 See paragraphs 1.71-1.77 above.
106 Paragraphs 40-42.
107 T18 28 June 2021 page 139.
108 T18 28 June 2021 page 140.
109 T26 14 July 2021 page 68.

6.68 Although the preliminary conceptual design and overall principle was approved by the Executive Council in 2002, the detailed plan was never presented to Cabinet (the constitutional successor to the Executive Council) for consideration and approval even though the estimated cost of the project had expanded to $6,653,469, more than four times the 2011 estimate for the project of $1,489,450[110] and costs were being expended for fabrication of the bulkheads at a contracted figure of approximately $700,000 (although the actual figure expended was, in the event, just under $250,000) and a further $335,706.30 for contractors and dayworkers for related works[111].

6.69 A total of just over $1.15 million of public money was spent on this project, which stands incomplete and abandoned.

Findings of the Auditor General

6.70 The Auditor General considered that the implementation of the Executive Council's 2002 decision to bulkhead the harbour using petty contracts was performed in a manner that was fragmentary, contrary to the Physical Planning Act 2004[112] and without an adequate budget or a government-appointed project manager to ensure that the public interest was safeguarded and public funds applied to the project were duly certified and performed within the scope of the project[113].

6.71 She also found that there was insufficient transparency in the management and execution of the project[114]. In particular, the Ministry's files reflected little or no information regarding the development for the period 2007-11. There were no progress reports or correspondence on the files, nor was the engineering report (which had cost $130,000) there[115]. The Auditor General's staff were advised by the Ministry's staff that the project was handled by the Minister (Hon Julian Fraser) who liaised directly with consultants, contractors and the PWD on plans, contracts and progress; the Minister took personal responsibility for the project[116] and the relevant Accounting Officer (the Permanent Secretary) had no significant involvement but, nevertheless, the Permanent Secretary still facilitated and approved payments[117].

6.72 In addition, the Auditor General considered that, given the materiality of the transactions involving the lease and contracts, and the relationship between Hon Julian Fraser and his brothers Earl and Kenneth Fraser, these were related party issues and represented a potential conflict[118].

6.73 The Auditor General concluded[119]:

> "The manner in which the project was implemented, with the general absence of information in the Government's record and the substantive exclusion of the accounting officer from the process, created the impression of a private undertaking that was being financed by the Government. This is further exacerbated by related party issues that were present in the development".

[110] Paragraph 46.
[111] Paragraphs 41-43, and T26 14 July 2021 pages 44-45.
[112] No 15 of 2004.
[113] Paragraph 49.
[114] Paragraph 66, and T18 28 June 2021 page 142.
[115] Paragraphs 70-71.
[116] T18 28 June 221 page 143.
[117] Paragraphs 68-69 and 72.
[118] Paragraphs 74-79, and T18 28 June 2021 page 147.
[119] Paragraph 78.

That, she considered, would undermine public confidence in the manner in which government was being conducted[120].

6.74 The Auditor General made 11 recommendations[121], including:

> "2. The Government needs to decide on the extent of its involvement….
>
> …
>
> 8. Permanent Secretaries should not accept responsibility for projects that they have not been involved in. This means refusing to cover costs of projects that are executed outside of their control.
>
> 9. Full disclosure of all related parties transactions should be made mandatory for all public officers and officials to avoid compromise of the process.
>
> 10. Record keeping for public projects and public expenditure should be fully transparent and adequately supported with the requisite documents and details where necessary to allow for succession, review and to support the legitimacy of public expenditure.
>
> 11. Government must take steps to recover sums issued to the five petty contractors who did not complete work under the bulkheading contract."

Response

6.75 On 29 June 2021, Hon Julian Fraser lodged with the COI the written response to the Auditor's draft report he had originally prepared and provided to the Auditor General two days before her final report was published, in the form of annotations to the report[122]. In his evidence, Hon Julian Fraser appeared to deny having had the opportunity of commenting on the Auditor General's draft report at the time[123]; but the Auditor General seems to have taken into account in her final report at least some of his written comments as provided to her prior to publication[124].

6.76 In addition to that response, on 14 July 2021 he gave oral evidence to the COI concerning the project[125]. Having considered that evidence, I issued a warning letter to Hon Julian Fraser setting out potential criticisms of him that appeared to arise from the evidence[126]. He gave further evidence in response to that letter both in writing[127] and orally[128], and subsequently provided an additional written response[129].

6.77 Hon Julian Fraser described the role of a Minister as not necessarily getting involved in the operational side of things as much as seeing that, once the Cabinet has made a policy, that policy is executed[130]. The task of taking forward operational matters fell on public officers within the Ministry[131]. In relation to the Sea Cow Project, he described his role as making sure

[120] T18 28 June 2021 pages 145-146.
[121] Auditor General's Report pages 19-20.
[122] Hon Julian Fraser Response to the Auditor General's Report originally dated 25 August 2014 and redated 29 June 2021.
[123] T26 14 July 2021 page 54.
[124] T26 14 July 2021 pages 54-55, and T26 14 July 2021 pages 51-52 and 85.
[125] T26 14 July 2021 pages 4-122.
[126] Hon Julian Fraser Warning Letter No 1 dated 31 August 2021.
[127] Hon Julian Fraser Response to COI Warning Letter No 1 dated 7 September 2021.
[128] T34 16 September 2021 pages 11-124.
[129] Hon Julian Fraser Addendum Response to COI Warning Letter No 1 dated 22 October 2021.
[130] T34 16 September 2021 page 50. See also T34 16 September 2021 page 81.
[131] T34 16 September 2021 page 51.

that it moved forward: he said he was not involved in the details of the project, neither did he sign contracts in relation to it [132]. He emphatically denied dominating or personalising the project, as the Auditor General had suggested.

6.78 Although Systems Engineering appears to have done some work on costings for the bulkheading[133], Hon Julian Fraser said that the Bills of Quantities were produced by the PWD[134]. He explained that he did not go back to the Cabinet despite the costings having risen to over $6.5 million, because at that stage only petty contracts for procuring the materials and fabrication for the bulkheading were being arranged[135]. Although he accepted that the bulkheading was the first step in a $6.5 million plus project, he still saw no reason to go back to Cabinet to approve the project with the newly estimated expenditure, in one form or another[136]. He said that projects should go back to Cabinet only where there is a major contract effectively ready and available for approval[137].

6.79 In arranging the seven petty contracts for the bulkheading, Hon Julian Fraser explained that contractors were chosen from the district in which the work being carried out, namely the Third District, which he represented at the time, as described above. He said he was not aware that only two of the seven contractors had completed the work in relation to the bulkheading[138]. He said he was not aware that his brothers Kenneth Fraser and Earl Fraser (Fraser Incorporate) were two of the five contractors who were paid a 10% deposit but did not go on to complete the contracted work[139].

6.80 When asked about planning permission for the project, Hon Julian Fraser explained that plans had not been submitted to the Development Control Authority in accordance with the Physical Planning Act as (i) in respect of the work done in relation to preparing the staging area, namely fencing and clearing the site, no planning permission was required as there was no physical alteration of the site[140]; and (ii) the work being carried out in respect of bulkheading was simply fabrication which did not in itself require planning permission[141]. When asked about the sequencing of the process undertaken, namely that significant costs were being expended on the project (petty contracts of up to $700,000 in aggregate had all contracts been completed, and a further $335,706.30 spent on preparation of the staging area) without planning approval first having been secured, Hon Julian Fraser was of the view that, whilst such approval was not a foregone conclusion[142], they were "in a good place for making a submission"[143]. He said he was of the view that it was a positive step to spend public money with the risk it would be wasted as this was a way of persuading the Planning Authority that planning permission should be granted[144]. He said it was not unusual for government projects to start work and expend public money before seeking planning approval[145]. He also stated that the Premier, as the Minister of Finance who would have signed the petty contracts as described, would also have the ultimate say over whether planning approval is denied or granted[146].

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[132] T26 14 July 2021 page 72.
[133] T34 16 September 2021 pages 42-45
[134] T26 14 July 2021 pages 39-40.
[135] T26 14 July 2021 page 42.
[136] See, e.g. T26 14 July 2021 pages 42-45.
[137] T26 14 July 2021 page 81.
[138] T26 14 July 2021 page 67.
[139] T26 14 July 2021 page 68.
[140] T26 14 July 2021 page 75.
[141] T26 14 July 2021 pages 74-75.
[142] T26 14 July 2021 page 79.
[143] T26 14 July 2021 page 80, and T34 16 September 2021 page 55.
[144] T34 16 September 2021 pages 56-57.
[145] T34 16 September 2021 pages 56 and 60.
[146] T26 14 July 2021 pages 78-79.

6.81 Hon Julian Fraser was asked about the severe difficulty encountered by the Auditor General in conducting the audit exercise in relation to the project due to an absence of information held by the MTWU regarding the development[147]; but he said he could not help in relation to this as he had left office in 2011[148].

6.82 The suggestion made in the Auditor General's Report that the manner in which the project was implemented, the absence of records and the exclusion of the Accounting Officer created the impression of a private undertaking that was being financed by the Government was strongly denied by Hon Julian Fraser[149]. He also denied her suggestion that he had dealings with contractors once appointed; but did not deny the possibility that he had liaised with a consultant or the PWD on the project[150].

6.83 Hon Julian Fraser said he did not know whether he had declared an interest when a lease application by his brother, Earl Fraser, for a parcel of reclaimed land at Sea Cow Bay was considered by the Cabinet in May 2011; and, if so, whether he recused himself or not[151]. He went on to say that, in his mind, there was no potential conflict of interest[152]. In relation to two of the seven petty contracts for the bulkheading being awarded to his brothers Kenneth Fraser and Earl Fraser (Fraser Incorporate) around the same time, he was also of the view that there was no potential conflict of interest[153]. As indicated above, he said that Kenneth Fraser and Earl Fraser had made representations to the Premier directly for the award of the petty contracts in the project, and he had played no part in their selection as contractors[154].

6.84 In relation to the project being halted in 2011, Hon Julian Fraser said that, following the election that year, there was a change of government and all the projects in the Third District were halted. He was not able to say why that was the case[155]. He recalled that some of the contracts on some of the projects within the district were issued to new contractors and some to supporters of the new government[156]. As the District Representative, he continued to make recommendations for contractors[157].

147 Paragraphs 67-68.
148 T26 14 July 2021 pages 97 and 100.
149 The suggestion is made in paragraph 73. Hon Julian Fraser strongly denied the suggestion at T26 14 July 2021 pages 109-111.
150 T34 16 September 2021 page 84.
151 T26 14 July 2021 pages 57-59.
152 T26 14 July 2021 pages 112-113, and T34 16 September 2021 pages 106-110. The Cabinet Extract for the 18 May 2011 Cabinet Meeting does not record Hon Julian Fraser recusing himself, and he is recorded as having declared an interest twice previously in relation to his brothers' interests in Sea Cow Bay. When giving evidence he could not remember whether he had or had not recused himself; and, perhaps importantly, when giving evidence he was of the view that there was no potential conflict of interest. On balance, I consider that he probably did not declare a potential conflict of interest in this case; but it is highly likely that Cabinet members would have been aware of the interests of his brothers and the relationship between his brothers and himself.
153 T26 14 July 2021 page 113.
154 Paragraph 6.66 above.
155 T26 14 July 2021 page 115.
156 T26 14 July 2021 pages 115-116.
157 T26 14 July 2021 page 116.

Concerns[158]

6.85 On the basis of this evidence, there are several matters of concern.

6.86 From 2007 to 2011, $1,157,088 of public money was expended on the Sea Cow Bay Harbour Development Project[159], without any public benefit. The project was abandoned in 2011, and stands incomplete. The reason for the abandonment is unclear[160].

6.87 The level of governance in relation to the decisions made in respect of the project, particularly the expenditure of the public money, was very poor. Over $1 million of public money was expended without Cabinet approval being sought in respect of that expenditure or of a project which, by this stage, had an estimated aggregate cost of $6.65 million, compared with the earlier estimate of $1.3 million; and without seeking and securing any planning approval, or indeed engaging with the planning process or the planning authorities. Whilst Hon Julian Fraser may have been quietly confident about obtaining Cabinet approval and planning approval in due course, the expenditure of over $1 million of a $6.5 million plus project without such approvals (i) ran the risk that the approvals would not be forthcoming and thus the public money spent wasted; and (ii) as Hon Julian Fraser recognised, would put pressure on the planning authorities (and the Cabinet) to grant approvals to avoid the wastage of public money. Hon Julian Fraser appeared to consider such pressure in these circumstances was a good thing; but, on the face of it, it appears to be manipulative.

6.88 Further, as the Auditor General concluded, the evidence suggests that the money was expended without appropriate planning or budgeting for a project of this size and scale; without appointing a project manager; and without adequately involving the Accounting Officer (Permanent Secretary) who nevertheless facilitated and approved payments.

6.89 The manner in which the initial stage of the project (namely the fabrication of bulkheads and the preparation of the staging area) was implemented lacked any transparency and accountability. Whilst there is no information such as correspondence, progress reports or engineering reports for the period 2007 to 2011 retained on files – an absence which inevitably hinders any attempt to scrutinise or audit the expenditure made – it is clear from what is available that the selection of the fabrication petty contractors was done in anything but an open way, without any formal or published criteria, and on the basis of only information which the Minister, the Ministry and the PWD happened to have. It was certainly a procedure that was not open to any degree of scrutiny. There were no sensible criteria for the selection of the contractors, except that they were to be drawn from the constituents of the relevant Minister/District Representative, i.e. Hon Julian Fraser. The potential for extraneous factors being taken into account in that selection is obvious. It is telling that Hon Julian Fraser said that (i) District Representatives generally made sure that contractors employed were from their own district, because of potential repercussions if they were not; and (ii) this type of selection process for petty contractors was the general practice in the BVI.

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[158] The concerns and potential criticisms in relation to the Sea Cow Bay Harbour Development Project arising from the evidence before the COI were put to Hon Julian Fraser in COI Warning Letter No 1 dated 31 August 2021 (which identified the evidence giving rise to the concerns and potential criticisms). Hon Julian Fraser had already lodged with the COI his written response to the Auditor General's Draft Report dated 25 August 2014 and redated 29 June 2021, and given oral evidence concerning the project (T26 14 July 2021 pages 4-122). He responded to the warning letter in writing (Hon Julian Fraser Response to COI Warning Letter No 1 dated 4 September 2021) and orally (T34 16 September 2021 pages 11-124), before submitting a further written response (Hon Julian Fraser Addendum Response to COI Warning Letter No 1 dated 22 October 2021). The criticisms of Hon Julian Fraser in relation to the Sea Cow Harbour Development Project in this Report are restricted to those in respect of which he has had a full opportunity to respond, as described.

[159] Paragraph 6, and T18 28 June 2021 page 132.

[160] The project was abandoned by the new administration in 2011; and Hon Julian Fraser suggested that the reason for its abandonment was political. There is no compelling evidence either way; but, if it were political, that would add to the evidence that BVI Government contracts are procured and managed, not for the public interest, but for political purposes.

6.90 Two of the contractors for the fabrication of the bulkheading were Hon Julian Fraser's brothers, Kenneth Fraser and Earl Fraser (Fraser Incorporate). This created a clear conflict of interest. I did not find the evidence of Hon Julian Fraser, that he had nothing to do with the selection of his brothers as contractors and effectively had them foisted upon him by the Premier, to be at all persuasive. I heard evidence from many other witnesses including former Premier and Minister of Finance Dr Orlando Smith, which I accept, to the effect that the general (indeed, almost invariable) practice in the BVI was and is that the Minister would choose contractors[161]. On the evidence, I find it more than likely than not that Hon Julian Fraser was involved in (and, indeed, was instrumental in) the selection of the contractors, including his own brothers.

6.91 There was no evidence of efforts to retrieve the deposits paid to contractors who did not complete the work[162]. Two of these contractors were Kenneth Fraser and Earl Fraser.

6.92 There were also apparent conflicts of interest in other regards, namely (i) in December 2010, at the same time as petty contracts were being arranged by Hon Julian Fraser for bulkheading, an application to construct two jetties and 30 commercial moorings was made by Earl Fraser in respect of a parcel of reclaimed land at Sea Cow Bay; and (ii) day workers were also engaged to prepare the staging area, including the fencing of the reclaimed area leased/owned by Earl Fraser (1.25 acres) and James Fraser (1.5 acres), also a brother of Hon Julian Fraser.

6.93 Insofar as Hon Julian Fraser suggested that the Auditor General's report was politically motivated, there was simply no evidence to support this. The Auditor General performed her audit and made the findings and observations that she did as an independent monitor of expenditure of public money. Simply because she came to conclusions with which Hon Julian Fraser does not agree does not make her report any the less independent or, indeed, compelling.

6.94 In all the circumstances, I conclude that:

(i) In respect of this project, no adequate steps were taken to safeguard the public interest by ensuring public funds were properly expended.

(ii) Hon Julian Fraser progressed this project, which was in his district constituency, by expending public money on employing his constituents as contractors. He made it clear that the choice of his own contractors was quite deliberate.

(iii) Whilst it is unnecessary for me to make a determinative finding as to the extent of the conflicts of interest involving Hon Julian Fraser and his brothers in respect of this project, on the evidence it is open to me to conclude, as I do, that the issue of conflicts is concerning, and deserves further investigation.

6.95 In his evidence, Hon Julian Fraser put up a spirited and eloquent defence of his conduct in relation to this project. However, given his use of his brothers and his constituents as contractors, the risk that this project involved political particularisation is both obvious and substantial. The Auditor General highlighted that risk, when she concluded the principles of good governance were to a significant extent ignored with the result that "it created the impression of a private undertaking that was being financed by the [BVI] Government", and related party issues arose and remain largely unaddressed. Whilst I do not find the evidence as compelling as it is with some other projects into which the COI looked, in the circumstances, I

[161] See, e.g., Dr Orlando Smith Response to Letter of Request in relation to Petty Contracts 30 November 2021; T28 19 July 2021 pages 37, 70-72, 90 and 97-98 (Ms Lorna Stevens and Ms Carleen Jolita Scatliffe); T4 11 May 2021 page 96 (Claude Skelton Cline); and T21 1 July 2021, pages 160 and 167-168 (Myron Walwyn).

[162] T26 14 July 2021 page 68.

am satisfied that the information in relation to this project falls within the scope of paragraph 1 of my Terms of Reference, because factors other than those falling within the broad scope of the public interest may have been taken into account in pursuing the project and allocating the contracts in the way they were allocated.

6.96 This project has already been audited by the Auditor General. A further audit is unnecessary. I recommend that the relevant BVI authorities consider, on the basis of that report and the information now available, whether it is in the public interest for further steps to be taken (e.g. in the form of a further investigation into potential criminality and/or in relation to recovery of any of the public money expended without public benefit).

Virgin Islands Neighbourhood Partnership Project

Introduction

6.97 From 2008 to when it was aborted in 2010, $689,800 of public money was spent on annual contracts with Claude Ottley Consulting Limited to develop, coordinate and operate a programme to assist the youth of the Territory. The Auditor General investigated and audited the project, in particular, "to determine whether value for money was achieved in both the consultancy and operational contracts issued for the programme"[163]. The report found a number of matters of serious concern, including breaches of the principles of good governance.

Background

6.98 In 2008, against a backdrop of increasing incidence of poor student performance and behaviour in the education and juvenile criminal justice systems, the then Minister for Education and Culture Hon Andrew Fahie[164] undertook an initiative geared towards assisting young people identified as "at risk", namely the Virgin Islands Neighbourhood Partnership Project ("the VINPP").

6.99 On 31 October 2008, the Ministry entered into a contract with Claude Ottley Consulting Limited to "establish a neighbourhood partnership between key stakeholders of the community such as churches, schools, parents, and organisations to work for the common good of the youth and to guide them in a holistic, wholesome approach to life". The company was owned and operated by Claude Skelton Cline, formerly known as Claude Ottley Cline: it was, for all intents and purposes, Mr Skelton Cline in corporate form, to the extent that the Auditor General's report appears to refer to the company and Mr Skelton Cline interchangeably. In this section of the Report, I shall therefore use the term "Mr Skelton Cline" to refer to both the individual and his company.

6.100 It was Mr Skelton Cline's evidence[165] that, in 2008, he was not living in the BVI. He had lived in the USA for the previous 25 years, and had been a pastor in Detroit for 20 years. As well as being involved in local community work, he was also involved in ecumenical leadership

[163] Paragraph 1 of the Auditor General's Report. Paragraph numbers in this section are to that report, unless otherwise indicated. The Auditor General also gave oral evidence with regard to this report (T18 28 June 2021 page 94ff).
[164] Whilst respecting that he is now Premier, in this section of the Report, references to "the Minister" are to the then Minister for Education and Culture Hon Andrew Fahie and references to "the Ministry" are to the Ministry for Education and Culture (as it then was), unless otherwise indicated.
[165] T4 11 May 2021 pages 88-91.

as an Executive Assistant to the Mayor of Detroit, Kwame Kilpatrick[166]; although he said he would return to the BVI for vacations and on preaching engagements, panels etc to which he would be invited. He returned to live in the BVI in 2010. It was his evidence that, whatever the precise dates, the VINPP project was prior to even any transition to living back in the BVI[167].

6.101 Under the October 2008 contract, Mr Skelton Cline was tasked with training volunteers, managing the project, providing technical support for capacity building projects, identifying and providing administrative staff and guest presenters for the project, coordinating workshops and seminars for key stakeholders, and strengthening the resiliency skills of youth at the primary and secondary school level. The contract value was $98,400. In August 2009, the Ministry entered into a second contract with Mr Skelton Cline, under which he would, for a period of 12 months, "act as coordinator of the [VINPP] and undertake the responsibilities to bring together stakeholders in the community, i.e. churches, schools, parents and community". That involved operational responsibilities. The value of that contract was $250,000. The programme was intended to be territory-wide and inclusive, i.e. it was proposed that schools and communities on Tortola, Virgin Gorda and Anegada be mobilised and actively involved. In December 2009 and January 2010, each of the two contracts was renewed for a further year for the same contract sum. The total amount due to Mr Skelton Cline under the contracts for the two years was thus $698,800.

6.102 Following expressions of concern by House of Assembly Members, in mid-2010, performance of the contracts was paused and, in the event, never resumed. More or less the whole of the contract monies were paid to Mr Skelton Cline except for $125,000 in respect of the second year of the larger contract. $571,800 was paid to Mr Skelton Cline under the contracts over the two years[168].

Findings of the Auditor General

6.103 The Auditor General made the following findings:

(i) The Ministry was unable to present verifiable details of achievements under the October 2008 contract or to provide any explanation as to the need for the August 2009 contract, the latter being entered into without any formal progress reports, written strategy or implementation plan from Mr Skelton Cline, or even any proposal explaining the resources etc that would be required to justify the contract amount of $250,000[169]. As there was never a proposal, there were no criteria against which performance could be measured[170].

[166] Kwame Kilpatrick was the Mayor of Detroit from 2002 to 2008, when he resigned having been found guilty of perjury and obstruction of justice and sentenced to four months' imprisonment. Following his release from prison, he was found guilty of violating his probation, and sentenced to five years' imprisonment. In 2013, he was convicted of fraud and racketeering while he held public office, and sentenced to 28 years' imprisonment (a sentence commuted by President Trump in January 2021, shortly before he left office).

[167] T4 11 May 2021 page 94. Mr Skelton Cline confirmed in his email to the COI dated 14 May 2021 that he did not move back to the BVI until 2010.

[168] Paragraphs 41-43.

[169] Paragraphs 8-12. As the Auditor General pointed out, for such an amount, the contract(s) should have been put out to tender (T18 28 June 2021 page 98).

[170] T18 28 June 2021 page 107. However, the Auditor General said that, even in the absence of a proposal, there were certain standards one would expect to be met in a programme such as this (T18 28 June 2021 page 107), which this programme singularly failed to meet.

(ii) The information received by the Auditor General indicated that, of Mr Skelton Cline, "performance was either non-existent or lacking in a number of areas stipulated under the contract"[171]. Whilst he provided a progress report in general terms for the year to October 2009, he failed to provide information that allowed for an assessment of the effectiveness of the programme, e.g. the names of the participating churches etc, the number of volunteers at each centre, the number of students attending each centre, other resources used (such as guidance counsellors), and the results of benchmarking etc. The Auditor General said that, in terms of regular progress reports to the Ministry, she would have expected the Ministry to have required monthly reports as good practice "but quarterly would also work"[172]. In the event, she found no report until towards the end of the first year, and then a report "only submitted so that the programme could continue". That was, in her view, insufficient oversight by the Ministry[173]. The progress report lodged at the end of the first year was not only inadequate, she thought it was:

> "… an immediate reason to discontinue, suspend the programme. It didn't show sufficient results, sufficient outcomes to carry on…. There was insufficient assessment by the Ministry before they extended this programme. They didn't actually go out and talk to the institutions, the churches, the schools to find out whether or not the programme was working for them[174]".

The audit obtained such information. It is perhaps unsurprising that Mr Skelton Cline was coy about its disclosure. In 2009, the Auditor General's enquiries showed that only four centres operated (two on Tortola and two on Virgin Gorda), with 41 students attending either an after school or summer programme. New Life Baptist Church[175], where Mr Skelton Cline became a pastor on his return to the BVI, accounted for 18 of the students. From that low initial level, performance deteriorated. Only two centres operated in 2010 with 13 students (10 at Mr Skelton Cline's own church). Despite the funding received, the programme did not organise any programmes during the 2010 summer break, simply assigning six college students to the ESHS summer programme. There was no evidence that the programme was commenced on Anegada[176].

(iii) The feedback was that the centres that were in operation were inadequately resourced[177]. Even Mr Skelton Cline's own church said that the programme was inadequately resourced in terms of materials, tools and the payment of stipends. The Virgin Gorda centres also complained of lack of resources and structure, which led to the programme being discontinued after one term at one centre on that island, and students at the other centre being reassigned to a pre-existing programme. The views of the Virgin Gorda leaders included the following[178]:

> "Programme unstructured and scope unclear.
>
> No curriculum.
>
> No follow up, no supervision, no guidance and support.
>
> Centres were under-resourced…".

[171] Paragraphs 13-36, the quotation coming from paragraph 13.
[172] T18 28 June 2021 page 102.
[173] T18 28 June 2021 page 102.
[174] T18 28 June 2021 pages 108-109.
[175] When questioned whether he had any particular association with the two Tortola churches (New Life Baptist Church and New Testament Church), Mr Skelton Cline said, "I'm a clergyman. I have relationships with all the churches." (T43 4 October 2021 page 33).
[176] Paragraphs 13ff.
[177] T18 28 June 2021 page 105.
[178] Paragraph 35.

(iv) The programme was largely unsupervised by the Ministry throughout the crucial implementation phase and thereafter. There was nothing in the Ministry files to indicate any monitoring of the project, and the contracts did not require Mr Skelton Cline to provide any regular progress reports to the Minister so that an entire year elapsed before any report was made. Regular payments were, however, made to Mr Skelton Cline: they were not dependent on performance[179].

(v) The Auditor General found that a number of the payments reported by Mr Skelton Cline either conflicted with information presented by other sources or were without verifiable association to the programme[180]. That is something of an understatement. In her report[181], the Auditor General, with fastidious care, went through each item alleged to have been expended by Mr Skelton Cline. In brief, of the $242,406.99 expenditure he claimed for 2009:

a) Grants $27,200: The report concluded that this figure appears to have been overstated: of the few churches that participated, the even fewer pastors who confirmed that they had received money said that they had received less than that claimed (e.g. New Life Baptist Church $5,000 claimed, $2,000 received)[182]. All of the institutions the Auditor General contacted said that they had received substantially less than the figures reported by Mr Skelton Cline[183].

b) Curriculum Support System $10,000: Whilst this sum was claimed by Mr Skelton Cline, there was no evidence that any centre had received any such system[184]. Again, the institutions contacted by the Auditor General said they were promised but did not receive any such resource[185].

c) Set up and Organisation $38,000: These were payments claimed by Mr Skelton Cline personally over and above the $98,400 he was due under the first contract; but they appeared to have represented duplication of the sum paid under the first contract for the services required to be provided under that contract[186].

d) Technical Support Programme $43,000: This was claimed for payments to MNP Technical Support; but no information was provided for the purpose of these payments or the benefit received[187].

e) Field Coordination $18,000: This was claimed for payment of $17,000 to Godfolks Media Group and another $1,000 to individuals for field coordination, without any information of the service provided (and, indeed, without evidence of any coordination[188]).

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[179] Paragraph 37-40.

[180] Paragraphs 41-43. Mr Skelton Cline was unable to provide any evidence on the matter, but he suggested that he would have provided a budget at the start of the contract. However, the Auditor General would have based her findings on the actual expenditure. Although Mr Skelton Cline said that the figures and/or the Auditor General's report were incorrect, he was unable to provide any evidence to support his assertion (T43 4 October 2021 pages 50-51).

[181] Paragraphs 44-73.

[182] Paragraphs 45-48.

[183] T18 28 June 2021 pages 110-111.

[184] Paragraphs 49-50.

[185] T18 28 June 2021 page 111-112. Mr Skelton Cline said he did provide a curriculum support system, but was unable to remember the details (T43 4 October pages 40-41).

[186] Paragraphs 51-52 (in substance, repeated T18 28 June 2021 pages 112-113). When questioned about this, Mr Skelton Cline said, "Whatever the total figure was would have been in the Contract" (T43 4 October 2021 page 42).

[187] Paragraphs 53-54. Mr Skelton Cline was unaware of who MNP Technical Support are/were; but said, "Who MNP were, I have no idea who they were at this point, but whatever they were, they would have been ancillary parts in bringing a programme online" (T43 4 October 2021 page 44).

[188] Paragraphs 55-58. Mr Skelton Cline said that he had no recollection of Godfolks Media Group (T43 4 October 2021 page 44).

f) Travel/Airfare/Car Rentals $19,062.60: This was claimed without any evidence of travel referable to the programme having taken place[189].

g) Training – Facilities and Personnel Costs $6,566.28: This was claimed without any support for the training in fact provided[190].

h) Computer Supplies/17 Work Sites allocated $34,000: This was claimed for computer supplies etc without any evidence of any computers etc having been purchased or supplied to centres[191].

i) Faith Based Comm.Org $29,800: This was allocated without any details of how this money was applied[192].

j) Other Expenses $15,778.11: This was claimed for "other expenses" including overheads and miscellaneous charges such as rent and telephone[193].

6.104 Mr Skelton Cline never prepared a financial report on his activity for 2010, for which he received $222,400 in contract payments including $125,000 (of the contract sum of $250,000) under the larger contract. In fact, in oral evidence, Mr Skelton Cline stated that he had no recollection of being asked to provide a financial report, and did not suggest that he had provided any[194]. The only supported expenditure for the year amounted to $4,462 ($2,962 to the students who assisted the ESHS summer programme, and $1,500 for transport costs in respect of three field trips[195]). It did not surprise the Auditor General that no records could be found, given the way the programme was being run and the lack of oversight: it was, she said, down to the Ministry to ensure that Mr Skelton Cline submitted appropriate records to justify how money was being spent[196]. Generally, she considered that lack of oversight was "a common problem" in BVI Government contracts[197]. The result of the lack of oversight in this case was, she said, that:

> "… [W]e were paying money on the assumption that something was happening, and nobody was actually checking to make sure that something was happening[198]."

6.105 In her report, the Auditor General concluded that Mr Skelton Cline "… ultimately fell short on a number of the contractually stipulated deliverables"; "… the capacity building aspect which was required for sustainability and long term impact was severely lacking"; and "… the funding provided by the Government to finance this initiative has not been fully accounted for"[199]. Given that there was no proposal, it would have been difficult to assess performance meaningfully because there were no criteria against which to make any assessment[200]: but there was little evidence as to what even might have happened to the very substantial amount of money paid to Mr Skelton Cline, and the value obtained for the money spent appears to have been close to nil.

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189 Paragraphs 59-60. Mr Skelton Cline said he had nothing to add to this evidence (T43 4 October 2021 pages 48-49).
190 Paragraphs 61-63. Mr Skelton Cline said he had nothing to add to this evidence (T43 4 October 2021 page 49).
191 Paragraphs 64-66. Mr Skelton Cline said he had nothing to add to this evidence, apart from stating that the report is "incomplete" (T43 4 October 2021 page 49).
192 Paragraphs 67-68.
193 Paragraph 69.
194 T43 4 October 2021 page 52, repeated at page 54. The evidence was that, in 2010, the Ministry pressed for reports, which were not forthcoming (see, e.g., paragraph 6.128 below).
195 Paragraphs 70-73.
196 T18 28 June 2021 page 110.
197 T18 28 June 2021 page 125.
198 T18 28 June 2021 page 123.
199 Paragraph 74.
200 T18 28 June 2021 page 107. The Auditor General went on to say that, as a starting point, she would have expected the Ministry to have the relevant standards "brought out up front"; but in any event there were well-recognised standards which Mr Skelton Cline singularly failed to meet.

6.106 In her report, the Auditor General made the following recommendations[201]:

> "1) For all major projects and programmes to be administered via contract, the Ministry should require a detailed proposal for implementation, execution and reporting (including resources to be applied, support systems and costing) before issuing a contract.
>
> 2) Programmes such as this require regular oversight. This should be done by an officer within the Ministry who has a clear understanding of the contracts' terms, programme's milestones and expected outcomes.
>
> 3) Consultants must be required to submit comprehensive reports which relate directly to the objectives and outcomes stipulated in their contracts. This should include verifiable data. A required level of quality and standards should be communicated to the Consultant and regular reviews undertaken to ensure that these are maintained.
>
> 4) Interim reports should be required for independent projects/programmes of this magnitude. These will allow the Ministry to see the programme's progress, challenges and results on an ongoing basis. It would also lead to improved accountability and reduce the risk to value for money for the Government.
>
> 5) The Ministry should verify and assess the progress and achievements of the programmes it sponsors prior to issuing subsequent contracts.
>
> 6) Full accounting for the funds advanced under contracts 2/2009 and 1/2010 demonstrating how these were applied for the purposes [of the] project should be submitted. Amounts that were either not applied for the purposes of the programme or cannot be supported by verifiable documentation should be reimbursed to the Government.
>
> 7) All documents relating to the contracts issued by the Ministry, from point of inception to current, should be maintained on the same file."

6.107 The Auditor General said that these recommendations were not directed at only these contracts: they were directed at trying to improve practice generally[202]. There was, however, no response or reaction from the Ministry[203].

[201] Paragraph 75.
[202] T18 28 June 2021 page 122.
[203] Whilst the date of publication was raised as an issue by the Minister (see paragraphs 6.120ff below), the Auditor General said that the report was sent to the Ministry in December 2011, i.e. after the 2011 election and thus after Hon Andrew Fahie ceased being the Minister. There was no evidence to controvert that date, which I accept. However, it means that Hon Andrew Fahie did not receive the report as Minister: he had left office by the time of its delivery. Nevertheless, (i) he knew the report had been commissioned, and could have sought a copy from his former Ministry, (ii) given the nature of the BVI community, it would be surprising if Hon Andrew Fahie was not made aware of at least the gist of the report once it had been delivered and (iii) as indicated below, he would have known that gist from press reports.

Concerns[204]

6.108 The expenditure of large amounts of public money, without any apparent return in public benefit or even any audit trail as to how the money was spent, obviously raises significant concerns. On 16 September 2021, the COI wrote warning letters to Mr Skelton Cline[205] and the Minister Hon Andrew Fahie[206] setting out potential criticisms of them arising out of the evidence in relation to the VINPP.

6.109 Mr Skelton Cline was given every opportunity to respond to the concerns arising out of the evidence. However, he declined the opportunity to respond in writing and, at the hearing at which this subject was considered, although called, he gave almost no evidence of substance[207]. He seemed exercised about the fact that the Inquiry was into the conduct of public officials, but he, a private citizen, had been "targeted" (as he put it) to give evidence. He wrongly assumed that he was the only person who had not been a public official who had been asked to give evidence to the COI[208]; and, clearly, evidence from those with whom public officials have engaged (especially those who, like Mr Skelton Cline, had engaged with public officials regularly over the last decade or so) could be highly relevant to the COI Terms of Reference[209]. He suggested that the best people to talk to about the project were those in government who had decision-making powers[210]. He appeared to consider that it was a mark of his success on the project and/or satisfaction on the part of the Minister and Ministry that the contract was not terminated earlier[211]. Mr Skelton Cline's over-defensiveness, and apparent reluctance to answer questions, did not assist the Inquiry.

6.110 Mr Skelton Cline repeatedly asserted that the Auditor General's report was "incomplete". However, he said that he had never read the report nor any other material relating to the VINPP (and declined the opportunity to read them whilst giving evidence); and he was unable to say in which respects he considered the report was not complete. When offered an express opportunity to explain how he thought the report was incomplete, given that the information used to base the findings of the report came from the Ministry, he gave no substantive response, but simply repeated his assertions that the information in the report was incomplete[212]. He was unable or unwilling to confirm basic information such as the value of the contract[213], the dates of the separate contracts and to whom he reported[214], whether

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[204] The concerns and potential criticisms in relation to the VINPP arising from the evidence before the COI were put to both the former Minister, now Premier, Hon Andrew Fahie and Mr Skelton Cline. They were put to the Premier in COI Warning Letter No 3 dated 16 September 2021, to which the Premier responded in writing (Hon Andrew Fahie Response to COI Warning Letter No 3 date 28 September 2021) and orally (T46 11 October 2021 pages 60-131). They were put to Mr Skelton Cline in COI Warning Letter No 2 dated 16 September 2021. Mr Skelton Cline did not take the opportunity afforded to respond in writing, but gave evidence orally (T43 4 October 2021 pages 4-265). Each warning letter identified the evidence giving rise to the concerns and potential criticisms. The criticisms of each of the Premier and Mr Skelton Cline in relation to the VINPP in this Report are respectively restricted to those in respect of which they had a full opportunity to respond, as described.

[205] COI Warning Letter No 2 to Mr Skelton Cline dated 16 September 2021.

[206] COI Warning Letter No 3 to Hon Andrew Fahie dated 16 September 2021.

[207] T43 4 October 2021 pages 4-265.

[208] I heard evidence from other private citizens including Mr Bevis Sylvester, Ms Patsy Lake and Mr Steve Augustine.

[209] T43 4 October 2021 page 7.

[210] T43 4 October 2021 page 9. The Minister Hon Andrew Fahie was, of course, called to give evidence. In oral evidence Mr Skelton Cline stated, "I don't create invoices. I don't draft contracts, I don't set out all the terms and agreements. I agree at the end to deliver certain things." One of the questions considered by the Auditor General was, of course, whether he had "delivered". Her report concluded that, on the evidence she had obtained, he had not. The hearing was an opportunity for him to give evidence as to, amongst other things, why that conclusion was wrong.

[211] T43 4 October 2021 page 10. Mr Skelton Cline said just "terminated" (rather than "terminated earlier"); but, of course, the second pair of contracts were terminated early. I can only assume that Mr Skelton Cline was relying on the fact that they had not been terminated earlier still.

[212] T43 4 October 2021 pages 56-58.

[213] T43 4 October 2021 page 23.

[214] T43 4 October 2021 page 31.

there were annual reviews[215], or whether indeed there was any degrading or degeneration of the programme[216]. When asked questions about the feedback from various church leaders regarding the lack of support, resources, oversight and guidance from him, Mr Skelton Cline strongly denied this, repeating his assertion that the report was incomplete; but he was again unable to offer any evidence to counter the feedback[217].

6.111 When asked about whether he provided supporting documentation for the amount of money spent, Mr Skelton Cline said that he had provided to the MEC whatever he had at the time, and that a breakdown of the figures would have been in the contract[218]. The Auditor General worked on the documents which she received from the MEC. The Auditor General gave him the opportunity to input into the audit exercise, which he apparently declined. There is no evidence that the Auditor General had anything less than all of the relevant documents that existed.

6.112 Mr Skelton Cline continued to assert that the report into the VINPP was politically motivated and that he had fulfilled the terms of his contract.[219] Mr Skelton Cline said that, although the Auditor General may have based her findings on the information before her as an audit, "Well, it's an audit, but I've known of wrong audits or incomplete audits, especially when you are in a political construct where offices such as that can be used against private citizen"[220]. However, despite these assertions, again he was unable to offer any evidence to assist the Inquiry[221].

6.113 On the evidence (including, as described below, the evidence of the Minister himself), it seems that the contract was terminated in 2010 due to the failings on Mr Skelton Cline's part outlined in the Auditor General's report[222]. However, although he could not recall being asked to provide detailed reports, he strenuously denied that the contracts and his consultancy service were terminated because of a lack of reports or for any other reason which lay at his door. He said that the audit came "onstream" in the middle of his contract term, when he believed his name was being tarnished for political reasons[223].

6.114 Unlike Mr Skelton Cline, the Minister provided a written response to his warning letter[224], as well as giving oral evidence in response[225]. He raised a number of points outside the substance of the matter.

6.115 First, he questioned whether the potential criticisms set out in the warning letter could be said to have taken place in "recent years", and consequently whether these matters properly fell within my Terms of Reference. However, what amounts to "recent years" for the purposes of paragraph 1 of the Terms of Reference is a matter of judgment for me; and, in any event, the VINPP project is relevant to other paragraphs of those Terms notably in relation to governance. Concerns that span different administrations are also relevant to possible recommendations.

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[215] T43 4 October 2021 page 29.
[216] T43 4 October 2021 page 34.
[217] T43 4 October 2021 pages 34-35.
[218] In this, of course, Mr Skelton Cline incorrectly elided the estimate of expenditure in the contract and the actual expenditure.
[219] T43 4 October 2021 pages 36-37 and pages 41-42.
[220] T43 4 October 2021 page 47.
[221] T43 4 October 2021 pages 44-45.
[222] Paragraphs 6-73.
[223] T43 4 October 2021 pages 54-56.
[224] Hon Andrew Fahie Response to COI Warning Letter No 3 dated 28 September 2021. In addition, the Attorney General made submissions on these contracts (Elected Ministers' Closing Submissions paragraphs 53-55). These attacked the reliability of the evidence in three respects: (i) the events occurred 13 years ago, and so much evidence was therefore unreliable or no longer available, (ii) VINPP records were destroyed in the 2017 hurricanes or otherwise not maintained, and the Auditor General had not preserved her records, and so the evidence in the report could not be corroborated, and (iii) the report was not published until 2021. These points are dealt with in the context of the evidence of the former Minister (the current Premier).
[225] T46 11 October 2021 pages 60-131.

6.116 Second, the Minister said that he considered the only evidence in relation to the VINPP project was that found in the Auditor General's report; and I would be wrong to draw conclusions based on that report alone[226]. However, whilst of course the passage of time and the non-availability of the underlying documents may affect the weight to be given to it (and, in assessing that weight, I have taken such matters fully into account), the Auditor's Report is evidence. As I have described, there is nothing to suggest that it was not based on full available contemporaneous information and documents. Further, both the Minister and Mr Skelton Cline had the opportunity to give evidence in relation to the VINPP project – and the Auditor General also gave evidence to the COI in relation to the matters set out in her own report, and she was subject to cross-examination by Sir Geoffrey Cox QC on behalf of (amongst others) the Minister[227]. In making findings, I take fully into account, with due care, all of the evidence available to me.

6.117 Third, the Minister complained that "due process" was not followed, because the Ministry should have been asked for a response to the draft Auditor's Report which should then have been attached to the Report so that any reader would have a balanced view. The Auditor General's failure to do this meant (he said) that the report was "incomplete"[228].

6.118 However, the Auditor General explained that the audit took place over a period of a year and, within that time (during almost all of which Hon Andrew Fahie was, of course, Minister), she made several attempts to gather more evidence from the Ministry, but without success[229]. She explained:

> "… So, if a person or entity is refusing to give information, that to us is a red flag. That says that something is wrong, and that is a really potent reason for us to go ahead and issue the report, because something is wrong, and if we can't get the answers, then somebody else should be able to get the answers, especially the people who have been making the money, they should be able to get the answers, and that was the Ministry[230]."

6.119 Further, she confirmed that the report was sent to the Ministry in December 2011; but no response was ever received[231]. In any event, it is not usual practice for the Auditor General to append any notes or responses to a report (as opposed to take into account any comments before finalising the report)[232]; and the Minister, in his own considerable experience, could not point to any example where this had been done[233]. As I have indicated, Mr Skelton Cline confirmed that he had passed all available documentary evidence of expenditure on the project to the Ministry; and there is nothing to suggest that the Ministry did not pass over to the Auditor General all of the documentary evidence it had.

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[226] Hon Andrew Fahie Response to COI Warning Letter No 3 dated 28 September 2021 paragraph 1.2.
[227] The Auditor General gave evidence at oral hearings on 28 June 2021, 29 June 2021 and 15 October 2021, when she answered questions put by and on behalf of me, as Commissioner. However, the Attorney General on behalf of the elected Ministers (including Hon Andrew Fahie) issued an application to cross-examine her. After the questioning of the Auditor General by and on behalf of the Commissioner on 15 October 2021, the Attorney General's representative at the hearing did not have instructions as to whether to pursue the application. The application therefore had to be adjourned. In due course, Sir Geoffrey Cox QC on behalf of the Attorney General pursued the application, which I granted (T50 19 October 2021 page 43). The Auditor General returned to be cross-examined by Sir Geoffrey on 20 October 2021. She therefore gave evidence on the topic over the course of four days.
[228] T47 12 October 2021 pages 24-26.
[229] T49 15 October 2021 pages 122-126.
[230] T49 15 October 2021 page 139.
[231] T49 15 October 2021 pages 124-125. The publication of this report became an issue in the COI: I return to it below (see paragraphs 6.120-6.125).
[232] T49 15 October 2021 page 117.
[233] T47 12 October 2021 page 114.

6.120 Fourth, the Minister and those representing him invested considerable time and energy into the question of whether (and, if so, when) the Auditor General's report was published. This hare was set running by the evidence of the Auditor General in the first (of four) hearings in which she gave evidence on this topic, when she said: "I think [it] was produced in or published in January 2013", then went on to say "I think the date might have been a little earlier than that, so let me verify that date"[234]. The Minister denied that, until 2021, the report had ever been published; and he had never received a copy or been asked to comment on it[235]. As I have already indicated, by the time the report was produced in late 2011, he had left office, and would not have received a copy as Minister. He submitted that this absence of publication was because (i) the Auditor General failed to submit this report as an annual report and therefore it had not been tabled, and/or (ii) this was a section 20 report which the Auditor General ought to have submitted to the Governor who would then have been legally obliged to publish it[236]. In other words, it was suggested that the reason for non-publication lay at the door of the Auditor General.

6.121 However, this publication point, raised by the Minister Hon Andrew Fahie, seems to me to be a red herring.

6.122 First, there is no question of the Auditor General seeking to give misleading evidence when she said that her report had been "published or produced" in or before January 2013: indeed, the report had been *produced* (and delivered to the Ministry) by about December 2011.

6.123 Second, in terms of publication, the Auditor General confirmed that, as it appeared to be, this was a section 12 report[237]. It was requested by Cabinet in 2010. She said that section 12 reports are generally sent to the Minister of Finance; but, where it is the result of a particular request, it would normally be sent to the relevant Ministry to provide a response and, after the report is finalised, it is sent to that Ministry which will then take steps to have the report tabled by the House of Assembly and thereafter published. However, she said, sometimes (as in this case) a report is not actioned by the Minister, and so it does not get tabled by the House of Assembly or published[238]. In this case, the Auditor General confirmed that the report in its final form was sent to the Ministry in December 2011[239]; but she could not confirm whether it also went to the Minister of Finance. It seems that the report was never tabled, and was therefore not published until she had put it onto the Auditor General's website early in 2021[240]. The Auditor General made clear that, once she had delivered the final report, she considered it was the job of the relevant Ministry (and specifically, she said, of the Permanent Secretary) to ensure that it is tabled and thereafter published; and she had no responsibility for that[241]. She did not take steps to publish the report, or draw it to the attention of the public, because that was not her job and she was engaged on other audits. She did not consider converting the produced report into a section 20 to the Governor, to ensure it was tabled by him: ultimately, she said, this is a matter for the Permanent Secretary to deal with[242].

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234 T18 28 June 2021 page 94.
235 T46 11 October 2021 pages 63-65.
236 T46 11 October 2021 pages 126-130.
237 T49 15 October 2021 page 113.
238 T49 15 October 2021 pages 115-116.
239 T49 15 October 2021 page 124.
240 T49 15 October 2021 pages 124 and 132, and T51 20 October 2021 page 182-184. The Auditor General explicitly accepted that the report was not published in or before January 2013. There is no evidence that it was formally published (as opposed to unofficially leaked) before 2021.
241 T51 20 October 2021 page 189.
242 When I asked the Auditor General directly who is primarily responsible for publishing, she replied: "The Permanent Secretary, it's her responsibility to move forward the Report to Cabinet, and then beyond that" (T51 20 October 2021 page 193).

6.124 Third, even if the Minister had not seen the report itself, he was clearly aware of the gist of it through press reports that he himself referred to in oral evidence. In 2012, there was an extensive article in the BVI Beacon based, not upon the report itself, but on a packet of underlying information provided by the Ministry to each Member of the House (which would have included the Minister who, although not still in office, remained a Member of the House of Assembly)[243]. That article refers to concerns expressed in the House of Assembly in December 2010 that no tangible results or report on the programmes had been seen; and the packet contained material which showed (e.g.) that the evidenced spending in 2010 was very small (it is said, less that $6,000 of the $125,000 allocated). A further press article appeared in BVI News in 2019, entitled "Leaked AG report: Major question about fruitless $500k spend in Fahie-led programme"[244]. The Minister's view was that the leak was politically motivated, particularly as this report was released days before the general election in 2019, with the intention (he thought) of damaging his reputation[245].

6.125 These press articles were public, and the Minister acknowledged that he was aware of them. It was always open to the Minister to seek a copy of the report from the Ministry, and to seek its tabling and publication by the (new) Minister. But, even if he had not seen the Auditor's Report, I do not accept that the Minister did not know of the gist of the criticisms of the VINPP which were essentially those identified in that report. He clearly did know of them.

6.126 As to the substance of the Auditor's Report, the Minister stressed the difficulties in recalling events that happened some years ago. The then Premier Hon Ralph O'Neal died some years ago, some of the relevant officials have left the Public Service, the Minister said he had not had sight of any of the relevant files (which he had been informed were most likely to have been destroyed in the 2017 hurricanes), and he could not recall who the Permanent Secretary was at the time[246].

6.127 In his evidence to the COI, the Minister sought to distance himself from the project. He said that the VINPP was referred to the Ministry by Hon Ralph O'Neal, who formally directed Mr Skelton Cline's services to be retained in connection to the project. Ministry officials drew up the contract, and reported directly to the Premier's Office. The Minister said he was not involved in the negotiations, nor did he sign the contract. The only involvement he admitted was that he publicised the project to the churches and attended one or two meetings for that purpose[247] and, as the Minister nominally responsible for the project, he answered any questions raised in the House of Assembly in relation to the concerns because he was the relevant Minister[248]. However, he maintained that the late Premier spearheaded the project and monitored the progress of the project[249].

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[243] "$571k programme's results, finances unclear", BVI Beacon 12 January 2012 (https://www.bvibeacon.com/571k-programmes-results-finances-unclear), excerpts of which were read into the record at T47 12 October 2021 pages 4-5).

[244] "Leaked AG report: Major questions about fruitless $500K spend in Fahie-led programme" (https://bvinews.com/leaked-ag-report-major-questions-about-fruitless-500k-spend-in-fahie-led-programme), excerpts read into the record at T46 11 October 2021 pages 132-133.

[245] T46 11 October 2021 pages 134-135.

[246] His current Permanent Secretary in the Premier's Office, Dr Carolyn O'Neal Morton, was his Permanent Secretary at the MEC at the time the VINPP project was being implemented; but he had not thought to ask her about this project (T46 11 October 2021 pages 86-87). Dr O'Neal Morton confirmed she was the Permanent Secretary for the Ministry until 2013 (T6 18 May 2021 page 6). The Auditor General said that, during the lifespan of the programme, there were three Permanent Secretaries namely Sheila Brathwaite, Dr O'Neal Morton and Dr Potter. She confirmed that Dr O'Neal Morton was the Permanent Secretary during the course of the programme while it was being executed, and Dr Potter was the relevant Permanent Secretary commenting on the report when it came before the SFC (T49 15 October 2021 page 127).

[247] Hon Andrew Fahie Response to COI Warning Letter No 3 dated 28 September 2021 paragraph 3; and repeated in his oral evidence (T46 11 October 2021 pages 93-94).

[248] T46 11 October 2021 page 104. However, the Minister said that, in doing so, he relied on information from "the technical people", i.e. public officials within the Ministry (T46 11 October 2021 page 108).

[249] T46 11 October 2021 pages 106-107.

6.128 The Minister said that he only became aware of concerns and hostile political scrutiny surrounding the project in mid-2010[250], which prompted him to direct his Permanent Secretary to request reports from Mr Skelton Cline which, despite the requests, were never forthcoming. The Ministry pressed for reports for several months without any success. In oral evidence, he clarified that the officials had not received any reports for some time.[251] As a result, the Minister said he had no choice but to terminate the contract which, he said, the late Premier was reluctant to accept[252].

6.129 Despite being the Minister responsible for the project, Hon Andrew Fahie denied any knowledge of any substantive concerns (other than the lack of reports) or of any of the other concerns detailed in the Auditor General's report. Rather, the Minister's evidence was that the programme was, in his view, a good one[253].

6.130 On the basis of the evidence, I am satisfied as to the following:

(i) In respect of entry into the arrangement with Mr Skelton Cline, the principles of governance were almost entirely ignored. The Ministry entered into the initial, 2008 contracts with Mr Skelton Cline without seeking or obtaining from him any (and, certainly, any arguably adequate) proposal, written strategy and/or implementation plan explaining the resources etc that would be required to justify the contract. This was done without any due diligence or any assessment (and, certainly, no arguably objective assessment) of his aptitude, ability or willingness to carry out his contractual obligations under the project.

(ii) Throughout 2009, during the currency of the 2008 contracts, the Ministry paid Mr Skelton Cline without any supporting evidence for the vast majority of the expenditure claimed and/or evidence of what had been done (in the form of reports or otherwise).

(iii) The Ministry entered into the 2009 contracts with Mr Skelton Cline again without seeking or obtaining from him any adequate progress report, or any (and, certainly, any arguably adequate) proposal, written strategy, and/or implementation plan explaining the resources etc that would be required to justify the contract. This was again done without any due diligence or any assessment (and, certainly, no arguably objective assessment) of his aptitude, ability, willingness or intention to carry out his contractual obligations under the project. No account appears to have been taken of the fact that, although the contracts required operational input, Mr Skelton Cline was not living in the BVI during the currency of the 2008 contracts. On his own evidence, whilst he may have occasionally visited, he did not live in the BVI during the currency of the 2009 contracts either.

(iv) During the currency of the 2009 contracts, the Ministry continued to pay Mr Skelton Cline without any supporting evidence for the expenditure claimed. That resulted in public money again being spent without any assessment of the expenditure claimed and/or evidence of what had been done (in the form of reports or otherwise).

(v) No better evidence of expenditure has subsequently been produced.

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[250] T46 11 October 2021 page 97.
[251] T46 11 October 2021 page 114.
[252] Hon Andrew Fahie Response to COI Warning Letter No 3 dated 28 September 2021 paragraphs 4-5; and repeated in his oral evidence (T46 11 October 2021 pages 97-101). See also Elected Ministers' Closing Submissions paragraph 55, which also state that "the Hon Andrew Fahie as minister of the relevant department at the time recognised the importance of accountability and value for money…".
[253] T46 11 October 2021 page 114.

(vi) In the event, the project resulted in no evidenced benefit to the public; or, at best, no substantial benefit to the public compared with the sums of public money expended. For that reason, following expressions of concern in the House of Assembly, the project had to be abandoned.

(vii) There is no evidence of the Ministry supervising the project. It did not (e.g.) require or ask Mr Skelton Cline to provide regular progress reports – when it did so, belatedly, in 2010, none was forthcoming – nor did it seek to assess his performance in any way under any of the contracts.

(viii) There is no evidence that Mr Skelton Cline complied with his contractual obligations, or gave value for money for the $571,800 in fact paid to him under the contracts over a period of two years. Indeed, there is no evidence that at any time he evinced any intention of complying with, or made any significant effort to comply with, his contractual obligations or give value for money in respect of the project.

(ix) Mr Skelton Cline suggested that the Auditor General's report was politically motivated. As with other such assertions, there is simply no evidence that she was other than objective and independent in her approach to auditing this project. As I have said in respect of similar assertions by those who have been criticised in Auditor General's reports, simply because the Auditor General makes findings and observations with which you do not agree is not evidence of partiality on her part.

(x) The Minister Hon Andrew Fahie sought to distance himself from the project by asserting, broadly, that the late Premier Ralph O'Neal was responsible for the policy and public officials within the Premier's Office and/or the Ministry were responsible for overseeing the mechanics and implementation of the project. However, this project fell under the Ministry, and there is no evidence that the Minister was not fully responsible for both the policy and (under section 56 of the Constitution) the mechanics and implementation of the project. Indeed, whilst the evidence suggests that very little was done by anyone (elected or non-elected public official, or contractor), the evidence that there is (e.g. of the launch and in responding to House of Assembly concerns) suggests that the Minister accepted responsibility for it[254]. Mr Skelton Cline did not say that he treated with anyone other than the Minister and Ministry. Whilst this project was not properly managed or monitored, there is no suggestion that any of its failings resulted from any lack of capacity/capability in policy formulation/implementation.

6.131 On the evidence, it is of impossible to say precisely what was behind the VINPP contracts; although it can be said that there is no evidence that this expenditure of public money provided any public benefit, nor any compelling evidence that Mr Skelton Cline ever intended that it should or complied with his contractual obligations which may have resulted in some such benefit. In respect of this project, whatever precisely was behind it, the public interest appears to be a very distant figure. In the circumstances, it is not difficult to be satisfied (as I am) that the information in relation to this project falls within the scope of paragraph 1 of my Terms of Reference, because factors other than those falling within the broad scope of the public interest may have been taken into account in pursuit of the project.

6.132 This project has already been audited by the Auditor General. Her task was not made any easier by Mr Skelton Cline's failure to produce any contemporaneous report on his activities, his failure to have any meaningful audit trail for his expenditure of public funds, and his failure to cooperate with the Auditor General's enquiries. No further audit is now likely to be met with any different response or conclusions. The only issue is whether, after this passage of

[254] Whilst it is of no evidential moment, I note that the BVI article in 2019 referred to the VINPP being "Fahie-led" (see paragraph 6.124 and footnote 244 above).

time, further criminal investigations and/or investigations in relation to the recovery of this public money expended without public benefit should be made. Whether it is in the public interest to take such steps is a matter for the relevant BVI authorities to determine and, if necessary, pursue. I shall make a recommendation accordingly.

Elmore Stoutt High School Security[255]

Introduction

6.133 There was a history of crime at the site of the ESHS, including vandalism and theft, with numerous break-ins and a possible case of arson, together with related concerns about poor lighting and fencing[256]. The openness of the campus meant that persons used the grounds as a thoroughfare to get to the Lower Estate and Long Bush communities. It presented a significant security challenge[257].

6.134 A number of initiatives were taken to address this significant issue[258], but the provision of school security officers was recognised as a necessary requirement for the safeguarding of pupils and staff and protection of school equipment and property. From 2004, that provision was made under section 59 of the Education Act 2004[259], which provides:

> "The Minister may by Order designate school security officers to assist the principal and teachers of any school, whenever he considers it necessary, in ensuring that students uphold the rules and regulations of the school".

The functions of school security officers are set out in section 60. They include patrolling the school premises, dealing with and logging any disturbances, and reporting students for any breach of school rules and regulations.

6.135 Such services of course invoked the general procurement provisions for BVI Government contracts.

[255] Dr Drexel Glasgow gave specific evidence in relation to the provision of security services at the ESHS in his Second Affidavit dated 6 September 2021, and in oral evidence on 17 September 2021 (T35 17 September 2021 pages 8-73). As indicated above (footnote 1), Dr Glasgow has worked in the MoF as the Director of Projects since February 2014 having previously worked in a variety of roles in the PWD and the MTWU. In addition to this specific procurement, he gave general evidence in relation to BVI Government procurement of contracts in his First Affidavit dated 10 June 2021 and in oral evidence on 8 July 2021 (T24 8 July page 97ff) (see paragraphs 6.1-6.25 above).

[256] Dr Glasgow exhibits a number of documents evidencing the problem. For example, on 29 June 2005, the then Minister for Education and Culture Hon Lloyd K Black presented Executive Council Memorandum No 238/2005: Public School Security and Provision of Services, which set out a history of "vandalism, theft and a case of arson" in the years running up to 1988, as well as robberies in 2003-4 and knife crime and assaults on staff in 2005. A proposal to establish a public schools security committee which would examine school security and prepare a report, as well advise upon tenders for the provision of security services, also formed part of the paper (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 7-11, especially at paragraphs 1, 4 and 5).

[257] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 3.3.

[258] Another initiative was the building of a school perimeter wall (see paragraphs 6.178-6.259 below).

[259] No 10 of 2004. Dr Glasgow referred to section 59 of the 2004 Act as the rationale and legal authority relied upon by BVI Government to procure security officers for the ESHS. He did not refer to the relevant provision under the previous legislation, but it is uncontroversial that the BVI Government had the power to make such provision at all relevant times.

Procurement 1988-2005

6.136 It seems that security services were provided at the ESHS from at least the late 1980s[260]. However, there is no evidence before me of any regulation of government procurement until the PFMA regime was established in 2005[261]; and there is generally a lack of documentation or information in respect of any procurement process that may have taken place.

6.137 However, on 23 September 1988, the Ministry of Health, Education and Welfare (as it then was)[262] entered into a contract with All Island Security Services Limited ("All Island") to provide 24-hour security at the school for an initial contract period of three months and a contract value of $91,992. There was no evidence as to how that contract was procured. At the end of the contract term, the provision of the services continued on a rolling basis until 2005, with the contract sum increasing to $95,992 in 1991 following a review of All Island's performance under the contract[263].

6.138 On 29 August 2001, the Ministry entered into a separate contract with Top Priority Security Services Limited ("Top Priority") for the supply of a block warden security service under which indoor security was to be provided to the ESHS for a monthly charge of $11,500. There is no evidence of the details of the contract; but it seems that the initial contract term was for one term, and thereafter the provision of the services was renewed on a rolling basis[264]. Top Priority was responsible for assisting the school administration and staff with student behaviour whilst they were on campus[265].

6.139 Therefore, security provision at the ESHS from 2001 appears to have been provided by two companies, Top Priority providing indoor security alongside All Island which was providing the external (including school gate) security[266]. There is no evidence as to how All Island or Top Priority was selected to provide these services.

6.140 On 20 August 2003, the Chief Education Officer Angel Smith wrote to All Island to advise it that the school would not be renewing the existing contract when the contract term ended on 30 September 2003. Steps were taken to appoint a single company to provide a full security service for the school from 1 January 2004 by way of public tender. All Island was invited to submit a tender and also to provide a monthly rolling service for the interim period from September 2003 to December 2003 at the existing monthly rate of $7,999.32 to ensure security provision remained continuously in place[267]. In a memorandum from the Ministry of Education and Culture (now the relevant Ministry) dated 22 June 2007, some three years later,

[260] Second Affidavit of Dr Drexel Glasgow dated 6 September 2021 paragraph 3.4.
[261] Dr Glasgow was unaware of any procurement statute or regulations before the PFMA and PFMR (T35 17 September 2021 page 13). For the PFMA scheme generally, see paragraphs 6.1ff above.
[262] In this section of the Report, references to "the Ministry" and "the MEC" are to the Ministry of Education, Culture, Youth Affairs, Fisheries and Agriculture, and its predecessors in respect of the education portfolio including (in 1988) the Ministry of Health, Education and Welfare.
[263] Executive Council Memorandum No 238/2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 7 paragraph 1); and T35 17 September 2021 page 11.
[264] Executive Council Memorandum No 238/2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 7 paragraph 3 and page 14 paragraph 3).
[265] Cabinet Proposal to the BVI Education Department for the provision of contract security guard for the BVI High School prepared by Vangard Security Services and Supply Services dated 27 October 2006 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 14).
[266] T35 17 September 2021 page 11.
[267] Letter Chief Education Officer Angel Smith to the President of All Island Douglas Wheatley dated 20 August 2003 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 13).

reference was made to draft tender documentation in preparation for a 2004 tender, which suggests that some attempts were made to begin a tender process although without such a process in fact being completed[268].

6.141 On 14 July 2004, the Principal of ESHS wrote to the Ministry to inform them that the school was unhappy with the service provided by All Island and expressing a preference for Top Priority to provide the full security service to the school. The Ministry acknowledged the school's input, but highlighted the need to undertake a formal process in which bidding, performance and the engagement of a provider would form part of an objective review[269].

6.142 In a letter dated 17 February 2005, the Chief Executive Officer of Top Priority Lesmore Smith wrote to the Chief Education Officer Angel Smith following a meeting which had taken place two days earlier. Mr Lesmore Smith expressed the view that having one security provider would be "less messy and cost effective"; and, on behalf of his company, he offered to supply a complete service for the ESHS at a total cost of $205,000 per annum[270].

Procurement 2005-09

6.143 The procurement regime in the PFMA and PFMR came into effect on 1 December 2005[271]. It was Dr Glasgow's evidence that the new procurement regime coincided with and supported the intent or recognition of an obligation to implement a tender process for security services for the ESHS from this date[272].

6.144 On 29 June 2005, the Ministry presented to Cabinet a memorandum seeking a decision that Cabinet:[273]

(i) approve the establishment of a Public Schools Security Committee ("PSSC") to examine school security;

(ii) approve the membership and Terms of Reference for the PSSC;

(iii) approve in principle the draft course outline for the training of school security officers;

(iv) advise that all security services at all relevant public schools be formally terminated and arrangements be made to engage said services on a provisional basis;

(v) advise that the invitation to tenderers to provide security services at relevant public schools be issued; and

(vi) advise that the PSSC be designated the official body to advise on the selection of security services for the public school system.

6.145 Dr Glasgow said that, in respect of an assessment of tenders, the CTB had authority to appoint any expert to participate in a Technical Evaluation Committee where there was sufficient justification, negating a need for a separate school committee; and, in his view, the establishment of a committee of this nature was permitted under the PFMR as a body to assist

[268] Memorandum Permanent Secretary MEC Ms Julia Christopher to the Principal of the ESHS dated 22 June 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 260-266).
[269] Executive Council Memorandum No 238/2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 8 paragraph 1).
[270] Letter CEO Top Priority Lesmore Smith to Chief Education Officer Angel Smith dated 17 February 2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 17-18).
[271] The PFMA came into force on 11 March 2004; but the PFMR and the relevant amendments to the PFMA did not come into effect until 1 December 2005 (see paragraph 1.151 and footnotes 221-224 above).
[272] T35 17 September 2021 page 13.
[273] Executive Council Memorandum No 238/2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 7-11).

any appointed Technical Evaluation Committee reach its findings in relation to procurement[274]. He said that the PSSC was established – as he had seen some decisions originating from them – but he was unaware of anything further or its current status[275].

6.146 On 22 November 2005 the Ministry received a proposal from Vangard Security Services and Supplies Limited ("Vangard") for the supply of security services to the ESHS[276].

6.147 The Ministry had by this stage received two proposals, one from Top Priority in 2004 and the other from Vangard in 2005. In Dr Glasgow's view, each was an unsolicited proposal and unregulated by any existing tender process[277].

6.148 On 27 March 2006, a request was made by the Minister Hon Lloyd Black urging Cabinet to expedite the matter and award the contract to Vangard in light of ongoing security issues and issues in relation to the existing security provider[278]. This was followed by a further letter dated 10 May 2006 from the Permanent Secretary MEC to the Attorney General with a proposal to terminate the contract with All Island, effect a tender waiver and award the contract to Vangard. It was suggested that an alternative security provider might be an effective solution to the increasing number of incidents occurring[279].

6.149 In his response to the Minister dated 2 June 2006, the Attorney General enquired why the Executive Council was being asked to waive the tender process and provided guidance that any justification for such a waiver would need to be set out in the Cabinet paper. He further noted that the PSSC had not yet been properly set up, and it would probably be better to enter into a six (rather than 12) month contract until such time[280]. On 2 November 2006, the Financial Secretary also queried with the Permanent Secretary MEC as to why the tender should be waived, and made clear his view that there should be a tender[281].

6.150 However, the proposal was for a guard day and night, accompanied by a dog at night, for £75,000 per annum, i.e. it was a petty contract which did not need Cabinet approval or tender waiver. On 18 December 2006, the Permanent Secretary MEC wrote to the Principal ESHS with Vangard's proposal confirming this.[282] The proposal was however rejected by the Principal on 15 January 2007 as being inadequate, as the school required more than one security officer and dog which was the basis of the proposal[283].

6.151 No documentation has been disclosed to evidence any discussions until 21 June 2007, when the Permanent Secretary MEC wrote to the Principal ESHS asking for details of the school's security requirements and enquiring what assistance they required to prepare the tender documents[284]. This was followed by further correspondence sent on 22 June 2007, when the

[274] T35 17 September 2021 page 15.
[275] T35 17 September 2021 pages 16-18.
[276] Proposal to the BVI Education Department for the provision of contract security guard coverage for the [ESHS] prepared by Vangard Security Services and Supplies Limited dated 22 November 2005 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 22-33).
[277] T35 17 September 2021 pages 18-19.
[278] Memorandum Minister MEC Hon Lloyd Black to Permanent Secretary MEC and Chief Education Officer dated 27 March 2006 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 34).
[279] Letter Permanent Secretary MEC Mrs Josephine Callwood to Attorney General and Chief Education Officer dated 10 May 2006 with draft Executive Council Paper (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 19-33).
[280] Memorandum Attorney General to Permanent Secretary MEC dated 2 June 2006 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 35).
[281] Memorandum from Financial Secretary to Permanent Secretary MEC dated 2 November 2006 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 37).
[282] Memorandum from Permanent Secretary MEC to the Principal ESHS dated 18 December 2016, Exhibit DG-2 pages 38-45.
[283] Memorandum Principal BVI High School to Permanent Secretary MEC dated 15 January 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 46).
[284] Memorandum Permanent Secretary MEC to Principal ESHS dated 21 June 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 259).

Permanent Secretary provided the Principal with a copy of the 2004 draft tender document for her consideration and confirmed readiness of the PMU[285] to assist in updating the same. It was expected that the tender would be issued by the end of July 2007[286].

6.152 On 28 June 2007, the Financial Secretary made a request for publication of the tender, and a radio and news release[287]. In a memorandum dated 10 July 2007 from the Permanent Secretary MEC to the Chief Education Officer, it was confirmed that the tender had been issued, and confirmation was sought as to the status of the PSSC whose assistance was desired as part of the tender process[288].

6.153 Three tender bids were received from All Island, Top Priority and Samuel Security and Investigators Limited ("Samuel Security") respectively, which were opened on 24 July 2007[289]. However, the bid from All Island was disqualified for failure to provide supporting documentation.

6.154 The other two bids then moved on to the evaluation stage, which took place on 15 August 2007[290]. However, at this stage, the bid from Samuel Security was disqualified as its proposal only provided for one year security provision as opposed to two years' provision which was stipulated in the tender instructions[291]. In light of the disqualification of two of the bidders, the Ministry itself noted that the tender notice had possibly not set out sufficiently clear instructions; and consideration was given as to whether it would be appropriate to allow more time for clarification and resubmission of tenders[292].

6.155 Dr Glasgow agreed that there may possibly have been a lack of clarity in the tender instructions[293]. However, whatever defects there had been in the tender process and unsatisfactory as it was to have only one tenderer (Top Priority) complete the process:

(i) As part of the tender process, Top Priority scored 431 out of 600 on the merit and score sheet. The benchmark for passing was 70%, and the company met this.[294]

(ii) The ESHS was due to re-open in September 2007, there was an urgent need for security to be in place when school opened, and there was no time to conduct another public tender.

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[285] Referred to in the correspondence as "the Projects Unit". Dr Drexel Glasgow has been the Director of the PMU, since 2014. He explained that it is properly called "the Projects Unit", and it has two components: the Procurement Unit which assists the CTB with procurement of projects valued at over $100,000 (i.e. major projects), and the Project Services Support Unit formerly the Project Support Unit which deals with the management of projects after they have been procured (T24 8 July 2021 page 101). I use "the Project Management Unit" (rather than "the Projects Unit") for this unit, as that was the term used during the COI's hearings and seems to be the term in popular use.

[286] Memorandum Permanent Secretary MEC to the Principal ESHS dated 22 June 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 260-266).

[287] Memorandum Financial Secretary to Permanent Secretary CMO and Tender Notice dated 28 June 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 267-295).

[288] Memorandum Permanent Secretary MEC to Chief Education Officer dated 10 July 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 299).

[289] Certification of bids from Samuel Security and Investigators, All Island Security Services and Top Priority Security Services dated 1 August 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 296-298).

[290] Draft Cabinet Memorandum: Supply of Security Service for the Elmore Stoutt High School dated 19 February 2008 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 300-303).

[291] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 6.10; and T35 17 September 2021 page 24.

[292] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 6.10; and T35 17 September 2021 page 25.

[293] T35 17 September 2021 page 26.

[294] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 6.11; and Public Tenders Sub Committee Report dated 13 August 2007 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 315-318).

(iii) Dr Glasgow considered that awarding a contract to the one remaining tenderer (Top Priority) was preferable – and would have been considered by the Minister to have been preferable – to a continuation of a monthly rolling contract which had been in place prior to the PFMR being brought into effect. He said that the fact that two bidders failed to comply with the process, leaving only one bidder, did not invalidate the tender process[295].

(iv) Dr Glasgow did not accept that the possible lack of clarity in the tender instructions rendered the tender defective; and his view was that there was an impetus to complete the tender and to be seen as having been compliant with the new PFMA regime[296].

6.156 That appears also to have been the view of the Evaluation Committee. In the circumstances, it decided to recommend to Cabinet Top Priority as the service provider, on the understanding that appropriate further training would be offered to the winning tenderer.

6.157 Top Priority therefore began providing these services. However, Cabinet approval was not sought prior to the commencement of the contract as the start of the new school term was imminent, and security needed to be in place by 1 September 2007[297]. Cabinet approval for the 2007 contract appears not to have been obtained until over a year later: Cabinet approved the award of the tender to Top Priority on 20 November 2008, when a contract for $455,550 for a two-year period was approved[298]. Top Priority were informed of the tender result by letter dated 2 December 2008 which was faxed to them on 10 February 2009[299].

6.158 No contractual documentation in respect of this contract is available. Dr Glasgow said that he had consulted Mr Pete Smith, the then Senior Administrative and Accounts Officer at ESHS, to seek clarification: and Mr Smith had told him that a paper contract was never issued following the award of the tender to Top Priority. He recalled that the Accounts Department at the ESHS were told simply to make monthly payments which continued for more than two years, the authority for making such payments apparently stemming from completion of a valid tender process eventually approved by Cabinet [300].

Procurement 2009-20

6.159 It seems that the services to be provided under the 2007 contract in fact commenced on 1 September 2007, and it was intended to be a two-year contract which would have run to September 2009.

6.160 There is no evidence that any new tender process was considered in 2009-10, or indeed before 2013. Pete Smith informed Dr Glasgow that a tender was supposed to have taken place but had been stalled: the ESHS Accounts Department were instructed to continue to make monthly payments to ensure continuity of provision[301]. Although, Dr Glasgow said that it was possible that some relevant documents may have been destroyed when the Procurement Unit building was affected by the 2017 hurricanes and he was not prepared to rule out altogether the possibility that a tender process might have been discussed or even tender documents prepared[302], he too understood that, following the expiry of the two year

[295] T35 17 September 2021 pages 25-32.
[296] T35 17 September 2021 pages 25-32.
[297] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 6.13.
[298] Draft Cabinet Memorandum: Supply of Security Service for the Elmore Stoutt High School dated 19 February 2008; and Memorandum Financial Secretary to Permanent Secretary MEC 2 December 2008 enclosing an extract from the Cabinet Minutes 20 November 2008 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 300-303, and 320-321).
[299] Letter MoF to Lesmore Smith of Top Priority dated 2 December 2008 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 322).
[300] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 6.15, and T35 17 September 2021 page 32.
[301] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraphs 7.1-7.2.
[302] T35 17 September 2021 page 35.

contract, payments simply continued to run on a monthly basis[303]. He accepted the inference that, following the expiry of the 2007-9 contract with Top Priority, there was a return to paying for the services on a rolling monthly basis rather than on a properly procured contract with a tender process[304].

6.161 From 2013, some steps appear to have been taken towards instigating a tender process for security services at the ESHS; but none came to fruition.

6.162 It seems that tender documents were prepared in February/March 2013; but no such tender process was in fact launched. Dr Glasgow said that, whilst paper records might have been destroyed, there would have been some electronic evidence if a tender had advanced to publication. There was evidence of electronic files with draft evaluation criteria and blank checklists in preparation for a tender process in 2013, but there was no evidence of any tenders having been sought, let alone received. He did not consider that the tenders were ever then sought[305].

6.163 In April 2014, the Ministry submitted tender documents to the Procurement Unit for the supply of security services to ESHS[306]. The CTB recommended that a request for proposal be used to initiate the process[307]. On 27 August 2014, the Financial Secretary wrote to the Permanent Secretary MEC reminding him that a request for proposal was required before the project could move forward[308]. However, it was not thereafter progressed.

6.164 There was a partial tender process in 2015-16, but it was never completed[309]. It seems that a tender document was drafted in September 2015 for the provision of security services for a two-year period; a public tender was issued in November 2015; and there were two responsive bids from Top Priority and another company[310]. On assessment against set criteria by the Technical Sub-committee of the CTB, Top Priority scored higher (92.7% compared with 55.7%); and, in any event, it was considered that the other company lacked the necessary resources and experience to perform the service. The CTB agreed with the Sub-committee's recommendation that the contract be awarded to Top Priority for $1,297,531 for 104 weeks. This would have constituted a major contract under the PFMR and required Cabinet approval. A paper was drafted for Cabinet[311].

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[303] T35 17 September 2021 pages 33-34.

[304] T35 17 September 2021 page 32. Dr Glasgow said that he had consulted with the FPO MEC Ms Jovita Scatliffe about the 2013 tender, and she had confirmed that the MEC had responsibility for the procurement process. Until such time a contract was awarded via tender, the Ministry continued to pay Top Priority as they required the services (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 8.5).

[305] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraphs 8.1-8.3.

[306] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 9.1.

[307] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 9.2. Dr Glasgow confirmed that this particular request would have been made because the terms of the standard tender documents were better suited to works (as opposed to service) contracts, and their language and terminology would not have been best suited to a contract for security services such as this. A request for proposal would have been tailored to a services contract (T35 17 September 2021 page 38).

[308] Memorandum Financial Secretary to Permanent Secretary MEC dated 27 August 2014 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 348).

[309] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 9.15.

[310] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraphs 9.2 and 9.6. (Due to a numbering error, there are two paragraphs numbered 9.2 in this section of the affidavit: the reference here is to the second paragraph 9.2.).

[311] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraphs 9.7-9.9; the Evaluation Report dated 13 January 2016 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 402-404); and the draft Cabinet Memorandum dated 19 January 2016 paragraph 6 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 409-419).

6.165 However, this too was never progressed. Dr Glasgow said that he thought the paper was never advanced to Cabinet[312]. On 8 March 2016, a re-evaluation of the bid was requested[313]: Dr Glasgow suggested that the disparity in the bids received showed a possible lack of clarity in the tender instructions and this may have been the reason for the re-evaluation request[314]. It was determined that the tender document had been inadequate; a feasibility study should be conducted to establish how to improve upon tender documents; and the tender process was terminated with a view to re-starting the process later in 2016[315].

6.166 However, the tender process was not revived in 2016; and there is no evidence of any discussion in relation to a tender process before 2020[316]. A memorandum was sent from the Permanent Secretary MEC to the Acting Accountant General on 12 February 2019 requesting special permission for Top Priority to continue to be paid "until information with regard to tendering process is sent from the MoF"; but the memorandum confirms that there was at that time no extant tender process[317].

6.167 In the meantime, Top Priority continued to provide security services at the ESHS and be paid on a monthly basis[318].

Procurement 2020-21

6.168 In March 2020, serious concerns began to be raised by the MoF in relation to the payments being requested by the Ministry for Top Priority. These were triggered by the fact that there were insufficient funds to pay the purchase orders submitted by the Ministry to the MoF for the first two months of 2020. The Budget Co-ordinator at the MoF Mr Ronald Emanuel reviewed the projected costs and noted that, based on the January and February invoices, the projected expenses for the year were in excess of $600,000, i.e. they would exceed the petty contract threshold[319]. The Permanent Secretary of the Ministry (by now the Ministry of Education, Culture, Youth Affairs, Agriculture and Fisheries) Carolyn Stoutt-Igwe, whilst affirming that services already rendered needed to be paid for, readily recognised that the mechanism for payment to Top Priority was a violation of the PFMR and could not continue. Steps were made to alert the Financial Secretary and the Accountant General who decided to halt any further payments. The MoF requested the Ministry to ask Cabinet to approve these requests as they were above petty contract level[320].

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[312] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 9.10; and Draft Cabinet Memorandum: Supply of Security Service for the Elmore Stoutt High School dated 19 February 2008 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 300-303).

[313] Second Affidavit of Dr Drexel Glasgow dated 6 September 2021 paragraph 9.11.

[314] T35 17 September 2021 page 42.

[315] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 9.11 (a)-(e), and T35 17 September 2021 page 45.

[316] T35 17 September 2021 pages 45-46. Dr Glasgow said that, whilst there may have been discussions regarding a tender process for security at the ESHS, following the 2017 hurricanes the focus of efforts may have been directed at other priorities, such as getting the school set up again and the separation of the school into two campuses.

[317] Memorandum Permanent Secretary MEC Dr Marcia Potter to the Acting Accountant General dated 12 February 2019 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 715). When asked about this document, Dr Glasgow said that the MEC would have been aware that monthly payments had been being made since the expiration of the 2007 contract, and payments continued to be made for the services being provided. However, in the absence of a new tender process, Dr Glasgow considered there would have been some conversations between the Accountant General, MoF and MEC of the need to have in place some more formal mechanism to allow payments to continue (T35 17 September 2021 pages 47-49).

[318] A letter dated 12 February 2019 was sent from the MEC to Top Priority (and countersigned on behalf of Top Priority) confirming the agreement that Top Priority would continue to provide security on a monthly basis, for six months or until the tender process was finalised (Letter Permanent Secretary MEC Dr Marcia Potter to Lesmore Smith of Top Priority dated 12 February 2019) (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 143).

[319] Second Affidavit of Dr Drexel Glasgow dated 6 September 2021 paragraphs 4.3-4.4, and 10.3.

[320] Email chain dated 17 March 2020 to 18 March 2020 between MEC and MoF (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 153-157). Dr Glasgow confirmed that, in his view, given the continuing breach of the PFMR, this was the appropriate course (T35 17 September 2021 page 59).

6.169 The Ministry prepared a paper for Cabinet dated 7 July 2020[321], by which time Top Priority, which continued to provide security services for the ESHS, had not received any payment for the period January-June 2020 and the sum of $247,859.30 was owing to them. The paper set out a chronology of the security provision in place since 2008 and requested Cabinet approval for payments for the calendar year 2020 as the annual amount would exceed the petty contract threshold. It was accepted in the paper that "the procurement of security services without a written contract for ten (10) years is a blatant disregard for the Procurement Guidelines outlined in Part 27 Public Finance Management Regulations 2005 more specifically S170(2)". Further, it accepted that, as the value of the services exceeded $100,000, "a form of tender should have been sought".

6.170 The paper recorded that, in 2019, the school had been divided into two campus sites[322] and this necessitated additional security officers being brought in, and the payments being increased accordingly. It also said that the Ministry had submitted documentation to the Procurement Unit to have all security services for secondary schools tendered; and the purpose of the paper was to seek Cabinet's approval to ratify retrospectively a contract for Top Priority's ongoing services. Approval for a waiver of the tender process was justified on the grounds that services had been provided and the costs incurred must be paid for; there was a continued requirement for security presence for the school pending a proper tender process; and, moving forward, all security contracts for secondary schools would comply with the tender process set out in the PFMR.

6.171 On 17 September 2020, Cabinet waived the tender process and retrospectively ratified the contract for the supply of services for the calendar year 2020 for a sum of $429,291.30. The contract was signed on 4 November 2020, some 11 months after the commencement of the services covered[323].

6.172 The tender process was not complete by the end of 2020. On 7 April 2021, Cabinet waived the tender process and retrospectively ratified a further contract with Top Priority for the supply of services for the period 1 January to 30 June 2021 for a sum of $327,360. The contract was signed on 4 May 2021, some five months after the commencement of the services covered[324].

6.173 In the meantime, an open tender process began in January 2021[325] based on the previous contract wording[326]. A tender notice for security provision at the ESHS was finalised in January 2021[327], with a pre-tender meeting being held on or about 16 February 2021. Bids were

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[321] Cabinet Memorandum No 352/2020: Security Services for the Elmore Stoutt High School dated 7 July 2020 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 405-408).

[322] The Lower Estate Campus and the Pasea Estate Campus.

[323] Cabinet Expedited Extract dated 17 September 2020 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 512); and Contract between BVI Government and Top Priority dated 4 November 2020 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 513-523). This contract, and the contract for the first six months of 2021, were not in the name of Top Priority (the registered Limited Company) but in the name of Lesmore Smith dba Top Priority Security Services (Dr Drexel Glasgow Second Affidavit 6 September 2021 paragraph 14.1). Nothing appears to turn on that change.

[324] Cabinet Expedited Extract dated 7 April 2021, following Cabinet Memorandum No 164/2021: Approval of New Major Contract MEC/01M 2021 for Additional Period of Security Services for the Elmore Stoutt High School (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 page 694); and Contract between BVI Government and Top Priority dated 4 May 2021 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 695-705). Certificates of Good Standing were also submitted after the event and are recorded as having been checked on 2 and 3 March 2021 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 707-709).

[325] Second Affidavit of Dr Drexel Glasgow dated 6 September 2021 paragraph 10. Dr Glasgow set out the reasons for the delay to commencing the tender process, and a chronology of the process. As at the time of that affidavit, no decision regarding the contract had yet been made by Cabinet (paragraph 17.2(e)). Later documents (notably paragraph 3 of the summary of Cabinet decisions on 30 November 2021 published online at https://bvi.gov.vg/sites/default/files/cabinet_decisions_-_meeting_of_17th_november_2021.pdf) revealed what happened.

[326] Second Affidavit of Dr Drexel Glasgow dated 6 September 2021 paragraph 10.6 (a)-(i) and Exhibit DG2 pages 431-432.

[327] Tender Document for Supply of Security Services for Elmore Stoutt High School, January 2021 (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 476-510).

opened on 25 March 2021; the bidders were assessed by the Technical Evaluation Committee and a recommendation was made to the CTB (and from there passed on to Cabinet) that the contract be awarded to the bidder with the highest bid score of 89.5%[328]. It was noted that this firm provided the most technically and economically sound bid. The Deputy Principal ESHS sat on the committee, and confirmed the recommendation. Top Priority entered a bid; but its bid did not proceed to evaluation stage due to its failure to submit a bid security which was a condition of the form of tender[329].

6.174 In the event, on 17 November 2021, Cabinet proceeded to waive the 2021 tender process (including the recommendation of the Technical Evaluation Committee and the CTB, which was abandoned) in favour of a further six-month contract to Top Priority for the term July 2021 to December 2021 at a contract value of $327,360. The reason for the waiver was said to be to give Cabinet the opportunity to redefine the scope of services being provided to the ESHS. No further information is explained in this regard; but it seems that Cabinet declined to follow the recommendation of the 2021 tender process which, for all intents and purposes, appears to have been conducted in compliance with the PFMR[330].

Concerns

6.175 The procurement procedures adopted for the provision of security services at the ESHS in the period 1988-2021 were lamentable.

(i) Between January 2006 (after the PFMA regime came into force) and December 2019, the cost of security provision at ESHS was in excess of $5 million, being well over $100,000 in each year. However, with the exception of the period September 2007 to September 2009, the services were supplied without a contract – or, at least, without a written contract that had been subject to any form of procurement process or approval by Cabinet.

(ii) For the two school years 2007-09, there was a tender process in accordance with the PFMA regime, albeit (i) doubts were expressed about the clarity of the tender documents and whether that resulted in only one valid tender (which was recommended and accepted), (ii) Cabinet approved the tender decision only 14 months after the performance of the services had begun, (iii) even for that period, there was no written contract, and (iv) after the expiry of the contract term in September 2009 until 2020, the services continued and were paid for on a monthly basis without any tender waiver or any Cabinet approval.

(iii) For the period 1 January 2020 to 30 June 2021, there was no such process, and the contracts entered into on a pro tem basis were approved by Cabinet only towards the end of the contract term.

(iv) For the period 1 July to 31 December 2021, there was an open tender process that complied with the PFMR regime, but Cabinet did not consider the recommendation arising from the process until late in the six-month period; and then Cabinet disregarded that recommendation in favour of continuing with services from the then current provider.

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[328] Draft Cabinet Memorandum: Supply of Security Services for [ESHS] at Lower Estate Campus and Pasea Estate Campus 7 June 2021 with Evaluation Assessments and Appendices (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 669-693).

[329] Dr Drexel Glasgow Second Affidavit dated 6 September 2021 Exhibit DG2 pages 674-694.

[330] Dr Glasgow said that, in his view, that was the case (T35 17 September 2021 page 67).

6.176 Consequently, for almost the whole period from 1988 (and, notably from 2005 when the PFMA regime came into force) to 2021, with the exception of 2007-09, payments were made to the suppliers of security services on a monthly basis, in all but the earliest years annually in excess of the petty contract level (without tender waiver), without a written contract, and generally without any procurement process and with minimal assessment in any form[331]. There were consistently prolonged delays in taking active steps to manage a tender process, such that (save for the process in 2007) no such process ran its course until 2021. Dr Glasgow appeared to accept that this amounted to a serious failure by the BVI Government in non-compliance with the PFMA regime[332]. In 2021, there was a PFMA-compliant tender process, but it was very late, and its recommendation was disregarded by Cabinet in favour of waiving the tender process and appointing the sitting contractor.

6.177 This is an example of extremely poor governance – and, in particular, of the lack of political will to ensure that proper procurement procedures are put in place and maintained. However, on the evidence I have seen, I do not consider that any further steps in respect of these past failures would be proportionate or appropriate.

Elmore Stoutt High School Perimeter Wall Project

Introduction

6.178 In December 2014, the MEC began the construction of a block concrete wall around four sides of the pentagonal perimeter of the ESHS, no wall being proposed across the front of the site. The works were performed in two phases: Phase 1 comprised the wall on the western perimeter, and Phase 2 the remaining three sides[333]. These works comprised "the School Wall Project".

6.179 Hon Myron Walwyn ("Mr Walwyn") was then Minister for Education and Culture, having been appointed to that role in 2011[334]. Dr Marcia Potter was then the Permanent Secretary MEC [335]. The School Wall Project was overseen by a team of three people[336], namely Lorna Stevens, Assistant Secretary MEC with responsibility for project management[337]; Carleen Jovita Scatliffe, the FPO MEC [338]; and Steve Augustine, an architect and project manager who acted as an

[331] There is no (and, certainly, no substantial) evidence of due diligence or performance reviews; although Dr Glasgow did say that the Principal ESHS Mr Cecil Hodge had said to him that he had regular meetings and training sessions with the CEO Top Priority Lesmore Smith (Dr Drexel Glasgow Second Affidavit dated 6 September 2021 paragraph 13.2).
[332] T35 17 September 2021 page 72.
[333] The wall as constructed is shown in Diagram 1 in the Auditor General's Special Report on Elmore Stoutt High School Perimeter Wall dated 24 August 2018 page 2. In this section of the Report, references to "the Auditor General's Report" are to that report. The Auditor General also gave oral evidence about her report (T19 29 June 2021 pages 67-110, and T49 15 October 2021 pages 145-151).
[334] A lawyer, Mr Walwyn also has business interests in the hospitality sector. He was first elected as a House of Assembly Territorial Representative representing the NDP in 2011, and was elected again at the 2015 election. For both terms, Mr Walwyn was appointed Minister for Education and Culture (T15 21 June 2021 pages 148-149).
[335] T28 19 July 2021 page 42.
[336] T28 19 July 2021 page 42. The evidence that the project was overseen by these three people was consistent and uncontroversial.
[337] Ms Stevens joined the MEC in 2009. In 2012, she became its internal project manager. As such she had responsibility for all types of project within the MEC, ranging from ceremonies to construction. Ms Stevens did not have a background in construction. Her training in project management was in greater part "on the job"; although, in August-September 2015, she spent a month in the UK undertaking two short courses on project-cycle management (T28 19 July 2021 pages 34-36, and T38 22 September 2021 pages 154-155 and 180).
[338] Ms Scatliffe transferred to the MEC in 2011 as a Budget Officer before becoming the FPO, a role in which she was confirmed in 2014. As FPO, she reported to both the Permanent Secretary MEC and the Financial Secretary in the MoF. She was not required to report to the latter on a regular basis, but would have discussions with the Financial Secretary if there were a need for additional funding or "things were not going correctly". By contrast, Ms Scatliffe would report to the Permanent Secretary daily (T28 19 July 2021 page 86, and T38 22 September 2021 pages 195-197).

external consultant to the MEC[339]. Mr Augustine trading as SA Architect had provided services to the MEC prior to Mr Walwyn's appointment; and, in that sense, the latter "inherited" him[340]. The established relationship between the MEC and Mr Augustine meant that, although he had no retainer, Mr Augustine was given regular jobs by the MEC year-on-year[341].

6.180 As part of the School Wall Project, there were some relatively minor preparatory clearance works. The wall itself was to comprise 8ft high concrete columns set 10ft apart in a continuous concrete base, between which were, alternately, a high section 8ft concrete slab and a low section 5ft concrete slab topped with 3ft galvanised rails[342]. The concrete columns and slabs were to be painted.

6.181 $1,125,740.44 of public money was spent on the wall. However, when the works stopped in late 2015, it was not finished: the MEC estimated that it would cost an additional $251,411 to complete the works. Those figures can be compared with the estimate for the whole project approved by Cabinet in February 2015 of $828,004.01[343]. There was significant overspend on Phase 2.

6.182 On 24 August 2018, the Auditor General produced a section 20 report[344] "to provide independent information and advice on: (a) whether the procedures for the procurement of goods and services were followed in the awarding of contracts and works orders in the [ESHS] Perimeter Wall Project (b) whether value for money was obtained in the execution of the works (c) the reasons for the excess expenditure incurred on this project"[345]. She formally audited Phase 2; but, for completeness, she also reviewed Phase 1. Most of the factual details recorded in the Auditor General's Report were not disputed. There was less agreement with regard to her conclusions.

The Impetus for the Project

6.183 I have referred in the preceding section of this report to the long-standing concerns about security at the ESHS[346]. The school had an open campus which meant that it was used as a thoroughfare between the Lower Estate and Long Bush communities. There were also instances of people walking onto the campus and assaulting teachers and pupils. Such concerns led to the adoption of measures such as the use of security officers.

[339] Mr Augustine also trades as Quantum Management, Construction and Project Management ("Quantum") through which he provides estimates (T38 22 September 2021 pages 237-238). In this section of the Report, references to SA Architect and Quantum are to Mr Augustine.
[340] T38 22 September 2021 page 218 (Steve Augustine); and T21 1 July 2021 page 132 (Myron Walwyn).
[341] In 2016, Mr Augustine was paid $265,110.17 by the MEC for services provided on a number of projects (Auditor General's Report paragraph 80). Ms Stevens said that it was not a contract for a yearly retainer but mostly job-by-job; but Mr Augustine obtained work each year (T28 19 July 2021 page 37). Mr Augustine himself said he was not on an annual contract, but paid job-by-job (T38 22 September 2021 pages 218-219).
[342] Shown in Diagram 2 of the Auditor General's Report page 7.
[343] The detail as to how these figures were calculated is discussed later in this section.
[344] A section 20 report derives its name from section 20 of the Audit Act 2003, which empowers an Auditor General to "at any time prepare and submit a special report to the Governor if he is satisfied that there is a matter that should be brought to the attention of the Governor" (see paragraph 1.105-1.106 above). The Auditor General explained that such a report would typically be prompted by an indication or request from the Governor. The Auditor General's Office would then undertake a review and decide whether or not to pursue the matter by investigating and reporting upon it (T18 28 June 2021 page 24).
[345] Auditor General's Report paragraph 10.
[346] See paragraphs 6.133ff above.

6.184 In late 2014, the then Acting Principal of the ESHS Mrs Sandy Underhill wrote to then Acting Chief Education Officer Mrs Jillian Douglas-Phillips again raising concerns over security at the school. The correspondence was copied to Mr Walwyn and Dr Potter[347]. The concerns raised included assaults involving students and non-students, and weapons and drugs being bought on to the school campus. The security of the western perimeter of the school in particular required to be urgently addressed due to undesirable activity in that area[348]. One measure, among a number proposed by Mrs Underhill, was to secure the school perimeter with more secure fencing. At the time, a wire mesh fence surrounded the entire school perimeter[349].

6.185 Mr Walwyn described the project team as "the technical folks" whom he relied upon, as he was "neither a technical nor a finance person". He said he saw himself as a policy maker whose role was to make sure that there was funding available for this capital project[350].

6.186 As might be expected, the project team members had different roles. Ms Scatliffe had responsibility for drafting contracts, ensuring there were available funds in the MEC's budget, and paying invoices[351]. Ms Stevens explained that her role of internal project manager included preparing Cabinet papers, issuing contracts drafted by the Finance Unit (Ms Scatliffe's team), ensuring that contractors issued with a petty contract "had their documents", and liaising with any consultant and contractors. On the School Wall Project, she would attend site visits and liaise with Mr Augustine who, as external project manager, had sole responsibility for ensuring contractors completed works properly[352]. As well as providing costings and producing design drawings, he also oversaw the project on site. His "directives" came from Ms Stevens with whom he would meet once a week[353].

Pre-Construction Preparation

6.187 Even as the correspondence was ongoing between the Acting Principal Mrs Underhill and the MEC, Mr Walwyn obtained a cost estimate from Mr Augustine trading as Quantum, dated 2 October 2014, for the design and erection of a perimeter wall around all five sides of the school perimeter with an estimated cost of $828,004.10[354]. Mr Augustine described this as a preliminary projection for the entire wall around the school produced before full construction drawings had been prepared. He could not therefore give any guarantee as to the price[355]. Asked why this estimate gave a wall length of approximately 2,695ft, when the Auditor General has measured it on the ground at some 1,600ft, Mr Augustine explained that the estimate had been prepared on limited information using aerial plans. Actual measurements

[347] Mr Walwyn provided the COI with copies of letters, dated from late September 2014 to early November 2014, written by Mrs Underhill together with a letter dated 1 October 2014 from Arthur Selwood, Education Officer, supporting the measures sought (Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 pages 5-6 and 16-18).
[348] T28 19 July 2021 pages 44-47 (Lorna Stevens); and T21 1 July 2021 pages 116-117 and 187-188, and T36 20 September 2021 pages 47, 55-56 and 62 (Myron Walwyn).
[349] T36 20 September 2021 page 62 (Myron Walwyn); and T38 22 September 2021 pages 224-225 (Steve Augustine).
[350] T36 20 September 2021 pages 110, 113 and 115; and T21 1 July 2021 page 145.
[351] T28 19 July 2021 pages 87-89 (Carleen Scatliffe); and T36 20 September 2021 page 22 (Myron Walwyn).
[352] T28 19 July 2021 pages 35-36; and T38 22 September 2021 pages 185-186 and 193.
[353] T38 22 September 2021 pages 256-257 and 272-275. Mr Augustine said that he would seldom meet with the Minister although occasionally when the latter was meeting with Ms Stevens, Ms Scatliffe and Dr Potter, he would telephone Mr Augustine.
[354] A copy of this estimate is attached to the Auditor General's Report at page 21. Mr Augustine (as Quantum) produced several such estimates which are referred to here, as they were during the COI's hearings, as "Bills of Quantities". That term is used in the memorandum submitted to Cabinet seeking a waiver of the tender process for Phase 2.
[355] T38 22 September 2021 pages 232-233 and 247-248. The estimate carried the following wording: "More detailed pricing will be provided upon completion of all working drawings. Prices as quoted are general and are intended to provide an indication of general cost projections. The listed works are all in a drawing stage of concept development".

would be taken at a later stage of the project[356]. Mr Walwyn obtained a second costs projection from STO Enterprises, an entity which had also previously worked for the MEC[357]. That was in the sum of $911,000.00[358].

6.188 SA Architect produced plans for both phases of the School Wall Project[359]. It was Mr Walwyn's decision to use SA Architect. That decision was not based on the outcome of a competitive process; but Mr Walwyn said that he had had positive recommendations of Mr Augustine from senior personnel in the MEC who had worked with SA Architect previously (specifically Dr Potter, Ms Stevens and Ms Scatliffe) and, after he saw his work, Mr Walwyn retained him for this project[360].

6.189 Mr Augustine explained that a challenge, that could have delayed the project, was to develop a design which avoided the footing of the wall (i.e. its foundation) encroaching on neighbouring properties, which required input from an engineer[361]. Another challenge was that the ground level on the internal side of the wall was variable. That had to be addressed to maintain a consistent height on the external (sidewalk) side of the wall[362].

6.190 SA Architect's design envisaged a wall built in increments of 11ft (including the column width), with a high section alternating with a low section[363]. Mr Augustine said that it was when he was asked to produce estimates for the construction of the wall based on 22ft segments[364] that he appreciated that there would be "lots of contractors" involved (although it is clear from his evidence as to what happened later that he did not appreciate quite how many would be involved). He understood that the estimate would be used to select contractors to build segments of the wall[365].

6.191 Quantum prepared the following cost estimates, each based on the costs per segment and dated 20 November 2014[366]:

(i) Estimate 1: This refers to "segmented quantities" of 22ft, with the cost of building each segment priced at $9,461.65[367].

(ii) Estimate 2: This also refers to "segmented quantities" of 22ft with the cost of installing rails into and painting each segment priced at $5,993.90[368].

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[356] T38 22 September 2021 pages 235-237. The Auditor General's Report gives a wall length of 1,650 linear ft (paragraph 96).
[357] T28 19 July 2021 pages 51-52.
[358] Bill of Quantities from STO Enterprises – Appendix C to Cabinet Memorandum No 039/2015. While he could not remember obtaining these two estimates, Mr Walwyn suggested that there was nothing wrong in a Minister doing so: it would still have been for the "technical folks" to analyse those estimates, draft any Cabinet Memorandum and make a recommendation. His role as Minister was to formulate policy and his knowing the estimate would allow him to determine whether a project was "do-able or not" (T36 20 September 2021 pages 119-122).
[359] T28 19 July 2021 page 76 (Lorna Stevens); and T38 22 September 2021 pages 220-221 (Steve Augustine).
[360] T21 1 July 2021 pages 133-135. Ms Stevens said that, for any project, the Minister would normally choose the consultants and the contractors, and whether to use an outside project manager. At the time, she was not asked for her views about retaining SA Architect in respect of this project or indeed any project (T28 19 July 2021 pages 37-38, and T38 22 September 2021 page 171-172). Ms Scatliffe's evidence was to the same effect (T28 19 July 2021 pages 88-89).
[361] T38 22 September 2021 pages 231-235. The result was a wall with a robust footing, which meant that it generally withstood the 2017 hurricanes.
[362] T38 22 September 2021 pages 240-241.
[363] T38 22 September 2021 pages 229-230, and 238-239; and SA Architect construction documents dated November 2014, Phase 2 planning application dated 23 March 2015. The space between two columns therefore measured 10ft.
[364] This would equate to the two lengths of a wall measuring 11ft each.
[365] T38 22 September 2021 pages 268-273. Mr Augustine accepted that the Bill of Quantities for a major contract put out to tender would have been very different.
[366] None of these estimates carry the wording found on the 2 October 2014 estimate which Mr Augustine pointed to as indicative of the latter being a preliminary projection.
[367] A copy of this estimate is attached to the Auditor General's Report at page 22.
[368] A copy of this estimate is attached to the Auditor General's Report at page 23.

(iii) Estimate 3: This estimate refers to the "West facing proposed wall", a "total linear feet measurement" of 180ft; and gives the "total number of contractors" as nine. The estimate for construction is based on segmented quantities of 20ft (but presumably 22ft with the column width) with the cost of each segment priced at $9,989.65[369].

(iv) Estimate 4: This again refers to the "West facing proposed wall", a "total linear feet measurement" of 180ft; and gives the "total number of contractors" as nine. The estimate for excavation, installing rails and painting is again based on segmented quantities of 20ft with the cost of each segment priced at $7,357.90[370].

6.192 Mr Augustine explained that, by 20 November 2014, he had had meetings and conducted "walk-throughs" at the school, so there was a "better appreciation of the project". The estimates produced in November 2014 took account of the need for more sophisticated footings to avoid encroachment and the variations in internal height. Mr Augustine described Estimate 1 as the "ideal document" for the MEC as it would have been closer to "where we had today"[371].

6.193 On the basis of Estimates 1 (construction) and 2 (installing railings and painting), the cost of each 20ft segment was $15,455.55. The length of the whole wall had still not yet been measured with specificity; but if, as the 2 October 2014 Quantum estimate assumed, the wall was going to be 2,645ft in length, the total cost would have been over twice as much as the 2 October estimate itself[372].

6.194 Ms Stevens initially said that these estimates were not provided to the MEC at the time[373]; and Mr Walwyn said he was not aware of the Bills of Quantities dated November 2014[374]. Shown Estimate 1 when giving his oral evidence, Mr Augustine could not positively confirm that he had provided it to the MEC on 20 November 2014, but thought he probably had[375]. Subsequent to giving oral evidence, he confirmed that, in his opinion, he would have provided Bills of Quantities at the time of their completion[376].

6.195 I can see no reason why Mr Augustine would not have shared this important work product with his client. He says that he probably did. Despite the evidence of Mr Walwyn and Ms Stevens to the contrary, on all of the evidence, I consider that it is more likely than not that Mr Augustine did send to the MEC all four estimates (but, certainly, at least Estimates 1 and 2) in late November 2014.

[369] Bill of Quantities for wall works dated 20 November 2014. Witnesses were not asked about this estimate as it was provided by the MEC only after they had given evidence.
[370] Bill of Quantities for excavation, rails and paint works dated 20 November 2014. Witnesses were not asked about this estimate as it was again provided by the MEC only after they had given evidence.
[371] T38 22 September 2021 pages 225-228 and 240-246. Mr Augustine also gave a presentation to Mr Walwyn, Dr Potter and Ms Stevens during the project (T38 22 September 2021 pages 250-251).
[372] Even with the eventual actual length of 1,560ft for the three perimeter sides proposed in Phase 2, the cost would have exceeded $828,000.
[373] T28 19 July 2021 pages 58-61.
[374] T36 20 September 2021 pages 101-103, 108-110 and 126-127.
[375] T38 22 September 2021 page 246.
[376] Letter Steve Augustine to COI dated 27 September 2021.

Phase 1 – December 2014

6.196 Phase 1 (described as "the focus area") addressed the area of the western perimeter which was of most pressing concern[377]. The work occupied the whole of December 2014, using funds from the MEC's 2014 secondary school budget[378]. The plan submitted to the Town and Country Planning Department ("the TCPD") for this phase, prepared by Mr Augustine as SA Architect, stipulated a 180ft long wall with a cost estimate of $156,124.95. The TCPD received the plan on 15 December 2014[379]. Ms Stevens acknowledged that it was her duty to submit the plan to the TCPD, but could not assist as to why the submission had been late[380]. Mr Augustine said he also prepared costings for the focus area[381]. These correspond to Estimates 3 and 4 above.

6.197 Referring to the costed plan, the Auditor General noted that "this, in accordance with [the PFMR], would require either a tendering process or a Cabinet waiver. Neither was pursued"[382]. The Auditor General concluded that the Regulations were avoided in relation to Phase 1 as a result of the following steps, as found by her to have occurred[383]:

(i) The phase was scaled back from a 180ft to 120ft[384] wall.

(ii) Works orders were issued to 11 contractors: six for wall construction ($9,989.65 each) and five for rail installation and painting ($7,357.90 each)[385].

(iii) The sixth rail/paint contract, also valued at $7,357.90, was not issued[386]. Had it been issued, then the cost of Phase 1 construction, installation and painting would have exceeded $100,000.

(iv) The total works orders issued, however, came to $96,727.40. This is just below the $100,000 threshold at which major contract procurement provisions would come into play[387].

(v) Excavation costs of $4,400 were not paid until 2015. With those costs and those of the rail/paint contract which was not issued, the total costs of Phase 1 was $108,485.30[388].

(vi) Contracts were issued for wall sections 20ft long to accommodate the 120 linear foot length[389].

(vii) At the time the project was stopped in late 2015, the works were incomplete as none of the wall sections had been painted[390].

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[377] T21 1 July 2021 pages 187-188, and T36 20 September 2021 page 51 (Myron Walwyn); and T38 22 September 2021 page 227 (Steve Augustine).
[378] T38 22 September 2021 page 197 (Carleen Scatliffe), and Auditor General's Report paragraph 86. Mr Augustine said that the school's closure when students were away from campus provided a "window of opportunity here to get this critical area in" (T38 22 September 2021 page 248). Ms Stevens gave evidence to similar effect (T38 22 September 2021 page 171).
[379] MEC's application to Town and Country Planning Department for permission to develop land dated 15 December 2014.
[380] T28 19 July 2021 pages 79-81.
[381] T38 22 September 2021 page 247; and Auditor General's Report paragraph 91.
[382] Auditor General's Report paragraph 90.
[383] Auditor General's Report paragraphs 89-94. No witness disputed the facts as set out by Auditor General. She said that, during the audit process, she was not able to establish why the option of a tender process or waiver had not been pursued in Phase 1 (T19 29 June 2021 page 69).
[384] Auditor General's Report paragraph 91.
[385] Auditor General's Report paragraph 91.
[386] Auditor General's Report paragraph 91.
[387] Auditor General's Report paragraph 100(a).
[388] Auditor General's Report paragraph 92 and Table 5.
[389] Auditor General's Report paragraph 93.
[390] Auditor General's Report paragraph 94; and T19 29 June 2021 page 71 (Auditor General).

6.198 Mr Walwyn could not assist as to why the wall had been scaled back to 120ft: he said that that was not a decision for him as Minister. He accepted that, as Minister, he had decided that Phase 1 required urgent action; but he said he was not part of the discussions as to how to take Phase 1 forward, and had no input into the decision to scale back the work: his instructions had been "just to see how we can get this done". During his evidence to the COI, however, Mr Walwyn questioned how such a scale back could have occurred when it did not leave a 60ft gap[391]. If additional money had been required, then he accepted that that would have been a matter for him.

6.199 Mr Augustine explained that, once he was able to identify the perimeter area of concern (which ran from a security booth to an existing column at the gate to the western side) and physically measure it, he found it was 120ft in length. He did not produce revised costings based on that length because the wall was being costed by section[392]. However, Ms Stevens thought that the scaling back was necessary because of the limited available funding in the MEC[393]. She suggested that the delay in paying excavation costs might have been because works were being carried out at the end of the fiscal year, and so these costs were carried over into Phase 2[394]. She also suggested that the decision not to carry the wall beyond the entrance gate (as originally envisaged) might explain why a works order for rail installation and painting had not been issued[395]. However, this could not explain why six works orders were issued for construction but only five for rail installation and painting. Ms Scatliffe was unsure as to why the work was scaled back but recalled that there was "only a little bit over $100,000 in the budget" at that stage of the fiscal year. Her recollection was that the MEC did not have enough money to do "the whole 180 feet at the time"[396].

6.200 The Auditor General considered that the scaling back of Phase 1 was done to drive the cost of the project below $100,000 and thereby avoid the works having to be subject to a tendering process[397]. The evidence before the COI was inconsistent and unsatisfactory, in that Mr Augustine said that the reduction from 180ft to 120ft was simply because the particularly vulnerable part of the school perimeter, on actual on-site measurement, proved to be 120ft rather than the estimated 180ft[398]; while Ms Stevens and Ms Scatliffe considered that the reduction was made on the basis that money was not available to do more in December 2014. Mr Augustine's explanation does not explain why the contracts made in December 2014 in respect of Phase 1 did not provide for the painting etc of part of the wall that was going to be erected. If either explanation were true, it is a remarkable coincidence that, in each case, the result was found to bring the cost down to just below $100,000.

6.201 Given that, on any view, the Phase 1 works as a project was estimated to cost over $100,000, which was only reduced below that sum by excluding some of the painting etc (as well as some of the excavations), on the evidence, it seems to me likely that the cost of Phase 1 was artificially manipulated to ensure that it was below $100,000 and thus not subject to Cabinet approval/waiver. However, on the evidence I have, I cannot say who (of the Minister and/or his officials) was responsible for that manipulation.

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391 T36 20 September 2021 pages 43-47, 54-57, 59-61 and 72; and Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 7.
392 T38 22 September 2021 pages 221-224 and 229.
393 T28 19 July 2021 page 39; and T38 22 September 2021 page 155.
394 T38 22 September 2021 pages 156-157.
395 T38 22 September 2021 pages 157-160.
396 T38 22 September 2021 pages 197-198.
397 Auditor General's Report paragraph 100(a).
398 I am afraid I simply do not understand Mr Walwyn's suggestion that there could not have been any reduction because there is, in fact on the ground, no "gap" in the wall.

6.202 Mr Walwyn selected the contractors who worked on Phase 1. Both Ms Stevens and Ms Scatliffe said that the decision to contract split[399] and use works orders in this phase was also made by the Minister. Ms Stevens had no recollection of any consideration being given to the use of a petty contract for Phase 1[400]. Ms Scatliffe said that she did not have any input into whether Phase 1 would be carried out using works orders or petty contracts: that was not part of the role of the FPO. However, she said that, in her experience, it was not common for a project costing $96,000 to be completed using works orders[401].

6.203 While confirming that he had made the decision to use works orders, Mr Walwyn did not accept that having 11 contracts (and 11 contractors[402]) might make the works more difficult to manage or more costly[403]. Mr Walwyn said that, as was the standard BVI Government approach, he was provided with a document divided into "sections" of under $10,000, which, when totalled, gave the projected costs of Phase 1 ($96,000). He then allocated the sections to contractors whom he selected. He said that he made no decision before being provided with this document, but the approach meant that he could award a petty contract by allocating more than one section to a contractor.[404] He could not confirm whether the unissued works order for rail installation and painting was on the document provided to him in relation to Phase 1[405].

6.204 Mr Walwyn's position was that regulation 189(1) of the PFMR[406] permitted him, as Minister, to decide whether to use works orders or petty contracts for any project of under $100,000[407]. He said that he appreciated that he could have used petty contracts for Phase 1, but thought that such an approach would not alter the total cost of the phase. He thought he had sufficient information "because it was done on the costings and the cost of the project would have remained the same". Mr Walwyn said that he did not appreciate at the time that increasing the numbers of persons involved by using works orders would lead to an increase in cost[408]; although he accepted, in his evidence to the COI, that using fewer petty contracts/contractors would have meant (e.g.) less set-up costs[409].

6.205 In deciding to use works orders for Phase 1, he did not seek, or have available to him, a differential costs assessment or implementation plan or any other document that might have assisted him in determining whether works orders or petty contracts might have provided

[399] During the course of his evidence, the term "contract splitting" was explained to Mr Walwyn as the breaking up of a project into several contracts so as to avoid the procurement provisions that would otherwise apply. He described this as a "very technical financial term" with which he had not been familiar at the time (T36 20 September 2021 pages 166-167). However, both Ms Stevens and Ms Scatliffe said they were familiar with the term which was used by other public officers. Ms Stevens could not recall when she was introduced to it. Nor could she recall using the term when discussing with the Minister how works were split on a particular project. Ms Scatliffe said the term had come "into effect" in about April 2012, but the Government did not have a set definition of contract splitting.

[400] T28 19 July 2021 pages 40-41, and T38 22 September 2021 pages 174-175.

[401] T28 19 July 2021 Page 90, T38 22 September 2021 pages 207-208.

[402] T38 22 September 2021 page 255 (Steve Augustine).

[403] T36 20 September 2021 pages 66 and 71.

[404] T36 20 September 2021 pages 71-73, 76-79, 84-87 and 93.

[405] If that works order had been included in the document, then the total cost would of course have been over $100,000.

[406] Regulation 189(1) of the PFMR provides: "A contract for work or a service not exceeding $10,000 in value may be entered into without the execution of a specific contract document by a works orders signed by an officer authorised to do so by the Minister or person designated by him". See paragraph 6.12 above.

[407] T36 20 September 2021 pages 64-66 and 166-170; and Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 7.

[408] T36 20 September 2021 pages 69, 74-76, 81, 87-88 and 93.

[409] T36 20 September 2021 pages 69.

better value for money[410]. He accepted that he was not provided with a differential costs analysis[411]. Ms Stevens said that a costs analysis was not something that the MEC would usually do. Rather, the practice was to get two estimates from two different surveyors. No cost analysis was undertaken for either phase of the School Wall Project[412]. Mr Augustine said that, while there was no implementation plan for either phase of the project, Ms Stevens and he did meet to consider how they could get as many sections of the wall built at the same time using different contractors[413]. The evidence, taken as a whole, was overwhelmingly to the effect that there was no differential costs analysis or implementation plan.

6.206 The process by which contractors were selected appears to have been the same for both phases. Similarly, Mr Walwyn's rationale for using works orders is also relevant to Phase 2 of the School Wall Project. These are discussed further below.

Phase 2 – January-September 2015

6.207 According to Mr Walwyn, financial restrictions meant it was not possible for the MEC to progress Phase 2 immediately[414]. The work on and concerning this phase covered January to September 2015. It is accepted that the cost of Phase 2 clearly took it above the threshold for a major contract, and so a tendering process was required unless Cabinet approved a waiver.

6.208 Ms Stevens took primary responsibility for drafting a Cabinet Memorandum which sought an exceptional waiver of the tendering process. Her draft would then have gone to Dr Potter and Mr Walwyn for review[415]. This paper, dated 19 January 2015[416], is drafted as a memorandum from the MoF, who would have formal responsibility for submitting the final version to Cabinet[417]. The version finalised by the MoF is dated 29 January 2015[418]. On comparison, there is very little difference between the draft and the final version of the memorandum or the documents appended to them. Generally, I can therefore simply refer to the final version which was submitted to Cabinet as Cabinet Memorandum No 039/2015.

6.209 Cabinet Memorandum No 039/2015 sought the following decisions:

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[410] T36 20 September 2021 pages 68-72. Mr Walwyn said that this sort of information had never been provided to him on any project (T36 20 September 2021 page 88). Mr Walwyn's evidence was not entirely consistent on this issue. In his Response to COI Warning Letter No 1 dated 14 September 2021 paragraph 3.6.1, Mr Walwyn said that he "[could not] agree with the statement that there was no differential cost analysis or implementation plan", because Ms Stevens made clear that "decisions [were] taken to ensure that the plan was implemented within the funding left in the ministry at the end of the financial year 2014". However, this was not evidence that there was any differential cost analysis or an implementation plan: it was simply evidence that steps were taken to make sure they had sufficient money in the budget to cover whatever the cost might be, which is a different matter.

[411] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 8; and T36 20 September 2021 pages 88-92.

[412] T38 22 September 2021 page 174.

[413] T38 22 September 2021 page 268.

[414] T36 20 September 2021 page 51.

[415] T28 19 July 2021 pages 41-43; and T38 22 September 2021 page 161.

[416] Draft Cabinet Memorandum No c00/2015: Exceptional Waiver of Tendering Process for the Construction of a Perimeter Fence at Elmore Stoutt High School dated 19 January 2015.

[417] Mr Walwyn disputed the statement in the Auditor General's Report that he, as Minister for Education and Culture, had brought the paper to Cabinet. He made the point that only the Minister of Finance had the authority to bring a contract valued at over $100,000 to Cabinet (T21 1 July 2021 pages 110-111). However, the Auditor General's Report merely says that the Minister for Education and Culture sought approval of Cabinet which, in substance, Mr Walwyn did. As he accepted, his MEC was the executing Ministry, and it prepared the draft paper which the MoF formally presented to Cabinet on 4 February 2015 (T21 1 July 2021 pages 112-119). The Premier and Deputy Premier being absent from the meeting, the paper was presented by the Acting Premier and Minister of Finance Hon Ronnie Skelton, although the paper was signed off by Dr the Hon Orlando Smith. None of this detracts from the fact that this was, in substance, the MEC's project; and Cabinet Memorandum No 039/2015 was its paper.

[418] Cabinet Memorandum No 039/2015: Exceptional Waiver of Tendering Process for the Construction of a Perimeter Fence at Elmore Stoutt High School dated 29 January 2015.

(i) Approval to construct a perimeter fence at the ESHS[419].

(ii) Approval to "exceptionally waive the tender process with respect to the construction of perimeter fencing at the [ESHS] on the basis of the urgency of the situation taking into account the security concerns outlined by the Commissioner of Police and the Principal of the ESHS"[420].

(iii) Approval to execute the project utilising petty contracts, and that the MoF's Project Management Unit[421] ("PMU") assist the MEC with the management of this project.

(iv) Approval of the sum of $828,004.10 to cover the cost of the fencing, to be met from the MEC's Budget Head 325 Subhead 3250102 (School Rehabilitation – Elmore Stoutt High School)[422]. This was, of course, the amount of the Quantum estimate for the whole perimeter wall dated 2 October 2014, which was appended to the Cabinet paper. In Cabinet Memorandum No 039/2015, however, it was said that: "We[423] are prepared to accept [it] as the actual cost of the project"[424].

(v) All charges related to the project to be secured from local funds and details to be worked out by MoF.

(vi) An expedited extract be issued to allow for the decision of Cabinet to be acted upon immediately.

6.210 Under the heading "Background Information"[425], it set out the history of security difficulties at the ESHS including more recent instances of the alleged sale and passing of illegal drugs, of fighting and brawling, and an increase in loitering. It referred to a security assessment prepared by the RVIPF dated 5 January 2015[426], which recommended the remodelling or installation of mesh wire perimeter fencing. The paper recorded that the ESHS had put a number of security and surveillance measures in place, but that it was "essential that the perimeter fencing be upgraded". It also referred to "numerous complaints received from the Principal of ESHS concerning "the inadequacy of the existing fence"[427]. In response, the MEC had undertaken remedial works costing $96,7272.40 to "what is considered one of the most critical areas of the perimeter fence", a reference to Phase 1.

6.211 Paragraphs 7 and 9 of Cabinet Memorandum No 039/2015 read as follows:

> "7. One of the major responsibilities of the Ministry is to ensure the safety and security of the administration, faculty, staff and students. The upgrade of the perimeter fencing of the [ESHS] is a project that is of great urgency, if the Ministry is to provide protection for the school population. Because of the lengthiness of the tendering process and the urgency of this matter, it is hereby being requested that

[419] Appendix D to Cabinet Memorandum No 039/2015 is a site plan of the ESHS, taken from documents prepared by SA Architect for the Phase 1 planning application.
[420] The text "on the basis of the urgency of the situation taking into account the security concerns outlined by the Commissioner of Police and the Principal of the ESHS" is absent from the draft prepared by Ms Stevens.
[421] The memorandum refers to "the Project Support Unit", which was one element of the PMU (see paragraph 6.151 and footnote 285 above).
[422] The reference to funding coming from a head of the MEC's budget is absent from the draft prepared by Ms Stevens.
[423] "We", here, appears to be a reference to the MEC, as this text appears in the draft Cabinet Memorandum and the MEC drafted the memorandum.
[424] Paragraph 9.
[425] The text of this part of Cabinet Memorandum No 039/2015 was unchanged from the draft prepared by Ms Stevens.
[426] Appendix E to Cabinet Memorandum No 039/2015. The RVIPF report made a number of recommendations including repairing or replacing CCTV cameras and monitors, the installation of metal scanners and giving staff the power to search.
[427] Appendices F and G to Cabinet Memorandum No 039/2015 are letters from the Acting Principal of ESHS Mrs Underhill addressed to the Acting Chief Education Officer Mrs Douglas-Phillips dated 6 October 2014 and 6 November 2014. Mr Walwyn and Dr Potter were copied into these letters. Ms Stevens said she obtained these letters from Mrs Douglas-Phillips (T38 22 September 2021 pages 161-162).

the tendering process be waived and that the Ministry of Education be allowed to sub-divide the project and offer petty contracts to qualified contractors."

"9. History has shown where the project estimates received by the Government when sent out to tender the cost significantly increases based on bids received. We are of the view that the very same will exist in this case. The Ministry of Education and Culture contracted a full time Project Manager who manages all our projects and ensures that we get value for money. He has provided the Ministry with an estimate which is included as part of the attached appendices. We further sought an additional costing from a second source which assisted us in our decision making process by providing a cost comparable for our final decision. We are prepared to accept the lower as the actual cost of the project and it is the intention of the Ministry to use Petty Contracts for the entire project."

The two estimates referred to in paragraph 9 are those obtained by Mr Walwyn from Quantum (dated 2 October 2014)[428] and STO Enterprises[429] referred to above. Neither Cabinet Memorandum No 039/2015 nor the draft paper prepared by Ms Stevens made any reference to (i) the segmental costs estimates of 20 November 2014 or the actual Phase 1 costs broken down per segment, or (ii) the possible use of works orders.

6.212 Under the PEFM, a business case (showing a cost-benefit analysis to ensure value for money) is a key part of the procurement stage of a capital project[430]. The business case appended to Cabinet Memorandum No 039/2015, prepared by Ms Stevens[431], summarised the concerns over security and safety, and stated that the MEC considered that the construction of a block perimeter fence at an "estimated final costs of $828,004.10 will be a less costly measure in the long run"[432]. The Auditor General considered the business case, as drafted, to be insufficient to support the premise that a tender process would be lengthy and likely to result in more expensive estimates[433].

6.213 In a paper appended to Cabinet Memorandum No 039/2015, the Attorney General also expressed the opinion that the justification advanced in paragraph 9 of the memorandum was insufficient for a tender waiver – a "compelling reason" was required[434]. The MoF's comments were included in Cabinet Memorandum No 039/2015[435]. These reiterated the MoF's advice that Ministries should not "abuse the option to ask Cabinet to approve the waiving of the tender process", noting that "the tender process is in place to ensure that there is accountability and transparency. Proper and timely planning and prioritization of all projects is necessary to achieve this objective". However, the MoF considered that, notwithstanding the view expressed by the Attorney General, the "urgency of the situation demanded quick action" and warranted a waiver being approved. It advised that the MEC would have to consider its capital spending plan, if Cabinet approved the decision sought.

[428] Appendix B to Cabinet Memorandum No 039/2015.
[429] Appendix C to Cabinet Memorandum No 039/2015.
[430] See paragraph 1.171 above.
[431] T38 22 September 2021 page 163.
[432] Appendix A to Cabinet Memorandum No 039/2015.
[433] T19 29 June 2021 pages 72-73.
[434] Appendix H to Cabinet Memorandum No 039/2015.
[435] They are not found in the draft memorandum.

6.214 Along with the Attorney General and the Auditor General, I have grave reservations as to whether the reasons given for tender waiver were legally sufficient. The need for clear justification is well recognised[436]. The risk that using split contracts will result in higher costs is also well recognised[437]. The fact is that it was always the intention to use petty contracts and works orders to execute this (major) project, and so a waiver of the tender process was always going to be required.

6.215 Mr Walwyn emphasised that his motivation had been the safety and security of students and staff at the ESHS which meant there was a need to act with urgency[438,439]. Asked how the use of 11 works orders in Phase 1 and 64 in Phase 2 enabled him better to achieve his goal of constructing the wall quickly, Mr Walwyn, whilst acknowledging the point was difficult to answer, suggested that a project might proceed more quickly if more people were working on it – that smaller contractors would tend to work longer hours – although good oversight would be important. He conceded, however, that there had been no assessment of his contention in relation to this project; and that he was not a "technical person"[440].

6.216 The reason given by Cabinet for the waiver was also "the urgency of the situation". However, the particularly urgent element of the project (Phase 1) had already been commissioned and completed. The cost estimate upon which the Cabinet paper relied had been obtained in October 2014: the project was not brought to Cabinet until February 2015. That does not suggest such urgency that would have precluded an open tender procurement process. When it was brought to Cabinet, there was no analysis of how long a tender process might take. No analysis was done on the potential savings that an open tender might provide. There was no cost-benefit analysis of proceeding by way of split contracts compared with a single contract subject to the tender process (or, indeed, any cost-benefit analysis) and/or analysis of the

[436] The current Acting Financial Secretary Jeremiah Frett said that, when a decision is made to split a project into different segments, it should be done with a clear analysis to see if it really brings value for money (T25 13 July 2021 pages 84-85). His predecessor Glenroy Forbes agreed: any project over $100,000 is a major project and, if Cabinet is going to derogate from the required tender process, then it has to put forward evidence as to why it wishes to do so, e.g. it would be more efficient or expedient, or sharing the work would make sure more people had a job (T25 13 July 2021 pages 132-133). He said that, in his time as Financial Secretary, he issued a number of circulars offering guidance (which were sent to every Accounting Officer, copied to Ministers, the Auditor General and the Governor) as to how petty contracts should be dealt with including saying that, if the project was above $100,000, then sufficient evidence had to be available as to why there should be contract splitting (T25 13 July 2021 pages 133-134). This need for proper justification for contract splitting is in line with the need for such justification for a waiver of tender (see paragraph 6.6 above). Indeed, as the School Wall Project illustrates, tender waiver and contract splitting often go hand-in-hand.

[437] Such a risk is acknowledged in, e.g., the Emergency Procurement Policy (see paragraph 6.19 above). In fact, the relevant witnesses in respect of the School Wall Project (with the exception of Mr Walwyn) generally accepted that petty contracts/works orders as result of contract splitting are inevitably more expensive than a single contract, because of factors such as the loss of the savings as a result of bulk goods/services. For example, on the School Wall Project, there were as many as 405 trucking excursions – as opposed to 100, at most, if there had been a single contract – because the contract was split into 70 petty contracts/works orders (T19 29 June 2021 pages 81-82). Ms Stevens said that the MEC were well aware that, by splitting up a project, the costs would increase (see paragraphs 6.219-6.220 below).

[438] Although Mr Walwyn did not refer to it, the recent Emergency Procurement Policy suggests that "expediency in the completion of the works" may justify contract splitting in some circumstances (although not the circumstances here, which did not involve that sort of emergency): see paragraph 6.19 above.

[439] As I understood his evidence, Mr Walwyn relied upon urgency as the justification for waiver and the use of contract splitting. He faintly referred to exercising his discretion in using works orders and petty contracts for a major project by reference to an unpublished (and, so far as the School Wall Project was concerned, unreferenced) policy to share the benefits of BVI development with those who live and work in the BVI. That is another possible reason that might, in some circumstances justify contract splitting that is referred to in the Emergency Procurement Policy (see, again, paragraph 6.19 above). However, it would not be lawful to rely upon such a policy without taking into account the disbenefits, e.g. the additional cost. No one suggests that that was taken into account. In any event, the Cabinet firmly pinned their colours to the urgency mast.

[440] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 15; and T36 20 September 2021 pages 243 and 256-259. Mr Walwyn provided no evidence for his assertion, and accepted that no assessment had been made in respect of the School Wall Project. Mr Augustine's evidence suggested that the use of multiple contractors on this project led to inefficiency on site (see paragraph 6.237 below).

need for urgency set against the disbenefits of using spilt contracts and/or wider comparative analysis performed. The reference to the need for expedition in the Cabinet minutes consequently rings hollow.

6.217 The evidence does not support the proposition that urgency justified tender waiver and the use of contract splitting. On all of the evidence, it seems to me that a pre-emptive decision was taken from the outset (by Mr Walwyn and so his Ministry, but approved by the MoF and ultimately the Cabinet) that the tender process should not be used and the project implemented by the use of petty contracts and/or works orders without consideration of the pros and cons[441].

6.218 As to funding, Cabinet Memorandum No 039/2015 explained that the cost of $828,004.10 would come from local funding[442] noting, by reference to the STO Enterprises estimate, that a "competitive cost estimate was sought to achieve value for money"[443]. Ms Stevens accepted that there were differences between the estimates provided by Quantum and STO Enterprises, but could not speak to what instructions had been given to each of them[444]. As to the former, Ms Stevens described it as a preliminary estimate based on one contractor undertaking the works. Her verifying of the estimate was limited to checking its maths, but it was appreciated that it referred to the entire perimeter of the school[445].

6.219 Ms Stevens also said that, at the time the draft paper was being prepared, it was appreciated within the MEC that the use of petty contracts would lead to an increase in costs over the estimate given by Quantum. She discussed this with Ms Scatliffe, Dr Potter and Mr Walwyn. As Ms Stevens put it, the MEC "would have been aware that it would have increased based on the individual Bill of Quantities for walls and rails and painting. Those were not submitted at that time, although they bear the date of November 2014"[446]. At the same time, there was discussion between the same individuals about the possible use not only of petty contracts but also of works orders[447]. Her understanding, at the time the draft paper left the MEC, was that Phase 2 would be progressed through the use of petty contracts[448].

6.220 When Ms Stevens gave further evidence to the COI, she confirmed her earlier evidence that it was recognised within the MEC that the costs of Phase 2 would exceed $828,000 and that this has been discussed with the Minister, Hon Myron Walwyn. She continued that, while the number of contracts into which the work might be divided was not then known, there was an awareness that the more contracts used, the higher the likely increase in cost. As far as

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[441] Mr Walwyn suggested that the tendering process in the BVI needs to be reviewed as, in his experience, when the Government puts something out to tender, it produces inflated bids (T21 1 July 2021 pages 191-192, and T36 20 September 2021 pages 158-159). That opinion does not explain the absence of analysis in the Cabinet Memorandum. Nor does it square with other evidence that the use of petty contracts would inevitably be more costly than a single contractor: see paragraphs 6.219-6.220 below. Mr Augustine, who had been involved in projects for the MEC before, said that if a major contract had been used to build the wall to his design, then the total cost would have been less than the eventual costs (T38 22 September 2021 page 272).

[442] This term refers to funding allocated to a MEC for a specific purpose (T28 19 July 2021 pages 91-94 (Carleen Scatliffe); and T36 20 September 2021 pages 139 and 145 (Myron Walwyn)).

[443] The reference to a "competitive cost estimate" does not appear in the draft paper prepared by Ms Stevens. It does not seem particularly appropriate terminology: these were not two competitive quotes from contractors, but provisional costs projections from two construction cost estimators.

[444] T28 19 July 2021 pages 51-54. An example of the differences in the criteria upon which the estimates were made, Quantum estimated for 3,148 sq yds of "paintworks" and 1,574 sq yds of "Blockwork between columns"; STO estimated for 3,593 sq yds of "painting" and 1,796 sq yds of "Construction of columns".

[445] T28 19 July 2021 page 49.

[446] T28 19 July 2021 page 49 58-61. Ms Stevens was less certain as to whether Mr Augustine was present at these meetings.

[447] T28 19 July 2021 pages 63-64. Ms Stevens initially said that at this time there had been a decision in the MEC to use both petty contracts and works orders although she accepted this was not reflected in the draft paper.

[448] T38 22 September 2021 page 173.

Ms Stevens could recall, no one queried the use of an estimate based on work being done by a single contractor to support a Cabinet paper which made specific reference to the use of multiple petty contracts[449].

6.221 Mr Walwyn rejected the proposition that he knew, or alternatively closed his eyes to the fact, that increased costs and the undermining of the quality of work had resulted from contract splitting in both phases of the School Wall Project[450]. His position was that the PFMR permitted the indiscriminate use of works orders and petty contracts for a contract valued at under $100,000[451]. He was robust in his assertion that the prospect that costs might increase if the work was divided among contractors was not discussed with him: he said it did not happen. Had there been such discussion, then neither he nor (he believed) Dr Potter would have allowed a paper using a figure of $828,004.10 to be submitted to Cabinet (presumably because he and she would have appreciated that the paper would then be misleading). Mr Walwyn was aware "at all times" that the estimate provided by Mr Augustine was based on the use of one contractor. However, he did not appreciate the implications of that until he read the Auditor General's Report. He had proceeded on the basis that, even if the work was done in "segments" by different contractors, it would not affect the overall cost of the project[452]. In answer to the proposition that, just on the sums, splitting up a contract meant costs would increase, Mr Walwyn said these were "technical areas"[453]. He acknowledged that the proposal put forward by the MEC had been to use petty contracts. He could not however assist as to whether consideration had been given to the use of a major contract or who had made the proposal to use petty contracts[454].

6.222 In any event, as to Phase 2, Mr Walwyn said that Cabinet, not he, had made the policy decision to use petty contracts, works orders and purchase orders. The responsibility of the MEC was to carry out that "policy"[455]. It was therefore inaccurate to suggest that he, as Minister, had engaged in contract splitting in Phase 2. As noted above, Mr Walwyn accepted that the decision as to how many petty contracts and works orders to use was for him. While he said he was exercising a discretion given to him by Cabinet, when asked why 15 petty contracts and 64 works orders were used in Phase 2, Mr Walwyn's answer was: "I don't have a reason for that". He reiterated that his thinking was that dividing up the contract would not impact the total budget and suggested that there may be a systemic issue because (he believed) Cabinet would not have taken a step that it was told might be wrong[456].

6.223 There is no evidence that a major contract was considered at all as an alternative to implementing this large project by way of petty contracts and/or works orders. There is no evidence that any cost analysis was performed to show the differential cost of implementing the project by way of a single major contract or fewer contracts. Although Mr Walwyn's evidence was that he never took part in discussions in which the (inevitable) additional costs of implementing the project through multiple contracts were raised – and he did not understand that additional management challenges and costs would be involved – even if it were not self-evident that further costs would be incurred, on this issue Ms Stevens was a compelling witness and I firmly prefer her evidence that these matters were discussed, with Mr Walwyn, prior to the project proceeding by way of petty contracts/works orders.

[449] T28 19 July 2021 pages 165-170.
[450] T36 20 September 2021 page 166.
[451] T36 20 September 2021 pages 167-170.
[452] T36 20 September 2021 pages 98-100 and 103-107.
[453] T36 20 September 2021 pages 100-101.
[454] T36 20 September 2021 pages 173-177.
[455] T36 20 September 2021 page 171-172.
[456] T36 20 September 2021 pages 172-173, 176, 180-183 and 218-219.

6.224 Furthermore, although tender waiver and associated contract splitting were decisions which were reserved to Cabinet, the decision to waive the procurement requirements and spilt the project into petty contracts and works orders as was done was clearly driven by Mr Walwyn as Minister albeit approved by Cabinet. He cannot avoid responsibility for the direction in which he, as Minister, took this project.

6.225 On 4 February 2015, having considered Cabinet Memorandum No 039/2015, Cabinet made the decisions sought in that paper (set out above)[457]. In summary, Cabinet approved the construction of a perimeter fence at the ESHS at a cost of $828,004.10 and the waiver of the tender process[458].

6.226 Cabinet made one change to the wording of the approvals sought, namely that it gave approval:

> "… to execute the project utilizing petty contracts and different suppliers and contractors that the Ministry of Finance's Project Support Unit assists the Ministry of Education and Culture with the management of this project".

6.227 The Auditor General did not consider that this decision of Cabinet in these terms sanctioned the use of works orders. In her view, the prohibition in regulation 189 of the PFMR against the use of multiple works orders[459] meant they should not be used to avoid the use of a petty contract or a major contract, as the case may be[460]. To the contrary, Mr Walwyn's view is that Cabinet had the power to direct that the entirety of Phase 2 be completed by way of works orders. He insisted that the words "different suppliers and contractors" gave him authority as Minister to use not only petty contracts but also works orders and purchase orders in Phase 2[461]: here, he said, "different suppliers" referred to purchase orders while "different contractors" referred to works orders. Mr Walwyn accepted that Cabinet had not told him how many works orders or petty contracts to use, and that its decision gave him the ability to use petty contracts[462]. Ms Stevens accepted that Cabinet's decision made no reference to works orders; but said that "it would be inferred that different suppliers and contractors is what we would have called 'Works Orders', which would have included invoices"[463]. Ms Scatliffe said that her thinking was that, once Cabinet had waived the tender process, then the Minister could divide the project in any way he wanted[464].

6.228 Mr Walwyn acknowledged that works orders were designed to be used for "small works"[465]. As to the use of works orders for the School Wall Project, he emphasised two points. First, in his view, the work that would be undertaken was not "sophisticated" or requiring "major

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[457] The voting members of Cabinet present were Hon Ronnie Skelton, Hon Mark Vanterpool and Mr Walwyn. The Premier and Minister of Finance Dr the Hon Orlando Smith and Dr the Hon Kedrick Pickering were absent (T24 8 July 2021 pages 35-36).

[458] Cabinet Paper Record and Extract of the Minutes of the Virgin Islands Cabinet held on 4 February 2015.

[459] Regulation 189(2) provides: "Two or more works orders shall not be issued for the same works or services". See paragraph 6.13 above.

[460] Auditor General's Report paragraph 75; and T19 29 June 2021 pages 87-88.

[461] T21 1 July 2021 pages 119-123, 125 and 127-129. Mr Walwyn said that he remembered "the conversation vividly in Cabinet", which (he said) included a discussion of works orders and purchase orders.

[462] T36 20 September 2021 pages 172-173 and 180-183. Mr Walwyn was unclear in his evidence whether he considered that the Cabinet decision required him to use works orders as well as petty contracts, or whether the Cabinet simply gave him the power to do so (page 180). It seems clear on the face of the Cabinet decision that it did not require him to use works orders; and, certainly, it did not require him to use any particular number of works orders. The absence of any particular number of works orders and purchase orders in the Cabinet decision is a clear indication that Cabinet did not require, but at most merely enabled, works orders to be used. On all the evidence, I am quite satisfied that Mr Walwyn did not consider that he was bound by the Cabinet decision to use works orders.

[463] T28 19 July 2021 pages 61-62. Ms Stevens would not have seen the Expedited Extract of Cabinet's decision: that would have been communicated to the MEC through a memorandum from the MoF.

[464] T38 22 September 2021 page 215.

[465] T36 20 September 2021 page 68.

skills"[466]. Second, he referred to an unwritten policy of successive governments to use works orders as a means of offering small contractors a chance to become involved in developing the BVI, i.e. although it would cost more money, it would benefit "in terms of distribution and assistance throughout the community"[467].

6.229 With regard to how the contractors were selected, the evidence was clear: they were selected by Mr Walwyn. According to Ms Scatliffe, the practice that the Minister would select which contractor would get work was common to every Ministry[468]. Both Ms Stevens and Mr Walwyn agreed this was a matter for him alone[469].

6.230 Mr Walwyn made no reference to any list of pre-qualified contractors. Neither the PWD, the MoF, the PMU nor any other agency was asked if they maintained a list of contractors. Ms Stevens said she had never heard of any department keeping a list of contractors[470]. Mr Walwyn said that he had never heard of the MEC asking the MoF for a list of pre-qualified contractors: he doubted whether in practice such a list existed[471].

6.231 Mr Walwyn said that a practice which had existed before he became a Minister (and continues still) was for persons interested in obtaining a government contract to make contact "with the Minister that they feel comfortable with". When approached in this manner, Mr Walwyn would write the person's name in a book and then allocate work to them in an "orderly fashion". Whether someone got work would, however, be dependent on public officers confirming that they had the requisite documents (e.g. if a contract required the contractor to have a constructor's licence)[472]. He added that the technical team would sometimes vet applicants as well as consider their history of working in the MEC. In Mr Walwyn's experience, public officers would sometimes raise a concern over a contractor he had selected[473]. Otherwise, as mentioned already, Mr Walwyn's evidence was that he would enter the names of selected contractors onto a document prepared by MEC staff and already divided into sections of work. As to how, as a Minister, he would allocate the contracts, he said that a person's experience (if and insofar as he was aware of it) would be relevant as to how many sections were allocated. Someone with limited experience might be allocated one section and contracted under a works order, while someone with more experience might be allocated sufficient sections to make up a petty contract[474].

6.232 In respect of the School Wall Project, Ms Stevens recalled creating a spreadsheet showing the sections into which each of the three sides of the Phase 2 wall had been divided; but she was unsure if that had been passed to Mr Walwyn, or whether he was given the information verbally[475]. While she could recommend contractors to the Minister, she said she had not done so for the School Wall Project. Her evidence was that the Minister "wrote the contractor down in terms of who would do walls, who would do rails". She did not know where the Minister

[466] T38 22 September 2021 pages 66, 82 and 150; and Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 paragraph 3.3. This does not sit well with Mr Augustine's evidence as to the efforts he had to make with contractors to ensure that they could execute the works and execute them properly (see paragraphs 6.236-6.237 below).
[467] T21 1 July 2021 pages 181-183 (the quote coming from page 183); and T36 20 September 2021 pages 66-67 and 79-80.
[468] T28 19 July 2021 pages 97-98.
[469] T28 19 July 2021 pages 71-72 (Lorna Stevens), T36 20 September 2021 page 216 (Myron Walwyn). Mr Augustine said that he was not involved in selecting contractors for either phase. He was just provided with a list of contact numbers (T38 22 September 2021 pages 255-256).
[470] T28 19 July 2021 pages 67-69.
[471] T21 1 July 2021 pages 159-161. There was some evidence that a list had existed at some time. Dr Drexel Glasgow said that as of April 2012, the PWD, of which he was then Director, maintained a list of contractors which it would regularly provide to the MoF (T24 8 July 2021 pages 133-138, and paragraph 6.16 and footnote 19 above).
[472] T36 20 September 2021 pages 220-221 and 227-228.
[473] T21 1 July 2021 pages 165-167.
[474] T38 22 September 2021 pages 78-79.
[475] T38 22 September 2021 pages 183-184.

had obtained these names from[476]. Ms Stevens thought she may have raised a concern about "maybe one or two--not many, not many of the contractors". That would have been based on her prior experience rather than records held by the MEC[477]. Ms Scatliffe's evidence was that she was not consulted as to who should be awarded a petty contract or a works order; nor was she asked as to the best way to progress the project in terms of contracts[478].

6.233 Ms Scatliffe explained that a member of her team drew up the petty contracts and works orders, inserting the names selected by Mr Walwyn. The contracts were then signed by the contractor, Ms Stevens and finally Mr Walwyn himself[479]. Mr Walwyn confirmed that he would be the last to sign and said that, during his time as Minister he had proceeded on the assumption that when a contract was brought to him to sign, the contractor had been "vetted"[480].

6.234 The construction of Phase 2 began on 1 March 2015[481]. Plans were not submitted to the TCPD until 23 March 2015. Approval was given on 2 April 2015[482].

6.235 In the event, Phase 2 was spilt into 79 contracts (15 petty contracts and 64 works orders)[483] covering construction, installation of railings and painting, involving 70 contractors[484] to complete a wall 1,562ft long along three sides of the ESHS[485]. Of the 70 contractors, 40 did not have a construction (i.e. an appropriate trade) licence[486]. Ms Scatliffe described the project as "special" because it was "a first for us doing a project with so many contractors"[487]. A small number of contractors were issued more than one works order[488]. Ms Stevens said that, in her experience, Phase 2 was not the type of project which would utilise works orders. This was the first project in which she had been involved with so many works orders. Asked about the difficulties having so many contractors caused, Ms Stevens said:

> "You would have had 64 different contractors. All had not been on the Project at the same time, but you would have had a number of contractors plus their workmen on the Project at the same time, so you were pretty much going from one site to the next, working out issues with different contractors, keeping track of all the different sections, so it was difficult."[489]

6.236 Asked if he had ever had to deal with a project with 70 contractors, Mr Augustine said:

> "I don't think there's a handful of people in the world that could say 'yes'. I can.

[476] T28 19 July 2021 pages 71-72, and T38 22 September 2021 pages 184-185.
[477] T38 22 September 2021 pages 186-187.
[478] T28 19 July 2021 page 102, and T38 22 September 2021 page 209.
[479] T28 19 July 2021 pages 96-97. Ms Stevens' evidence was that the Permanent Secretary (rather than her) would sign the contracts (T38 22 September 2021 page 186).
[480] T36 20 September 2021 pages 211-213.
[481] The only change to the design of the wall sections was that the directions of bars set into the wall was changed from horizontal to vertical following concerns raised by the community (T38 22 September 2021 page 158).
[482] Auditor General's Report paragraph 87; and Phase 2 planning application dated 23 March 2015.
[483] Auditor General's Report paragraph 31 and Table 1.
[484] T38 22 September 2021 page 255 (Steve Augustine). The total number of men involved for the contractors is not known; but Mr Augustine said that each contractor might have half a dozen men working with him or her. On any view, there were several hundred men working on Phase 2.
[485] Auditor General's Report paragraphs 24-36; and T19 29 June 2021 pages 76-77 (Auditor General), and T38 22 September 2021 pages 183-184 (Lorna Stevens). Documents originating from the MEC confirmed that this occurred in respect of few contractors.
[486] Auditor General's Report paragraphs 31 and 72.
[487] T38 22 September 2021 page 211. As to this requirement, see section 3(1) of the Business, Professions and Trade Licences Act 1990 quoted and discussed at paragraph 6.25 above.
[488] Auditor General's Report paragraph 76.
[489] T38 22 September 2021 pages 188-189.

> It was not an easy task, I'll tell you that. 70 contractors is what you say because that's information you were provided with, but you must realize that these 70 contractors perhaps had seven, eight, nine workmen per day working with them. … [G]ranted, I'm not saying that they were all on the site at the same time…. But the numbers were large."[490]

6.237 He explained that he had meetings each day with the contractors on site to explain to them what was required (made more difficult by the fact that the workforce did not all turn up at the same time), but was still left with multiple explanations and firefighting:

> "[S]ometimes you would answer a question at point A, and then the same question would arise at point Z… [w]ith a different contractor, and I would make my way over to point Z, and, lo and behold, contractor B is concerned about the very same thing."

The project was, he said, a "professional challenge"[491]. On his evidence taken as a whole, that sounds like a considerable understatement.

6.238 The draft memorandum prepared by Ms Stevens referred to the MEC offering "petty contracts to qualified contractors", an intention maintained in Cabinet Memorandum No 39/2015. Ms Stevens explained that contractors awarded a petty contract were required to produce a trade licence and certificates of good standing. While she said that any business operating in the BVI requires a trade licence[492], it was common knowledge within the MEC that a contractor awarded a works order would not be required to satisfy the MEC that they did in fact have a trade licence or certificates of good standing. Assessment of the ability of a successful contractor to carry out work to an appropriate standard pursuant to a works order was therefore dependent on the MEC having previous experience of that contractor[493].

6.239 Mr Walwyn said that it was only through the COI that he had become aware that a contractor on a works order had to have (but did not have to produce) the required documents. His personal understanding throughout his eight-year tenure as a Minister was that a trade licence was not even required in those circumstances[494]. While making the point that it was not for a Minister to check whether contractors were licensed, Mr Walwyn described a practice where contractors were required to have but not produce documents "as totally senseless" and "the most ridiculous thing I ever heard". Had he been aware of it, then he said he would have raised it (including at Cabinet) given the risk that a prospective contractor might not disclose that they lacked a trade licence. Mr Walwyn saw the issue as systemic rather than as the fault of an individual public officer. Indeed, he believed that the public officers he worked with would not have allowed contractors who did not have the correct documents to undertake work[495].

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[490] T38 22 September 2021 page 258.
[491] T38 22 September 2021 page 259. Mr Augustine gave further general description of the challenge at T38 22 September pages 258-261.
[492] The Auditor General also said that any contractor doing work in the BVI is required to have a trade licence (T19 29 June 2021 pages 85 and 88).
[493] T28 19 July 2021 pages 72-74, T38 22 September 2021 pages 185-186 and 190-191. Ms Scatliffe's evidence was to similar effect (T28 19 July 2021 page 98). Mr Augustine said that his role did not involve checking the credentials of contractors (T38 22 September 2021 page 256).
[494] T36 20 September 2021 pages 83-84, 185 and 192-193. For the relevant law, and the evidence of other witnesses as to their understanding of this statutory requirement, see paragraph 6.25 and footnote 35 above.
[495] T36 20 September 2021 pages 185-197.

6.240 That 40 contractors lacked trade licences did not, in Mr Walwyn's view, mean that "skills" was an issue in the School Wall Project given that the work was scrutinised by Mr Augustine and the PWD[496]. Mr Augustine said that the PWD had carried out periodic inspections during the construction[497]. The Auditor General raised a different concern over the PWD however – specifically the failure of the MEC to involve the PWD and the PMU[498] in the management of the School Wall Project.

6.241 The Auditor General observed that Ministries justified undertaking their own project management on the basis that the PWD was inadequately resourced[499]. Ms Stevens said that from the time she took on the role of internal projects manager, the PWD had not "been engaging in projects". She saw their only role as certifying plans[500]. Mr Walwyn said that the PWD did not then, and does not now, provide the level of support to Ministries envisaged by the Auditor General; it would not be possible to have the PWD on a project for a year[501].

6.242 As to the PMU, Mr Walwyn described it as being in an embryonic stage in 2014-15 but could not assist as to the extent to which it had in fact been involved in the School Wall Project[502]. Ms Stevens said that the PMU had carried out several site visits, but she had not approached them for assistance (nor had they been involved) in the management of the project as they were not "functioning as they are now"[503]. The PMU provided "support in a limited sense … throughout Government" but were not certifying works. That was a reason for the MEC using an external project manager (Mr Augustine)[504].

6.243 The lack of engagement with the PMU is somewhat surprising given that (i) it was the MEC that first proposed that the unit assist it with the management of this project[505], (ii) Cabinet approved the PMU's involvement and (iii) according to Dr Orlando Smith, the PMU had a remit which included ensuring that major projects, which fell within the scope of the MoF, were proceeding as expected, and the work was done expeditiously and properly[506].

6.244 Phase 2 had not been completed by the time the project was bought to a halt in August-September 2015 following a memorandum from the MoF putting a stop on all projects. By that point, the cost of Phase 2 had already exceeded $828,000 with $985,690.86 being the global figure of actual payments[507]. On that basis, and taking account of the cost of Phase 1 ($96,727.40), the total cost of the School Wall Project had reached $1,082,418.26 by that stage. This figure does not include the sum of $43,292.18 paid to Mr Augustine in September 2016 for work done on the project[508]. The total actual spend to date on the incomplete project

[496] T36 20 September 2021 page 191. Mr Walwyn explained that he had only recently become aware that the PWD had visited the site when concrete was being poured (T36 20 September 2021 pages 82-83).
[497] T38 22 September 2021 pages 275-276.
[498] See paragraph 6.151 and footnote 285 above. The PMU has two components: the Procurement Unit which assists the Central Tenders Board with procurement of projects valued at over $100,000 (i.e. major projects) and the Project Support Unit which deals with the management of projects after they have been procured (T24 8 July 2021 page 101).
[499] T19 29 June 2021 pages 90-91.
[500] T28 19 July 2021 page 68.
[501] T21 1 July 2021 page 131.
[502] T21 1 July 2021 pages 131, 139-140 and 142-143, and T38 20 September 2021 pages 250-251.
[503] T28 19 July 2021 pages 65-66. Mr Augustine gave evidence to similar effect (T38 22 September 2021 pages 276-277).
[504] T38 22 September 2021 pages 164-165. Ms Stevens was not able to assist with who in the MEC had decided that the PMU should be involved in the School Wall Project.
[505] The proposal is found in the draft Cabinet Memorandum prepared by Ms Stevens and reproduced without change in Cabinet Memorandum No 039/2015. It was put forward notwithstanding that these papers refer to the MEC contracting a project manager to manage their projects and ensure value for money.
[506] T24 8 July 2021 page 35.
[507] Auditor General's Report paragraph 37 and Table 2; T38 22 September 2021 pages 179-182 (Lorna Stevens); and T38 22 September 2021 pages 205-205 (Carleen Scatliffe).
[508] Auditor General's Report paragraph 80; and T28 19 July 2021 page 60 (Lorna Stevens).

was therefore $1,125,710.44. That figure indicates the overspend that arose on the School Wall Project. The Auditor General considered that the decision to split the contract was the main reason for the increase in costs[509].

6.245 There were wider plans for the development of the ESHS campus. Mr Augustine described a "master plan", encompassing the separation of the junior and senior elements of the school, the building of an auditorium and the revamping of entrances to the school. He had met with the PWD to compare drawings[510]. Mr Walwyn was inconsistent in his evidence as to how the perimeter wall related to this wider development. At one point he said that there was no intention to complete the wall in one financial year[511]; later he said that he had expected a block perimeter wall to have been built by the end of 2015[512].

6.246 The MEC estimated that an additional sum of $251,411.05 was needed to complete Phase 2[513]. Mr Walwyn said that this sum may have included the cost of about $53,000 for constructing a lay-by to provide a safer pickup and drop-off point for school buses and additional work contemplated as part of a wider development of the ESHS campus[514]. Mr Augustine and Ms Stevens confirmed that the lay-by was the one variation to the project[515]. However:

(i) The cost of the lay-by was a small proportion of the overspend.

(ii) The approved estimate of $828,004.10 included a contingency element of about $73,000. The MEC did not take issue with the Auditor General's finding that the cost of the lay-by was accommodated within that contingency element[516]. Mr Walwyn accepted that the contingency was enough to accommodate this expenditure[517].

(iii) The detail in the Auditor General's Report as to how the figure of $251,411.05 was calculated came from the MEC[518].

(iv) Ms Scatliffe explained that, when Phase 2 started, she expected it would cost and she would have to find $828,000. When the approved estimate was exceeded, she was able to find sufficient funds to meet the further costs which were expended. At the time the project was halted, however, Ms Scatliffe had had to approach the MoF for $250,000 in additional funding to "complete the balance of the wall"[519].

6.247 The Auditor General provided the MEC with an opportunity to comment on her draft report, which they did[520]. Mr Walwyn took the novel step of recording a press interview before the report was laid before the House of Assembly, a step that, he said, was in the public interest in order to protect those he had worked with[521]. The Auditor General released a press statement in response to Mr Walwyn's interview[522]. It is not necessary for me to consider these

[509] T19 29 June 2021 page 83.
[510] T38 22 September 2021 pages 252-255.
[511] T21 1 July 2021 pages 180-181.
[512] T36 20 September 2021 pages 235-236.
[513] Auditor General's Report paragraph 64.
[514] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 5; and T36 20 September 2021 pages 27-29, 137, 139-141 and 255.
[515] T38 22 September 2021 pages 175-178 (Lorna Stevens); and T38 22 September 2021 pages 260-266 (Steve Augustine).
[516] Auditor General's Report paragraph 51. The 2 October 2014 estimate allowed for a 10% contingency.
[517] T36 20 September 2021 page 140.
[518] Auditor General's Report paragraphs 53-64.
[519] T38 22 September 2021 pages 198-204. The MEC saw and responded to a draft of the Auditor General's report. Its response did not take issue either with the finding as to how the lay-by was constructed nor with the observation that $251,411.05 was required to complete Phase 2.
[520] The undated document is headed "Comments from Senior Officers with Oversight of Project - MEC". I do not need specifically to consider the detail of this document because most of the points it makes were covered in evidence by witnesses or did not bear on my Terms of Reference.
[521] T21 1 July 2021 pages 192, 198-201, 204-205 and 209-224.
[522] T19 29 June 2021 pages 100-110.

statements, or the circumstances in which they were given, save in one regard. In response to the Auditor General's Report, Mr Walwyn obtained three estimates intended to cost the wall as it was "on the ground"[523].

(i) The PWD[524], based on the use of 75 petty contracts, estimated:

(a) The cost of the proposed 1650ft of perimeter wall at $1,045,374.28.

(b) The cost of the 1572ft of uncompleted wall at $871,942.34.

(ii) James Todman Construction Ltd[525], based on the use of one contractor, estimated the cost of building a perimeter wall of 1650ft at $861,442.30.

(iii) BCQS[526], based on the use of one contractor, estimated the cost of building a perimeter wall of 1650ft at $899,892.08.

6.248 However, there are in my view serious limitations in relying on these estimates in support of an argument that there was not a significant overspend. Two estimates are based on the use of a sole contractor, and so do nothing to undermine the point that contract splitting increased costs. The estimate from the PWD, while based on the use of multiple contractors, is still below the actual costs incurred on the School Wall Project.

Concerns[527]

6.249 The way in which the School Wall Project was contracted and implemented was, on any view, extraordinary. The construction of a single wall involved 70 different contractors, the majority of whom had no constructor's trade licence, in circumstances which disregarded the increased costs and complexity that the use of multiple contractors would inevitably entail, which would inevitably put at risk any desire to get the works completed at speed, as those involved including the Minister Hon Myron Walwyn well knew. It gives rise to a number of serious concerns[528].

6.250 First, the relevant procurement provisions were avoided.

6.251 In respect of Phase 1, as I have found, matters were artificially manipulated (e.g. by omitting the painting etc. of one section of wall, which was clearly an integral part of the Phase 1 project works) so that Cabinet involvement was not required and the major contract

[523] T21 1 July 2021 pages 177-181.
[524] PWD Cost Opinion dated 20 November 2018.
[525] James Todman Construction Ltd Estimate dated 26 October 2017 [sic].
[526] BCQC International Bill of Quantities dated 8 October 2018
[527] The concerns and potential criticisms in respect of the School Wall Project arising out of the evidence before the COI were put to Mr Walwyn in a COI Warning Letter No 1 dated 6 September 2021 (which identified the evidence giving rise to the concerns and potential criticisms), to which Mr Walwyn responded fully in writing on 14 September 2021 and at an oral hearing (T36 20 September 2021 pages 3-262). Some of the concerns raised here are properly described as systemic. The criticisms of Mr Walwyn are restricted to those in respect of which he has had a full opportunity to respond, as described.
[528] The Auditor General's Report set out the concerns she had at paragraphs 69-98. She identified a number of concerns essentially in relation to the implementation of the works, e.g. (i) in respect of both phases, contracts and works commenced before planning approval had been obtained and even before the relevant plans were submitted to the TCPD; (ii) if a person is engaged on a works order and it is being said that they are not a contractor and do not need a trade licence, then that person is being employed as a labourer which prompts the social security and payroll obligations; and the regulations require a process to ensure that social security and payroll obligations are met from works order contracts resulting on payments – there was no such process here (see also T19 29 June 2021 pages 88-89); (iii) no request was made to the MoF for an independent subhead/subledger to facilitate prudent management of funds which were simply added to the school rehabilitation subhead – there were thus no controls to limit the total spend or alert the Minister when spending limits were reached; and (iv) payments were made in full for incomplete work. Whilst some of these may well have some substance, for the purpose of this Report it is not necessary for me to deal with each of them. I have focused on the concerns, as I see them, that particularly bear upon my Terms of Reference (although many of these were also identified in the Auditor General's Report).

procurement provisions did not apply to a project which was, on any view, valued at over $100,000. As I have described, Mr Walwyn suggested that urgency might have been a good reason for overriding the statutory controls on procurement: but I reject that. I have already set out my reasons for rejecting urgency as a good reason for bypassing the procurement provisions requiring a tender[529]; but, in any event, such manipulation cannot be a proper way of dealing with an urgent situation where the value of a project is over $100,000. There is no compelling evidence that urgency required such a course in relation to Phase 1 or Phase 2. As I have found, an early view was taken by Mr Walwyn that this substantial project would be implemented by petty contracts and/or works orders. That required (but, of course, did not justify) a waiver.

6.252 Second, Cabinet Memorandum No 039/2015 was based upon a false premise as to cost. It gave an "estimated final cost" of Phase 2 as $828,004.01, a figure derived from the Quantum document of 2 October 2014. However:

(i) The figure of $828.004.01 was put forward as the estimated costs of Phase 2, but it was calculated on the basis of all five sides of the perimeter fence, whereas (a) the front was not to have a wall and (b) most, if not all, of a second side fell within Phase 1 (the costs of which, as described above, had been dealt with already).

(ii) The figure was described by Mr Augustine (from whom it derived) as a "preliminary projection" which had been made before the construction drawings had been produced and before the length of the wall had been estimated on site.

(iii) The figure did not take into account either (a) the November 2014 cost estimates prepared by Mr Augustine, or (b) the actual costs in respect of Phase 1. I have found that the November 2014 estimates were probably sent to the MEC that month; but, even if they were not (or if they were and no heed was taken of them), by the time Cabinet Memorandum No 039/2015 was prepared, the actual costs of Phase 1 were known. These showed unit costs similar to the November 2014 estimates; and clearly indicated that the October 2014 costs projection used in the Cabinet paper was much too low.

(iv) The figure was known to be on the basis of a single contract and a single contractor. However, it was inevitable and appreciated that the costs (direct and indirect) of using multiple contracts and contractors would be higher. That is self-evident because (as the Auditor General put it) the "division of the project into multiple parts eliminated possible economies of scale and further escalated the cost to government"[530]. But in any event, here, as I have found, there were prior discussions with regard to the increased costs in these circumstances within the MEC including with Mr Walwyn. In response, Mr Walwyn said:

529 Paragraphs 6.215-6.217 above.

530 Auditor General's Report paragraph 103.

(a) The fact that the costs would be higher if more than one contractor was used was irrelevant because the MEC in any event had sufficient funds to pay them. The MEC had an estimated capital budget of $1.6 million in 2015, which included $350,000 for school rehabilitation and design and $900,000 for development projects: there would thus have been enough funding to cover the School Wall Project. It would have been possible to seek approval from the MoF to reallocate funds or to use money allocated for development projects[531]. However, the expenditure of more public money than necessary is never "irrelevant": if there were additional costs and these were paid out of MEC budgeted funds, that would mean that the MEC would not have those funds to spend elsewhere. It cannot be assumed that Cabinet would have approved the proposal if it had known the true position.

(b) The process by which Cabinet Memorandum No 039/2015 reached the Cabinet meant that it would have been "vetted" (and essentially, approved) by the MoF. Mr Walwyn conceded this was supposition on his part, but said that he had heard of occasions when the MoF had reverted to the MEC seeking more information[532]. However, the MEC (and Mr Walwyn as the relevant Minister) was responsible for this project, and there is no evidence that the MoF would have vetted the substance of the proposal he had put forward. The draft Cabinet Memorandum and supporting documents provided by the MEC would not have enabled the MoF to do this. The MoF would have been most concerned that the money requested was available, rather than whether the estimated cost and money requested were accurately calculated.

(c) Linked to (b), Mr Walwyn said that the use of the October 2014 estimate was an "administrative error… an oversight by the [MEC]…, [MoF] and the Cabinet". He suggested this was indicative of a systemic error[533]. Another such error was the failure of the MoF, as required by Cabinet, to work out the details of the "charges related to the project". Mr Walwyn took this to mean that the MoF would look at the cost implications of the project to ensure that funding was secured and that "things were going to run in the way in which Cabinet wanted it to run". He considered that had the MoF done this then it ought to have identified the costs implications of the Cabinet decision[534]. But this was not an oversight by the MEC or Mr Walwyn as Minister with whom it was discussed: they were well aware that the costs would be higher if multiple contractors were used, costs being positively correlated with the number of contractors used. This was something that they chose not to share with the MoF (or Cabinet). In this context, it is noteworthy that the Cabinet adopted the MEC's proposal that the PMU (located within the MoF) support it with the management of the project. Yet on the evidence, described above, it appears that there was limited interaction with the PMU and certainly none in relation to their assisting in project management (which might have included considering costs)[535].

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[531] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 9; and T36 20 September 2021 pages 99-100, 113 and 127-132.

[532] T36 20 September 2021 pages 125-126 and 146.

[533] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 9; and T36 20 September 2021 pages 104-107 and 143.

[534] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 9 paragraph 4.2, T36 20 September 2021 pages 143-145.

[535] Given what Mr Walwyn and others said about the PMU (see paragraph 6.242 above), it is difficult to see any rationale for why the MEC made the proposal in relation to the PMU that it did.

(d) Mr Walwyn said that, as Minister, he was reliant on the project team. Given the demands of the role of Minister and elected representative, it was unrealistic to expect him to have looked at every detail[536]. However, as I have found, his team did speak to him about the fact that the estimate would not be right – it would be substantially too low – if more than one contractor was used; and that there was a positive correlation between number of contractors used and cost. Mr Walwyn accepted that, knowing this, it would have been wrong to rely on that estimate before Cabinet.

6.253 Third, there is the use of works orders. I do not accept that multiple works orders can properly be used to avoid the need to have a petty contract for a project of more than $10,000 (or a major contract, in a case where the project is valued at over $100,000)[537]. However, even if I am wrong in that, on the basis of the PFMR and the Cabinet decision as Mr Walwyn understood it to be[538], he as Minister had a discretion as to whether to use petty contracts and/or works orders (including the proportions of each). There was no costs analysis (differential or otherwise) done; but Mr Walwyn was informed that to use works orders (or, generally, more rather than fewer contracts) would mean higher costs. In a decision that he accepts was for him alone, Mr Walwyn nevertheless proceeded to use 70 contractors on Phase 2. That significantly increased the challenge of managing the implementation of the project, and of course increased costs. As I have found, no justification for that course has been evidenced. Indeed, the evidence suggests that Mr Walwyn determined from the outset that this project should be implemented by using many small petty contracts and works orders.

6.254 Fourth, in respect of most of the contractors, there is no evidence that they were qualified to do the work. Most of the contractors used did not have an appropriate constructor's trade licence. I do not accept that those who contract with the BVI Government on the basis of a works order do not have to have an appropriate trade licence[539]. However, even if I am wrong in that, Mr Walwyn had an unfettered discretion as to how he selected contractors: it was open to him to have adopted any criteria he chose, including one that required those who obtained works orders to demonstrate that they were properly qualified to do the work by (e.g.) having a constructor's trade licence. Mr Walwyn said that he considered the works straightforward, and capable of being performed by someone without experience or expertise. However, that was not the evidence of Mr Augustine (who, with Mr Walwyn's other advisers, was not consulted on this issue): he said that a considerable amount of supervision was required to ensure that the contractors did as they were contractually required to do. In any event, the consequence was that the MEC did not have in place the means to satisfy any intention (set out in the draft memorandum and incorporated into Cabinet Memorandum No 039/2015) to use "qualified contractors."

6.255 Fifth, the contractors were personally chosen by Mr Walwyn. Where (as here) there has been no tender process, regulation 181 of the PFMR requires BVI Government bodies to obtain a list of pre-qualified contractors from the MoF for procurement services and construction

[536] Myron Walwyn Response to COI Warning Letter No 1 dated 14 September 2021 page 9. Mr Walwyn said he was not one of those Ministers "who want to be involved in every single thing": he trusted public officers to do their work (T36 20 September 2021 page 53).
[537] I accept that, in practice, multiple works orders are used in respect of a single project valued at more than $10,000; but, as a matter of law, regulation 189(2) of the PFMR provides: "Two or more works orders shall not be issued for the same works or services". See paragraph 6.13 above.
[538] See paragraph 6.227 and footnote 461 above.
[539] Again, I accept that, in practice, contracts by way of works orders are given by the BVI Government to contractors without any requirement for them to show a trade licence (and so, in practice, without any requirement to have such a licence); but section 3(1) of the Business, Professions and Trade Licences Act 1990 provides that: "Notwithstanding the provisions of any other Act, no person shall engage in any business, profession or trade as set out in the First Schedule, or otherwise, without first having obtained a licence for that purpose". They are clearly, by law, required to have a trade licence if they engage in the building trade. See paragraph 6.25 above.

works[540]. However, in relation to this project, there was no evidence of any reference to such a list, or of any effort to consult with the MoF or any other agency on the selection or eligibility of contractors. Mr Walwyn chose the 70 contractors from a book of people he kept for the purpose[541]. The practice of not requiring those who were awarded works orders to produce required documents meant that there was little if any "vetting". The Auditor General found that: "This process is contrary to best practices and contributes to a culture where contractors expect gratuitous public contracts from political representatives without due regard to fairness, transparency and proficiency in the selection process"[542]; and that: "[T]he subjective manner with which contractors were selected and assigned introduces issues of inappropriate political influence into the procurement process"[543]. It seems to me that there is considerable force in those observations.

6.256 Sixth, there is the concern that this is a particular example of political particularism[544]. There was a general election in the BVI in 2015. In response to the suggestion that he had a deliberate and improper political motive for his decisions as to the manner in which this project was implemented and the contractors selected, Mr Walwyn said that, as the administration was not sworn into office for a four-year term until December 2011, an election did not have to be called until December 2015 and could consequently take place as late as early 2016. The Premier Dr the Hon Orlando Smith in fact announced an election on 8 June 2015: no one (and certainly not Mr Walwyn) knew of the proposed election date until then, after this project was well underway. Mr Walwyn submitted that, in these circumstances, it would be impossible to conclude that the manner in which these contracts were issued and distributed had any political motive. However, the point is that an election had to take place before February 2016, and these contracts were issued in 2015 and due to be executed in the period to September 2015. There is a temporal association.

6.257 On the evidence before me, I cannot positively find that the decisions taken by Mr Walwyn were made, even in part, as a potential political inducement to prospective voters. However, Mr Walwyn has failed to provide any satisfactory explanation for the quite extraordinary course he adopted, knowing that it would cause expenditure of public money in excess of that needed to individuals with the right to vote. It was, in fact, shortly before an election had to be called. Consequently, on all the evidence, I am satisfied that, in expending public money, factors other than those of the public interest may have been taken into account; and, therefore, there is here information that serious dishonesty in relation to elected public officials may have taken place, i.e. the conduct falls within paragraph 1 of my Terms of Reference[545].

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[540] Regulation 181 of the PFMR provides (so far as relevant): "(1) The Financial Secretary on the recommendation of a technical committee appointed under regulation 177 shall maintain a list to be approved by the Minister, of pre-qualified contractors for the procurement of services, including construction works. (2) … [I]f (a) tenders are not invited, received or accepted for the procurement of services, including construction works […] an Accounting Officer may select a suitable contractor for providing the services required from the list of pre-qualified contractors if (c) where the contract sum does not exceed $50,000, the approval of the Financial Secretary has been obtained; or (d) where the contract sum exceeds $50,000 and up to $75,000, the approval of the Minister has been obtained". See paragraphs 6.16-6.17 above.

[541] This book was not produced to the COI.

[542] Auditor's General's Report paragraph 108.

[543] Auditor's General's Report paragraph 106.

[544] See paragraph 5.17 and footnote 54 above.

[545] It is unnecessary for me to make any findings in relation to particular individuals. It is possible that, beyond Mr Walwyn, other elected officials may be implicated (e.g. the Cabinet which, Mr Walwyn emphasised, had approved the use of works orders and petty contracts for Phase 2); but it is unnecessary for me to make any express findings in relation to (or any criticisms of) Cabinet or any other individual.

6.258 One final point. Insofar as it is suggested that the Auditor General's report on this project was politically motivated, there is simply no evidence whatsoever to support such a contention. The evidence is that the Auditor General acted as professionally and impartially in relation to this audit as she has done with her other audits.

6.259 In my view, on the basis of the evidence before me, this is a matter which clearly requires further investigation. However, I understand that it is in any event currently the subject of a criminal investigation, with public officials as persons of interest. It is important that that investigation is allowed to run its course. It is unnecessary – and would be inappropriate – for me to make any further specific recommendations in relation to further steps in relation to this project at this stage.

BVI Airways

Introduction

6.260 Easy and reliable air access to the BVI is essential to the prosperity of its tourism industry. It is also important for the maintenance of its corporate services industry.

6.261 A previous attempt by British Caribbean Airways to operate an air service between Miami and the BVI in 1986 was unsuccessful[546]. In 2013, American Eagle (affiliated with American Airlines) ended its flights between the BVI and San Juan Airport in Puerto Rico. This cut off an important international route to and from the BVI, leading to a decline in tourist arrivals to the BVI[547].

6.262 The runway at BVI's international airport – Beef Island Airport[548] – is short, which limits the types of aircraft that are able to use it. The BVI Government took a strategic decision to extend that runway to accommodate larger aircraft direct from international destinations, and studies and consultations on possible financing commenced. However, it was projected that an appropriate runway extension would not be completed until three years after the commencement of the construction works[549]. The BVI Government was therefore interested in temporary measures which could improve tourist numbers until the new runway was operational.

6.263 It seems that a number of options were considered, although not pursued. Former Financial Secretary Neil Smith said that the improvement of the existing ferry system between the US Virgin Islands and the BVI, and a subsidy of a local airline on a route that linked incoming European flights in and out of Antigua to the BVI, were both considered[550]. The then Premier Dr the Hon Orlando Smith said that the BVI Government also considered a proposal involving Miami-Dominica-BVI flights; but these were not pursued due to "capital backing issues". He said that a US Virgin Islands-BVI ferry option "was not considered feasible as the USVI itself had capacity issues in relation to its terminal"[551].

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[546] T40 27 September 2021 page 122. Mr Neil Smith, the Financial Secretary at the time of the BVI Airways project, said that the earlier British Caribbean Airways project failed for two reasons of which he was aware, neither of which concerned the lack of profitability, namely (i) competition from American Eagle who began its route to and from the USA through Puerto Rico and (ii) "some controversy with the Caribbean Airways in which it was shut down due to its involvement in illicit activity" of which (he said) he was "vaguely aware" (Neil Smith Response to COI Warning Letter No 1 undated pages 5-6). There was no firm evidence before the COI as to why that earlier project may have failed.

[547] Auditor General's Report on Government's Financing of BVI Airways' Direct Flights to Miami dated 27 January 2020 page 3. In this section of the Report, references to "Auditor General's Report" are to this report.

[548] Now formally known as the Terrance B Lettsome International Airport.

[549] Auditor General's Report page 3.

[550] Neil Smith Response to COI Warning Letter No 1 undated page 5; and T39 24 September 2021 page 25.

[551] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 5; and T40 27 September 2021 page 119.

Part 1: The 2014 Proposal

6.264 In November 2013, Lester Hyman (who had served as the BVI Government's US legal counsel and lobbyist in Washington DC for over 25 years) introduced Bruce Bradley (a prospective investor and realtor operating through Castleton Holdings ("Castleton")) to Dr Orlando Smith. Mr Bradley was seeking the BVI Government's backing to develop a commercial airline offering a direct air service between Miami and Beef Island Airport using British Aerospace Avro RJ85 jet planes which could fly using the short runway. To further this, Mr Bradley had entered into a partnership with Jerry Willoughby of BVI Airways (a company incorporated for the purpose) and Scott Weisman of Colchester Aviation ("Colchester") ("the operator parties").

6.265 The evidence suggests that this proposal was unsolicited; and, although there was some consideration of possible alternatives, there was no comprehensive examination of alternative solutions to the issue such as comparative costings for a ferry system or pursuing established airlines to undertake the route[552].

6.266 Nor was the project put out to tender[553]. Mr Neil Smith accepted that the procurement provisions of the PFMR applied; indeed, he accepted that the BVI Government "dropped the ball" in failing to put the project out to tender[554]. He suggested that this was due to the BVI Government's haste to establish an air service[555]. However, in response to the suggestion that there was a "complete bypassing of the tendering process"[556], he said:

> "The PF[M]A and PF[M]R[557] provides the Cabinet the authority to waive the tender process if they deem circumstances to be necessary to do so. I disagree with the statement of a 'complete bypassing of the tendering process' entirely as it obviously assumes that those actions taken were done outside of what was allowable by law or approved by the entity that had the authority to do so (Cabinet). I do however agree that the process was not tendered."

But there is no evidence that Cabinet waived the tender process, or were ever even asked to do so. The paper eventually prepared by Mr Neil Smith on behalf of the Minister of Finance and submitted to Cabinet in September 2015 asked Cabinet to "support BVI Airways" in providing direct flights between the BVI and Miami[558]. Indeed, Dr Orlando Smith suggested that a tender waiver was not required because there was no contract for services, but rather merely an agreement to subsidise flights operated by BVI Airways: he said that "there was no invitation for competitive submissions because Cabinet considered that the proposal before it was the best solution to the immediate problem"[559].

6.267 In any event, a Memorandum of Understanding between the BVI Government and Castleton was signed on 5 June 2014 ("the 2014 MOU"). Under the 2014 MOU, Castleton's proposed obligations were:

(i) development of the proposed air service;

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[552] Those were the Auditor General's conclusions on the evidence she had seen: Auditor General's Report pages 20 and 24.
[553] As readily accepted by the then Premier Dr the Hon Orlando Smith (Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 3, and T40 27 September 2021 page 119) and the Financial Secretary Neil Smith (Neil Smith Response to COI Warning Letter No 1 undated page 4, and T39 24 September 2021 page 20).
[554] T39 24 September 2021 page 22.
[555] T39 24 September 2021 page 22.
[556] A phrase used of the circumstances of this case by the Auditor General in her evidence to the COI (T19 29 June 2021 page 129).
[557] An apparent reference to regulation 170 of the PFMR (see paragraph 6.3 above).
[558] Cabinet Memorandum No 118/2015: BVI Airways Direct Flights between Terrance B Lettsome International Airport and Miami International Airport dated 16 September 2015.
[559] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 5. With respect to Dr Orlando Smith, that appears to miss the point.

(ii) provision of experienced personnel;

(iii) obtaining the necessary licenses to operate the flights[560];

(iv) commissioning of (a) a feasibility study and marketing plan from Sixel Consulting Group Inc ("Sixel") and (b) a study from Falko Regional Aircraft Limited ("Falko") on Beef Island Airport runway and apron to assess whether the existing pavement condition could accommodate Avro RJ85 aircraft (the costs of both studies being shared equally between the BVI Government and Castleton)[561]; and

(v) submission of its internal operational cost model[562].

6.268 The BVI Government's proposed obligations under the 2014 MOU were more extensive, and included:

(i) a guaranteed level of income for BVI Airways to be fixed after the Sixel study had been completed, but to cover "all operating costs… which shall include an amortization of investment capital over the contract period plus 20% per annum return"[563];

(ii) provision of operating concessions including abatement of landing fees[564];

(iii) provision of exclusive rights to pursue the project for a 12-month period[565]; and

(iv) entry into a three-year contract with the operating parties, to be extended for an additional five years if mutually agreed and profitable[566].

6.269 The pavement condition study by Falko concluded that, for "planning purposes only, not operational use", "airfield surface and pavement loading limitations were assumed adequate for the proposed operations"[567].

6.270 The Sixel Report was produced in September 2014, and concluded that the programme would:

(i) offer a "low cost and execution risk solution";

(ii) provide the BVI a significant opportunity to increase its penetration of the annual air travel market;

(iii) potentially stimulate BVI air passenger traffic from new markets; and

(iv) produce $2.6m in net cash flow, on a 36-month initial operating term. If a 60-month term were selected, the report indicated that the programme "may produce more than 4 times the initial net cash flow of the first 3 years" [568].

6.271 Mr Neil Smith confirmed that it was the operator parties who proposed Sixel to perform the feasibility study[569]. He said that the purpose of commissioning the Sixel Report as a joint engagement between the BVI Government and the operator parties (as opposed to the Government commissioning its own report) was "to demonstrate a commitment to the

[560] Provisional obligations (i)-(iii) appear in the 2014 MOU Preamble.
[561] 2014 MOU paragraph 4.
[562] 2014 MOU paragraph 2.
[563] 2014 MOU Preamble.
[564] 2014 MOU paragraph 5.
[565] 2014 MOU paragraph 6.
[566] 2014 MOU paragraph 7.
[567] The Falko Study**.**
[568] The Sixel Report entitled "Beef Island Airport Market Analysis", September 2014 ("the Sixel Report").
[569] T39 24 September 2021 page 49.

success of the venture by both parties" and "to share costs"[570]; although, of course, that would not have prevented the BVI Government obtaining its own independent advice had it been minded to do so.

6.272 After the collapse of the venture, the BVI Government and the operator parties entered into an arbitration to resolve various issues between them[571]. During the course of the arbitration, Mr Neil Smith said he became aware that the operator parties had substantially amended the Sixel Report prior to providing it to the BVI Government[572]. According to the arbitration award, the BVI Government attempted to demonstrate during the course of the arbitration that the operator parties' interaction with Sixel demonstrated "deceit and corruption" on the operator parties' part[573]; but the arbitrator made no such finding, concluding that the operator parties' interaction with Sixel was "exactly as envisioned when the Sixel Group was retained jointly by the BVI Government and BVI Airways"[574].

6.273 The Sixel Report appears to have been relied upon by the BVI Government to satisfy the requirement of the PEFM for a business case[575]. However, (i) the report focused on one solution only, and did not consider alternatives (such as improving the ferry system): Mr Neil Smith said that he did not know why Sixel was not asked to consider alternatives[576]; and (ii) the report appeared optimistic (and, arguably, substantially over-optimistic) in its outlook for the project[577].

6.274 Indeed, on 14 December 2014, the Premier Dr the Hon Orlando Smith rejected the proposal for the BVI Government to become involved in the venture, citing concerns about the cost commitment and scepticism regarding the growth assumptions put forth in the proposal. Key areas of concern included[578]:

(i) the operator parties' requirement for the BVI Government to cover the operating costs of the venture and pay a 20% annual return;

(ii) the proposed BVI Government guarantee based on 80% seat occupancy, an occupancy rate that it was estimated that would be needed for the venture to be profitable;

(iii) the estimation of a loss of $3.6 million in Year 1, followed by profits of $2.97 million and $3.25 million in Years 2 and 3 respectively (none of which accounted for start-up costs, which were estimated at $6 million); and

(iv) the operator parties providing no guarantee that they could negotiate interline arrangements with established airlines, which were considered essential.

[570] Neil Smith Response to COI Warning Letter No 1 undated page 7.
[571] The final award in the arbitration Colchester Aviation LLC and BVI Airways Inc and the Government of the British Virgin Islands Final Arbitration Award was dated 12 May 2021 ("Final Arbitration Award") page 24.
[572] Neil Smith Response to COI Warning Letter No 1 undated page 8; and T39 24 September 2021 page 54
[573] Final Arbitration Award page 75.
[574] Final Arbitration Award page 75; and T39 24 September 2021 page 56.
[575] Auditor General's Report page 19. In respect of the PEFM requirement, see paragraph 1.171 and footnote 242 above.
[576] T39 24 September 2021 page 53.
[577] The Auditor General observed that the Sixel analysis "appeared optimistic in its break even projections" (Auditor General's Report page 19).
[578] Summarised in the Auditor General's Report paragraphs 22-32.

6.275 In his oral evidence, Dr Orlando Smith said that the reason that the BVI Government rejected the 2014 proposal was that the cost to the Government was too high[579]. He also emphasised that the Sixel Report was prepared in respect of the 2014 project (which was rejected by the BVI Government) rather than for the 2015 project (which went ahead)[580], a point to which I shall return[581].

Part 2: The 2015 Proposal

6.276 However, the BVI Government's rejection of the proposal in 2014 was not the end of the matter. A month after that rejection, Dr Orlando Smith was again approached by Mr Hyman, and they entered into communications regarding a new proposal, albeit one still based upon the 2014 MOU[582]. Dr Orlando Smith accepted that some of Mr Hyman's communications were "emotive"[583] (as they were described by the Auditor General[584]); but he considered his responses to have been calm; and he did not consider that Mr Hyman was necessarily attempting to take advantage of their personal relationship[585]. Dr Orlando Smith stated that the BVI Government was proceeding in good faith, and in reliance on the fact that Mr Hyman had been the Government's US representative for a significant period[586]. He also pointed to the fact that the BVI Government had rejected the 2014 proposal as evidence that Mr Hyman did not exert undue influence over it[587].

6.277 In January 2015, the BVI Government engaged accounting and consultancy firm BDO to assess the merits of the new proposal in the form of a financial risk analysis[588]. One of the BDO staff engaged on the assessment was Mr Ryan Geluk[589]. The BDO report is dated 9 January 2015[590].

6.278 The BDO assessment was more sanguine that the earlier Sixel Report. In particular, it identified the following concerns, which Mr Geluk considered substantial[591]:

(i) the rate of annual return on the operator parties' investment capital of 20% was far too aggressive given the lack of risk being borne by Castleton: 5-8% was recommended as more appropriate;

(ii) the BVI Government should not proceed without having interline agreements in place;

(iii) the age of the aircraft would likely result in higher maintenance costs: it was recommended that more modern aircraft were leased, although the initial leasing costs would be higher; and

(iv) the BVI Government was taking on a significant liability risk by signing a contract guaranteeing revenue to operating parties who apparently lacked relevant operational experience[592].

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[579] T19 29 June 2021 page 155, and T40 27 September 2021 page 127. The Auditor General said that the overarching reasons for the rejection of the proposal appeared to be that "the financial risk were too high and the absence on interline agreements rendered the success of the project uncertain" (Auditor General's Report paragraph 21).
[580] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 4; and T40 27 September 2021 page 127.
[581] See paragraph 6.286(iii) below.
[582] T40 27 September 2021 page 147.
[583] T19 29 June 2021 page 156.
[584] Auditor General's Report paragraph 34; and T19 29 June 2021 page 139.
[585] T19 29 June 2021 at page 156
[586] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 6; and T40 27 September 2021 page 147.
[587] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 6; and T40 27 September 2021 page 148.
[588] T20 30 June 2021 page 10.
[589] T20 30 June 2021 page 12.
[590] BDO Avro Project Analysis Report to the Government of the Virgin Islands dated 9 January 2015 ("the BDO Report").
[591] T20 30 June 2021 page 8.
[592] BDO Report page 5.

6.279 The BDO assessment concluded that the proposal as outlined in the 2014 MOU "which require the Government to assume the financial risk of the project whilst Castleton are guaranteed a significant return, appear to negatively impact the likely success of this project"[593]. The report advised that the "operational concerns needed to be addressed and the financial terms renegotiated to more appropriately apportion risk and reward for this project to be reconsidered"[594].

6.280 The extent to which these concerns were addressed by the BVI Government before it proceeded with the project (by way of a Framework Agreement[595]) is unclear[596]. In respect of the recommendations set out above:

(i) In respect of the rate of annual return on the operator parties' investment capital, clause 6 of the Framework Agreement stated as follows:

> "During the Term, the operating profits, if any, of the Project, shall first be retained by BVI Airways to establish commercially reasonable reserves, second, shall be retained by BVI Airways to reduce any operating deficit of the Project, plus a twenty percent (20%) per annum return, not reimbursed by the Guarantee and any remainder will then be paid, on a quarterly basis to the Government in an amount not to exceed, singly or in the aggregate, the Guaranteed Amount.[597]"

On its face, that appears to (i) suggest that the operator parties would invest their own capital in the project, and (ii) reflect the 2014 MOU without addressing BDO's concern about the return. However, Mr Neil Smith initially said in evidence that BDO's recommendation of reducing the rate of return from 20% was adopted[598]; but he went on to say that he did not think that the interest rate had been put into the Framework Agreement at all[599]. When clause 6 of the Framework Agreement was specifically put to him, he said that this was different from the 20% rate of return on operator's capital as referred to by BDO; and was "to do with our Government's investment in the enterprise such that BVI Airways gets a 20 per cent return"[600], i.e. as I understand it, BVI Airways would retain a figure equivalent to 20% of its total capital as invested, before the BVI Government received any return itself. Mr Neil Smith seems to have understood that the 20% return was based on the previous proposal under which the BVI Government was to invest over $10 million, and when the investment was reduced to $7 million, then the rate of return also reduced accordingly[601]. However, this appears to be at odds with the fact that clause 6 of the Framework Agreement states that BVI Airways were to receive a 20% return per annum. The position does not therefore appear to be entirely clear; although what does appear to be clear is that the BVI Government was in practice unlikely itself to receive any return on its capital outlay.

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[593] BDO Report page 5.
[594] BDO Report page 6.
[595] The Framework Agreement was entered into as of 7 December 2015 by Castleton Holdings, Colchester Aviation, BVI Airways and the BVI Government. The essential clauses were set out in paragraph 9.4 of the Final Arbitration Award.
[596] The Auditor General concluded that none of BDO's recommendations was adopted (Auditor General's Report page 20). However, Neil Smith said that the concerns which were raised by BDO were fed into the Framework Agreement and that this conclusion of the Auditor General's was "simply not true" (T39 24 September 2021 pages 76-77).
[597] Read into the COI transcript at T39 24 September 2021 page 80.
[598] T39 24 September 2021 page 77.
[599] T39 24 September 2021 page 78.
[600] T39 24 September 2021 page 81.
[601] T39 24 September 2021 page 83.

(ii) With regard to interline agreements, and BDO's recommendation that the BVI Government should not proceed without such agreements being in place, Mr Neil Smith said that "to the best of [his] recollection" this requirement was included in the Framework Agreement[602]. However, that was not the case. Clause 3 of the Framework Agreement provided that:

> "BVI Airways will use commercially reasonable efforts to enter into one or more interline arrangements with international and/or domestic air carriers servicing [Miami] from points other than [the BVI]".

That is clearly less stringent than BDO's recommendation that the BVI Government should not proceed without interline agreements already in place. Even if it be the case that interline agreements could only in practice be formally entered into once the primary route had been established, there would be some additional commercial risk arising from the fact that such agreements would not be in place before the BVI Government committed itself to expend public money on the BVI Airways project.

(iii) With regard to the concern over the age of the aircraft, Mr Neil Smith said that, while BDO's recommendation that more modern aircraft were used was not directly in the Framework Agreement, it was "a discussion that we had in the negotiations"[603].

(iv) With regard to the operational experience of those involved in the operating parties[604], Mr Neil Smith stated that he was confident in the commercial experience of the operator parties, but accepted that this element of BDO's recommendations was not directly dealt with in the Framework Agreement. In response to the suggestion that the operator parties had insufficient aviation experience, he said that "establishing and running an airline is above all a commercial enterprise…. [T]he principals of BVI Airways were experienced businessmen with evidenced successful track records in real estate and investment, and one of them was a highly experienced aviator"[605]. When asked how he knew that Mr Bradley and Mr Weisman had the requisite commercial acumen, Mr Neil Smith said that he had conducted searches on the internet, notably searching the three principals on World-Check (an online risk intelligence portal), which did not reveal any adverse information. He said that, later (and after the Framework Agreement had been entered into), he also contacted the Head of the FIA and asked him to conduct a further search on the operator parties which also did not yield any results[606]; and, at some point after July 2017, he also consulted the professional services firm PricewaterhouseCoopers for their opinion on the operator parties[607].

6.281 The COI received considerable evidence about the part played in the project by Mr Hyman. He appears to have played two roles in the project, namely (i) as adviser to the BVI Government (as he had acted in the past) and (ii) as a key member of the operator parties, roles that were apparently in conflict[608].

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602 T39 24 September 2021 page 78.
603 T39 24 September 2021 page 80.
604 The Auditor General expressed concern about the operator parties' lack of experience. She found Mr Bradley had "over 25 years' experience in the commercial real estate [industry] but no prior experience in the aviation industry": Mr Weisman also had "no former experience in commercial aviation": although Mr Willoughby had 35 years' experience in "various aviation roles", which the Auditor General felt "lent some legitimacy to the proposal" (Auditor General's Report paragraphs 119-137).
605 Neil Smith Response to COI Warning Letter No 1 undated page 7.
606 T39 24 September 2021 page 38.
607 T39 24 September 2021 pages 36-42.
608 The Auditor General concluded that "in assuming dual roles in the BVI Airways venture Mr Hyman operated in conflict of interest as his fiduciary obligations to the BVI Government appeared to be superseded by his personal interests in the project" (Auditor General's Report paragraphs 122-126, the quotation coming from paragraph 126).

6.282 Dr Orlando Smith gave extensive evidence regarding what he called Mr Hyman's "double-dealing"[609]. In his view, given Mr Hyman's long-standing service as US Counsel to the BVI Government, it was inconceivable that additional due diligence on him with regard to the BVI Airways project should have been taken[610]: "nothing in the history of Mr Hyman's association with the BVI could have remotely prepared us for or alerted us to what only came to light after the project, namely Mr Hyman's double-dealing"[611]. Mr Neil Smith gave evidence to similar effect[612]. However, his evidence as to what would have happened had he known that Mr Hyman was a member of the operator parties' team was unequivocal:

> "… [H]ad I been aware of it, it would have resulted in a firm recommendation for immediate termination of the agreement; a recommendation which I reasonably expect would have been implemented by the [BVI Government] immediately."

6.283 The question of Mr Hyman's allegiances was also raised in the arbitration. The arbitrator noted that he was not required to determine whether Mr Hyman (who declined to give evidence in the arbitration) had behaved improperly, and the arbitrator properly declined to do so. However, he found that the operating parties (namely Colchester and BVI Airways itself) did not know that Mr Hyman was acting for the BVI Government or that he was behaving improperly[613]. He went on to conclude that "the best interpretation of the evidence [was] that Mr Hyman was acting as an intermediary between two of his friends – Dr [Orlando] Smith and Mr Bradley (and, derivatively, to Mr Willoughby and Mr Weisman) – and as mediator between the BVI Government and the airline-related companies, trying to get the [BVI Airways] deal done"; although he "was careless about how he presented and defined his role in the… project… [which] carelessness really made a mess"[614].

6.284 With regard to the more general BDO conclusion that, given where the commercial risks and potential returns lay, the proposal outlined in the 2014 MOU was "inequitable" to the BVI Government, it was understood that the operator parties would invest $6 million capital in the venture. However, this never appeared as an obligation in the Framework Agreement or, indeed, anywhere else: the operator parties consequently never had any legal obligation to make any financial investment, although the wording of the Framework Agreement at times suggests that it may have been drafted on the premise that someone other than the BVI Government would invest in the project[615]. Mr Neil Smith could not explain why the operator parties' proposed investment of $6 million was not included in the Framework Agreement[616]. Whilst he accepted that the operator parties took the decision that they should not include an obligation in the Framework Agreement, Mr Neil Smith said that he did not consider that the non-raising of the funds was a deliberate action on their part[617]. However, he was unable to explain why the $6 million injection of funds was not included as a condition or requirement of the Framework Agreement; indeed, Mr Neil Smith said that "even up to now, we're trying to figure out what happened"[618].

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609 Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 5; and T40 27 September 2021 page 139.
610 Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 5; and T40 27 September 2021 page 139.
611 Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 6.
612 Neil Smith Response to COI Warning Letter No 1 undated page 16.
613 Final Arbitration Award paragraphs 12.14 and 36.8.
614 Final Arbitration Award paragraphs 36.9-36.10.
615 Mr Geluk accepted that the Framework Agreement "made it appear that there would be investment in the project". However, he said that he was never told that Castleton or anyone involved with the operator parties would be investing in BVI Airways – nor was he at any time told that anyone else had in fact invested (T20 30 June 2021 page 23).
616 Neil Smith Response to COI Warning Letter No 1 undated page 14; and T39 24 September 2021 pages 80 and 88.
617 T39 24 September 2021 page 86.
618 Cabinet Memorandum No 118/2015: BVI Airways Direct Flights between Terrance B Lettsome International Airport and Miami International Airport dated 16 September 2015; and T39 24 September 2021 page 88.

6.285 A paper was prepared for Cabinet, drafted by Mr Neil Smith but in the name of Dr the Hon Orlando Smith as Minister of Finance[619]; and Cabinet considered the matter on 23 September 2015 (it having been deferred on 16 September 2015 to enable further information to be provided).

6.286 In respect of the Cabinet paper:

(i) Whilst he accepted that he may not have formally notified Cabinet that the operator parties had no financial obligation to invest, Mr Neil Smith "flatly reject[ed]" the suggestion that he incorrectly informed Cabinet that the operator parties would be investing $6 million in BVI Airways. He said:

> "It should reasonably be expected, and I am reasonably assured that the Premier and Minister of Finance did inform Cabinet members of such an omission in the framework agreement and that such an injection was ultimately not made with their full knowledge. Whether Cabinet members were officially informed in a Cabinet meeting I cannot tell, as I had (and do not have) access to the minutes that would have been associated with such discussions had they occurred.
>
> To state that I failed to formally notify Cabinet that the funding was not made, though perhaps through in form as I cannot recall the Cabinet paper being prepared conveying the same, is possibly accurate. However, to state that Cabinet members were not made aware of the circumstance that no commitment for a 6-million-dollar injection by Castleton was not made in the framework agreement or that it was ultimately not done is simply not true" [620].

However, the Cabinet Memorandum stated[621]:

> "In order to support this venture, Castleton Holdings, *which will be investing in excess of six million dollars for startup and operational costs*, has requested that the BVI Government backstop the venture with a revenue guarantee" (emphasis added).

There is no evidence that the statement that that investment was to be made was ever corrected or changed prior to Cabinet approving the proposal.

(ii) The liability of the BVI Government was capped at $7 million over three years, which was to be repaid in full within five years[622].

[619] T19 29 June 2021 page 203.
[620] Neil Smith Response to COI Warning Letter No 1 undated pages 15-16; and see also T39 24 September 2021 page 93.
[621] Cabinet Memorandum No 118/2015 paragraph 9.
[622] Cabinet Memorandum No 118/2015 paragraphs 10(ii) and 11.

(iii) The Sixel Report is recorded as being attached to the Cabinet paper[623] but the BDO Report was not. The Sixel Report was therefore relied upon in support of what Dr Orlando Smith called the 2015 Proposal (and, certainly, no other feasibility study was relied upon). Mr Neil Smith said he did not know why the BDO Report was not included in the papers sent to Cabinet alongside the Cabinet paper itself, but he doubted that the omission was deliberate[624]. He said that he was "not in a position to confirm or deny" that the BDO Report was not included in the papers submitted to Cabinet; but, he said, "Cabinet procedure requires that the relevant files associated with decisions to be made accompany the decision papers that go to Cabinet. The BDO report would have been on that file(s)" [625]. Mr Neil Smith expanded on this in evidence by saying that the BDO Report would have been available to Cabinet because it would have been in a file with the Cabinet paper itself[626]. This however was subject to the caveat that there is often only a short amount of time between the sending of papers to Cabinet and the Cabinet meeting itself, so Ministers may not have read all of the documents in the file[627]. There is simply no evidence that any Cabinet member would have considered the BDO Report prior to the discussion in Cabinet: and, if any had, one would have expected it to have been raised during the Cabinet discussions especially as the Governor, His Excellency John Duncan, expressed himself concerned about the financial sustainability of the project[628]. The minutes of Cabinet do not refer to it.

6.287 On 23 September 2015, Cabinet approved moving forward with the proposal on the following conditions (which were as set out in the proposal in the Cabinet Memorandum)[629]:

"(i) The [BVI] Government would support BVI Airways in providing direct flight between BVI and Miami for a 3 year period;

(ii) This support would take the form of a maximum Government financial input of $7.0 million to be distributed in even annual instalments;

(iii) An agreement between the parties that would include a fail-safe mechanism to allow the parties to terminate the agreement after two years;

(iv) Full disclosure of financials by BVI Airways, the contents of which would not be subject to public disclosure;

(v) The Government would have a seat on the BVI Airways Board;

(vi) The agreement would be contingent on the completion of interline agreements with major air carriers operating via Miami International Airport;

(vii) At least 10% of the shares in the new venture would be made available for local investors;

(viii) The financial model would be further vigorously scrutinized by the Ministry of Finance and Consultants to verify the anticipated pay-outs by the Government;

(ix) The Attorney General's Chambers would vet the Agreement prior to it being signed".

[623] As Appendix I.
[624] T19 29 June 2021 page 204.
[625] Neil Smith Response to COI Warning Letter No 1 undated pages 12-13.
[626] T39 24 September 2021 page 75.
[627] T39 24 September 2021 page 75.
[628] Cabinet Minutes 23 September 2015 paragraph 588.
[629] Cabinet Minutes 23 September 2015 paragraph 595.

6.288 A Framework Agreement between the parties was signed on 7 December 2015. The key provisions included[630]:

(i) BVI Airways was to use its "commercially reasonable efforts" to launch a commercial air service by 31 October 2016 "or such later date as may be agreed by the parties", and maintain a minimum of three flights per week[631];

(ii) the BVI Government had the right to termination with 30 days' notice if the service was not commenced by 31 December 2016[632];

(iii) BVI Airways was to use its "commercially reasonable efforts" to enter into one or more interline arrangements with international and/or domestic air carriers servicing Miami[633];

(iv) BVI Airways would appoint a director nominated by (and to represent the interests of) the BVI Government[634]: in the event, this was Mr Geluk[635];

(v) the BVI Government was to reimburse BVI Airways for start-up costs and operating losses during the initial 3 years, and guarantee BVI Airways an annual return on investment of at least 20%, up to a total of $7 million, payable in set tranches over the period January 2016 to November 2017: the final $2 million of the $7 million was to be paid by the BVI Government only after the air service was successfully launched[636];

(vi) the BVI Government was required to guarantee payment of those sums by way of an irrevocable letter of credit in the sum of $7 million[637]; and operator parties had the right to immediate termination if the BVI Government failed to provide such a letter of credit by 19 January 2016[638]; and

(vii) the BVI Government's only return on the investment was to be repayment of the guaranteed amount, which was contingent on funds being available after other provisions were satisfied[639].

6.289 In respect of the requirement that the operators were to use their "commercially reasonable efforts" to launch a commercial air service by 31 October 2016, the Attorney General Hon Baba Aziz advised that this terminology be changed because it was insufficiently clear and imposed an insufficient obligation on the operators to launch the service[640]. However, both Dr Orlando Smith[641] and Mr Neil Smith[642] stated that they had also taken advice on this point from Mr Hyman. Dr Orlando Smith indicated that consulting various legal advisers was Mr Neil Smith's task[643]. Mr Neil Smith said that whether or not the BVI Government was prepared to accept the phrase "commercially reasonable efforts" was ultimately the decision of Dr Orlando Smith as Premier and Minister of Finance[644]; but he said the Attorney General

[630] The key provisions of the Framework Agreement are quoted in full in the Final Arbitration Award paragraph 9.4; and also summarised in the Auditor General's Report paragraph 36.
[631] Framework Agreement clause 1.
[632] Framework Agreement clause 5.
[633] Framework Agreement clause 3.
[634] Framework Agreement clause 6.
[635] T20 30 June 2021 page 11.
[636] Framework Agreement clause 5; and see paragraph 6.278(iv) above.
[637] Framework Agreement clause 5.
[638] Framework Agreement clause 7(c).
[639] Framework Agreement clause 6.
[640] T19 29 June 2021 page 208.
[641] T19 29 June 2021 page 178; and T40 27 September 2021 page 150.
[642] T19 29 June 2021 page 208; and T39 24 September 2021 page 96.
[643] T40 27 September 2021 page 151.
[644] T39 24 September 2021 page 101.

was "not infallible"[645], and he emphasised that he consulted several legal practitioners in the BVI as well as Mr Hyman[646]. Both Dr Orlando Smith[647] and Mr Neil Smith[648] said that they were unaware of Mr Hyman's conflict of interest.

6.290 More broadly, the Auditor General concluded that "throughout the venture there were periodic objections from the Attorney General who vetted the legal documents (all of which originated from the operating parties) and the Accountant General who was tasked with making the payments. Significantly, several of the amendments made to the draft agreements by the Attorney General that were intended to protect Government's interests and import balance and certainty into the agreements were reversed by the operator parties and subsequently not adopted"[649].

Part 3: Implementation

6.291 In terms of implementation, the project was brought to an end before any flight to Miami was made, but not before the BVI Government had paid $7.2 million of public money to BVI Airways.

6.292 Four issues in relation to the implementation of the Framework Agreement are particularly worthy of note.

6.293 First, Mr Neil Smith found himself in a position of apparent conflict of interest. As indicated above, the Framework Agreement required the BVI Government to appoint a representative to serve as "special liaison officer" for the project[650]. The person appointed was Mr Neil Smith[651]. On the one hand, as such, he had an obligation to ensure the success of the project; but, on the other hand, as Financial Secretary, he was the relevant Accounting Officer with obligations as custodian of the public purse.

6.294 Mr Neil Smith accepted that this constituted a conflict of interest[652]. However, he said that it was "a conflict that Financial Secretaries and Treasury Secretaries around the world deal with all the time"[653]. In evidence, Mr Neil Smith said that he managed the conflict of interest through "basic simple integrity", and that he was not "wedded personally to the success of the venture"[654]. He also made the point that Cabinet (including the Attorney General) "must have been aware of the conflict of interest [but] obviously felt that it was acceptable", and that "it [was] perhaps [his] credibility, professionalism, abilities and ethical standards that allowed Cabinet to feel comfortable in giving [him] this assignment in light of the accepted conflict of interest"[655]. He consequently said:

[645] T39 24 September 2021 page 97.
[646] Neil Smith Response to COI Warning Letter No 1 undated page 17; and T39 24 September 2021 page 97.
[647] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 at page 7; and T40 27 September 2021 page 150.
[648] Neil Smith Response to COI Warning Letter No 1 undated page 17; and T39 24 September 2021 page 103.
[649] Auditor General's Report paragraph 100.
[650] Paragraph 5.
[651] T39 24 September 2021 page 116.
[652] The Auditor General also considered that this did create a conflict of interest (Auditor General's Report paragraph 98; and T19 29 June 2021 page 126).
[653] T19 29 June 2021 page 231.
[654] T39 24 September 2021 page 119.
[655] Neil Smith Response to COI Warning Letter No 1 undated page 19.

> "… I am very confused as to the rationale for, and vehemently reject, any determination that I allowed my roles to be conflicted. In fact I did not place myself in the conflicting roles but was carrying out duties assigned to me by the Cabinet who must have been fully aware of those conflicts and my abilities to act responsibly even in view of those conflicts"[656].

6.295 Second, the BVI Government's nominee on the Board of BVI Airways, Mr Geluk, was effectively denied access to the affairs of the company. On the other hand, he received very few substantive instructions from the BVI Government which he represented on the board.

6.296 Mr Geluk was appointed to the BVI Airways Board as the BVI Government's nominee in March 2016[657], having been asked on the telephone by Mr Neil Smith if he would accept that post because (Mr Geluk thought) of his previous involvement in the work on the projects done by his firm, BDO[658]. He had no previous experience in the start-up of a commercial airline[659]. He considered that it was his role "to ensure that the Government's position was adequately protected for any decisions that were made by the Board"[660]. However, his only guide to understanding what the BVI Government's position – in terms of how it expected the project to proceed – was derived from copies of the 2014 MOU and the Framework Agreement with which he was provided: he was given no other instructions[661].

6.297 Mr Geluk said that he had concerns about the lack of Board meetings[662], and felt that he was being shut out[663] . He did not see any quarterly financial statements; but, given the overall lack of information given to Mr Geluk, he said he was not surprised by this[664]. He occasionally contacted Mr Weisman to get an update as to what was going on; but received only one, high-level update in June or July 2016. Mr Geluk did nothing with the information received, such as it was[665].

6.298 Mr Geluk was invited to only one meeting, in Miami in September 2016. He had been contacted by Mr Weisman to ask him to attend, which was the first time he had received any notification of anything as a director. Mr Geluk attended the meeting with the Financial Secretary Mr Neil Smith and the Chairman of the BVI Tourist Board Russell Harrigan[666]. Mr Hyman was present, and Mr Geluk said that he thought Mr Hyman was introduced as a director of BVI Airways[667]: he was aware that Mr Hyman had provided legal services to the BVI Government[668].

6.299 Third, the BVI Government was not supplied with any sensible financial statements for BVI Airways.

6.300 Reflecting the condition required by Cabinet when it approved going forward with the proposal on 23 September 2015, the Framework Agreement required BVI Airways to provide the BVI Government with quarterly financial statements no later than 60 days following

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656 Neil Smith Response to COI Warning Letter No 1 undated page 20.
657 T20 30 June 2021 page 14.
658 T20 30 June 2021 page 12.
659 T20 30 June 2021 page 12.
660 T20 30 June 2021 page 12.
661 T20 30 June 2021 page 14.
662 T20 30 June 2021 page 16.
663 T20 30 June 2021 page 19.
664 T20 30 June 2021 page 20.
665 T20 30 June 2021 page 16.
666 T20 30 June 2021 page 15.
667 Mr Neil Smith said he was unable to recall Mr Hyman being introduced as a director of BVI Airways, but had no reason to doubt Mr Geluk' s evidence in relation to it (Neil Smith Response to COI Warning Letter No 1 undated page 17).
668 T20 30 June 2021 page 22.

the last day of each quarterly period[669]. However, only one set of financial statements was submitted by the operator parties during the term of the venture, for the 15-month pre-operational period 1 January 2016 to 31 March 2017; and those were substantially deficient[670].

6.301 Dr Orlando Smith said he was not initially aware that financial statements were not being provided, but became aware of this later. He said that this was a matter delegated to Mr Neil Smith as Financial Secretary[671].

6.302 Mr Neil Smith said that "the financial statements that [BVI Government] did receive were in [his] opinion inadequate"; and he accepted that "the absence of financial statements did pose a challenge" [672]. Despite this, he felt he still provided some financial oversight using the information to which he did have access, e.g. information as to the hiring of staff, the completing of regulatory requirements etc. However, he accepted that it "was not the type of financial oversight that [he] would have liked" and "that this was not good as having timely audited financial statements"[673].

6.303 The Auditor General identified the following areas of concern regarding the single set of financial statements that was received by the BVI Government[674]:

(i) The financial statements showed that the company received no income, but incurred $4.25m in expenses of which $3.07m was said to have been paid in salaries and professional fees.

(ii) The airline's accountant submitted payroll information and financial statements to the Inland Revenue Department ("the IRD") for the years 2016 and 2017. A verification exercise performed on the salary amounts in the pre-operational statements against information BVI Airways reported to the IRD indicated that the amounts in the pre-operational financial statements were either substantially overstated or the payroll taxes submitted to the Government were severely under-reported.

(iii) Despite the operator parties' assertion that they invested over $2 million into the venture, their pre-operational statements showed that, aside from BVI Government financing, BVI Airways did not receive any significant private investment or other loan financing.

(iv) Both the presentation and the level of detail provided in the BVI Airways pre-operational statements are unsatisfactory and the discrepancies are sufficient to render those statements unreliable.

(v) In 2017, Colchester spent $3.3 million in undefined expenses.

She concluded that "an audit must be performed by a firm of independent accountants for both companies"[675].

6.304 Mr Neil Smith said that the operator parties claimed that financial statements could not be sent to the BVI due to confidentiality concerns; although he did not regard this as a good enough reason for non-compliance with the Framework Agreement requirement that the operator parties produce and present regular financial statements to the BVI Government[676]. Mr Neil Smith accepted that the operator parties extended an open invitation to him to

669 Framework Agreement paragraph 10.
670 Auditor General's Report paragraphs 80-90.
671 Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 page 9; and T40 27 September 2021 page 162.
672 Neil Smith Response to COI Warning Letter No 1 undated page 8; and T39 24 September 2021 page 59.
673 Neil Smith Response to COI Warning Letter No 1 undated at page 9; and T39 24 September 2021 page 60.
674 Auditor General's Report paragraphs 80-90.
675 Auditor General's Report paragraph 90.
676 T19 29 June 2021 page 233.

visit Fort Lauderdale to inspect the company accounts; but, for such a trip, he needed the approval of the Premier/Minister of Finance and this was not forthcoming[677]. This was despite Mr Neil Smith's advice that travelling to Fort Lauderdale to examine the accounts was necessary[678]. He was not provided with a reason for this refusal[679].

6.305 Nor did Mr Geluk see any BVI Airways financial statements, despite his position on the BVI Airways Board[680]. This removed another route by which the BVI Government could have had access to the statements, and so Mr Neil Smith saw it as another way by which proper financial oversight was denied[681].

6.306 Fourth, the BVI Government was unable to secure the letter of credit by January 2016 as required by the Framework Agreement[682], with the result that the operator parties had the right to immediate termination.

6.307 As I have indicated, the Framework Agreement provided that the final $2 million of the $7 million was to be paid by the BVI Government only after the air service was successfully launched[683]. However, on 7 June 2016, the parties executed an addendum to the Framework Agreement to remedy the breach caused by the Government's failure to obtain the letter of credit by waiver; but on terms[684]. These included (i) pushing back the flight commencement date by eight months, (ii) providing for the remaining $2 million of the $7 million to be deposited into an escrow account for the benefit of BVI Airways, and (iii) requiring the BVI Government to make immediate payment to the operating parties of an additional $200,000 in respect of the costs caused by the delay in the letter of credit (although there does not appear to have been any supporting evidence for these or any additional costs[685]). The operating parties appear to have provided no information or evidence to substantiate their claim for these additional funds.

6.308 The $2 million was placed into an escrow account on 15 July 2016, and the additional $200,000 was paid out by the BVI Government on 26 August 2016. The escrow agreement under which the $2 million was held stipulated that $1.2 million was to be paid on 30 May 2017 and $800,000 on 30 November 2017, with no requirement for performance (i.e. the commencement of flights)[686].

6.309 However, Mr Neil Smith terminated the escrow arrangement and authorised release of the funds to the operator parties on 11 January 2017. He explained that this "came about as a result of very difficult and prolonged discussions" between himself and Dr Orlando Smith[687]; and that the decision was taken with approval of Dr Orlando Smith[688]. Dr Orlando Smith confirmed this[689].

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677 T19 29 June 2021 page 234; and T39 24 September 2021 page 64.
678 Neil Smith Response to COI Warning Letter No 1 undated page 9; and T39 24 September 2021 page 63.
679 T39 24 September 2021 page 64.
680 T20 30 June 2021 pages 14 and 20.
681 T39 24 September 2021 page 63.
682 T39 24 September 2021 page 47.
683 See paragraph 6.288(v) above.
684 The text of the Second Supplemental Letter to the Framework Agreement is set out in full in the Final Arbitration Award paragraph 11.2.
685 As pointed out in the Auditor General's Report paragraph 50.
686 Escrow Deposit Agreement.
687 Neil Smith Response to COI Warning Letter No 1 undated page 20.
688 Neil Smith Response to COI Warning Letter No 1 undated page 21; and T39 24 September 2021 page 124.
689 T40 27 September 2021 page 158.

6.310 The power under which this payment was made was not clear. Dr Orlando Smith was aware that Cabinet sanction had not been obtained: he said he authorised Mr Neil Smith to release the $2 million, which was later retrospectively authorised by Cabinet[690]. Mr Neil Smith accepted that the decision was taken without Cabinet approval[691]; but he said that Dr Orlando Smith authorised the payment under section 21 of the PFMA, which gives a Minister power to make a payment in advance subject to going to the House of Assembly for ex post facto approval[692]. Mr Neil Smith said the decision to terminate the escrow early was made from a desire to give the project every possible chance of success by "going above and beyond" the requirements of the Framework Agreement[693]. However, he accepted that the fact that the operator parties were not prepared to bear any contractual risk indicated that, at the point at which the BVI Government provided an extra $2.2 million, the operator parties were not optimistic that the venture was going to succeed. He said that this concern was one of the things that the BVI Government was considering[694].

6.311 On 13 June 2017, Miami International Airport's Director of Aviation made a public announcement that BVI Airways would be commencing its BVI to Miami route on 22 July 2017. This announcement "was immediately countered in the press by BVI Airways CEO Mr Willoughby who asserted that [the Director of Aviation] had 'jumped the gun'". Four weeks later, BVI Airways suspended operations, citing lack of funding[695].

6.312 The BVI Airports Authority had undertaken various upgrades to its facilities to accommodate the anticipated service. In March 2017, the Director of the Authority sought reimbursement of $735,350 from the Government for these improvements. The upgraded facilities were never used by the airline[696].

6.313 When the agreement was terminated, none of the $6 million private investment expected from the operator parties had materialised[697]. Not a single plane had flown between the BVI and Miami under the agreement.

Part 4: Aftermath

6.314 The BVI law firm of Conyers Dill and Pearman ("Conyers") was initially engaged by the BVI Government in 2017 to assist with issues related to non-performance by the operator parties[698]. Dr Orlando Smith said that Mr Mark Forte of Conyers was instructed to view the operator parties' financial records[699]. Mr Neil Smith said that his recollection was that Mr Forte became involved "at the point where things began to go south", i.e. after the escrow was terminated[700]. Despite repeated requests from Conyers, no information was provided by the operator parties other than the single set of unsupported financial statements referred to above[701].

690 T19 29 June 2021 page 186.
691 T39 24 September 2021 page 124.
692 Neil Smith Response to COI Warning Letter No 1 undated page 21; T39 24 September 2021 page 124, and T19 29 June 2021 page 239.
693 T39 24 September 2021 page 126.
694 T39 24 September 2021 page 130.
695 Auditor General's Report paragraphs 69-70.
696 Auditor General's Report paragraphs 91-95.
697 T19 29 June 2021 page 137, T39 24 September 2021 page 115 and T40 27 September 2021 page 154.
698 T19 29 June 2021 page 135; T40 27 September 2021 page 162 and Auditor General's Report paragraph 171.
699 Dr Orlando Smith Response dated 24 September 2021 to COI Warning Letter No 1 page 9.
700 T39 24 September 2021 page 115.
701 Auditor General's Report paragraph 171.

6.315 On 1 June 2017, on behalf of the BVI Government, Dr Orlando Smith sent a "letter before action" to the operator parties reminding them of their obligations under the Framework Agreement and advising that failure to adhere could lead to termination. This was prompted by rumours that the operator parties planned to sell or lease the planes which were acquired for the flights from the BVI to Miami[702]. On 31 October 2017, the BVI Government issued notice to Mr Bradley that failure to commence services by 30 November 2017 would lead to termination. No services were commenced. It is understood that the planes were resold to Tronosjet in Canada[703].

6.316 In October 2018, the BVI Government instructed Martin Kenney & Co to undertake a cross border investigation with a view to obtaining evidence to facilitate the recovery of the $7.2 million it had expended on the project; and, as part of the steps to recover those losses, the arbitration was commenced. It is understood that that firm continues to take steps to recover monies including civil proceedings in the US and proceedings before the Commercial Court in the BVI which are ongoing[704].

6.317 In his evidence to the COI the Premier, Hon Andrew Fahie, stood by comments he had made whilst in opposition, widely reported in the press at the time, that the NDP administration of Dr Orlando Smith was corrupt; and that BVI Airways was an example of such corruption[705]. In his evidence, he made clear that this was not simply political puff, but allegations he stood by.

6.318 In May 2020, a criminal investigation was launched into the BVI Airways project. This investigation is ongoing, with public officials as persons of interest.

Concerns[706]

6.319 The BVI Government invested $7.2 million in the BVI Airways project to establish a regular air link between the BVI and Miami as a temporary measure pending the extension of the runway at Beef Island Airport to accommodate larger planes on international flights. No flight on that route was made at the time the project was abandoned.

6.320 Of course, commercial failure of a project can be for a wide variety of causes, including the actions or inaction of third parties, or poor commercial judgment. In itself, it is not proof or even evidence of a failure of governance let alone serious dishonesty in public office.

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[702] Auditor General's Report paragraph 187; and T19 29 June 2021 page 136.
[703] Auditor General's Report paragraph 191.
[704] T19 29 June 2021 page 137, T40 27 September 2021 page 166; Auditor General's Report paragraph 192; and letter Martin Kenney & CO to COI dated 22 October 2021.
[705] In VINO dated 26 January 2015 (also reported in the BVI Beacon on 28 January 2015), Hon Andrew Fahie is quoted as saying "This government has been the most corrupt government in the modern history of this Territory. They have repeatedly used this Territory as their personal piggy banks; and they have refused to adhere to the principles of good governance… They only adhere to the rules when it benefits them and theirs…. They have ensured jobs for their boys; projects for their friends; and have left you to fend through getting the crumbs from their corrupted tables." He reiterated the claims as reported in BVI Platinum News dated 6 May 2021, in which he cited the BVI Airways project as an example; and stood by the claims in his evidence to the COI (T6 18 May 2021 pages 215-220). He said that, in terms of the way he was using the word "corrupt", "the word 'corrupt' means more than just dishonesty. It also means persons who could do something about it, ignoring, taking care of their responsibilities, and then move towards others with what you will call less-off sin or no sin at all. I find that to be corrupt, so that's my definition." He also said "I just saw it as corruption, not just the mere fact of planes or what wall of whatever else was there. I saw the whole system as corrupt".
[706] The concerns and potential criticisms in relation to BVI Airways arising from the evidence before the COI were put to both the former Premier and Minister of Finance Dr the Hon Orlando Smith and former Financial Secretary Neil Smith in warning letters each dated 10 September 2021. The former responded in writing (Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021) and orally (T40 27 September 2021 pages 107-170). The latter responded in writing (Neil Smith Response to COI Warning Letter No 1 undated) and orally (T39 24 September 2021 pages 4-113). Each warning letter identified the evidence giving rise to the concerns and potential criticisms. The criticisms of each of the former Premier and Mr Neil Smith in relation to BVI Airways in this Report are respectively restricted to those in respect of which they had a full opportunity to respond, as described.

6.321 The two key players for the BVI Government in respect of the BVI Airways project, the then Premier and Minister of Finance Dr the Hon Orlando Smith and the then Financial Secretary Neil Smith, firmly deny any failure of good governance on their part. Dr Orlando Smith emphasised that his main consideration was the policy of promptly obtaining an air route to and from Miami: he handed over implementation of the project to Mr Neil Smith[707]. As to his own position, he summarised this as follows:

> "There is no justification to conclude that in my capacity as Premier and Minister of Finance, I acted contrary to principles of good governance and that this matter when taken as a whole, amounts to corruption, abuse of office or other serious dishonesty among officials. The findings of the Arbitrator in May of this year to which I alluded earlier, is further evidence that my Government acted responsibly in bringing an immediate end to a situation once we realized that it had become inimical to the public good."

Mr Neil Smith similarly denied any failure of good governance[708]:

> "I do accept that the circumstances were suboptimal. However, I also flatly reject (and am quite insulted by) any statement that suggests I acted inconsistently with the principles of good governance. Instead, I propose that under challenging circumstances I acted responsibly and within the confines of what was allowable by the law that governed my actions, with authorizations supported by the PFM[A], and with full disclosure to the Minister to whom I was responsible, and to whom the responsibility lay for onward transmission of information to Cabinet members.[709]"
>
> "I cannot therefore accept any assertions that my actions constituted any that were inconsistent with good governance, corruption in any form, abuse of office or dishonesty of any form, and as a matter of fact an objective examination of the evidence suggests that on the contrary, that despite the circumstances, I did what was possible within the limits of my authority, and with the approval of those with the authority to do so, to protect the interests of the Government of the Virgin Islands, and was not involved in any action that can remotely be associated with corruption of any form."

6.322 However, I simply cannot accept the assertion that the BVI Airways project was an example of good governance or, indeed, anything less than shockingly poor governance.

6.323 Had the principles of good governance been applied, amongst other things:

(i) Proper due diligence would have been carried out in relation to the operating parties and the individuals representing them including Mr Hyman. Whilst Mr Geluk appears to have known that Mr Hyman was a Director of BVI Airways (and thus a key player for the operator parties) but not that he was representing the BVI Government in this venture, Dr Orlando Smith and Mr Neil Smith were instructing him in that latter role but did not know he was also representing the operator parties. Mr Neil Smith was clear: had he known, then he would have recommended the BVI Government's immediate withdrawal from the venture, and he would have expected that withdrawal to have taken place.

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[707] Dr Orlando Smith Response to COI Warning Letter No 1 dated 24 September 2021 paragraph 23.

[708] Mr Neil Smith expressed general "profound disappointment in the quality" of the Auditor General's report (Neil Smith Response to COI Warning Letter No 1 undated page 1). However, insofar as that was a criticism of the Auditor General's report, I do not consider it was well founded. The Auditor General's report was necessarily constrained by the lack of information provided to her (mainly as a result of the sparsity of information which BVI Airways had provided to the BVI Government, particularly in respect of financials); but, in my view, the report identified a number of areas of very poor governance, which the evidence before the COI has failed to address.

[709] Neil Smith Response to COI Warning Letter No 1 undated page 11.

(ii) Mr Neil Smith would not have been placed in a position where he was compromised and conflicted.

(iii) A better handle on where the BVI Government's money was being spent would have been maintained, and regular financial statements for BVI Airways (as required by the Framework Agreement) would have been insisted upon and not simply waived. As it is, in 2016, there were $3.3 million of undefined expenses on the project.

(iv) Mr Geluk, as the BVI Government representative on the BVI Airways Board, would not have been excluded from details of the operations of BVI Airways.

(v) The BVI Government would have obtained independent advice on the feasibility of the project, instead of relying upon the Sixel Report in circumstances in which it is now said that the operator parties manipulated the findings and conclusions of that report.

(vi) The BDO Report would have been brought to the attention of Cabinet members before they approved proceeding with the project to a Framework Agreement.

(vii) The advice of the Attorney General which sought to afford greater protection to the BVI Government's interest in relation to the draft Framework Agreement would not have been ignored: it would have been properly considered.

(viii) The final payment of $2 million would not have been made without better consideration of a link with performance.

(ix) The operating parties would have been required to provide a written commitment in respect of their financial input and this commitment would have formed part of the Framework Agreement.

6.324 Looking at the project as a whole, whilst I accept that the policy foundation for the project was to encourage a higher level of tourism (and therefore benefit the BVI economy), my view is that the project was an example of extremely poor governance with dire financial consequences for the BVI Government, i.e. the expenditure of $7.2 million with no benefit obtained for the public at all.

6.325 Further, the failure of the BVI Government to require financial statements from BVI Airways (to which it was entitled under the Framework Agreement) means that what in fact happened to the $7.2 million, and upon what it was spent, is not known. The fact that some of the money was expended on (e.g.) obtaining licences and staff does not by any means fully address that as an issue. Nor do the various findings of the arbitrator, such as his finding that BVI Airways used reasonable commercial efforts to establish the route.

6.326 These unsatisfactory circumstances are, in my view, probably sufficient in themselves to fall within paragraph 1 of my Terms of Reference, i.e. from them, I can be satisfied that, in respect of this project, there is information that some form of serious dishonesty in relation to public officials may have taken place. However, in circumstances in which there is an ongoing criminal investigation with public officials as the persons of interest, the criteria for paragraph 1 are even more clearly met.

6.327 I would otherwise have recommended an audit of this project and/or the companies involved in it; but, again (as with the School Wall Project), in my view it is important that that criminal investigation is allowed to run its course. It is unnecessary – and would be inappropriate – for me to make any further specific recommendations in relation to further steps in relation to this project at this stage.

Claude Skelton Cline[710]

Introduction

6.328 As indicated above[711], Claude Skelton Cline undertook theological studies in the US before becoming a pastor in Detroit where, for 20 years, he was involved in ministry and various community-based projects. Whilst he was a pastor in the US, he was involved in ecumenical leadership as an Executive Assistant to the Mayor of Detroit, Kwame Kilpatrick; although he returned to the BVI from time-to-time for vacations and on preaching engagements, panels etc to which he would be invited.

6.329 During the time when he lived in the US, Mr Skelton Cline was involved in the Virgin Islands Neighbourhood Partnership Project; and, on his return to the BVI, in addition to being Executive Pastor of New Life Baptist Church[712], he became a consultant to the Minister for Communications and Works in relation to the Cruise Ship Port Development Project and then Managing Director of the Ports Authority[713]. He set up Grace Consulting, a marital counselling/ coaching consultancy with a bible school component; and was also involved in import-export, worked for his family group (Skelton Group of Companies) and, later, helped his wife with her pizza business[714]. Although over time he moved from party to party, by 2019, Mr Skelton Cline was a supporter of the VIP[715]. He hosts a weekly radio talk show, "Honestly Speaking", on the ZBVI 780AM channel.

6.330 From 2019, through an entity wholly owned and controlled by him, Mr Skelton Cline entered into a series of three consecutive consultancy contracts with the BVI Government spanning the period 25 March 2019 to 17 September 2021 for which he was paid $349,980. This section of the report concerns those contracts.

Pre-Contract: The Role of Mr Skelton Cline

6.331 The VIP were returned to government in the General Election of 25 February 2019. In a month, by 27 March 2019, the new BVI Government and "Grace Consulting" had entered into a consultancy contract for the six-month period from 25 March 2019 to 17 September 2019[716]. That contract was twice renewed for a year each, to 17 September 2020 and then to 17 September 2021. In this part of the report, these three contracts will be referred to as "the First Contract", "the Second Contract" and "the Third Contract" respectively.

6.332 The evidence in respect of how the First Contract came into being is neither clear nor consistent.

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[710] In relation to the contracts he entered into with the BVI Government between 2019 and 2021, Mr Skelton Cline gave oral evidence to the COI on 11 May 2021 and on 4 October 2021.

[711] Paragraph 6.100.

[712] T4 11 May 2021 page 102.

[713] Considered elsewhere in this report. For the Virgin Islands Neighbourhood Partnership Project, see paragraphs 6.97-6.132; for the Cruise Ship Port Development Project, see paragraphs 7.31-7.66.

[714] T4 11 May 2021 page 101.

[715] T6 18 May 2021 page 177 (the Premier).

[716] Agreement between Government of the Virgin Islands and Grace Consulting dated 27 March 2019. The First Contract was signed on 25 March 2019 by Mr Skelton Cline for Grace Consulting, and on 27 March 2019 by Ms Elvia J Smith-Maduro for the BVI Government in her capacity as Acting Permanent Secretary Premier's Office. Permanent Secretaries had authority to sign petty contracts: T44 5 October 2021 page 58. It is unclear why the contract term pre-dated the date of the contract. When asked about this, Mr Skelton Cline said he would have commenced work on the day he signed the Agreement, i.e. 27 March 2019. He could not explain why the contract term preceded this date: T43 4 October 2021 page 115 (there appears to be an error in the date on transcript on page 115, where it says 25th; but this is corrected to 27th on page 120).

6.333 When he first addressed this issue before the COI[717], the Premier distanced himself from these contracts. He said that, shortly after the election, Mr Skelton Cline approached him saying that he could "help with finding different ways for new investments to come to the BVI". The Premier was particularly interested in this, as he considered the BVI Government had an "institutional capacity issue" which meant that the MoF, which might otherwise have assisted, might not be able to do so. He told Mr Skelton Cline to submit a written proposal, which would be considered by his "technical people" (i.e. the public officers in the Premier's Office, notably the Permanent Secretary) who would then consider and assess it, and advise the Premier as to whether it was something to be pursued. Given Mr Skelton Cline's position (and the fact that the Premier said he did not know Mr Skelton Cline well), the Premier said that he asked for the assessment to be "a thorough and good one". It was on the basis of that assessment and advice that Mr Skelton Cline was retained.

6.334 After the First Contract, the oversight moved from the Premier's Office to the MoF, and the person directly involved with overseeing the contracts moved from the Permanent Secretary Premier's Office to the Financial Secretary Glenroy Forbes. The Premier said that, on the basis of the assessment of Mr Skelton Cline's on-going performance by the technical people, the contract was twice renewed. The Premier was clear that, after Mr Skelton Cline's initial approach and prior to the First Contract being entered into, they had no discussions about it nor did they communicate about it in any way (e.g. by email). During the course of the contracts, Mr Skelton Cline's performance was assessed by the technical people (notably, Mr Forbes), and further deliverables and targets were inserted; and, had the technical people indicated to the Premier that Mr Skelton Cline was not performing, then he would have dispensed with his services. Whenever Mr Skelton Cline wrote to the Premier during the course of the contracts, the Premier said he would route that through to the Permanent Secretary or the Financial Secretary (as the case may be), "all the time". The Premier did not recollect the expression of any concern about Mr Skelton Cline's performance in respect of any of these contracts. His view was that it was the Financial Secretary's role to make sure there was satisfactory delivery of the contract as he, as Accounting Officer, was responsible for guarding the public purse and ensuring that public money was properly spent[718]. He could not recall his public officers ever expressing any concerns about Mr Skelton Cline's performance of these contracts.

6.335 However, the picture painted by the later evidence was somewhat different.

6.336 The Premier said that Mr Skelton Cline was appointed by him (the Premier) as his personal political/special adviser, and the relevant "technical people" had very little, if any input, into the arrangement.

6.337 At the time the First Contract was entered into, Ms Elvia Smith-Maduro was Acting Permanent Secretary Premier's Office[719]. She said that, when Mr Skelton Cline first approached the BVI Government, he described his proposed role as including political advice to meet the Premier's mandate; and the Premier told her that he was to be "a personal adviser to the Premier on economic development policy". Ms Smith-Maduro created the First Contract in its final form[720]; but she said she did not know how Mr Skelton Cline was selected. However, she said that, from the knowledge of his experience:

[717] T6 18 May 2021 pages 170-186.
[718] T6 18 May 2021 page 182.
[719] Ms Smith-Maduro gave evidence on this topic particularly in her Response to COI Warning Letter No 1 dated 1 October 2021, and in her oral evidence (T44 5 October 2021 pages 49-125). She was Assistant Secretary, but Acting Permanent Secretary until September 2019 when Kedrick Malone was appointed Permanent Secretary.
[720] Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October 2021 paragraph 5.

> "… we thought, the Premier thought, and I agreed, that it was worth giving him an opportunity to see what he could deliver"[721].

6.338 Ms Smith-Maduro said that the proposal submitted by Mr Skelton Cline was for a four-year contract at $196,000 per year. To reflect the (personal) nature of services, the Premier asked for the contract to be only six months in duration; terminable by the Premier at short notice (in case the relationship did not work); and that Mr Skelton Cline reported on progress at the end of the period. This was translated into the contract[722]. This role (she said) was not suitable for a tender process, there was a political dimension to it and Mr Skelton Cline was a very personal choice of the Premier[723]. During the course of the contract, Ms Smith-Maduro said she was aware that Mr Skelton Cline worked closely with the Premier; they met several times a week; and Mr Skelton Cline worked with public officials to drive forward the Premier's political initiatives[724]. The Premier assessed whether Mr Skelton Cline was performing his services adequately. As Ms Smith-Maduro put it (with reference to the assessment at the end of the first contract)[725]:

> "… [O]nly the Premier could say 'yes, I'm satisfied with what the level or the effort that he put in it. I would want to go forward with giving him additional responsibilities under a new arrangement'".

6.339 Dr Carolyn O'Neal Morton (who was appointed Permanent Secretary Premier's Office in March 2020[726]) said that, on taking up her post, she was told that Mr Skelton Cline had been engaged as an adviser by the Premier to work on various tasks for economic development and advance the Premier's priorities and objectives[727]. She too did not consider that a tender process was realistic for this role which was a personal one to the Minister, giving political advice and helping fulfil political objectives[728]. At the time of renewal of the contract for a second time, Dr O'Neal Morton said she had no input as she knew the nature of the role and that would have carried on from previous contracts[729].

6.340 The Financial Secretary Glenroy Forbes, however, was under the impression that Mr Skelton Cline had the obligations as set out on the face of the contracts, and it was his job to measure his performance against them[730]; whilst his effective successor, Jeremiah Frett (who had been Acting Financial Secretary from 1 January 2021) said that, upon his appointment, he was aware that Mr Skelton Cline had been appointed as a policy adviser or special ministerial adviser to the Premier to advance his political priorities, who was able to conduct high-level international talks on economic initiatives because he was known to be a personal adviser who spoke on behalf of the Premier[731]. He agreed that tendering was not appropriate for Mr Skelton Cline's role; but, he said, there was no suitable framework in place until 2021 to address the true nature of his appointment as political adviser[732].

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[721] T44 5 October 2021 page 54.
[722] The concept of Ministerial Political Advisers, which appears to reflect the thinking of the Premier in respect of Mr Skelton Cline, was later expounded in Cabinet Memorandum No 281/2021 pages 2-14 and adopted by Cabinet (see paragraph 1.64 above).
[723] Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October 2021 paragraph 9.
[724] Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October 2021 paragraph 7.
[725] T44 5 October 2021 page 81.
[726] Dr O'Neal Morton joined the Public Service in 1985 leaving in 2013, her last appointment being as Permanent Secretary MEC. She returned to public service in March 2020 taking up the role of Permanent Secretary Premier's Office (T6 18 May 2021 page 5-6).
[727] Dr Carolyn O'Neal Morton Response to COI Warning Letter No 2 dated 4 October 2021 paragraph 1.
[728] Dr Carolyn O'Neal Morton Response to COI Warning Letter No 2 dated 4 October 2021 paragraph 5.
[729] T44 4 October 2021 page 135.
[730] See paragraphs 6.420 below.
[731] Jeremiah Frett Response to COI Warning Letter No 1 dated 1 October 2021 paragraphs 3-8.
[732] Jeremiah Frett Response to COI Warning Letter No 1 dated 1 October 2021 paragraph 13.

6.341 The later evidence of the Premier[733] was broadly consistent with this evidence of his senior public officers. He said that, following a speech on 6 March 2019 (at which he stressed the need for a functioning policy unit within the elected BVI Government), Mr Skelton Cline made a short presentation to him, as to how he could assist him as a strategic or policy adviser[734], following which the Premier took soundings from other Ministers and "took some trouble to delve into his political affiliations and involvement [in the BVI]":

> "It was essential that anyone who would advise, work with, and represent me personally on matters so closely connected with the priorities and objectives of the new Government should be committed to its goals and aspirations".

It appears that the Premier considered that Mr Skelton Cline fitted the bill; and he asked his technical people to contact Mr Skelton Cline and obtain a formal proposal. However, Mr Skelton Cline was always going to be a personal adviser to the Premier and, in his later evidence, the Premier did not suggest that his public officials substantively assessed Mr Skelton Cline. He was the Premier's choice, on the basis of what the Premier knew of (and found out about) him. He was appointed as a personal special adviser to assist the Premier devise and develop policy in line with his political priorities. He confirmed that Mr Skelton Cline was acting as an intermediary/representative in outside groups related to economic policy, and he held no authority to make commitments on his behalf and all final decisions were for the BVI Government to make. The BVI Government had appointed such advisers as consultants before, and this role was not suitable for public procurement. The Premier referred to the (longer-term) need to bring in a functioning policy unit[735], and said that when Mr Skelton Cline approached him, it was with the proposal to be his strategy and policy adviser in respect of economic development[736]. The Premier said he:

> "…insisted that if I [i.e. the Premier] was not satisfied with his conduct or his performance the arrangement could be terminated at the Government's discretion on short notice. I also wanted his appointment to be made public from the outset."

6.342 Mr Skelton Cline, too, said that it was incorrect to read his contract in a literal sense. In reference to the initiatives set out in the First Contract, he repeatedly emphasised that he had no authority to make a decision, but only to make recommendations. His role, he said, was not to deliver an end product, but rather to bring together, facilitate, review and make recommendations to those individuals or companies who could affect such decisions in collaboration with the BVI Government[737]. His position was that he was not required to provide/furnish the deliverables which were set in any of the contracts, but rather to make recommendations to the Government which would facilitate/instruct the relevant government entity or statutory board to deliver the end goal/project objective which he could not do because he did not have the requisite authority or power to make or implement decisions[738]. However, he rejected the suggestion that he had not brought "anything to fruition" in the

[733] Premier Response to COI Warning Letter No 4 dated 4 October 2021.
[734] Mr Skelton Cline said that there was no formal approach by either party. He said he simply sent an email to the Acting Permanent Secretary Premier's Office Ms Elvia Smith-Maduro on 8 March 2019 with a sample strategic adviser agreement which, in line with the Premier's evidence, might have been indicative of him making the first move. It was certainly very shortly after the Premier's speech of 6 March 2019. It was Mr Skelton Cline's evidence that the contract would have been drafted by the BVI Government but he would have looked and made sure he could comply with its provisions before signing the same (T43 4 October 2021 page 128-129). He said that the discussion was "from both ends" as the parties knew each other, and his conversation was with the Premier and MoF who was aware of the service he could provide; and it was in that context "this contract was given birth" (T43 4 October 2021 page 125-127).
[735] Premier Response to COI Warning Letter No 4 dated 4 October 2021 paragraph 4.
[736] Premier Response to COI Warning Letter No 4 dated 4 October 2021 paragraphs 8-12.
[737] T43 4 October 2021 page 203.
[738] See his evidence at T43 4 October 2021 generally; but specifically (e.g.) pages 116, 134, 144, 159, 166, 181, 186, 191, 197 and 203.

six months of the First Contract: although in his only report for that contract each item was marked as "on-going"[739], he considered that he had provided "a tremendous amount of value" and "moved a multiplicity of projects forward"[740].

6.343 However, Mr Skelton Cline said that, after the pandemic had hit, the contract could not in any event be fulfilled in the way in which it had been anticipated, and discussion with the Financial Secretary at that stage appeared to have brought a different interpretation and new understanding of his contractual obligations[741].

6.344 In respect of the contracting parties, there is no suggestion on the face of any of the three contracts that the contracting party was other than Mr Skelton Cline as an individual (albeit doing business as Grace Consulting (First Contract) or Grace Center (Second and Third Contracts)); and Mr Skelton Cline did not sign them on behalf of a corporation. The various Certificates of Good Standing and trade licence eventually relied upon for the First Contract (and subsequent contracts) were in Mr Skelton Cline's personal name (although doing business as "Grace Center")[742]. However, Mr Skelton Cline said all of these were erroneous: the entity which contracted was in fact incorporated, namely Grace Limited. He said he had simply not picked up on this discrepancy when signing the contracts[743].

First Contract dated 27 March 2019

6.345 The First Contract was entered into by the BVI Government and Grace Consulting on 27 March 2019, for the period 25 March to 17 September 2019, with a fee for the services as a "Srategic [sic[744]] Advisor" being $16,330 per month (the equivalent of $196,000 per annum) with expenses and a tax-free gratuity of 5% of the gross salary payable upon satisfactory completion of the contract[745]. Mr Skelton Cline did not recall whether he received this gratuity[746]; but Ms Smith-Maduro confirmed that he did receive it, although the provision had been inserted accidentally (as it was only applicable to an employee, and not a consultant). She said that Mr Skelton Cline was never meant to get a tax-free gratuity (or holiday entitlement, also included in the contract), and he knew this prior to the end of the First Contract period[747]. This gratuity took the First Contract over the petty contract limit[748].

[739] See paragraphs 6.345-6.382 below.
[740] T43 4 October 2021 page 202.
[741] T43 4 October 2021 page 209-211.
[742] The Certificates of Good Standing post-dated the contract. They were as follows: (i) Inland Revenue Certificate of Good Standing dated 28 March 2019 in the name of "Claude O Cline dba 'Grace Center'", and (ii) National Health Insurance Certificate of Good Standing in the name of "Cline, Claude O DBA Grace Center" dated 28 March 2019. There is no certificate from the SSB: but a letter from Compliance Manager for the SSB Lorrily Anthony to Acting Permanent Secretary Premier's Office Ms Elvia Smith-Maduro dated 28 March 2019 explains that an application has been made in the name of Mr Skelton Cline dba Grace Center because the business relationship between the dba and the Board is very recent; but the sole proprietor "Claude O Cline" is of good standing. The trade licence relied on was in the name of "Claude O Cline dba 'Grace Center'", sole proprietor "Claude O Cline, Owner".
[743] T43 4 October 2021 page 123-124.
[744] The same spelling error occurs in Appendix A to all three contracts.
[745] Agreement between the Government of the Virgin Islands and Grace Consulting dated 27 March 2019 (Agreement No PMO/005P/2019) clause 3.
[746] T43 4 October 2021 page 135-136.
[747] Elvia Smith-Maduro Correction to Response to COI Warning Letter No 1 dated 5 October 2021 paragraph 3.
[748] The procurement provisions in the PFMA and PFMR for major contracts were not, however, followed or, apparently, even considered.

6.346 Clause 1.1 of the First Contract required Mr Skelton Cline to provide services to the BVI Government, the "scope and deliverables" being set out in Appendix A[749]. In that Appendix:

(i) The following five areas of focus were identified: (a) climate change and renewable energy, (b) a jobs program to achieve "1000 jobs in 1000 days", (c) ideas to promote youth empowerment, (d) developments in telecommunications and (e) the development of Prospect Reef.

(ii) In respect of those areas, Mr Skelton Cline's obligations were expressly set out as follows:

a) formalising and leading the strategic planning process, focusing on short- and long-term initiatives;

b) translating strategies into actionable and quantitative plans;

c) facilitating the execution of the strategy by working collaboratively with ministerial leadership, special committees, private sector, regional and international bodies, and consultants to support execution of key initiatives;

d) monitoring the execution of the strategic plan;

e) ensuring that strategic actions were completed at various levels to achieve desired results; and

f) ensuring that appropriate metrics were in place to measure performance and progress towards strategic goals.

(iii) Mr Skelton Cline was to report directly to the Permanent Secretary Premier's Office, and indirectly to the Premier.

6.347 Clause 6.1 of the Contract provided that the Consultant was to deliver to the BVI Government, statements, strategic advice, reports, briefings and other documents as particularised in Appendix A, but without specifying the frequency or timing of such advice and reports. However, both Mr Skelton Cline and Ms Smith-Maduro said that it was always understood that, given the short period of this contract, just one report would be provided, at the conclusion of the contract[750].

6.348 The contract contained clauses that the contract comprised the entire agreement between the parties, and that no amendment or modification to the agreement would be valid or binding unless it was made in writing and signed by the parties[751].

[749] The Auditor General had, of course, reported earlier that Mr Skelton Cline "…ultimately fell short on a number of contractually stipulated variables" in respect of the VINPP project (see paragraphs 6.103-6.107 above, the quotation coming from paragraph 6.105) and had recommended that "Consultants must be required to submit comprehensive reports which relate directly to the objectives and outcomes stipulated in their contracts" (see paragraph 6.106 above), some focus on the deliverables under these later contracts (and the extent to which they were, in the event, delivered by Mr Skelton Cline) is appropriate. Although the Auditor General's report on the VINPP project appears not to have been published at the time, press articles from 2012 indicated there had been (e.g.) discussions in the House of Assembly about a lack of evidence of tangible results in respect of that project (see paragraph 6.124 above).

[750] T43 4 October 2021 page 137-138; and Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October 2021 paragraph 6.

[751] Clauses 17 and 16.1 respectively. Identical clauses appeared in the Second and Third Contracts. There is no evidence of any amendments or variations being made to any of the contracts under clause 16.1.

The First Status Report dated 13 September 2019

6.349 The First Contract was due to expire on 17 September 2019. On 13 September 2019, Mr Skelton Cline (purportedly on behalf of "Grace Consulting Limited") sent a status report to the MoF which later appears to have been revised into a different form at the MoF's request ("the First Status Report") [752].

6.350 The Executive Summary began:

> "Grace Consultants Ltd has been engaged by the Government of the Virgin Islands, Office of the Premier, to assist in the planning and execution of a number of projects that are central to the new government's mandate."

6.351 The report sets out the objective of each of 11 projects by now apparently falling under the consultancy, and the services Mr Skelton Cline was required to provide under the contract (the relevant "deliverable") in respect of each[753]. It provided a summary of the work completed, and recommendations for further steps.

(i) Climate Change[754]

6.352 The project came from the MNRLI in conjunction with the Premier's Office[755]. There were two identified deliverables.

6.353 First, there was the creation of a climate resilience and renewable energy unit. Mr Skelton Cline reported that he had met staff at the Department of Natural Resources and Labour[756], and reviewed their policies and made recommendations. As far as the next steps were concerned, he said that, subject to stakeholder approval, Cabinet should be advised to make a decision/recommendation to re-establish the Climate Change Trust Fund Board to achieve the BVI Government's objectives. That was a prerequisite to making any progress[757,758].

6.354 Second, Mr Skelton Cline was to advise on projects linked to climate resilience[759]. Mr Skelton Cline said that he had met experts to discuss the restoration of the watershed in Cane Garden Bay and mangroves throughout the BVI. He had also had discussions with Power 52 to establish a solar farm on Anegada, and a solar panel installation training programme at Lavity Stoutt Community College. He recommended that the MEC review the solar panel training

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[752] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Honourable Premier dated 13 September 2019 ("the First Status Report"). Various versions of this status report were produced, without any satisfactory explanation as to their genesis. However, there appear to have been essentially two forms (i) a version produced to the COI by Mr Skelton Cline (of 19 pages) and (ii) a version produced to the COI by the MoF notably as an exhibit to Jeremiah Frett's First Affidavit dated 9 June 2021 Exhibit JF1 pages 13-47 (of 35 pages). These versions are different: for example, "conclusions' and "recommendations' are separated in the longer version. Unhelpfully, they are both dated 13 September 2019; and appear to have identical covering letters from Mr Skelton Cline to the Premier dated 13 September 2019. From Mr Skelton Cline's oral evidence to the COI, it seems that the shorter version was sent to the MoF, which then asked him to revise it, which it may have been in the longer form (see T43 4 October 2021 pages 138-139). The longer version of the report appears to have been confirmed as the final and definitive version by an email from the Deputy Secretary Premier's Office Elvia Smith-Maduro to the Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton dated 20 May 2021. I have treated the longer version as such; and this section of the Report refers to that version.

[753] There is no documentary evidence of the assignment of any projects over and above those listed in the contract itself.

[754] The First Status Report paragraph 2.1.

[755] T43 4 October 2021 page 141.

[756] Presumably a reference to the Ministry of Natural Resources, Labour and Immigration as, by then, it was.

[757] The First Status Report paragraph 2.1; and T43 4 October 2021 pages 147 and 151.

[758] For the story of why and how all the members of the Climate Change Trust Fund Board were removed by Cabinet, and then not replaced, see paragraphs 7.91-7.133 below.

[759] The First Status Report paragraph 2.1; and T43 4 October 2021 page 148.

curriculum to approve and take further. Further, the BVI Electricity Corporation needed to sign up to an agreement to power purchasing with Power 52[760]. On this basis, it was expected that around 200 people would be trained in solar installation in two years[761].

6.355 Mr Skelton Cline considered that he had taken the above two proposals as far as he could. He never expected to deliver them in the literal sense, as this required decision-making by the BVI Government including the re-establishment of the Climate Change Trust Fund Board[762].

(ii) Prospect Reef[763]

6.356 Mr Skelton Cline was to assist the BVI Government to re-establish a hotel and amenities at Prospect Reef to boost tourism. In terms of deliverables, Mr Skelton Cline was asked to set up a programme of activities designed to attract and select a developer, and to liaise with them during the project life cycle. He reported that he completed an amendment for a Request for Proposal[764], and sent this to the Attorney General's Chambers to review. He recommended that the Request for Proposal be published and issued once the Prospect Reef Development Board was reinstituted by Cabinet. The public would have 60 days to respond once the proposal was announced. The target time frame for Cabinet to make the award was the end of December 2019[765].

6.357 This was also dependent upon Cabinet re-establishing the Development Board, which was again a prerequisite to further progress[766].

(iii) The Shores Development at Brandywine Bay[767]

6.358 This was in respect of the establishment of a boutique resort with a hospitality training facility/programme with other local amenities to support tourism at Brandywine Bay. In the status report, it is said that the project was assigned to Mr Skelton Cline by the Premier on 1 August 2019.

6.359 The key deliverables were for Mr Skelton Cline (i) to meet with the representatives of the proposing developer and negotiate the terms of an MOU with respect to the project, and (ii) to assist the BVI Government in developing and implementing the programme of activities required for engaging the developer for the project and liaising with the developer during the project lifecycle[768].

6.360 Mr Skelton Cline reported that he had met the principals of the proposed development for a discussion; and, after negotiating the terms, he submitted an MOU to the Premier's Office for approval. Once such approval were given, they would be able to move to pre-development stage.

6.361 In discussing this initiative, despite the phrasing of the First Contract, Mr Skelton Cline said that his role was as a facilitator, not a negotiator; and he did not have the authority to take further steps as he was not a member of BVI Government[769].

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760 T43 4 October 2021 page 149.
761 T43 4 October 2021 page 152.
762 T43 4 October 2021 page 150.
763 The First Status Report paragraph 2.2; and T43 4 October 2021 page 161.
764 T43 4 October 2021 page 164-165.
765 The First Status Report paragraph 2.2; and T43 4 October 2021 page 130.
766 T43 4 October 2021 pages 163-164.
767 The First Status Report paragraph 2.3.
768 T43 4 October 2021 page 165.
769 T43 4 October 2021 page 166.

(iv) Telecommunications[770]

6.362 Mr Skelton Cline said that the objective was to strengthen management and regulation of the Information and Communications Technology ("ICT") sector, and facilitate the upgrade of the network and improve services. This would involve developing an ICT strategy plan for the BVI, promoting e-commerce, negotiating contract renewals and the review and revision of the Telecommunications Act. In terms of deliverables, Mr Skelton Cline was to liaise with key providers to identify key impediments to achieving the aforementioned BVI Government's objectives. He was tasked with leading on negotiations with telecoms providers for new terms of service to be provided to the BVI.

6.363 To this end, Mr Skelton Cline said that he attended the Telecommunications Regulatory Commission ("the TRC") briefing, and had had three meetings with the Caribbean Telecommunications Union ("the CTU"). He had also reviewed national draft ICT policy, and attended the four-day CTU conference in May 2019 in Trinidad. He had had meetings with two telecommunications companies.

6.364 Mr Skelton Cline made recommendations to reconstitute the TRC Board, bring policy in line with the broader BVI Government national strategy, develop telecom policy, review the ICT legislative framework, and carry out market analysis and an ICT audit. It was noted that licencing negotiations would not start until 2021, when concessions would become due for renewal.

6.365 The crucial next step was: "Cabinet to reconstitute the board of the TRC so that work on the development of the Telecommunications sector strategy can continue". Mr Skelton Cline said that, once the Board was set up, it would be for them to take forward the various initiatives. Matters could not be taken further forward without the TRC Board being in place[771].

(v) Youth Empowerment[772]

6.366 The objective of this project, which originated in the Premier's Office, was to prepare young people for a successful future by implementing various initiatives, including a youth bank, ideas for job creation, tax waivers for youth, technology and apprenticeships programmes, careers in the police, national aid for tertiary education, youth first home financing schemes, youth pension jump start programme, youth centres and job creation.

6.367 The deliverable set was for Mr Skelton Cline to provide organisational support towards the project objectives. He reported that he had assisted in the launch of the marine training programme for which the first intake was underway, which would assist young people to get the skills necessary to enter the cruise ship industry. He recommended that a working group be established involving stakeholders to establish a youth bank, and for financial ideas to be considered for the budget in 2020 and a solar panel curriculum be approved by the MEC.

(vi) Job Programme[773]

6.368 It had been a manifesto pledge of the new BVI Government in 2019 to create 1000 jobs in 1000 days. Mr Skelton Cline's role was to assist in expediting the programme.

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[770] The First Status Report paragraph 2.4; and T43 4 October 2021 page 171.
[771] T43 4 October 2021 page 172.
[772] The First Status Report paragraph 2.5; and T43 4 October 2021 page 174.
[773] The First Status Report paragraph 2.6.

6.369 He reported that he had helped to launch the campaign, and he had discussed with Power 52 opportunities for job placements subject to a contract award. He said that he had obtained commitment from four cruise lines for recruitment on cruise ships. The report recommended that the programme be sustained and monitored with further waves of recruitment to meet its target and a draft cruise ship policy be passed to Cabinet for approval.

6.370 Mr Skelton Cline considered that it was his job to "ensure the implementation team implemented the programme", and that the launch took place[774].

(vii) Small Business Development – Creation of an Innovative Business Lab[775]

6.371 The project objective here was to establish a space where innovative ideas could be shared discussed, supported and developed before an idea could be taken to market. The deliverable was to provide organisational support to an implementation team to expedite this project. Mr Skelton Cline said that he held meetings with the committees who would be executing the project. He recommended that the launch team begin preparation for the project launch, a Fintech symposium. He said he considered "his job was to convene those people who will then launch the innovative business lab"[776].

(viii) Special Committee on Cruise Tourism[777]

6.372 Mr Skelton Cline said this project was added to his contract during the course of the contract. Its objective was to foster and strengthen communications between the BVI Government and cruise tourism stakeholders. The deliverables were threefold:

(i) to keep stakeholders in the cruise industry informed of the BVI Government's policies and initiatives;

(ii) to keep the BVI Government sensitised to real-time information on the industry's needs as provided by the stakeholders; and

(iii) advise the BVI Government on the expansion of excursion options for visitors.

6.373 Mr Skelton Cline reported that he had held monthly meetings with stakeholders, cruise agents, personnel from Tortola Pier Park ("TPP") and the Ports Authority; and he said in his oral evidence that he had made recommendations as to future steps, e.g. to re-engage the Dolphin Discovery Group (which provided sea-flights) as an excursion. However, he said that any recommendations were for BVI Government (not him) to take forward[778].

(ix) TPP Floating Pier Extension[779]

6.374 The ultimate objective here was to construct a floating pier, providing a further cruise ship berth at TPP.

6.375 The deliverable was for Mr Skelton Cline to facilitate a meeting of stakeholders to discuss the project and present the BVI Government with options. Mr Skelton Cline reported that he had concluded preliminary negotiations with respect to a proposed MOU with an interested developer, which was to be passed to the Ports Authority for review.

6.376 Mr Skelton Cline emphasised his limited role, and the reasons for the role, in this project, as follows:

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774 T43 4 October 2021 page 179.
775 The First Status Report paragraph 2.7.
776 T43 4 October 2021 page 181.
777 The First Status Report paragraph 2.8.
778 T43 4 October 2021 page 186.
779 The First Status Report paragraph 2.9.

> "At the time the Consultant was asked to assist with this project, the BVI PA [i.e. the Ports Authority] Board had not yet been appointed. As a subject matter expert, the consultant was asked by the Premier to facilitate the meetings and to assist in looking after the interests of the citizens of the BVI. With a BVI PA Board now in place, this body is the best and most competent entity to continue with this project, especially since the project will be under the BVI PA's ambit.
>
> The consultant would remain available to the process which is ongoing."

(x) Medical Marijuana Project[780]

6.377 The objective of this project was to establish medicinal marijuana as a viable commercial industry in the Virgin Islands. The key deliverable was for Mr Skelton Cline to assist the BVI Government to bring together the subject matter experts, professional experts and potential investors.

6.378 Mr Skelton Cline reported that he had completed the tasks, in that he had received and reviewed a proposal from one BVI company with a commercial interest; and had received and reviewed a legislative brief from a firm of solicitors retained by the Premier's Office to develop the legal and regulatory framework. He said that he had engaged separate lawyers to develop a comprehensive strategy for establishing the industry and facilitated a presentation on 1 June 2019.

6.379 Mr Skelton Cline recommended that further research be done in relation to exporting cannabis oil, which had been shown to be successful in other countries. He also recommended that action be taken to consult local people on their views on this policy, and accelerate a decision on this.

6.380 He reiterated his role in the process was as a facilitator[781], and confirmed that he had approached the industry experts for a proposal and made contacts out of existing relationships. It was then for the BVI Government to decide whether they would engage those experts: he could not engage, obligate or negotiate the final analysis for the BVI Government. He facilitated the preliminary stages to a point when it would be handed to the MEC[782].

(xi) Medical Schools[783]

6.381 The objective was to establish two medical schools in the BVI, with Mr Skelton Cline's particular role (assigned, he said, by the Premier on 1 August 2019) being to identify the impediments in moving forward. It was noted that the jurisdiction needed to obtain certification for the jurisdiction and accreditation of the institutions. He had consulted with the Permanent Secretary MEC and the Permanent Secretary Premier's Office. He recommended that a special Task Force with representatives from the MEC and the MSHD be established along with a representative on behalf of the Premier's Office to drive the process once the requisite approvals and documentation had been provided by the Attorney General's Office.

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[780] The First Status Report paragraph 2.10. This project was the subject of criticism of the Governor/the UK Government by the elected Ministers: see paragraphs 13.71-73 below.
[781] T43 4 October 2021 page 198.
[782] T43 4 October 2021 page 198.
[783] The First Status Report paragraph 2.11.

6.382 Further, Mr Skelton Cline recommended that CARICOM[784] facilitate this project, and that the Attorney General's Office review the CARICOM framework and revert to the Premier's Office Permanent Secretary. Cabinet approval would be required once locations for the schools had been identified.

Second Contract dated 2 December 2019

6.383 Mr Skelton Cline continued giving his services after the expiry of the First Contract. The Second Contract was entered into by the BVI Government and "Grace Center" on 2 December 2019 for a period of 12 months from 18 September 2019 to 17 September 2020[785]. Certificates of Good Standing, post-dating the contract, were provided, all issued in the name of Claude O Skelton Cline dba Grace Center[786].

6.384 Mr Skelton Cline said that he just continued to work after the First Contract had expired. He did not recall that he was ever required to submit a proposal prior to being granted the Second Contract: it was a continuation of the First Contract, and he considered that he had demonstrated by his performance on the First Contract the justification for a further contract. The delay in entering the contract was due to administrative matters[787].

6.385 Under the new contract, Mr Skelton Cline was to receive a base fee of $12,000 per month, with no provision for any gratuity[788].

6.386 As with the First Contract, Mr Skelton Cline was contracted as "Srategic Advisor" to assist the BVI Government to identify and develop a portfolio of revenue generating initiatives as outlined in Appendix A; but, unlike the First Contract[789], Appendix A had the additional overarching deliverable, namely:

> "… to assist the Government identifying and developing a portfolio of revenue generating initiatives and be responsible for developing and delivering a minimum of 3 initiatives within the 12 months' timeframe that will generate a minimum of $5,000,000".

This hard-edged financial deliverable is no doubt why responsibility for the contract moved from the Premier's Office to the MoF, with direct reporting to the Financial Secretary Glenroy Forbes.

6.387 In relation to this deliverable, the following duties and responsibilities were expressly set out. Mr Skelton Cline was to:

(i) proactively identify, and secure, evaluate and prioritise a portfolio of new revenue-generating opportunities, including the appraisal of the commercial and financial viability of the organisation and their ability to afford to take on investment where required;

(ii) ensure effective information gathering and analysis is conducted in order to identify and maximise on all possible revenue-generating opportunities and minimise any risks;

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[784] The Caribbean Community including the Caribbean Common Market, established by the Treaty of Chaguaramas signed on 4 July 1973. The BVI became an Associate Member on 2 July 1991.
[785] Contract between the BVI Government and Grace Center dated 2 December 2019. The contract was signed by the Premier for the BVI Government and Mr Skelton Cline for Grace Center, both on 2 December 2019.
[786] Certificate of Good Standing from the SSB and the NHI both dated 3 December 2019; and Certificate of Good Standing from Inland Revenue dated 4 December 2019. The trade licence was similarly in Mr Skelton Cline's name dba Grace Center.
[787] T43 4 October 2021 pages 200-201.
[788] T43 4 October 2021 page 204.
[789] See paragraph 6.346 above.

(iii) lead commercial and financial due diligence and to prepare briefing documents for consideration by the Cabinet;

(iv) conduct thorough market research, financial analysis, modelling and forecasting, and social impact assessment of proposed initiative; and

(v) prepare a concise and insightful weekly update and written reports to the Premier and Permanent Secretary Premier's Office on progress of the initiatives and other activities[790].

6.388 On the face of this contract, there were therefore three particular changes in Mr Skelton Cline's contractual obligations from those imposed by the First Contract.

6.389 First, there was the requirement to ensure the generation of at least $5 million by the identification and development of at least three "new revenue generating opportunities" within the contract period. The Permanent Secretary Premier's Office Kedrick Malone[791] said that, although Ms Elvia Smith-Maduro oversaw the First Contract and continued to handle payments to Mr Skelton Cline, Mr Malone's main concern about the contract was the absence of hard-edged and detailed deliverables such as a properly formulated project plan with a timeline and milestones for achieving it. He considered that a "deliverable" should be an actual objective which was to be met by Mr Skelton Cline with the view to seeing tangible results. Having discussed that with the Premier, he said the Premier set the criteria which appeared in the Second Contract[792].

6.390 Second, there were particular specified operational obligations. Notably, he was required to conduct "financial analysis" of the proposed initiatives. Mr Skelton Cline said that, at the initial drafting stage, it had been suggested that his responsibilities should include the provision of financial analysis modelling and forecasting. However, he considered he could not perform this role, which (as, he said, he told them) ought to have been done by the MoF[793]. He took the view that, irrespective of what the contract said, his role had not changed from the First Contract – it was to "make things happen"[794] – and the BVI Government should not have been under the illusion that it was something else. However, the contract was never varied – indeed, these obligations remained upon him even in the Third Contract.

6.391 Third, the reporting requirements changed. Despite duty/responsibility (v) above (i.e. the contractual requirement that Mr Skelton Cline deliver a weekly update and written reports to the Premier and Permanent Secretary Premier's Office), Mr Skelton Cline was now to report directly to the Financial Secretary, and indirectly to the Premier and Minister of Finance (although a copy of each report was also to be sent to the Permanent Secretary Premier's Office). This was in line with the new focus on hard-edged deliverables involving bringing in income. In relation to frequency, Mr Skelton Cline said that he had a meeting with the Financial Secretary who agreed that it would have been unreasonable to request a weekly report, and it was agreed that a quarterly report would be sufficient[795].

6.392 Under the Second Contract, Mr Skelton Cline produced three status reports.

[790] See footnote 747 above. The importance of monitoring performance of a contract against deliverables was clear.
[791] Kedrick Malone was Permanent Secretary from September 2019 to March 2020, when he was succeeded by Dr Carolyn O'Neal Morton. Mrs Smith-Maduro was Assistant Secretary, but Acting Permanent Secretary until Mr Malone's appointment.
[792] T44 5 October 2021 pages 12-23.
[793] T43 4 October 2021 page 206.
[794] T43 4 October 2021 page 212.
[795] T43 4 October 2021 page 206.

The Second Status Report dated 22 January 2020

6.393 The first status report under the Second Contract is dated 22 January 2020, and comprised six pages ("the Second Status Report")[796]. The report provided an update on six projects and reported on one new project.

(i) Climate Change (headed "Power 52")[797]

6.394 Mr Skelton Cline confirmed that he had attended five meetings between October 2019 and January 2020, and the first phase of workforce development and training for the installation of solar panels was underway and would be launched in January 2020. A workforce development training day had been set for 22 January 2020. The second phase was still in progress, with the plan of reaching agreement with BVI Electricity Corporation to sign a power purchase agreement with them. Mr Skelton Cline reported that the "timeline remains a moving target", but they were looking at an end date of the first quarter of 2020.

6.395 He said that the project was now in the hands of the BVI Government to progress and take forward[798].

(ii) Medical Marijuana Project (headed "Medical and Recreational Marijuana Project")[799]

6.396 Mr Skelton Cline reported that he had attended one meeting with the Premier on 7 December 2019, and papers had been sent to their lawyers on 12 December 2019. Further meetings were required, and the legislative provisions still needed to be passed, which it was hoped would be by April 2020. This was the next step. He was handing over the matter to others to make a decision as to what to do next.

(iii) Fintech/innovation (Fintech symposium)[800]

6.397 Mr Skelton Cline reported that, between September to December 2019, he had had five meetings with two potential investors. He had also run a symposium on 3 December 2019. The next step was for Cabinet to establish a Fintech Committee to develop a roadmap for digitisation of the BVI economy and create regulation and a legal framework as necessary. Public consultation was to continue. The matter was ongoing.

(iv) The Shores Development at Brandywine Bay[801]

6.398 A proposal had gone to the Premier and points of negotiation had been sent to the Attorney General's office to draft an MOU; but Mr Skelton Cline attached a copy of the negotiations meeting note of 1 August 2019 which had already been submitted with his update in September 2019. On the face of it, there was no movement on this project. In his evidence to the COI, Mr Skelton Cline confirmed that this matter had now been taken out of his hands and was now with the Premier and Attorney General: Mr Skelton Cline had arranged the negotiation, and now "someone else" would draft the MOU and the BVI Government would then make a decision as to whether or not to take the proposal forward[802].

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[796] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Glenroy Forbes dated 22 January 2020 ("the Second Status Report").
[797] The Second Status Report paragraph 1.1.
[798] T43 4 October 2021 page 217.
[799] The Second Status Report paragraph 1.2.
[800] The Second Status Report paragraph 1.3.
[801] The Second Status Report paragraph 1.4.
[802] T43 4 October 2021 page 219.

(v) TPP Further Berth[803]

6.399 Mr Skelton Cline reported that an unsolicited proposal had come from a company for the development of a further berth. An amended proposal was being prepared for submission by the end of January with a decision to be made by the end of the first quarter of the year. The matter was in the hands of the Ports Authority[804].

(vi) Cyber Security[805]

6.400 This venture concerned security in technology, and was intended to create at least 30 jobs and to foster a public and private relationship with a profit share with the BVI Government. Mr Skelton Cline confirmed that he acted as a conduit between the BVI Government and the relevant consultancy in presenting their business case[806].

(vii) Tourism Growth/Cultural Heritage Vision[807]

6.401 This appeared to be a new project to enhance BVI tourism by developing three cultural sites to "tell the BVI story". This initiative came from the BVI Government, and some preliminary conversations led to a group of consultants coming up with a business case which Mr Skelton Cline put to the BVI Government so "Government can make a decision"[808]. Mr Skelton Cline said that he had the role of a conduit.

The Third Status Report dated 17 March 2020[809]

6.402 This report was the second report submitted by Mr Skelton Cline during the currency of his Second Contract. In it, Mr Skelton Cline reported on only two of the seven initiatives mentioned in the January report because (he said) they were the most viable and, as such, he had focused his time on these only, as well as commenting on a new prospective development. No report is made on the other initiatives. The report was thus short, six pages with attachments comprising recycled material.

6.403 The updates were in respect to the following:

(i) TPP Further Berth: The update was limited to a statement that Mr Skelton Cline had been focused on this project, and attaching a copy of the presentation by a potential investor with a draft MOU by them. Information contained in the presentation was inserted into his report. This was not new information[810].

(ii) The Shores Development at Brandywine Bay: There was very little by way of progress. Mr Skelton Cline had handled the initial negotiation, and it was now for the BVI Government to make a decision[811].

(iii) TPP Hotel: This was new. There had been an expression of interest.

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[803] The Second Status Report paragraph 1.5.
[804] T43 4 October 2021 page 219-220.
[805] The Second Status Report paragraph 1.7.
[806] T43 4 October 2021 page 221.
[807] The Second Status Report paragraph 1.6.
[808] T43 4 October 2021 page 221.
[809] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Glenroy Forbes dated 17 March 2020 ("the Third Status Report").
[810] T43 4 October 2021 pages 223-224.
[811] T43 4 October 2021 page 224.

The Fourth Status Report dated 24 June 2020[812]

6.404 Mr Skelton Cline submitted a further status report on 24 June 2020. The update consisted of two pages, and 64 pages of attachments which were again recycled material.

6.405 He reported on four matters.

(i) Safe Haven Programme: Mr Skelton Cline reported that, following the COVID-19 pandemic, the focus had shifted from creating new revenue streams to restoring lost revenue streams. He said that, with others, he had been tasked to establish a working group to develop a plan for the re-opening of the Territory's borders to visitors (named the "Safe Haven" programme). This did not prove to be difficult as there were already unofficial working groups trying to address this matter of which Mr Skelton Cline was a member, so they continued but with the specific task of facilitating the safe access of visitors travelling to the more isolated sister islands. A proposal had been passed to the Health Emergency Operations Committee. Mr Skelton Cline said that he viewed this as a "repurposing" of his contract following the COVID-19 pandemic.

(ii) TPP Further Berth: Mr Skelton Cline reported that the Ports Authority had entered into negotiations with a particular company. He attached the same MOU to this report that had been appended to the previous report. It was said to be worth $110 million, if it came to fruition.

(iii) TPP Hotel: This had moved from Expressions of Interest to requests for proposals. For both (ii) and (iii), there was no further action for Mr Skelton Cline to carry out and he was simply reporting on progress by others[813].

(iv) Tropical Ocean Airways: Mr Skelton Cline reported on a new matter. Tropical Ocean Airways were negotiating with the Ports Authority for a landing and docking station in TPP to assist with transporting visitors to sister islands after re-opening of the Territory. Licences had been granted by the BVI Airport Authority. This was a new development due to COVID-19, and it appeared that there had been some necessary progress. There was a draft proposal for the phased re-opening.

Third Contract dated 26 November 2020

6.406 Mr Skelton Cline continued providing his services after the expiry of the Second Contract. The Third Contract was entered into by the BVI Government and "Grace Center" on 26 November 2020 for a period of 12 months from 18 September 2020 to 17 September 2021[814]. No certificates of good standing were disclosed nor any evidence of an active trade licence.

6.407 In respect of Mr Skelton Cline's obligations and responsibilities, the Third Contract was in the same terms as the Second Contract notably in respect of the operational and income deliverables. However, he said that he continued on the basis that he had no operational responsibility[815]. Mr Skelton Cline's fee was, however, reduced to $9,000 per month. No explanation is apparent for that reduction.

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[812] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Glenroy Forbes dated 24 June 2020 ("the Fourth Status Report").
[813] T43 4 October 2021 page 230.
[814] Contract between the BVI Government and Grace Center dated 26 November 2020. The contract was signed by the Premier for the BVI Government and Mr Skelton Cline for Grace Center, both on 26 November 2020. The contract term expired on 17 September 2021. It is not known whether Mr Skelton Cline has continued to provide services and, if so, on what terms. When he gave evidence on 12 October 2021, the Premier indicated that Mr Skelton Cline's position was being considered in the context of contracts for political advisers which have been adopted, but no decision had yet been made (T47 12 October 2021).
[815] T43 4 October 2021 page 233.

6.408 There was an understanding that status reports were to be made on a quarterly basis. Four status reports were in fact made.

The Fifth Status Report dated 16 December 2020[816]

6.409 This report referred to six initiatives:

(i) Aquaculture: The report appended a proposal on aquaculture written by a third party as to the steps which might be taken; but the report did not discuss or add to that document. It was simply something which had been brought to his attention unsolicited, as part of the wider discussion in relation to food security at the time[817].

(ii) Safe Haven Programme: Although headed "Safe Haven Part 3", this text merely replicated the information seen in the previous status report, adding little new information.

(iii) TPP Further Berth: An update was provided on the berth project, which again appeared to repeat text from the previous report but with an update in respect of the MOU. No information was provided of any actions taken by Mr Skelton Cline[818].

(iv) Tropical Ocean Airways: This too repeated text from the previous report. Mr Skelton Cline said negotiations with the Ports Authority relating to the landing/docking station were continuing, and three companies had signed up to use the facility. Flights were due to start at the end of March 2021. He set out the current state of play; but he did not appear to be involved in his role as a consultant. He noted that he could always be brought in as a facilitator if anything caused an impediment in the process[819].

(v) TPP Hotel: The matter was with the Ports Authority, who were considering the tender.

(vi) Economic Advisory Council ("the EAC"): Mr Skelton Cline reported again that the EAC had been set up by the Premier. His view was that, at this point in time, his contract was being repurposed more to sit as one of the Secretariat within that Council. In this report, he simply attached the charter instrument of the EAC[820]. Mr Skelton Cline said what was attached to the report was the fruit of the Council's efforts, but it was a charter and not much else[821].

The Sixth Status Report dated 19 March 2021[822]

6.410 This report covered two matters.

6.411 First, the Premier had established the EAC to generate revenue-generating ideas which had two Secretariats, in one of which Mr Skelton Cline sat. This report simply attached two draft interim reports from the EAC dated 9 November 2020 and March 2021. They contain suggestions and ideas of the Council which had been meeting regularly. The update was brief and short: the EAC document was 200 pages.

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816 Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Glenroy Forbes dated 16 December 2020 ("the Fifth Status Report").
817 T43 4 October 2021 page 234.
818 T43 4 October 2021 page 235.
819 T43 4 October 2021 page 237.
820 T43 4 October 2021 pages 237-238.
821 T43 4 October 2021 page 238
822 Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Glenroy Forbes dated 19 March 2021 ("the Sixth Status Report").

6.412 Second, Mr Skelton Cline provided a short update on the TPP Further Berth MOU. The period for negotiating had been extended. There was nothing new to report. He attached a copy of an update of the draft MOU which had been attached to every status report since September 2019.

The Seventh Status Report dated 22 June 2021[823]

6.413 The Seventh Report was very short, and partly illegible. It briefly covered initiatives (i) to enhance and develop the gateway portal to interrogate databases, (ii) for waste management and (iii) for re-opening the marine sector. The report said that Mr Skelton Cline was continuing in his role as a facilitator with effective action in the hands of the Cabinet.

The Eighth Status Report dated 24 September 2021[824]

6.414 This report was shorter still. It did not add anything of substance to the Seventh Report, although it gave a short reference to the climate change initiative, still at a standstill due to inaction by the Cabinet.

Concerns[825]

6.415 There has been considerable public speculation in the BVI about these contracts and, in particular, concern that they were in essence payments made to Mr Skelton Cline without any (or any adequate or sufficient) public benefit.

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[823] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Jeremiah Frett dated 22 June 2021 ("the Seventh Status Report").

[824] Status of Assignments from Claude Skelton Cline of Grace Consulting Limited to the Financial Secretary Jeremiah Frett dated 24 September 2021 ("the Eighth Status Report").

[825] The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to the Premier, Mr Skelton Cline and several public officers. They were put to the Premier in COI Warning Letter No 4 dated 23 September 2021, to which the Premier responded in writing (Premier Response to COI Warning Letter No 4 dated 4 October 2021) and orally (T47 12 October 2021 pages 149-243). They were put to Mr Skelton Cline in COI Warning Letter No 3 dated 23 September 2021. Mr Skelton Cline did not take the opportunity afforded to respond in writing, but gave evidence orally (T43 4 October 2021 pages 114-256). In respect of public officers are concerned:

(i) Kedrick Malone: The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to former Permanent Secretary Kedrick Malone in COI Warning Letter No 1 dated 23 September 2021, to which he responded in writing (Kedrick Malone Response to COI Warning Letter No 1 undated) and orally (T44 5 October 2021 pages 4-45).

(ii) Elvia Smith-Maduro: The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to former Acting Permanent Secretary Ms Elvia Smith-Maduro in COI Warning Letter No 1 dated 23 September 2021, to which she responded in writing (Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October, and Supplementary Response dated 5 October 2021 correcting a number of inaccuracies in her earlier response) and orally (T44 5 October 2021 pages 46-125).

(iii) Carolyn O'Neal Morton: The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to Permanent Secretary Premier's Office Dr Carolyn O'Neal Morton in COI Warning Letter No 2 dated 23 September 2021, to which she responded in writing (Carolyn O'Neal Morton Response to COI Warning Letter No 2 dated 4 October 2021) and orally (T44 5 October 2021 pages 126-139).

(iv) Jeremiah Frett: The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to Acting Financial Secretary Jeremiah Frett in COI Warning Letter No 1 dated 23 September 2021, to which he responded in writing (Jeremiah Frett Response to COI Warning Letter No 1 dated 1 October 2021) and orally (T44 5 October 2021 pages 143-192).

(v) Glenroy Forbes: The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to former Financial Secretary Glenroy Forbes in COI Warning Letter No 1 dated 23 September 2021. He did not take the opportunity afforded to him to provide a written response but gave evidence orally (T44 5 October 2021 pages 193-214, and T46 11 October 2021 pages 3-6).

Each warning letter identified the evidence giving rise to the concerns and potential criticisms. The criticisms of the Premier, Mr Skelton Cline, Mr Malone, Ms Smith-Maduro, Dr O'Neal Morton, Mr Frett and Mr Forbes in relation to these contracts in this Report are respectively restricted to those in respect of which they had a full opportunity to respond, as described.

6.416 Such speculation is understandable, given the mis-match between (i) the obligations and responsibilities imposed upon Mr Skelton Cline under the contracts (particularly the Second and Third Contracts), which included operational responsibilities and hard-edged deliverables such as the obligation to "bring home" projects and income for the BVI Government, and (ii) the evidence latterly given to the COI that his role was not that as set out in the contracts, but as a personal political adviser to the Premier. In this regard, it is to be noted that:

(i) Each of the three contracts contained provisions that the contract was the entire agreement between the parties, and it could only be varied in writing: and there was never any such variation[826].

(ii) So far as relevant, the Third Contract was in the same terms of the Second Contract: it was not suggested by anyone at the time that the terms be changed to reflect what it is now said was the reality.

(iii) Each of the contracts was a major contract (i.e. valued at over $100,000), and there was therefore an obligation to lodge a copy of the contract with the High Court Registry where it would be accessible to the public[827]. In the lodged contracts, particularly given (i) above, there was effectively a representation to the public that Mr Skelton Cline had various obligations and responsibilities (including operational responsibilities and hard-edged deliverables) which it is not now suggested, by either him or the BVI Government, he did in fact have.

(iv) The Premier can only have compounded public speculation in respect of the role of Mr Skelton Cline under these contracts by initially giving evidence to the COI that his public officers assessed Mr Skelton Cline, both as to whether he was suitable for the role and as to his performance against the obligations on the face of the contracts during their course; only to say later that that was not the case. He later suggested that, now, if Mr Skelton Cline were to be retained in the role he in fact performed under these three contracts, it would be as a Ministerial Political Adviser[828]; and, under these contracts, Mr Skelton Cline was in fact a personal political adviser who could only be assessed, selected and monitored by him (the Premier) alone. The Premier said that the only reason that his contracts were not framed as such is that there was no available contract template for such a role at that time. Whilst I understand that the Attorney General's Chambers may have been under pressure, this seemed to me a remarkable excuse for entering into a contract with Mr Skelton Cline on a basis which, on the face of the contract, was false.

6.417 On the basis that Mr Skelton Cline's obligations and responsibilities were as set out in the contracts, there would of course be very considerable concerns.

6.418 First, there was no tender process in respect of any of the three contracts, each of which was valued at over $100,000[829]. The Premier and the public officers who gave evidence said, with some force, that it was not appropriate to put out personal policy advice to tender; but there seems no reason why the services provided for by the contract could not have been put out to tender.

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826 See paragraph 6.348 and footnote 750 above.

827 See paragraph 6.10 above. It is not entirely clear whether the contracts were lodged in a timely manner. The Third Contract, dated 26 November 2020, is stamped as having been lodged on 15 April 2021; when, as an attachment, the two previous contracts were also lodged. It is not clear whether (and, if so, when) they were previously lodged. I am proceeding on the basis that they were not concealed, but lodged within a reasonable time as they ought to have been.

828 See paragraph 1.64 above.

829 The value of the First Contract was over $100,000 if the tax-free "gratuity" is taken into account (see paragraph 6.345 above).

6.419 Second, the Premier initially said that his public officials assessed Mr Skelton Cline's suitability for the role he took up under the contracts. However, whilst Certificates of Good Standing and an appropriate trade licence were produced (and presumably checked by the public officers), leaving aside the fact that (i) they were generally produced after the relevant contract had been entered into and (ii) they were in the name of Mr Skelton Cline doing business as Grace Centre (which, in Mr Skelton Cline's view and despite the face of the contract, was not the contracting party), no due diligence or assessment of Mr Skelton Cline's experience or ability to perform the contractual obligations was done. Dr O'Neal Morton said that, normally, a consultant would submit a proposal and public officials would then check their qualifications etc[830]; but, in this case, Mr Skelton Cline did not submit a proposal and it is not suggested that any due diligence checks were done. She said that consideration of Mr Skelton Cline's part in the VINPP project would not have been looked at: the only due diligence would have been in respect of ensuring that he had a trade licence etc. In the event, Mr Skelton Cline frankly accepted that he could not have performed some of the obligations as set out on the face of the contracts (e.g. financial analysis). The response to these concerns was that, as a personal policy adviser to the Premier, that sort of assessment would not have been appropriate: it was simply for the Premier to decide whether Mr Skelton Cline could adequately perform the role of political adviser.

6.420 Similarly, third, if Mr Skelton Cline was being measured against the criteria and deliverables set out in the contracts, he did not measure up well. First, his reporting (which would provide the evidence of delivery or non-delivery of the contractual deliverables) was clearly inadequate. The Financial Secretary Glenroy Forbes (to whom Mr Skelton Cline directly reported during the Second and the beginning of the Third Contract, until Mr Forbes retired from that post at the end of 2020), was under the impression that Mr Skelton Cline was required to meet his obligations as set out on the face of the contracts (e.g. to deliver projects to the value of $5 million). He made no reference to Mr Skelton Cline having a distinct role as a "personal adviser" to the Premier, or being there simply to facilitate or recommend proposals. He did note that for Mr Skelton Cline to effect those deliverables as set out in the contract he would have required some help and assistance; it was not a task he could have done alone, because of the need for (e.g.) Cabinet approvals to progress some initiatives. In his view, the contract was still lacking in concrete milestones that were required to be met and, if they were not met, the consultant should have been required to explain why they had not in his report. But, in respect of the deliverables that were in the contract, Mr Forbes did not consider that the quarterly reports were adequate to monitor progress, which he considered it was his job to do: as against the criteria in the contracts, he did not consider that Mr Skelton Cline measured up at all well[831,832].

6.421 Of course, although both the Premier and Mr Frett suggested that Mr Skelton Cline might arguably have met some of the specific requirements of the contract, on the Premier's later evidence, that would have been entirely coincidental – because his role was simply as a political adviser, not as someone who had contracted to bring home hard-edged deliverables in terms of (e.g.) specific income as set out on the face of his contract. Any attempt at assessment of performance against the terms as set out on the face of the contract therefore has no validity or value; and the fact that no one apparently considered the evidence that

[830] T6 18 May 2021 pages 24-31.
[831] Unsurprisingly, as Mr Skelton Cline was not attempting to meet the requirements imposed upon him on the face of the contract with regard to (e.g.) operational responsibilities and financial analysis.
[832] Mr Forbes accepted that it was his task to monitor Mr Skelton Cline's performance as against his obligations on the face of the contracts, he said that in fact did not have the resources adequately to monitor Mr Skelton Cline's work in any event (T46 11 October 2021 page 208-213).

previously (i.e. in respect of the VINPP[833]) Mr Skelton Cline had singularly failed to deliver in respect of the operational elements of a project becomes, perhaps, slightly less extraordinary. I was entirely unimpressed by both the Premier's suggestion (unsupported by evidence) that Mr Skelton Cline did a good and worthwhile job in respect of the VINPP and his suggestion that, when engaging Mr Skelton Cline in respect of these later contracts, he, his public officers and his Cabinet were unaware of the criticism levelled against Mr Skelton Cline in respect of the way in which he had executed the VINPP project. But, despite the wording of the contracts, on the basis of the later evidence before the COI, in respect of the 2019-21 contracts, there were simply no deliverables against which success or failure could be measured.

6.422 Therefore, by the end of the hearings, the overwhelming evidence was that, from 2019, Mr Skelton Cline was very much the Premier's personal choice as a political adviser, and his public officers had little if anything to do with assessing his suitability for that post or monitoring his performance in it. The evidence was that, in this role, Mr Skelton Cline worked closely with the Premier, met him several times a week and he worked with public officials to drive forward the Premier's political initiatives[834].

6.423 However, even on this basis, it is still not entirely clear how payments came to be made to Mr Skelton Cline under the contracts in circumstances in which it is now not suggested that he was complying (or attempting to comply) with his obligations as set out in the contracts. The Permanent Secretary Premier's Office signed the authorities for payment; but the Financial Secretary (to whom the invoice was sent) also approved payment. Indeed, it was the approval of the Financial Secretary that triggered the payment[835].

6.424 Given the remarkable state of affairs in relation to these contracts as appeared on the evidence obtained by the COI, I caused warning letters to be sent to the Premier; his Permanent Secretaries over the relevant period, Kedrick Malone, Elvia Smith-Maduro (Acting) and Carolyn O'Neal Morton; the Financial Secretaries over the relevant period, Glenroy Forbes and Jeremiah Frett (Acting); and Mr Skelton Cline.

6.425 The letter to Mr Skelton Cline indicated that the evidence obtained by the COI gave rise to the potential criticisms of him that he failed to comply with his contractual obligations and failed to give value for money or any substantial public benefit over the 30-month period of the three contracts; and, indeed, he made no significant effort to comply with those obligations or give value for money, and evinced no intention so to do. The manner in which these contracts were pursued was inconsistent with the principles of good governance, and the information about the contracts may be sufficient to show that serious dishonesty in public office may have taken place in connection with them[836]. The warning letters sent to the public officials reflected those concerns. All the individuals issued with a warning letter attended to give oral evidence, and each of them also provided a written response to the warning letter save for Mr Skelton Cline and Mr Forbes. As indicated above, they generally said that Mr Skelton Cline was not seeking to satisfy the obligations as set out on the face of his contract; but, rather, he was a political adviser who gave value for money as such. That role was not capable of being monitored and assessed, except subjectively by the Premier himself to whom Mr Skelton Cline reported. The Premier was content with what Mr Skelton Cline did in that role.

[833] See paragraphs 6.97-6.132.
[834] Ms Elvia Smith-Maduro Response to COI Warning Letter No 1 dated 1 October 2021 pages 1-4.
[835] T6 18 May 2021 page 58.
[836] COI Warning Letter No 3 to Claude Skelton Cline dated 23 September 2021.

6.426 When assessed against the face of the contract, the core criticisms are clearly made good. Mr Skelton Cline did not perform the contract, nor did he seek to do so. He gave no (or no adequate) value in those terms. Any value would have been entirely coincidental. No sensible record was kept of what he did, or assessment of his performance made against any objective criteria. We only have the assertion of the Premier and Mr Skelton Cline that he provided "good value" in a public interest sense. There is evidence that he spent some time acting as the Premier's political adviser. But, in terms of governance, this was not what the contracts required/allowed, and was unmonitored. Mr Skelton Cline was not even the subject of the constraints that have been placed on political advisers in the newly established posts of Ministerial Political Advisers. In governance terms, this is, at least, highly unsatisfactory; and troubling.

6.427 Even compared with other projects upon which the COI focused, these contracts had strands of governance that were not only very poor but quite astonishing. On the evidence, there can be little if any doubt that these contracts were, on their face, false: they did not attempt to set out the intended contractual obligations of Mr Skelton Cline (if any, and whatever they might have been) for which Mr Skelton Cline was on the face of it being paid out of the public purse. By the end of the evidence, no one suggested that they did[837]. I did not find any explanation of this that was put forward to be at all persuasive, or anything but transparently thin[838].

6.428 In the circumstances, I find it that factors other than those of the legitimate public interest may have been in play when these contracts were awarded – in my view, on the evidence, it is impossible to find otherwise – and, thus, I am satisfied that there is information that serious dishonesty in relation to public officials may have taken place in relation to these contracts. The conduct thus falls within paragraph 1 of my Terms of Reference.

6.429 I consider that, as soon as practical, a full audit of these contracts should be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the evidenced work done by Mr Skelton Cline under these contracts, (ii) the contractual obligations of Mr Skelton Cline under these contracts, and any mismatch between those obligations and the work done; (iii) to the extent that he was not performing his contractual obligations, the circumstances in which Mr Skelton Cline was paid out of the public purse; and (iv) whether the contracts provided value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

[837] The Premier accepted that they did not (Elected Ministers' Closing Submission paragraph 63).

[838] The Attorney General made submissions on these contracts (Elected Ministers' Closing Submissions paragraphs 56-64). The submissions do not refer to the Premier's initial evidence in relation to these contracts, in which he distanced himself from contracts saying they were dealt with by his public officers who monitored them. The submissions simply say that this was "a contract for personal services" (paragraph 56), the formulation of which "did not really reflect the role [Mr Skelton Cline] was to fulfil" (paragraph 59). "There was a mismatch between the contracts as drafted, which failed to capture the intended role and the real nature of the services to be provided by Mr Skelton Cline" (paragraph 63). The submissions do not attempt to explain this state of affairs. The submissions simply assert that: "The engagement of a special Advisor was entered into solely for the public interest" (paragraph 61). The submissions are not helpful. I have dealt with the substance of what they say in this section of the report when dealing with the evidence.

Radar Barges

Introduction

6.430 Given that the BVI is comprised of numerous small islands, close to other states, its security poses particular challenges, compounded during the COVID-19 pandemic.

6.431 With regard to who is responsible for security in the BVI, as indicated above[839], section 60(1) of the Constitution reserves to the Governor several areas of special responsibility, including external affairs, defence (including the armed forces) and internal security (including the RVIPF).

6.432 However, section 57 provides that there shall be a National Security Council ("the NSC") which shall consist of (i) the Governor (as Chairman), (ii) the Premier, (iii) one other Minister appointed in writing by the Governor acting in accordance with the advice of the Premier, (iv) the Attorney General and (v) the CoP. Since 2019, the appointed Minister has been the Deputy Premier Dr the Hon Natalio Wheatley. All are voting members[840]. In practice, the Attorney General advises the NSC on legal matters, and the CoP on security matters. The CoP has responsibility for the day-to-day operation of the RVIPF and has to report regularly on such operations to the Governor; and is required to provide regular briefings to the NSC on matters of internal security including the RVIPF[841].

6.433 The NSC is required to advise the Governor on matters relating to internal security, and the Governor is obliged to act in accordance with the advice of the NSC unless such advice would adversely affect Her Majesty's interest. Where the Governor has acted otherwise than in accordance with the advice of the NSC, he or she is required to report that to the NSC at its next meeting[842].

6.434 On 12 January 2020, WHO confirmed that a novel coronavirus causing respiratory disease, COVID-19, had been reported in Wuhan Province, China. In relation to the new virus, it declared a public health emergency on 31 January 2020, and pandemic status on 11 March 2020.

6.435 The importance of severely limiting the numbers infected with the virus was quickly recognised in the BVI, given the closeness of communities and the sparsity of intensive care facilities.

6.436 The BVI consequently closed its borders on 22 March 2020[843]. The first two COVID-19 cases were reported in the BVI on 25 March 2020, both involving individuals who had travelled to the Territory earlier that month. On 27 March 2020, the BVI Government declared a 24-hour a day lockdown with closed borders until 2 April 2020, later extended to 30 days. It was followed by a succession of restrictive regimes involving curfews, restrictions on places from where one could travel to the BVI, and quarantine/self-isolation for those who were allowed to enter the BVI.

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[839] See paragraph 1.52 above.

[840] The oral evidence was not clear – some evidence suggested that the CoP may not have a vote on the NSC (T7 20 May 2021 page 175 (former CoP Michael Matthews)), but cf the evidence of the Attorney General (T16 22 June 2021 page 6). The Attorney General later confirmed that, whatever the practice might be, all members of the NSC (including the ex officio members) have the right to vote: letter Attorney General to COI dated 7 December 2021.

[841] Section 57(4).

[842] Section 57(3).

[843] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 3.

6.437 It was clearly important to keep the borders tightly regulated, in the sense of preventing the unregulated entry of people into the BVI from other countries where the rate of infection was often much higher. In Spring 2020, for example, there was a substantial spike in COVID-19 cases in the US Virgin Islands which, at their nearest point, are less than a mile away from the BVI.

6.438 Whilst a more permanent solution was investigated, temporary expedients to police and prevent unlawful entrants by sea were considered and implemented. From 23 August 2020 to 22 January 2021, at a total cost of $2,040,000, two or three barges equipped with radar were leased from a company called EZ Shipping Limited ("EZ Shipping") and stationed off the coast to track sea traffic and alert interceptors, thus deterring unlawful entry into the BVI.

6.439 The contracts under which these radar barges were leased by the BVI Government have been the subject of considerable speculation in the media and amongst the public in the BVI. The COI requested disclosure of the relevant documents and heard evidence in respect of these contracts over several days; but the documents initially provided were substantially incomplete and in disarray, and many witnesses who ought to have known the details of the arrangement were initially unable greatly to assist. However, with persistence, the picture became a little clearer.

Part 1: Pre-Contract

6.440 The then CoP Michael Matthews said that, when the BVI closed its borders in March 2020, he realised that ensuring the security of the closed borders was beyond the capacity of the RVIPF alone; and so he approached both HM Customs and the Immigration Department about a possible joint approach to the issue[844]. As a result, a Joint Task Force ("the JTF")[845] of the three arms of law enforcement was created in April 2020[846], which included the following members:

(i) Mr Wade Smith, HMC Commissioner and Chairman of the JTF (from 7 August 2020)[847];

(ii) Mr Greg Romney, Deputy HMC Commissioner;

(iii) Mr Leslie Lettsome, Deputy HMC Commissioner;

(iv) Mr Ian Penn, CIO;

(v) Mr Matthews until his retirement in April 2021[848], and then his successor as CoP Mr Mark Collins QPM; and

(vi) Mr St Clair Amory, Superintendent of Operations within the RVIPF.

6.441 Although instigated by the CoP, the lead agency for the JTF was HM Customs[849], with the HMC Commissioner Wade Smith chairing the meetings of the JTF from his appointment in August 2020. Initially, minutes of JTF meetings were not taken; but they were taken from shortly after the date of Mr Wade Smith's appointment as chair[850].

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[844] T7 20 May 2021 pages 178-179.

[845] Also referred to as the "Border Control Task Force (see, e.g. T4 11 May 2021 page 16, and T5 13 May 2021 page 114) and occasionally the "Joint Intelligence Unit" (see, e.g., NSC Memorandum No 008/2020: COVID-19 Border Security Plan for the BVI dated 25 May 2020 prepared by Governor Jaspert and the Premier paragraph 7, and T52 21 October 2021 pages 130-131).

[846] T5 13 May 2021 page 114.

[847] Mr Lettsome was Acting HMC Commissioner from 7 December 2018 until 7 August 2020 (T7 20 May 2021 page 85 and T52 21 October 2021 page 141). Mr Romney was briefly in charge early in the lockdown period, for about a week, as Mr Lettsome was on sick leave (T7 20 May 2021 page 110).

[848] T7 20 May 2021 pages 172-173.

[849] T5 13 May 2021 pages 113 and 129.

[850] A minute secretary was appointed on 3 September 2020 (Memorandum HMC Commissioner to COI dated 12 May 2021 paragraph 7; and T7 20 May 2021 page 174 and T5 13 May 2021 page 129).

6.442 The JTF reported to the NSC, in writing or sometimes orally, its task being to make proposals to the NSC which would then decide, from a security point of view, the proposals they wished to approve and pursue. As the NSC had no authority to expend money, any proposed expenditure would have to go for approval to the Minister of Finance, if a petty contract; or, if over $100,000, to Cabinet in the form of a paper from the Minister of Finance[851].

6.443 The JTF was specifically tasked with drawing up a Comprehensive Border Security Plan ("the Border Security Plan")[852].

6.444 Initially, private sea vessels were used to secure the borders of the BVI. They were of two types: vessels which could use their radar systems to monitor sea traffic, and fast boats which could, if alerted to identified sea traffic, intercept it.

6.445 In March 2020 or soon thereafter, Mr Matthews tasked Mr Amory with approaching the private sector (and, in particular, the charter industry) to identify vessels that might be available to assist the JTF with coverage of the borders. Mr Matthews did not recall receiving written offers; but people voluntarily came forward (by, e.g., contacting people within the RVIPF), offering boats to be positioned offshore with their radar systems on to monitor the sea traffic. Mr Matthews recalled one particular offer from a charterer, which prompted him to make a positive direct approach to the charter industry for assistance[853].

6.446 Initially, one boat with a captain on board was voluntarily provided, with no rental charge but only a charge for fuel and provisions, on which a member of the law enforcement agencies was placed to monitor traffic and pass information to RVIPF patrols for interception. That was later supplemented by two additional private vessels[854]. However, by about May 2020, it seems that the charter companies were indicating they were no longer prepared to provide their boats for free; and the RVIPF was approached about hiring the boats at $1,000-$2,000 per week to continue the arrangement[855].

6.447 Furthermore, law enforcement officers were complaining about the conditions encountered when serving on private yachts when they were being used for radar patrols, due to a combination of standing on such vessels when the sea was turbulent, close proximity of officers and civilians working together on boats and safety concerns. Mr Lettsome, in his evidence, emphasised the importance of the welfare of the officers, and it appears that these concerns were passed on to the Premier[856].

6.448 It was regarded as essential that, in addition to the radar capability, fast boats were available to intercept identified sea traffic. Whilst the RVIPF and HM Customs had several such vessels, at all relevant times most were non-functional and awaiting funding from the MoF for repairs, meaning that the law enforcement agencies did not have sufficient boats of their own to provide an adequate interceptor capability[857].

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[851] T7 20 May 2021 pages 135, 137 and 185.
[852] T52 21 October 2021 page 130.
[853] T7 20 May 2021 pages 179-180.
[854] T7 20 May 2021 pages 108 -110.
[855] T7 20 May 2021 pages 180-181 (Mr Matthews), T7 20 May 2021 pages 108-110 (Mr Romney and Mr Lettsome); and Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 4.
[856] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 4.
[857] As will be seen, the evidence was consistent on this point. The draft Comprehensive Border Security Plan of 20 July 2020 noted that HM Customs and the RVIPF had only one working vessel each, four vessels needing repair and non-operational. By 17 August 2020, the number of operational boats was down to one (Email Mr Matthews to the Financial Secretary dated 17 August 2020, chasing an update regarding a funding decision). The Premier said that he understood that none of these repairs was done during the period covered by the radar barge contracts with EZ Shipping i.e. by January 2021 (T52 21 October 2021 pages 159-160), which certainly appears to have been the case. Hence the perceived need to hire fast boats.

6.449 Mr Matthews said that, consequently, he had conversations with the MoF early on about hiring fast boats. No adverts or tenders were placed, but again people nevertheless approached the RVIPF with offers, some of which were taken up on the basis that the RVIPF could deploy law enforcement personnel on them as interceptor/patrol boats[858]. However, the use of these volunteer boats ceased by July 2020, as many of those volunteering left the BVI once permitted to do so; and many of the boats were also either taken away or put into safe locations because of the upcoming hurricane season[859]. The Premier also said that, in his view, the ready availability of such boats reduced, in part, because the marine industry felt that the BVI Government were not working with them in terms of the pandemic[860]. In any event, it seems that none was available from July 2020.

6.450 Parallel with those steps in respect of private vessels, on 17 April 2020, the Premier wrote to Governor Jaspert stating that, as Minister of Finance, he would immediately make available $2 million to fund the acquisition of four suitable boats for border protection[861]. Mr Matthews' evidence was that he never saw money reaching the operational frontline for the RVIPF – for example, this money was not used to speed up the repairs to the fast boats referred to above or other priority areas for the JTF – but he acknowledged that there were already boats on order and some of this promised $2 million appears to have been directed to paying for those.

6.451 Governor Jaspert was willing to seek UK military assistance in the form of a small team of advisers; but, on 5 May 2020, at an NSC meeting, the Premier indicated his view that he did not want a UK military assistance team in the BVI at that time. He asked for two further weeks to allow the JTF to complete their Border Security Plan before considering UK assistance again[862].

6.452 The following day, 6 May 2020, EZ Shipping[863] (a company owned by Mr Clyde Chadwell) sent an unsolicited proposal to the Premier (copied to the then Financial Secretary Glenroy Forbes, Mr Matthews and Governor Jaspert) for the BVI Government to hire two barges from the company to be used for border control, namely Midnight Stone (at $9,500 per day) and Midnight Chief (at $7,500 per day), i.e. a total proposed cost of $17,000 per day[864].

6.453 In his evidence to the COI, the Premier explained that such unsolicited proposals were not uncommon in the BVI. People approach elected officials attending to their daily activities with details of their businesses, and asking whether the BVI Government would be interested in working with them, suggesting that they write in with details. The Premier explained that, if people wrote to him with unsolicited proposals, he would direct them to the correct person. He recalled receiving this particular unsolicited response, as his office received a couple of

858 T7 20 May 2021 page 182.
859 T7 20 May 2021 page 188.
860 T52 21 October 2021 page 147.
861 Letter from the Premier to Governor Jaspert: Maintaining Border Security and Public Safety dated 17 April 2020.
862 Email Governor Jaspert to Ben Merrick FCDO and others dated 6 May 2020. On 7 May 2020, the Premier wrote to Governor Jaspert with reference to a draft letter he (the Governor) had prepared to FCDO, and had shown to the Premier on 1 May 2020, whereby he was seeking military assistance from the UK in the form of a small team of advisers. Although the request to the UK was for advisory assistance only, the Premier stated that he could not support a UK "military intervention" in the BVI (which he suggested was "synonymous with Home Rule") and asked Governor Jaspert to defer such a request. The Premier identified priority areas of need, if the UK were able to assist, being the provision of a suitably equipped quarantining ship (the Premier noted that the UK had not to date provided such a ship) and the grant of funding to provide financial support to those who lived in the BVI who had been displaced from their jobs due to the pandemic (Letter Premier to Governor Jaspert: UK Military Presence in the BVI dated 7 May 2020).
863 The unsolicited proposal contains a number of references to "Midnight Marine Holdings Limited", a company that appears to have the same postal address as EZ Shipping and to be under the same ownership (Mr Clyde Chadwell). Mr Chadwell is also referred to as "Mr Chalwell" in some documents; the correct spelling has been adopted throughout this section.
864 There appears to have been some confusion at first as to whether this rental charge was per day or per week: see email Mr Matthews to Mr Lettsome and Mr Penn (copied to Mr Romney and others) dated 5 July 2020 where the figure was stated as $17,500 per week. Also see Mr Wade Smith's evidence at T4 11 May 2021 page 37. However, later correspondence and events make clear that the offer was in respect of a daily rate of $17,000.

follow up calls from Mr Chadwell. He said he asked his office to call Mr Chadwell, and to inform him that this matter was not within the Premier's domain and that he would need to direct his correspondence to either the CoP or the HMC Commissioner: it was not a decision for the Premier to take[865].

6.454 On 15 May 2020, Mr Matthews responded to the unsolicited proposal from EZ Shipping by way of an email to Mr Chadwell[866]. He explained that the JTF was being supported by volunteers from the private sector who had loaned the JTF both boats and captains for mobile patrol and static platforms. Mr Matthews noted in his email that the JTF had been able to deliver EZ Shipping's proposals for radar vessels using volunteers "virtually cost free". He told Mr Chadwell that the JTF had no current need for hiring further vessels as part of enforcement activity.

6.455 In evidence before the COI, Mr Matthews elaborated his concerns regarding EZ Shipping's offer[867]:

(i) He did not believe that it represented value for money, and he did not consider that the sums quoted could be afforded within the RVIPF budget. He thought he would be "laughed out of the room" and that the MoF would think he was "mad" for taking such a proposal forward, so he turned it down and (literally) threw the proposal away.

(ii) As security adviser to the NSC, he had "severe reservations" about paying for and utilising such radar capability, as he felt that the JTF lacked sufficient interceptor vessels to respond to radar notifications.

(iii) He had concern over who would be on the barges with law enforcement officers.

(iv) RVIPF officers had no training in being stationed on vessels of this scale; so he had concerns for their health and safety.

(v) He did not believe it was the best use of RVIPF officers to be static on a barge waiting for radar notifications. His view was that it would be better for them to be on fast boats to intercept. He made this view known to the NSC.

(vi) Ultimately, he did not want to be seen as recommending something that he did not believe in. As a police officer of some years' experience, who had held senior positions in a number of police forces and as security adviser to the NSC, he said the proposal was not something he could professionally justify.

6.456 Meanwhile, the JTF had prepared a Border Security Plan, which went through a number of iterations. It is not clear precisely when the first draft was prepared; but on 5 May 2020 the Premier had indicated that it was not ready and may take another two weeks, and an apparently first version of the short-form and full Plan are attached to an NSC Memorandum dated 25 May 2020 as appendices[868]. So, it appears to have been produced sometime in mid-May 2020. Whilst it had a substantial narrative, the full draft Plan was still a relatively rudimentary document which effectively set out a "wish list" of requirements by the three law enforcement arms of the JTF with an aggregate estimated cost of $1,167,350, including (i) several (land) motor vehicles ($335,000), (ii) 90 body and five static cameras ($468,000), (iii)

[865] T6 18 May 2021 pages 152-154.
[866] Email Mr Matthews to Mr Chadwell (copied to the Premier, Mr Lettsome, Mr Romney and others): Unsolicited Proposal – Service For Border Control" dated 15 May 2020. There is also an email from Mr Romney to Mr Frett dated 11 March 2021 confirming that this email from Mr Matthews was the first time he became aware of the proposal from EZ Shipping.
[867] T7 20 May 2021 pages 183-184 and 212-216.
[868] NSC Memorandum No 008/2020: COVID-19 Border Security Plan for the BVI dated 25 May 2020 prepared by Governor Jaspert and the Premier Appendices A and B.

various bullet-proof vests and night-time equipment and (iv) five radar platforms ($150,000)[869]. It noted that land-based radar platforms, to be erected at strategic locations throughout the BVI, would enable the tracking of the movement of vessels especially at night; and would assist in more intelligence-driven operations. It also identified the need for more go-fast interceptor vessels and a next generation of patrol vessel built for long hours at sea. The document highlighted that, being more mission-based in approach, this would give value for money; and that sea patrols could not cover all areas of the sea at once, being another reason for acquiring fixed surveillance equipment. There appears to be no reference in these appendices to sea-based radar barges[870].

6.457 In response to this initial Border Security Plan, the Financial Secretary Glenroy Forbes addressed a memorandum to the JTF dated 25 May 2020, which suggested that an indication of priority areas in the plan, along with timeframe, would assist with cash flow planning and budgeting[871]. In the NSC Memorandum dated 25 May 2020, prepared by Governor Jaspert and the Premier, it was recommended that the NSC ask the JTF to re-submit the Border Security Plan, outlined as a three-month plan and as a six-month plan, inclusive of timescales and funding requirements with priorities identified. At the NSC Special Meeting the following day, the NSC approved that recommendation[872].

6.458 On 3 July 2020, the Cabinet Secretary emailed the members of the JTF, in the following terms:

> "Please see below the following Action Item for your information and action:
>
> > 'Cabinet agreed that HM Customs/RVIPF/Immigration (Border Control Task Force [i.e. the JTF]) revisit the proposal received from private vessel owners offering their vessels to support border management/control efforts, which will be considered by the National Security Council.'"

The Premier explained that this was not a Cabinet decision taken on a vote based on a Cabinet paper; but simply a Cabinet action item requiring action to be taken forward[873]. He could not remember why Cabinet took that action, and stated that there might not be any records for this action item as sometimes in Cabinet there was just a general conversation about different topics out of which action items arose[874]. In any event, the email indicated that there would be a Special Meeting of the NSC on 7 July 2020 to discuss this[875].

6.459 Following receipt of that email, on 5 July 2020 Mr Matthews emailed Mr Lettsome and Mr Penn (with a copy to, amongst others, Mr Romney), as follows:

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[869] Mr Matthews said that, when it drew up the first Border Security Plan, the JTF had in mind the $2m figure to which the Premier had earlier referred; although Mr Matthews said he never in fact saw the end-of-year figures/breakdown as to what may have been spent on the items identified in the Plan (T7 20 May 2021 pages 216-219).

[870] The Premier said, in oral evidence to the COI, that the focus at this time was ensuring the BVI had radar covering the waters around the BVI, whether by way of land-based radars or sea-based radars (T52 21 October 2021 pages 131-132).

[871] Memorandum Financial Secretary Glenroy Forbes to the CIO, the HMC Commissioner and the CoP: COVID-19 Border Security Plan for the BVI dated 25 May 2020.

[872] Expedited Extract issued on 2 June 2020: COVID-19 Border Security Plan for the BVI NSC Memorandum No 008/2020. No minutes of the meeting have been provided to the COI. As to the requirement for prioritisations, see also T7 20 May 2021 pages 175-176 (Mr Matthews). Mr Matthews also recalled the Minister of Finance making it clear that funding might not be available all at once (ibid).

[873] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 2.1. Reference is made to Elected Ministers' Response to Governor Position Statement paragraphs 90-105.

[874] T52 21 October 2021 pages 178-179. See also T52 21 October 2021 pages 69-70 (Mr Jaspert).

[875] Email Cabinet Secretary Sandra Ward to Mr Matthews, Mr Lettsome, Mr Romney and Mr Penn, copied to Governor Jaspert, the Premier and the Financial Secretary: Cabinet Action Item: Special NSC Meeting on Tuesday, 7 July 2020 dated 3 July 2020.

> "I have been caught by surprise by the Emergency NSC meeting topic. On 15th May I wrote to Mr Clyde Chalwell [sic] of EZ Shipping following receipt of an unsolicited proposal from him, offering two of his vessels as static platforms in support of our border security plan.
>
> His proposal indicated a cost of around $17,500 per week [sic[876]] hire charges.
>
> My response was to decline his offer and I explained that where we had made use of boats as platforms these had been provided free with just costs for fuel and provisions. I gave no further thought on the matter until I saw this NSC summons.
>
> Of course you must make your own mind up but the costs involved (if such funding is being made available) could be used for static radar, night vision cameras or other support to the security operation rather than being used for the hire of static vessels. We could even seek to address the issue of compensation for crews as previously discussed if such additional funding is available. This is a law enforcement operational decision and that is why I am surprised that Cabinet are seeking to have this matter raised with us. I would add that such platforms do not feature as a priority in our previous plan submitted to NSC.
>
> Should we face pressure to make such use of private vessels, my view is that for such high sums of money we should go out to tender and let others bid. These are purely my views and I do not seek to influence you but purely inform. As I said, I have been caught by surprise by this subject matter appearing and the summons to discuss it at NSC."[877]

6.460 In that email, Mr Matthews therefore indicated surprise at the Cabinet seeking to move this (essentially law enforcement operational) matter forward as it did; and indicated that, in his view, if radar barges were to be used, then the contract should be put out to tender. In his oral evidence to the COI, he emphasised that he would have expected that, if Cabinet were to have discussions about border security, then he as CoP would have been involved. However, Cabinet appears to have considered it without his involvement, or the involvement of the other law enforcement agencies (HM Customs and Immigration). Consequently, Mr Matthews said it seemed to him that the elected Ministers had "reached this conclusion themselves". He considered it unusual for Cabinet to intervene in a security issue in this way: this was the only time he could recall a directive from Cabinet to JTF about something that he had not previously discussed with Cabinet. Mr Matthews said that, in his view, this was a poor solution and would not resolve what they were seeking to tackle: in particular, he could not understand a decision to invest in radar barges when the RVIPF did not have the capability to respond adequately to radar sightings[878].

6.461 The Premier said he did not appreciate that interceptor boats were not readily available until the COVID-19 border closures, when he asked about using the boats to be told that several were out of the water awaiting money to effect repairs; and the RVIPF and HM Customs had each ordered one boat which was awaited. The Premier said that, if he had known, he would have made the necessary funds available; and subsequently adjustments were made to ensure that funding came through although (he said) not much occurred to remedy the situation

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[876] The proposal was in fact for a charge of $17,000 per day (see paragraph 6.452 and footnote 864 above).
[877] Email Mr Matthews to Mr Lettsome, Mr Penn and copied to Mr Romney and others: Cabinet Action Item: Special NSC Meeting on Tuesday 7 July 2020 dated 5 July 2020. Mr Lettsome and Mr Romney also appear to have been surprised, given that until they were told to reconsider radar barges, the JTF was focusing on a land-based radar system. Until this request from Cabinet, Mr Romney did not recall any JTF conversation, or NSC conversation, around the use of static barges or any proposals (T7 20 May 2021 pages 106-107).
[878] T7 20 May 2021 pages 198-200, and 217. See paragraph 6.448 and footnote 857 above.

during the period the radar barges were in position. None of the repairs required to make boats operational was done. During this time, he accepted that the JTF was limited in terms of available boats[879].

6.462 The NSC Special Meeting was duly held on 7 July 2020. The NSC did not approve the EZ Shipping proposal, but rather agreed that other potential providers of sea-based radar should be assessed[880]. They referred the matter back to the JTF.

6.463 When the matter returned to the JTF, HM Customs (Mr Romney) took the lead for looking at barge owners in the BVI, and RVIPF (Mr Matthews) took the lead for approaching the chartering industry[881].

6.464 On 16 July 2020, Mr Romney forwarded the EZ Shipping proposal to the other members of the JTF for their review[882]. As Mr Matthews noted, this was the first time that the entire JTF had considered the EZ Shipping proposal[883]. The following day, Mr Matthews responded that he did not think the expenditure could be justified[884].

6.465 On 19 July 2020, Mr Romney sent a further email to other JTF members with two attachments with revisions to the Border Security Plan, notably including estimated figures for the temporary hire of radar barges. The beginning of his email suggested that the JTF might not have received this initiative from the Cabinet with much warmth:

> "I know this will reach many with a hard heart as this is something we didn't expect and it will change the whole dynamics of this operation moving forward if we are to use the proposed platforms."

He indicated that he wished to have the revised Border Security Plan finalised and sent to the NSC by the next day.

6.466 Mr Matthews considered the "hard heart" comment may have been particularly aimed at him as he was not in favour of the barges as a way forward. He also felt that this comment was a reference to the fact that, with the Border Security Plan now suggesting the use of barges, it would mean a change to what had been previously agreed by the JTF as the best course. Mr Matthews considered that the JTF had already agreed that the way forward was a proposal for land-based radar (and to fund that accordingly), and that short-term focus should be on getting the interceptor boats they required and paying allowances to the officers for night patrol. He recollected that, by the time of the Cabinet action item, the JTF had already prepared draft three-month and six-month proposals, which did not include static barges but did include other security provisions. Then, despite that agreement as to the way forward, as a result of the Cabinet's intervention, radar barges suddenly became an imposed priority[885]. Mr Romney said that this change in approach would inevitably impact on the available funds,

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879 T52 21 October 2021 pages 159-160.
880 The Premier confirmed that there are no NSC Papers, Appendices, Minutes or decision extracts for the NSC Meeting of 7 July 2020 (Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 2.2). However, the elected Ministers accept that the NSC did not, at that stage, agree to the EZ Shipping proposal; but decided rather that it should be considered further (Elected Ministers' Response to Governor Position Statement paragraph 96).
881 The evidence was consistent that smaller fibreglass vessels are susceptible to damage, and Mr Matthews agreed that this was relevant to the decision on using charter boats or not (T7 20 May 2021 page 220). On the evidence, the decision not to use such boats cannot be considered unreasonable.
882 Email Mr Romney to Mr Lettsome, Mr Matthews, Mr Penn and others: Unsolicited proposal for border security by EZ Shipping dated 16 July 2020.
883 T7 20 May 2021 page 194.
884 Email Mr Matthews to Mr Romney, Mr Lettsome, Mr Penn and others: Unsolicited proposal for border security by EZ Shipping dated 17 July 2020.
885 T7 20 May 2021 pages 195-196.

and the direction the JTF wanted to go. His concern was that the JTF considered that land-based platforms were the permanent solution; but, if they hired radar barges, funding that might be used for such platforms would be diverted[886].

6.467 On 20 July 2020, Mr Romney circulated to other members of the JTF a further iteration of its Border Security Plan with a revised narrative (drafted by Mr Lettsome as Chair of the JTF) and a proposed costs schedule with three-month and six-month breakdowns, described as "[t]his final version"[887] (although, as will be seen, the version that eventually went to the NSC two days later showed some changes).

6.468 The narrative led with the need to have sufficient operational interceptor boats. This was clearly key. It was said that "… it has been agreed that there is much effort needed to ensure that all marine assets are functional at all times", these resources being "… critical to adequately address the border security issues". However, the draft noted that HM Customs and the RVIPF had only one working vessel each, whilst HM Customs had one non-operational vessel in need of repairs and the RVIPF had three. By 17 August 2020, the situation appears to have worsened: there was only one available fast boat[888]. The draft narrative said that the plan for the next three months should include the costs of repairs of the non-working vessels (a total of $55,000) which had not hitherto been forthcoming from the MoF[889]. That funding was urgently sought.

6.469 However, the draft Plan recommended further measures, over and above ensuring that there were adequate fast interceptor boats, as follows (italics added):

> "In order to complement the Sea patrols to secure the Territory's borders, there is an urgent need to introduce additional mitigation measures to prevent illegal activities. The [JTF] has recommended for the purchasing of radar platforms to identify vessels approaching our borders and to track vessel movement around the Territory. Pending the acquisition of this technology, it was suggested that we utilise the services from a company within the Territory. An unsolicited proposal was submitted a few months ago to the Premier and copied to the Governor, the Financial Secretary and the [CoP] from EZ Shipping Company, to provide access to the service needed. The proposal submitted showed a cost per day for 2 platforms is $17,000.00 totalling $510,000 a month.
>
> *Considering the Public Health, Social and Economic risks associated with unauthorised entry of persons into the territory, it is important that efforts are made to strengthen detection of and aid response to attempts at illegal entry…. This can be done immediately since the resources required to do so are at our disposal in the Territory.*

[886] T7 20 May 2021 page 117.

[887] Email from Mr Romney to Mr Lettsome, Mr Matthews and Mr Penn: Joint Task Force Agencies 3/6 month Plan and attachment. With regard to the barges proposal, Mr Romney notes in his email that Mr Chadwell had previously indicated that his rate was negotiable but he had used the "the higher cost" of "$1,700" per day in the costings. As the enclosed draft Plan refers to a cost per day of $17,000, this appears to be simply a typographical error.

[888] HM Customs' M/V Midnight Express: email Mr Matthews to the Financial Secretary dated 17 August 2020, chasing an update regarding a funding decision. In respect of the lack of operational fast boats, see also T7 20 May 2021 pages 202-203 (Mr Matthews), and T7 20 May 2021 pages 123-125 (Mr Romney).

[889] The estimated repair costs were as follows: M/V Predator at $8,000, M/V Defender at $7000, M/V Midnight Justice at $15,000 and M/V St Ursula at $25,000). In the event, none of these repairs was done during the period of the EZ Shipping radar barge contracts.

Optimistically, if EZ Shipping is willing to entertain a daily rate of $12,000-$14,000, the cost of obtaining the service… would be significantly reduced (to $360,000-$420,000 per month). It may be prudent to utilise this service for one month, during which the five proposed radar platforms can be procured and possibly installed. The cost of five radar units is $150,000, and installation cost is estimated at $300,000.

EZ Shipping's barges will provide an added benefit of functioning as a strategic outpost location from which HM Customs or RVIPF Marine vessels can be rapidly launched to intercept any suspicious vessels that are detected. This will extend the patrol range of the local authorities and lower the cost of patrols in fuel, maintenance and time.

Additionally, while the cost may be deemed significant for the temporary measure, it pales in comparison to the cost of the Territory shutting down for a second time if the Coronavirus/COVID-19 is allowed to reach our shores, especially undetected. In addition, this temporary measure would allow the territory to achieve its goals while working on the permanent measures.

The installation of the five proposed radar platforms is a more permanent, and hence desired, option for the security of the territory's borders in the longer-term. It is, therefore, inevitable that this acquisition will have to be made at some point in the near future as a matter of national security. Given the current urgency for this resource at this time, it is recommended that this should be given high priority along with the repairs and maintenance of the marine assets.

Conclusion

…

The agencies going forward would like to work on actionable intelligence. It is critical to stress that agencies preferred option at this time is the procurement of a Costal [sic] Surveillance System (Radar) to provide the much needed intelligence for the protection of our borders.

The Hiring of platforms at this time is a short term fix for what will be a continued challenge for the territory. The effectiveness of this resource is also a concern, as it is unsolicited, there is no vetting of the persons going to provide this service and the agencies cannot secure intelligence.

A cost Analysis indicates that the use of these platforms at the prices quoted will cost the BVI [Government] about $510,000.00 per month and over $1.5 million dollars for a 3 month period.

Research indicates that the procurement and installation of a radar system will cost in the region of £1.5-$2 million dollars. The use of the platforms are short term with no guarantee[d] benefits, the procurement of the radar is a 6-12 months project but with greater benefits for years[890]…".

[890] In respect of "no guarantee[d] benefits", the Premier said that the situation was very fluid and uncertain at that time. He considered that there were never guaranteed benefits with any system, but remained of the view that you could not rely on landbased radar system solely, "if at all". Due to the geography of the BVI, from the Premier's view, land-based radar would not be able to detect all shipping, unless it was complemented by something on the sea (T52 21 October 2021 pages 150-151). The Premier did, however, of course have expert advisers on such matters, such as the NSC and the JTF.

6.470 Thus, in the draft Plan, the JTF recommended ensuring that sufficient operational patrol vessels were available (by repairing those then unavailable), but supported by a fixed land-based radar system which should be installed as a matter of urgency. In the meantime, for a few months while the land-based system was purchased and made operational, it recommended the temporary and short-term use of radar barges.

6.471 In the attached costs schedule, under the heading "Costs description", the three-month costs estimate set out the monthly cost of renting radar barge platforms with a three-month estimate of $510,000; and the purchase of fixed, land-based radar platforms, with a six-month cost estimate of $150,000 plus (in the schedule, unspecified) construction costs.

6.472 On 22 July 2020, a revised NSC Memorandum was produced by Governor Jaspert and the Premier, with a revised version of the Border Security Plan attached[891]. The paper invited the NSC to review and accept the JTF's three-month and six-month Border Security Plan, and sought the NSC's in principle approval for the immediate priority funding areas (including $55,000 for repairs to vessels and "at least two 24-hour platforms, in principle, to be negotiated by the JTF in conjunction with the MoF following a rapid invitation of proposals for approval by the [NSC]"). It also sought approval that "the JTF would prepare a proposal to be approved by the [NSC] to further strengthen border security through the engagement of the United Kingdom in the offer of specialised capability building of marine borders surveillance including radar and drone technology".

6.473 The Border Security Plan was reviewed and adopted by the NSC – and the priority expenditure and proposal to seek assistance from the UK were approved – at a meeting on 24 July 2020[892].

6.474 Following the NSC decision to proceed with radar barges, the contract was not put out to tender; but, in the following days, Mr Romney approached three other owners of barges to check availability and cost. Two said they were unable to assist, and one said it could offer only one landing craft for $15,000 per day[893]. None was considered to fit the criteria for two, immediately available barges. EZ Shipping was left as the only runner.

6.475 Although HM Customs was the lead agency on the JTF, Mr Romney and Mr Lettsome said they had no direct involvement in negotiating the EZ Shipping arrangement including rates – although, they said, if anything went through HM Customs after early August 2020 (when he was appointed), it would have been via Mr Wade Smith as the newly re-appointed HMC Commissioner[894]. Mr Matthews confirmed that he was not consulted in any way in negotiating the terms with EZ Shipping[895]. It seems that the MoF dealt with these negotiations[896].

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[891] NSC Memorandum No 011/2020: COVID-19 Border Security Plan for the BVI (Revised) dated 22 July 2020 prepared by the Governor and the Premier. The attached Border Security Plan is not identical to the 20 July 2020 draft. In particular, the italicised passages quoted in the report text were removed. No witness gave evidence as to why this was so; but, for the purposes of this Report, there appears to be no significance in the changes.

[892] As noted in the Expedited Extract issued on 24 July 2020. This Extract was forwarded by email from Ms Cherryl Fahie to Mr Matthews and subsequently by Mr Matthews to Mr Lettsome, Mr Penn and Mr Romney. See also Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 6. The Premier recalled that the NSC "went through [the Border Security Plan] line by line".

[893] The efforts made were described in evidence to the COI given by the CIO Mr Penn (T5 13 May 2021 pages 139-141) and Mr Romney (T7 20 May 2021 pages 137-144). Mr Matthews accepted that a "fairly thorough job" had been done in checking "anything else that might be available barge-wise in the territory" (T7 20 May 2021 pages 208-209).

[894] T7 20 May 2021 pages 144-148.

[895] T7 20 May 2021 page 210.

[896] Cabinet Memorandum No 376/2020: Award of Contract - EZ Shipping Limited dated 7 October 2020 which, at paragraph 6, identifies the Financial Secretary Glenroy Forbes as being tasked with going back to EZ Shipping with a view to reducing the costs. Mr Matthews recalled subsequently hearing that the price had reduced from $17,000 to $14,000 per day; and he understood, based on that reduction, a decision was made by the MoF to go ahead (T7 20 May 2021 page 210).

6.476 On 12 August 2020, there was a meeting with Mr Chadwell of EZ Shipping[897]; and, the following day, Mr Chadwell emailed a letter (dated 12 August 2020) to Mr Romney, with a new proposal for two vessels at a rate of service of $7,200 per day plus fuel costs. The letter suggested an initial agreement for 30 days with an option to renew[898]. However, there was apparently a second letter from EZ Shipping to "Commissioner of Customs", also dated 12 August 2020, which proposed the hire of three vessels, at a rate of $14,000 per day for all three vessels[899]. Again, this proposal suggested an initial agreement for a period of 30 days. The exact terms of this second letter were repeated in a further letter from EZ Shipping to the HMC Commissioner dated 21 August 2020, the same day as (i) there was a further meeting with EZ Shipping (Mr Chadwell) but attended by the Premier, the Financial Secretary and Mr Wade Smith[900]; and (ii) the BVI Government announced the imposition of an overnight curfew including a general restriction on the movement of vessels within the BVI's waters[901].

6.477 On 22 August 2020, there was a reported incursion by illegal entrants at West End, Tortola[902]. In his evidence, the Premier said that the public's concerns about secure borders increased dramatically as a result of this incident[903].

6.478 On 23 August 2020, the three EZ Shipping barges[904] were deployed on the instruction of the Premier. The Premier said[905]:

> "In light of the unprecedented threat to the Territory posed by the pandemic, I took the decision to deploy the radar barges on 23 August 2020, as recorded in paragraph 8 of Cabinet Paper Memo No 376/2020, prepared by Mr Frett and signed by me…. I gave oral instructions to my officials that the barges should be deployed. I have made no secret of the fact that I did so, and that I took that decision in what I thought were the best interests of the Virgin Islands. I was not prepared to take unnecessary risks with the health and wellbeing of their people, and it was important in itself and to public confidence, that they should, as much as possible, be clearly protected from the real risk of the introduction of the disease by the illegal entry of persons who might be carrying it."

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[897] It is not clear who from the JTF attended the meeting. Mr Penn did not attend, and did not play any part in the negotiations with EZ Shipping. Mr Wade Smith recollected that he, Mr Romney and Mr Lettsome attended; but Mr Lettsome said he did not (T4 11 May 2021 pages 55-56, T5 13 May 2021 page 150 and T7 20 May 2021 pages 144-145).

[898] Letter Mr Chadwell to the HMC Commissioner: Proposal for Border Patrol Services 12 August 2020. From the face of the letter, it is not clear whether the rate of $7,200 per day was per vessel or the aggregate rate for the service. Mr Wade Smith said that some of his colleagues might have been under the impression that the offer made per vessel per day (T4 11 May 2021 page 62); and, given the surrounding circumstances, that seems probably correct. However, it does not seem to fit very well with the further offer in the second letter that day – three barges for a total of $14,000 per day.

[899] Letter Mr Chadwell to the HMC Commissioner: Re: Proposal for Border Patrol Services 12 August 2020 and letter Mr Chadwell to the HMC Commissioner: Proposal for Border Patrol Services 21 August 2020. There is no ready explanation for the fact that there are identical letters dated 12 and 21 August 2020. In evidence, the Premier simply said that "JTF together with the MoF" had managed to obtain this new offer (Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 8).

[900] T4 11 May 2021 pages 60-61, and T52 21 October 2021 page 150.

[901] Press Release, Office of the Governor: New Curfew Imposed on BVI after Reports of New COVID-19 Cases 21 August 2020. The restrictions were imposed in the light of nine new cases of COVID-19 being reported in the BVI. The press release quotes Hon Carvin Malone as saying that "as earlier decided, the sea borders must be protected and are now under 24 hour patrol and watch at all points to protect the lives and livelihoods of our people".

[902] As recorded in Cabinet Memorandum No 376/2020: Award of Contract – EZ Shipping Limited dated 7 October 2020 paragraph 8.

[903] T52 21 October 2021 page 143.

[904] There is a COVID-19 Contracts Audits Questionnaire document relating to the eventual first contract, which appears to have followed an interview with the HMC Commissioner Mr Wade Smith. Although undated, it states that the barges are not currently being used, so it seems that the document was made after January 2021. To the question as to how was it determined that three barges would be adequate, the answer given is "No specific number of badges [sic] was determined. Three badges were rented to cover South, North and East of the BVI. Ideally four (4) would have been preferred". This appears to be the first, and only time, the hiring of four barges was raised.

[905] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraphs 1 and 10. Reference is made to Elected Ministers' Response to Governor Position Statement paragraphs 90-105. The Premier gave evidence of being summoned to a meeting by Mr Wade Smith and Mr Forbes: T52 21 October 2021 page 138.

6.479 At the time of deployment:

(i) Although the NSC had given in principle approval to the deployment of at least two radar barges, on terms to be negotiated by the JTF in conjunction with the MoF, (a) the NSC had not yet made a decision to use the EZ Shipping barges, either on the terms under which they were hired or at all, and (b) the terms of the use of EZ Shipping barges had not been approved by the JTF.

(ii) The Cabinet had not yet approved the use of the EZ Shipping barges, either on the terms under which they were hired, or indeed at all; nor, in particular, had Cabinet approved the public expenditure on them.

(iii) Governor Jaspert did not know that the Premier was going to deploy the barges without NSC or Cabinet approval. He said that he was aware of the unsolicited proposal but does not recall having any information beyond that: he only learned of the terms of the arrangement (e.g. how many barges there would be and the daily rate that would be charged) after the barges were deployed on the 23 August. He recalled that the JTF had reservations about the barges, and that Mr Matthews had raised concerns related to the nature of the threat and the operational effectiveness of the proposed response direct with him. Governor Jaspert was concerned because it was an unsolicited proposal, and he believed that there should have been a wider approach to the problem of border security and radar, and that there should have been consideration of other possible approaches. He considered that, with radar barges, there was no way to guarantee cost effectiveness or operational effectiveness, and, at that point, he was not given any information as to any due diligence undertaken on EZ Shipping itself. So far as he could recall, he was not aware that the Premier was taking steps outside of the security advice, which compounded his concern[906].

(iv) Nor did Mr Matthews as CoP know of the deployment in advance. Whilst, on 24 July 2020, the NSC had agreed in principle to having at least two temporary sea-based radar platforms, Mr Matthews said that the EZ Shipping barges were deployed before the NSC had agreed the final security solution. He said that, when the deployment was announced at the NSC, it had caught out the Governor and himself because debate had not taken place in NSC about whether they should or should not take up the EZ Shipping offer. By the time that debate happened, the barges had already been deployed. He did not know who actually made the decision to deploy the barges[907].

6.480 The Premier (and the other elected Ministers) accepted that the decision the Premier took on 23 August 2020 to deploy the barges was made by the Premier without JTF, NSC or Cabinet formal approval. However, they denied that the decision was in any way wrong: indeed, the Premier asserted that he had to take the decision, when he did, in the public interest.

6.481 The elected Ministers (including, of course, the Premier) said that:

> "By 21 August [2020], the EZ proposal had been identified as the only viable option for a temporary barges solution and negotiations by the JTF and the Ministry of Finance had significantly reduced the price for 3 barges to $14000 a day." [908]

6.482 In his oral evidence, the Premier said he felt it was important, in itself and for public confidence, that the citizens of the BVI should, as much as possible, be protected from the real risk of the spread of COVID-19 to the BVI by the illegal entry of persons who might be carrying

[906] T52 21 October 2021 pages 70, 74-76 and 79-81.
[907] T7 20 May 2021 page 211.
[908] Elected Ministers' Response to Governor Position Statement paragraph 101.

it. He explained that there were deep concerns regarding the virus and the economic effects of the lockdown. He recalled being advised by health officials, early on, that, if nothing were done, the BVI would experience thousands of cases. It was a matter of weighing up the cost of the barges versus what could happen if no steps were taken to prevent illegal entry. The BVI Government had taken a stance from the beginning of the pandemic to keep the numbers of coronavirus infections down; and there were rumours of people attempting to get to the BVI for sanctuary, and many familial connections with the US Virgin Islands where infection numbers were high. The Premier was of the view that the BVI "just had to move", before it was too late. In taking the decision, he took into account, not only the cost-benefit analysis in the Border Security Plan, but also the fact that to do nothing would risk a further lockdown which would cost the BVI economy $3 million-$4 million per day. He said he regularly kept his Ministers up-to-date with matters regarding deployment, and then they regularised the position afterwards[909].

6.483 The Premier recalled that, when raised with him, Governor Jaspert was not receptive to deployment of the barges and wanted the decision to come through the NSC; but the Premier did not consider that was possible in the circumstances as an urgent decision had to be made based on the technical advice they were receiving. The Premier did not consider this was a matter of overstepping any bounds of his role as Premier: he took the view that, during those times and in the public interest, he had to make decisions based on the information the JTF was providing[910].

Part 2: The First Contract (23 August to 22 October 2020)

6.484 Therefore, the EZ Shipping barges were deployed from 23 August 2020, but without the approval of either the NSC or the Cabinet, and without a written contract. The BVI Government entered into a written contract with EZ Shipping for the hire of three barges for the period 23 August to 22 October 2020 on 14 October 2020. In the period between first deployment and the signing of the contract, payments were made to EZ Shipping as if the contract were in place; and steps were taken to obtain the retrospective approval of the NSC and Cabinet for the contract (covered in this section of the report). There was also further consideration of the permanent security solution, and some data were collected on the performance of the radar barges[911].

6.485 The contract sum proposed was $420,000 per month for two months. On 24 September 2020, a payment was made to EZ Shipping in the sum of $420,000 to cover the month 23 August 2020 to 22 September 2020[912]. The voucher was certified by FPO Maria Smith-Thomas as follows:

> "I certify that this Payment is in accordance with the term of contract/agreement Major Contract #MOF/006M/2020 and the work to this amount has been properly performed".

The voucher was also authorised, and the amount certified as being "under the authority quoted", by the Financial Secretary Glenroy Forbes (i.e. the relevant Accounting Officer).

[909] T52 21 October 2021 pages 134-137, and 149-150.
[910] T52 21 October 2021 pages 141-142.
[911] These are dealt with in a separate section of the Report: see paragraphs 6.518-6.552 below.
[912] Payment Voucher No 960836.

6.486 The contract, however, had not yet been signed (or even approved by the NSC or Cabinet): indeed, an unsigned agreement with EZ Shipping is attached to the payment voucher. Mr Forbes nevertheless asked the Accountant General to make the payment which, having had the circumstances explained (notably that EZ Shipping had already provided one month's services), she did[913].

6.487 Before the COI, Mr Forbes explained that he was not aware of any formal procedure for payments to be made prior to the approval and signature of a contract. However, where services were rendered before a contract was signed, the Accounting Officer would usually contact the Financial Secretary and ask whether or not a payment could be made. When this happened, he as Financial Secretary would satisfy himself that the work was actually being done, and that there was no attempt to circumvent any of the procedures. He considered a two-month delay after the services had commenced for the completion of a contract to be "quite a long time", but reflected that "there are known to be delays". Once he was satisfied that the person was performing the services in good faith, and there was no attempt to circumvent any of the procedures, he would normally indicate to the Accountant General that the payment could be made; as he did in this case[914].

6.488 The Premier's evidence was to similar effect. He said that payments were made when the technical team was able to ensure that the Financial Secretary, who had made the payments, was comfortable with it. That would not involve the Premier, as Premier or Minister of Finance, himself[915].

6.489 In respect of approvals for the contract, on 13 September 2020, the Premier circulated a further memorandum to the members of the NSC, which invited the NSC to recommend to Cabinet that the BVI Government enter into an agreement with EZ Shipping for the hire of three radar barges for a period of 60 days from 23 August 2020[916].

6.490 The paper rehearsed the background, and confirmed that "the latest initiative has been the implementation of static platforms to identify all vessel movement in and around the territorial borders"; but, pending the acquisition and installation of this technology, it was suggested that the BVI Government use a BVI company to provide these services on barges. The EZ Shipping proposal was "the lowest of the bids from the locally own barge companies and is only a temporary but urgent strategy to protect our sea borders given their extensive radar capabilities, among other measures". As indicated above, the memorandum stated that the barges were deployed on 23 August 2020 and had "yielded significant results". In evidence, the Premier said that the memorandum reflected his view that the BVI had the manpower and resources to secure its own borders; and it was a policy objective of the BVI Government to develop the capacity for the BVI to be able to secure its own borders without needing to depend on the UK[917].

6.491 The NSC held a Special Meeting on 25 September 2020, when it agreed with the recommendations in the memorandum[918].

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913 Email Accountant General Ms Laurel Smith to the Financial Secretary: EZ Shipping Limited dated 24 September 2020.
914 T46 11 October 2021 pages 4-6.
915 T52 21 October 2021 page 192.
916 NSC Memorandum No 016/2020: Engagement of EZ Shipping Limited to Provide Radar Surveillance Platforms dated 13 September 2020.
917 Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 11.
918 Expedited Extract issued on 25 September 2020: Engagement of EZ Shipping Limited to Provide Radar Surveillance Platforms Memo No. 016/2020. A record of the discussions at this meeting was not provided to the COI, and it is unclear if one exists.

6.492 The Premier acknowledged that Governor Jaspert expressed disappointment that the matter had not come back to the NSC before the barges were deployed; and noted that Mr Mathews had expressed opposition to the use of the barges. However, he expressly took full responsibility for being proactive and moving expeditiously to protect the BVI by deploying the EZ Shipping radar barges before either on the terms under which they were hired or at all, the NSC and Cabinet had approved the agreement to use them[919].

6.493 The contract (as a major contract) of course still required Cabinet waiver of the tender process and approval.

6.494 On 24 September 2020, the Public Finance Management (Amendment) Regulations 2020[920] amended regulation 170(2) of the PFMR to give the Cabinet the power to dispense with the tender process otherwise required in respect of major contracts during public emergency, health emergency or other exceptional circumstances[921].

6.495 On the day the NSC approved the EZ Shipping arrangement (25 September 2020), the Cabinet Secretary emailed Mr Forbes with details of the action item arising from that day's NSC meeting for his attention and further action[922]. The email pointed out that the NSC requested that, as part of a Cabinet paper on this matter, he include not only the technical details but also a payment plan.

6.496 The MoF prepared a Cabinet Memorandum signed by the Premier as Minister of Finance and dated 7 October 2020[923]. In setting out possible alternatives, the paper said[924]:

> "Assistance from the UK military was also recommended as a temporary solution. This option was not acted upon as it is viewed that the Territory possesses both the requisite manpower and the ability to procure the necessary resources to secure our sea borders. The cost of UK military support is unknown[925]. However, such assistance is welcomed in the form of a grant that would aid the infrastructure development and build a permanent capacity amongst the agencies responsible for securing the sea borders…".

6.497 The memorandum noted that EZ Shipping had already commenced the services and that it was within Cabinet's discretion to ratify the issuance of a contract to EZ Shipping.

6.498 At a meeting on 7 October 2020, Cabinet approved entering into the contract with EZ Shipping[926]. In pursuance of that decision, a written contract with EZ Shipping was signed with EZ Shipping on 14 October 2020[927].

6.499 In respect of the new criteria for waiver that came into force on 24 September 2020[928], the Premier gave evidence that, due to the need to secure the BVI's borders from the threat of a global pandemic, he considered those criteria were fulfilled; and Cabinet decisions to approve

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[919] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 12.
[920] VISI 2020 No 110 (see paragraph 1.151 and footnote 224 above).
[921] See paragraph 6.9 above.
[922] Email Cabinet Secretary to Financial Secretary: NSC Action Item: Engagement of EZ Shipping Limited to provide Radar Surveillance Platforms dated 25 September 2020.
[923] Cabinet Memorandum No 376/2020: Award of Contract - EZ Shipping Limited dated 7 October 2020. It was drafted by Mr Frett, whose name is at the top of it. He drafted it with the assistance of HM Customs: and it, understandably, to a large extent mirrored the earlier NSC Memorandum: T6 18 May 2021 pages 88-92.
[924] Paragraph 3**.**
[925] Mr Frett did not recall having personally asked for information on the costs of UK military support from the UK and was not aware of any other body making such enquiries (T6 18 May 2021 pages 91-92).
[926] Expedited Extract issued on 7 October 2020: Award of Contract – EZ Shipping limited Memo No 376/2020(/memorandums/766).
[927] No 327/2020 Agreement No MOF/006M/2020 between BVIG and EZ Shipping.
[928] See paragraph 6.9 above.

the contracts with EZ Shipping were, thus, justified[929]. However, he did accept that none of the records of the decisions of Cabinet in respect of EZ Shipping expressly referred to the waiver of the tender process pursuant to the PFMR; but, he said, they should have done, and he believed it is implicit that Cabinet intended such a waiver[930].

6.500 On 19 October 2020, a second and final payment of $420,000 was made under the (now signed) agreement with EZ Shipping[931].

Part 3: The Second Contract (23 October to 22 December 2020)

6.501 Notwithstanding that the period covered by the first contract expired on 22 October 2020, the provision of the three barges continued after that date, and without obtaining NSC and Cabinet prior approval to enter into any further contractual arrangements with EZ Shipping.

6.502 The need for further approvals for any further contract was recognised. On 6 November 2020, the Financial Secretary Glenroy Forbes wrote a memorandum to the NSC regarding the awarding of a further contract to EZ Shipping in which he noted the importance of securing the BVI's borders. The memorandum emphasised that the MoF supported the principle of contracts of over $100,000 being tendered, but also stated that EZ Shipping were already providing the service and that it was within Cabinet's discretion to ratify a further contract with them[932].

6.503 On 9 November 2020, the Financial Secretary's Office emailed documents (including a draft NSC Memorandum prepared by the Premier dated 6 November 2020 and entitled "Award of New Contract – EZ Shipping Limited", and a copy of the first contract with EZ Shipping) to the Attorney General's Chambers asking them to review the documents for the proposed new contract for EZ Shipping[933]. In the draft memorandum, the NSC was invited to recommend the continued engagement of EZ Shipping to provide three barges for a further 60 days, with effect from 23 October 2020 to 22 December 2020, at a total sum of $840,000 (calculated at $14,000 per day for 60 days). The NSC was asked to note that the previous contract with EZ Shipping resulted in improved border security measures that "are quantitatively successful" (and "objectively successful") in deterring illicit border activity and reducing marine traffic; and that the BVI is working "assiduously" towards finalisation of a Border Security Plan which includes long-term solutions. The Attorney General considered that no legal issues arose[934].

6.504 On 23 November 2020 (prior to the second contract having been approved by the NSC or Cabinet), the Premier approved the Financial Secretary/Accountant General making available the sum (an over-commitment[935]) of $840,000 to cover payments due to EZ Shipping for the deployment of the three barges during the period 23 October to 22 December 2020.

6.505 On the same day, as with the first contract, the Financial Secretary sent an email to the Accountant General which "exceptionally"[936] instructed her to prepare the payment documentation so that payment to EZ Shipping for the period 24 October to 23 November

[929] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 16.
[930] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 27.
[931] Payment Voucher No 964701.
[932] Memorandum Financial Secretary to the NSC: Award of New Contract – EZ Shipping Limited dated 6 November 2020.
[933] Email Ms Teshonda Thomas (on behalf of the Financial Secretary) to the Attorney General: NSC – Award of New Contract – EZ Shipping dated 9 November 2020. The draft became NSC Memorandum No 021/2020.
[934] Memorandum from the Solicitor General Jo-Ann Williams-Roberts for the Attorney General to the NSC: Award of New Contract – EZ Shipping Limited dated 23 November 2020.
[935] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 19.
[936] Although payments had also been made under the First Contract without a written and signed contract in place.

2020[937] could be made the next day (24 November 2020), as the delays were not the fault of EZ Shipping[938]. On 25 November 2020, payment was indeed made to EZ Shipping in the sum of $420,000 for that period[939].

6.506 On 22 December 2020, the Financial Secretary emailed the Accountant General's Office again regarding payments to EZ Shipping[940]. The necessary Cabinet approvals and contract were still not in place; and he again asked for payment of the second and final tranche in respect of EZ Shipping's service to be made. He asked that his email be accepted as authority to make a cheque payable to EZ Shipping in the amount of $420,000, and he requested that such cheque be made available no later than 24 December 2020.

6.507 EZ Shipping was duly paid the sum of $420,000 on 24 December 2020[941]. The relevant Payment Voucher notes that this payment was being made under "Major Contract MOF/009M/2020", although such contract had neither been approved by the NSC or Cabinet nor signed at the time of payment. The payment was expressed to be a final payment and to cover the period 24 November to 23 December 2020[942]. Once again, this payment is certified as in accordance with the terms of the agreement and that work to this amount has been "properly performed". This declaration, and a second declaration certifying that the above details are correct and that the rate is both fair and reasonable, appear to be signed by the Financial Secretary. On the Payment Approval Form, the Financial Secretary signed a declaration to the Accountant General to confirm that the sum of $420,000 was approved and forwarded for settlement.

6.508 On 29 December 2020, the second written agreement with EZ Shipping, for the provision of three barges for the period 23 October to 22 December 2020, was signed by the Premier[943]. This was prior to the NSC or the Cabinet approving the contract and, indeed, after the contract period had expired.

6.509 The NSC met on 30 December 2020, and it recommended a second agreement with EZ Shipping to provide three barges for radar platforms, covering the period 23 October 2020 to 22 December 2020[944]. Governor Jaspert said that he did not believe he was in the BVI at the time of this meeting: he said he was not aware of the particular details relating to this agreement, but was aware of a contract being retrospectively agreed outside of the correct NSC and Cabinet procedures[945].

6.510 The MoF produced a Cabinet Memorandum on the awarding of a new contract to EZ Shipping that day, seeking both a tender waiver and approval for the contract[946]. Cabinet met that day, and duly waived the tender process and approved the contract in accordance with the recommendations in the memorandum[947].

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937 The period ought to have been 23 October to 22 November 2020.
938 Email Financial Secretary to Mrs Maria Smith-Thomas (Accountant General's Office): Payment to EZ Shipping dated 23 November 2020; and Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 18.
939 Cheque No 801829.
940 Email from Financial Secretary to Ms Laurel Smith (Accountant General's Office): Border Security Contract – EZ Shipping dated 22 December 2020
941 Payment Voucher No 976363.
942 Again, this was one day out, the agreed period of two months in fact expiring on 22 December 2020.
943 Contract No 43/2021 Agreement No MOF/009M/2020.
944 Expedited Extract issued 30 December 2020: Award of New Contract – EZ Shipping Memo No 021/2020.
945 T52 21 October 2021 pages 90-91.
946 Cabinet Memorandum No 555/2020: Award of New Contract – EZ Shipping Limited dated 30 December 2020.
947 Expedited Extract issued 31 December 2020: Award of New Contract – EZ Shipping Limited Memo No 555/2020.

Part 4: The Third Contract (24 December 2020 to 23 January 2021)

6.511 Although the period of the second contract expired on 22 December 2020, EZ Shipping continued to provide the radar barges after that date.

6.512 On 19 January 2021, there was a further memorandum to the NSC, prepared by the Premier's Office and signed by the Premier, on the re-engagement of EZ Shipping for a period of 30 days from 23 December 2020 to 22 January 2021, at a rate of $12,000 per day for two barges[948]. The memorandum noted that the NSC had agreed that a full marine costal surveillance system should be implemented, and that the Deputy Governor's Office ("the DGO"), the MoF and the JTF had commenced the process of determining the required technical specification and drafting the tender document. It is said that the deployment of the barges since August 2020 had "yielded numerous significant results" along the lines previously identified.

6.513 On 10 February 2021, the NSC held a meeting[949] where it recommended the draft agreement with EZ Shipping for the period to 22 January 2021. Therefore, the NSC was again asked to approve a contract with EZ Shipping for a period that had already expired.

6.514 On 15 February 2021, the Premier, as Minister of Finance, presented to Cabinet a memorandum, which noted that the earlier contracts had proved "objectively successful" in deterring those attempting to enter the BVI illegally and in a marked reduction in marine traffic[950]. It was noted that work is ongoing for a permanent solution but, in the meantime, it recommended that EZ Shipping be given a third contract to provide two barges[951] for 30 days.

6.515 Cabinet met on 17 February 2021, and again waived the tender process and approved the further contract[952]. The Governor (now Governor Rankin[953]) queried whether the BVI Government was receiving value for money through these platforms, and made clear that he was not impressed with the statistical report provided by the JTF or the detection rate of EZ Shipping's barges[954]. The Deputy Premier is noted as highlighting the deterrent nature of the barges[955]; and the Premier confirmed this would be the last contract with EZ Shipping[956].

6.516 On 18 March 2021, a third contract was signed with EZ Shipping[957]. The total contract price was $360,000 ($12,000 per day for two barges) for the period 24 December 2020 to 23 January 2021. Again, this contract was signed almost two months after the contractual period expired.

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948 NSC Memorandum No 002/2021: Engagement of EZ Shipping Limited to provide additional Radar Surveillance Platforms dated 19 January 2021 prepared by the Premier.
949 Expedited Extract issued on 10 February 2021.
950 Cabinet Memorandum No 73/2021: Additional Award of Contract – EZ Shipping Limited dated 15 February 2021. Glenroy Forbes had retired as Financial Secretary on 31 December 2020, and Mr Frett became the Acting Financial Secretary (Jeremiah Frett First Affidavit dated 9 June 2021 paragraph 1). He had been involved in the EZ Shipping arrangements in 2020, and he was responsible for preparing Cabinet Memoranda etc on the arrangements from 1 January 2021.
951 As to why the number of barges had reduced from three barges down to two, Mr Romney said that, in December 2020, the BVI's borders were re-opened and the Immigration Department needed to pull their officers in preparation for the opening, so there was a reduction in manpower available (T7 20 May 2021 page 163). On the other hand, the Premier said that, at the end of December 2020, securing a long-term solution still appeared a long way off; but, with a clearer picture in respect of the pandemic (e.g. the BVI were expecting to receive the first consignments of vaccine in late January), he considered it was right to maintain the barges for one last month, but this time reducing the number to two and hence the cost to $12,000 per day (Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 23).
952 Minutes Cabinet Meeting No 8.
953 Governor Jaspert ceased being Governor on 29 January 2021, when Governor Rankin was sworn in as Governor (T50 19 October 2021 page 66).
954 Paragraphs 60 and 62.
955 Paragraph 63.
956 Paragraph 66.
957 Contract No 169/2021 MOF/005M/2021.

6.517 No documentation has been provided as to when and how EZ Shipping was paid under this contract, but its invoice for the full contractual sum ($360,000) was dated 2 May 2021[958]. It would appear that payment under this contract was made after the contractual period ended, and after the written agreement was approved by the NSC and Cabinet and signed.

The Effectiveness of the Radar Barges

6.518 By the time the NSC and Cabinet came to consider the first contract for the hire of radar barges from EZ Shipping, the barges had been in operation for some time. The memoranda relied upon in support of the recommendation to approve the contract referred to the effectiveness of the barges, indicating that they had yielded "significant results"[959]. The later papers seeking approval for the second and third contracts also referred to the efficacy of the barges in reducing smuggling and unlawful entry into the BVI.

6.519 The memoranda in support of the first contract refer to the barges assisting in aborting attempted smuggling on 28 August 2020; although Mr Romney could not recall if this information came from him, and Mr Lettsome said the information did not come from him[960]. In general, it was Mr Lettsome's evidence that he was not involved in collecting or providing evidence relating to the effectiveness of the barges. Mr Romney said that, in his view, the period between the barges' deployment and 2 September 2020 (when the draft Cabinet Memorandum No 376/2020 for Cabinet approval in respect of the contract was drafted) was an insufficient period to give a clear idea of their effectiveness; and he accepted that the Joint Border Patrol Monthly Reports[961] (which comprised four lines of simple statistics of the vessels detected, intercepted, detained and fined, in low or very low figures) may suggest that the detection rate etc was insignificant; but, in his view, they reflected a reduction in sea traffic[962]. Mr Romney explained that this document was just a standard report from the Department, and he could not recall any other data being published regarding the performance of the radar platforms[963]. He considered the real effect of the barges was in being a deterrent to those wanting to travel between the BVI and US Virgin Islands, as the BVI is a small community and the public would have known about the barges[964].

6.520 Mr Matthews said that, at the weekly JTF meetings, HM Customs would normally give an update as to where the barges had identified a vessel and whether that had resulted in interception. However, this information did not change his view as to the usefulness or the utility of using EZ Shipping to provide radar platforms: in fact, it reinforced his view a permanent radar solution was required in the BVI. He accepted that in the last part of 2020 there was a significant drop in sea traffic, and agreed that people generally knew that the barges were out there which would have had a deterrent effect. However, people also knew that the law-enforcement agencies had a lack of operational fast boats that could act on any radar intelligence[965]. The suggestion was that, whilst the barges might generally deter sea traffic, those who wished to breach the blockade provided by the radar barges could do so.

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[958] Invoice No 21-0205.
[959] NSC Memorandum No 016/2020: Engagement of EZ Shipping Limited to Provide Radar Surveillance Platforms dated 13 September 2020 paragraph 9; and Cabinet Memorandum No 376/2020: Award of Contract – EZ Shipping Limited dated 7 October 2020 paragraph 8.
[960] T7 20 May 2021 pages 161-162.
[961] Joint Border Patrol Monthly Reports 24 August 2020 [it is dated "24 August 2021", but this is clearly a typographical error] to 31 January 2021. Mr Lettsome said that these were prepared by Mr Wade Smith: Mr Lettsome considered that there should have been more data (T7 20 May 2021 pages 150-151).
[962] T7 20 May 2021 page 159.
[963] T7 20 May 2021 pages 151-152
[964] T7 20 May 2021 pages 158-160.
[965] T7 20 May 2021 page 226.

6.521 Mr Matthews said he did not find the statistics compelling; and the RVIPF continued to pick up vessels that the barges had not picked up, and he queried why the barges had not picked them up. He also stated that, during the same period of time, a significant amount of serious crime was detected within the BVI – for example, between November 2020 and April 2021, the RVIPF seized over 3.6 tons of cocaine – and Mr Matthews wondered how significant quantities of drugs still managed to arrive in the BVI when barges were in place. Furthermore, he did not believe that the EZ Shipping solution was financially sustainable. Through the Governor's Office and the NSC, he started pushing to resurrect obtaining a permanent border solution[966].

6.522 As indicated above[967], Governor Rankin was also sceptical about the effectiveness of the radar barges.

6.523 For the purposes of the memoranda in respect of the second contract, the Premier said that Mr Frett, as the public officer responsible for drafting them, would have had to seek out the information he referenced (so, he would have sought information about the success of the barges from the JTF). Cabinet was not otherwise receiving briefings on progress/success, they would depend on the information summarised in the memorandum; but the Premier did confirm that the reduction of sea traffic was clear and this, for him, was a major indicator of the effectiveness of the barges[968]. He considered that the barges acted as a deterrent: this was difficult to assess, but the numbers of boats on the water were low[969].

The Permanent Security Solution and the Role of the UK

6.524 At its meeting on 24 July 2020 (and as part of a Border Security Plan with radar barges as a temporary expedient whilst a land-based radar system was obtained, installed and made operational), the NSC had agreed that there should be engagement with the UK in respect of "the offer of specialised capability building of marine borders surveillance including radar and drone technology". After the deployment of the barges in August 2020, there was correspondence (mainly between the Premier and Governor Jaspert) concerning the UK's assistance with border security.

6.525 On 15 September 2020 (following an NSC meeting the previous day), the Premier wrote to Governor Jaspert confirming that the JTF was seeking to procure land-based platforms as part of a permanent border control solution; but, due to the length of time for the procurement process for these assets, there would be a window of at least three months where further temporary measures would be needed. In light of this, he said there was opportunity for agreement with the UK military so that they could play a role in both (i) the provisional sea border protection strategy after the two-month engagement of the EZ Shipping barges and during the three-month procurement period, and (ii) in lending its expertise in terms of what would be needed in terms of radar systems and other equipment on a more permanent basis[970]. The plan was (the Premier said) to have a permanent system in place by the time the supportive UK military left from performing its temporary duties. It seems that a meeting took place between the JTF and the UK Border Force on 17 September 2020, to explore potential areas of training, knowledge exchange and other support[971].

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966 T7 20 May 2021 pages 224-225.
967 Paragraph 6.515.
968 T52 21 October 2021 pages 156-158.
969 T52 21 October 2021 page 169.
970 Letter Premier to Governor Jaspert: re Further permanent strengthening of the BVI's border protection apparatus dated 15 September 2020.
971 NSC Memorandum No 002/2020: Update on UK Security Support to BVI dated 23 September 2020 (prepared by the Governor's Office) paragraph 15.

6.526 In response, on 22 September 2020, Governor Jaspert wrote to the Premier with regard to UK security support, noting a significant change in the Premier's position compared to when UK security support was first offered earlier in the year[972]. The following day, the Governor circulated a memorandum to NSC members with an update on UK security support to the BVI[973], in respect of which the NSC was invited to note (i) the support the UK is providing in line with the Border Security Plan, and (ii) that the UK could contribute to the procurement of a new permanent border surveillance and protection system (further details to be brought to the NSC after technical discussions with the JTF).

6.527 The memorandum notes the impending re-opening of the BVI borders on 1 December 2020, how this would stretch the resources of the JTF and how UK support could mitigate this pressure. It makes clear that the UK's position on supporting the BVI is based on building long-term local capability with sustainable approaches. It divided this support into three types: short-term (HMS Medway would be in the vicinity of the BVI the following month, at no cost to the BVI); medium-term (remote training and mentoring provided by UK Marine Border Force to JTF members, funded by the UK); and long-term (co-funding of a permanent border surveillance system). It went on to note that UK-funded maritime equipment had arrived in the BVI. It was further noted that the Governor's Office would work with the JTF and other relevant experts to draw up a full technical specification for the permanent border surveillance system.

6.528 However, in his response to Governor Jaspert the following day, the Premier said that his position had not changed, because the initial offer of UK support did not include assistance with a permanent solution. The Premier said he considered that, whilst UK military support was "not unwelcome", it should not be at the cost of long-term institutional strengthening of the BVI's agencies. He pressed for details of the assistance the UK was now offering[974].

6.529 Governor Jaspert responded to the Premier the same day, saying that (i) the initial support offered by the UK was set out in his letter of 22 September 2020 and had "a clear focus on ensuring the security of the people of BVI and building local capability for the long term", and (ii) an update paper for the NSC with details of the UK support offered had been circulated.

6.530 On 24 September 2020, the Premier wrote to Governor Jaspert[975] disputing that his letter of 22 September 2020 set out details of the UK's offer of military support, and complaining that he only received the NSC update paper that morning when attending the NSC meeting. The Premier made clear that the BVI Government's invitation to the UK military (as per his letter of 15 September 2020) was limited to (i) surveillance of the BVI sea borders for a period of three months whilst a permanent system is procured and installed and (ii) "technical expertise in the procurement and installation of said system". This was confirmed in a further letter sent by the Premier the following day (25 September 2020)[976], when he said:

> "First of all, I wish to thank you for your offer of funding in the sum of 50 percent of the cost of the BVI's border surveillance apparatus, the total cost of which is estimated at approximately $600,000.
>
> The acquisition of a fully BVI-funded, BVI-owned and BVI-operated border surveillance system will be a milestone for the Territory in our march towards self-determination, self-reliance and resilience. This is an achievement that can inspire

[972] Letter Governor Jaspert to the Premier: UK Security Support dated 22 September 2020. See paragraph 6.451 above.
[973] NSC Memorandum No 002/2020.
[974] Letter Premier to Governor Jaspert: UK Security Support dated 23 September 2020.
[975] Letter Premier to Governor Jaspert: RE: UK Security Support dated 24 September 2020, in response to Governor Jaspert's letters of 22 September 2020 and 23 September 2020.
[976] Letter Premier to Governor Jaspert dated 25 September 2020.

> the people of the Virgin Islands because it demonstrates that they are capable of this accomplishment. As such, you would agree, it would be a tragedy to deprive the Virgin Islands people of this opportunity. Thus, you would understand why my Government prefers not to enter into a co-funding agreement with the UK Government on this project. We strongly believe that this is something the people of the BVI should be allowed to purchase on their own.
>
> We do believe, as I have articulated in my correspondences before, that the most stable role for the UK in this initiative is to provide technical expertise with respect to the type and specification of the equipment that we should consider and the installation of same.
>
> In this regard, I wish to submit for your consideration that the $300,000 that the UK Government identified as available could be redirected to other areas of need…".

The Premier then listed other items of security equipment. Some UK-funded security equipment had already arrived in the BVI: this was a request for further UK-funded equipment[977].

6.531 On the same day (25 September 2020), the Premier wrote to the Baroness Sugg, Parliamentary Under Secretary of State, Minister for Sustainable Development and the Overseas Territories[978]. It is a lengthy letter, but the following extracts give its tenor:

> "I am writing to express my dissatisfaction and outrage with the hijacking of the Territory's sea border protection by your Governor on the basis of a grossly inaccurate and exaggerated misrepresentation of the true state and extent of the capabilities of the BVI's resources and the threat that the Territory faces during COVID-19. Governor Jaspert's intention to deliberately bulldoze the elected Government is pellucidly clear as he has issued a public statement at 6pm local time today, 25 September, 2020, informing the public that the UK Government would be providing various things which my Government and I have not asked for and which we advised him of our objection to in the format in which he is proceeding to act. He has further, and yet again, made statements aimed at injuring the relationship between the people of the Virgin Islands and their democratically elected Government, and conducted himself in a manner that jeopardises the relationship between the BVI Government and the UK Government.
>
> Your Governor's imperialistic, rough-shod behaviour in this matter is offensive and insulting to my Government and I, as well as to the aspirations of the people of the Virgin Islands who are struggling to realize the centuries-old dream of their enslaved ancestors to one day be fully free of the grip of the British, as encapsulated in Article 73 of the United Nations Charter.
>
> …
>
> No request was made for the UK to co-fund or to donate any funds to the procurement of the permanent border surveillance system. What was requested was for the UK to provide technical expertise with regard to the equipment

[977] As indicated above, some UK-funded security equipment had already arrived in the BVI by 23 September 2020 (as per NSC Memorandum No 002/2020 (see paragraph 6.527 above). As the Premier attended that meeting, this was clearly a request for further UK-funded general security equipment.

[978] Letter Premier to Parliamentary Under Secretary of State, Minister for Sustainable Development and the Overseas Territories Baroness Sugg dated 25 September 2020.

needed and its installation. It was made very clear to the Governor that the BVI being able to purchase a border protection system on its own would be a tremendous accomplishment for Virgin Islanders and would inspire them to recognise their ability and to have confidence in themselves.

…

To describe the BVI's situation as exasperated and our resources as stretched, as Governor Jaspert has done in his NSC paper, is an exaggeration and grossly misrepresents the state of affairs on the ground. To use this fabricated case to create justification for UK interventions is dishonest. To suggest that the UK Military and Government must swoop in and rescue the BVI people is highly insulting, considering that neither the BVI's border protection nor our public health situations are out of control. The evidence is that these are being well managed by the Government of the Virgin Islands and our people.

…

When asked to amend his NSC paper to more accurately reflect the state of the Territory's affairs and needs, and to keep the UK involvement within the scope of what was requested, Governor Jaspert was adamant that he would not. The meeting ended with the NSC not agreeing to the structure of Governor's paper following an extended session in which Governor Jaspert's demeanour became quite aggressive.

Around 6pm this evening, I was advised via a Facebook post of a public statement issued by the Governor in which he announced that the HMS Medway would be in the vicinity of the BVI for the month of October and that he is working to put in place a package for permanent border surveillance in spite of the wishes of the BVI people that they would like to do this on their own.

The Governor, yet again, went on to state to the public that my Government has declined and resisted the UK's offer to assist in border protection, even though the records show that I have consistently stated that there is a role for the UK and that I have been asking Governor Jaspert for months to provide me with the details of the UK's offer, which request he has consistently ignored.

The Governor's actions are a serious affront to the partnership based on mutual respect that is supposed to exist between the BVI and the UK, as expressed in the Virgin Islands Constitution Order 2007. It shows an unmitigated lack of reverence by the UK Government's representative in the Territory for the aspirations of the people of the Virgin Islands to exercise the highest degree of control over the affairs of their country at this stage of its development.

Yet again, your Governor has deliberately made public statements that serve to undermine the relationship between the BVI public and their democratically elected Government through dangerously misleading misinformation…. I must point out that such deliberate malicious actions, especially where it is designed to undermine the sitting Government and reinforce Britain's colonial status quo in the BVI, fall within the classical definition of political sabotage, legitimised and sanctioned by the UK Government."

The letter was widely copied, including to all Members of the House of Assembly "so that they may be aware of the tyranny that is unfolding through Governor Jaspert on behalf of the British Empire".

6.532 In terms of timeframe, Mr Matthews considered that a three-month estimate to have a land-based radar system purchased and installed was "overambitious": he had in his mind that it could take until late 2020/early 2021. The JTF subsequently got advice from experts from other Overseas Territories in the Caribbean as to how to select and install radar, and what the time scale and cost would be; but, by the time Mr Matthews retired (in April 2021), no static platforms had been put in place[979].

6.533 Mr Matthews recalled being involved in a JTF meeting which Mr Wade Smith chaired and the Governor's Office invited guests from (he believes) the Cayman Islands and the Turks & Caicos Islands where they obtained advice on land-based static platforms. He understood that the Governor's Office had also sought expert advice from the UK around the type of radar to consider, its range and locations. He believes the relevant papers were circulated for discussion with the JTF and (as far as he could recall) the NSC. This was in October-November 2020[980].

6.534 The Premier said that he was initially informed that a land-based radar system would take a month, and then (in the Border Security Plan) 6-12 months. Based on the effectiveness of the barges, and continued concerns of smuggling, something had to be done urgently to secure the borders; and hence the contract with EZ Shipping was entered into and continued[981].

6.535 On 5 November 2020, there was a Territorial Security Action Group ("TSAG") Meeting where "a full marine coastal surveillance option" ("Option 3") was discussed[982]. It is also noted that the TSAG security plan was superseded by the JTF Border Security Plan in 2020. On the same topic, there is an NSC paper drafted by the Governor's Office[983] inviting the NSC to agree to this option.

6.536 On the following day (6 November 2020), there is a draft memorandum, prepared by the Governor's office with regard to UK Marine Police Training secondments[984]. In this draft, the NSC is invited to endorse an exchange of knowledge and capacity building with UK and endorse that six UK Marine Police Officers (constable and sergeant level) should be seconded to the RVIPF for up to two months from November 2020 to exchange information and provide specialist law enforcement marine training and mentoring.

6.537 On 9 November 2020, Mr Wade Smith sent a memorandum to the Financial Secretary with further information on permanent border solutions[985]. The purpose of the memorandum appears to be to make Mr Forbes aware of unsolicited offers received from local vendors (referred to by Mr Wade Smith as "additional to option 3"), one of which appears to have been owned by Mr Chadwell. The proposal from Mr Chadwell (dated 4 November 2020) totals $5,750,000, more than double the estimate obtained from another company (dated 10 September 2020) of $2,235,961.01. In evidence, Mr Wade Smith gave details of the proposals for a permanent solution, explored with several other companies[986].

6.538 On 11 November 2020, the Financial Secretary responded in the form of a memorandum to the NSC about enhanced marine surveillance for the BVI[987]. The memorandum discusses the paper's conclusion that Option 3 is the most viable option. The memorandum queries how

[979] T7 20 May 2021 pages 196-197.
[980] T7 20 May 2021 page 197.
[981] T52 21 October 2021 pages 150-154.
[982] TSAG Meeting Minutes 5 November 2020.
[983] NSC Paper [not numbered]: Enhanced Marine Surveillance for BVI dated 6 November 2020.
[984] NSC Memorandum [not numbered]: UK Marine Police Training Secondments dated 6 November 2020 prepared by the Governor's Office. This document appears to be a draft as it is not numbered and has no legal advice in it.
[985] Memorandum from Mr Wade Smith to Financial Secretary: Permanent Border Solutions dated 9 November 2020.
[986] T4 11 May 2021 pages 78-79.
[987] Memorandum Financial Secretary to the NSC: Enhance Marine Surveillance for BVI dated 11 November 2020.

the estimated costs have been arrived at, whether a tender process will be used, queries the level of contingency sum and the total cost of the project. It notes the MoF's concern that the JTF was not implementing the project (it appears that the NSC was directing the project), and notes that the NSC and Cabinet should satisfy themselves that the project being proposed provides the widest base in terms of capability building across all three agencies, not just the RVIPF.

6.539 On 13 November 2020, Governor Jaspert sent a memorandum to NSC members on UK Marine Police training secondments, inviting the NSC to endorse the support the UK proposed to provide to enhance the BVI's long-term capabilities, which included exchange of knowledge with the JTF and TSAG, a proposed "Train the Trainers" programme, and the secondment to the RVIPF of six UK Marine Police Officers for two (and, potentially, up to five) months. The memorandum records that the RVIPF Marine Unit has expressed the need for additional support and training, and there was an appetite in the JTF to up-skill officers. This support would be at no deployment cost for the BVI. At the NSC meeting on 19 November 2020, these recommendations were endorsed[988].

6.540 On 16 November 2020, Governor Jaspert sent a further memorandum to NSC members inviting the NSC to agree a full marine coastal surveillance system for the BVI (as recommended by the JTF), with technical specifications and tender documents prepared and taken forwards by the DGO, the MoF and the JTF[989].

6.541 This memorandum invited the NSC to "agree that the MoF will withdraw the tender publicly issued for the procurement of radar equipment"[990]. This requires some explanation.

6.542 It was always proposed that the land-based radar system (sometimes referred to as the marine coastal surveillance system), strongly supported by the JTF, should meet the needs of each of the three law enforcement arms (the RVIPF, HM Customs and the Immigration Department). However, in November 2020, the Premier as Minister of Finance caused a tender to be prepared and issued for a radar system that was for HM Customs' purposes only[991].

6.543 The Premier justified this on the basis that HM Customs (which falls within the Minister of Finance's portfolio), and not the Governor, "is responsible for border security"[992]. The Premier said that he was regularly seeking updates from the NSC as to progress being made in relation to a land-based radar system and was concerned at the speed of progress: he wanted to avoid a situation where the BVI's use of the radar barges came to an end without land radars to replace them. He took the view that it was better that a tender for some kind of radar was published than to have no radar at all whilst discussions continued at the NSC. Constitutionally, he considered that, as HM Customs falls under the Minister of Finance, this could be progressed without consultation with the other law enforcement authorities or the Governor.

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988 Expedited Extract issued on 30 November 2020.
989 NSC Memorandum No 020/2020: Enhanced Marine Surveillance for the British Virgin Island dated 16 November 2020.
990 Decision Sought paragraph (c).
991 The final tender document does not appear to be available. There is a draft tender document entitled "Procurement and Installation of Radar and Camera Border Security Surveillance Equipment for the HM Customs – Request for Quotation" dated 24 November 2020, which involved procurement of several radars and cameras with submissions of tenders by 9 December 2020). The Premier, when asked about the tender, recalled the radar system being tendered, through the MoF, during budget time in December 2020 (T52 21 October 2021 page 171). However, it is clear from NSC Memorandum No 20/2020 that the tender documents had been published by 16 November 2020; and from NSC Expedited Extract dated 4 December 2020 that the NSC agreed that the tender should be withdrawn on 1 December 2020. However, the precise timing does not appear to be of any moment.
992 Premier Response to Request for Information/Documents No 14 dated 10 December 2021 paragraphs 3 and 4.

The Premier[993] therefore decided, without reference to the other arms of government, to issue a tender for a land-based radar system on the basis of the requirements of HM Customs only, which would overcome what he saw as the decision-making delay within the NSC. He frankly accepted that the proposed system for which tenders were sought did not meet the requirements of the NSC or the JTF, nor were they consistent with previous decisions made in relation to the proposed system[994].

6.544 Governor Jaspert wrote to the Premier raising issues about the course he had taken, and asking him to withdraw the tender[995]. In particular, there had been endorsement for a joint approach to the security issues and there had been discussions around (and agreement in principle to) to the approach to land-based radar. Governor Jaspert did not consider that this tender aligned with this, and so he requested that the tender be withdrawn so that a new tender could be taken forward in line with the previous decisions[996].

6.545 In his evidence to the COI, the Premier initially said he was perfectly willing to do that, so that the Governor (and, no doubt, the NSC) could have more input into the tender process[997]. However, that does not paint a full or accurate picture as reflected in the contemporaneous documents. Initially, the Premier refused to withdraw the tender. In a letter of 27 November 2020[998], the Premier told the Governor that border protection was the responsibility of HM Customs, which is within the portfolio of the Minister of Finance. He said that there was nothing constitutionally irregular with the publication of the tender notice by HM Customs, the Governor had no constitutional authority to instruct the Premier/Minister of Finance on this matter and he confirmed that the tender would not be withdrawn. In a further letter two days later[999], he reiterated that border protection was outside the parameters of the Governor's constitutional authority. The letter concludes "[t]he tender notice will, therefore, remain as published."

6.546 The Premier explained this reluctance to withdraw the tender for HM Customs on the basis that he had become frustrated with having meetings with no concrete results. He was concerned that the BVI were at risk of not having measures in place to secure its borders and considered that they needed to move swiftly so that they had some border protection in place to replace the barges when the contract with EZ Shipping expired. He considered that taking some action was better than spending more time trying to find common ground on how to move forward. He wished to progress matters because of the urgency as he saw it, and his view that some radar system was better than none.

6.547 However, he said that, as part of his attempt at good governance and not to "fight too many fights", when he saw this matter was becoming an issue, at the NSC meeting on 1 December 2020, he agreed to withdraw the tender and agreed to whatever expertise Governor Jaspert wished to put towards the project[1000]. He said that he considered this was in the best interests of the BVI and the government "partnership" he was pursuing: the Premier said that, "in a

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[993] In his Response to COI Request for Information/Documents No 14 dated 10 December 2021) paragraph 11, the Premier said that "HM Customs decided to proceed with the acquisition and installation of a radar system"; but, on all the evidence, it is clear that the decision was substantively that of the Premier (as Minister of Finance, under whose portfolio HM Customs falls). There is no evidence of HM Customs making the decision itself.

[994] T52 21 October 2021 pages 171-173.

[995] Letter Governor Jaspert to the Premier dated 27 November 2020.

[996] T52 21 October 2021 page 98.

[997] T52 21 October 2021 page 173: "I said, No problem, Governor, but we've been discussing this for a very long time, so let us expand it. We'll pull it back and let's expand it."

[998] Letter Premier to Governor Jaspert: Radar Tender dated 27 November 2020.

[999] Letter Premier to Governor Jaspert: Radar Tender dated 29 November 2020.

[1000] There are no minutes of that meeting; but there is an Expedited Extract of the decisions made, including the agreement that the tender would be withdrawn by the MoF.

spirit of cooperation", he instructed the MoF to pull the tender documents [1001]. However, he maintained his view that the original tender would have allowed BVI to have something in terms of fixed radar, rather than the situation they have now which is no radar barges and no land radar[1002].

6.548 At the 1 December 2020 meeting, as well as agreeing that the tender documents would be withdrawn, the NSC agreed to a "Full BVI Marine Coastal Surveillance system for the Territory, as recommended by the Joint Task Force (JTF) and other Virgin Islands agencies, with an initial funding commitment not exceeding $1m for this surveillance system"[1003]. The timeline for delivery was estimated at 35 weeks.

6.549 There were subsequently substantial discussions, with input into the Terms of Reference from the JTF, the NSC, the DGO, the Financial Secretary, the MoF Director of Projects (Dr Drexel Glasgow), and radar experts from the UK Marine & Coastguard Agency and the Royal Navy[1004]. The technical specification has, as a result, changed significantly. Further, there have been discussions as to whether the project should be design-and-build (preferred by MoF) or whether these two functions should be split (preferred by the Governor's Group). It has been agreed that there should be necessary safeguards to ensure transparency and value for money[1005].

6.550 A governance structure for implementation of the project has been designed and now agreed, one of the key members of the proposed technical team being the International Association of Marine Aids to Navigation and Lighthouse Authorities ("IALA").

6.551 The final Terms of Reference were agreed on 23 March 2021, and they are being used to develop the tender document for the procurement process. The MoF, being the authority for tendering, opted to utilise design-build as the preferred procurement method[1006].

6.552 The BVI Government is carrying out a maritime safety risk assessment, which will inform the wider IALA risk assessment. The internal assessment was due to be completed in January 2022: the IALA assessment was not due to start before that was complete[1007]. However, the Premier said that he remains optimistic that this entire project can be achieved in the 2022 Financial Year, and provision has been made for this in the 2022 Budget[1008].

Concerns[1009]

6.553 One can only have sympathy for any government facing the novel and substantial challenges of the COVID-19 pandemic; and particularly for the BVI Government because (i) the GDP of the BVI and its working population were heavily reliant upon tourism which was particularly badly affected by the pandemic, (ii) as a result of its small population, it has very limited intensive

[1001] T52 21 October 2021 pages 170-171, and 180-187.
[1002] T52 21 October 2021 pages 172 – 173.
[1003] Expedited Extract dated 4 December 2020.
[1004] Premier Response to COI Request for Information/Documents No 14 dated 10 December 2021 paragraphs 21-22.
[1005] Premier Response to COI Request for Information/Documents No 14 dated 10 December 2021 paragraph 24. The Premier considers the choice of procurement method is ultimately for the CTB which has the responsibility for the BVI Government's procurement processes.
[1006] Premier Response to COI Request for Information/Documents No 14 dated 10 December 2021 paragraph 27.
[1007] Premier Response to COI Request for Information/Documents No 14 dated 10 December 2021 paragraph 31.
[1008] Premier Response to COI Request for Information/Documents No 14 dated 10 December 2021 paragraph 32.
[1009] The concerns and potential criticisms in relation to these contracts arising from the evidence before the COI were put to the Premier in COI Warning Letter No 6 dated 6 October 2021, to which the Premier responded in writing (Premier Response to COI Warning Letter No 6 dated 19 October 2021) and orally (T52 21 October 2021). The warning letter identified the evidence giving rise to the concerns and potential criticisms. The Attorney General also responded to them by way of submissions (Elected Ministers' Closing Submissions paragraphs 65-68). The criticisms of the Premier in relation to radar barges in this Report are restricted to those in respect of which he had a full opportunity to respond, as described.

care medical facilities to deal with seriously ill patients, and (iii) it comprises a large number of small islands close to other states which from time-to-time have had substantially worse rates of COVID-19. Of course, I accept that adherence to rigorous procurement provisions may not be appropriate in such an emergency. That is no doubt why the Public Finance Management (Amendment) Regulations 2020, which gave Cabinet a wider discretion to waive the standard procurement process in such an emergency, were enacted with effect from 24 September 2020[1010].

6.554 Nevertheless, the way in which the Premier acted during this crisis gave rise to considerable public concern. In my view, that concern is justified.

6.555 In respect of the deployment of radar barges, the Premier appears to have pressed ahead with (effectively, operational) decisions in deploying the radar barges, thereby committing the BVI Government to a course of action (and expenditure of substantial amounts of public money), without any proper governance. For example, he deployed the radar barges, not just under the First Contract, but by distinct decisions under the Second and Third Contracts:

(i) without the recommendation or approval of those who were advising him, notably the JTF and the NSC;

(ii) without Cabinet approval;

(iii) without any open tender process or a waiver by Cabinet of that process, as required by the PFMA regime; and

(iv) without any analysis of effectiveness or any cost-benefit analysis.

6.556 The Premier rejected any suggestion that he acted inconsistently with the principles of good governance or that the decisions he took were arbitrary or involved any abuse of office.

6.557 He explained that the barges were always intended to be a temporary solution, adopted in a crisis[1011]. He understandably emphasised the environment and circumstances in which the deployment was made: the BVI Government was having to tackle the worst pandemic for a century, and he considered it was essential that steps were taken to shore up wavering public confidence in how COVID-19 was being contained and dealt with in the BVI[1012]. The decisions he took, including the decision to deploy radar barges, were all (he said) taken in what he perceived to be the public interest of the BVI. He stressed that such decisions were subsequently endorsed by the NSC and Cabinet; payments were made to EZ Shipping with the approval of the Financial Secretary; and at no stage did the Attorney General advise that the decisions and actions that were taken might be arbitrary or otherwise unlawful. Further, he relied upon that fact that, if Governor Jaspert had considered the decision to deploy radar barges to be fundamentally wrong, he had the powers effectively to veto that decision – it was open to him to issue a direction under section 57(3) and/or section 60(8) of the Constitution[1013] – but, so far as the Premier recalled, at no stage did the Governor even raise with the Premier the possibility of doing so[1014].

[1010] See paragraph 6.9 above.

[1011] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 22; and T52 21 October 2021 page 144

[1012] T52 21 October 2021 pages 189-190

[1013] See paragraphs 6.433 and footnote 842 above, and paragraph 1.52 above, respectively. Under section 57(3), the Governor need not act on the advice of the NSC where giving effect to that advice would adversely affect Her Majesty's interest. Under section 60(8), where the Governor determines that the exercise of any function conferred on any other person or authority (other than the House of Assembly) would involve or affect a matter reserved to the Governor, he or she has the power to issue a direction with which the person or authority is bound to comply.

[1014] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 28.

6.558 The Premier said that, in the light of his view (shared by Cabinet) that it was of paramount importance to keep the borders of the BVI secure through the height of the pandemic, taken with the reported efficacy of the radar barges (as set out in the Cabinet and NSC Memoranda upon which approval was sought and given), the Premier said he considered that the initial and continued deployment of the barges was well justified. Whilst the deployment/continued deployment was prior to formal execution of each contract, that was justified on the basis of extreme urgency[1015]. If the Premier had not acted when and as he did, then (he said) there would have been no barges, no obvious alternative and the BVI's borders would have been unnecessarily vulnerable to illegal entry and virus spread. The Financial Secretary repeatedly told him that Cabinet was, in the circumstances, entitled to waive the tender process, pursuant to regulation 170(2) of the PFMR[1016]. The Premier said that, throughout, he was in close informal discussion with his Cabinet, and considered that his approach was likely to gain their support once the issue was brought before Cabinet[1017].

6.559 As I have made clear, I do not underestimate the challenges that COVID-19 posed to the BVI Government, particularly in its earlier stages when global data indicated that the attrition rate for the disease was high and the BVI, like many other places round the world, did not have the medical facilities or equipment to deal with large number of cases of infection.

6.560 However, the way in which the radar barges were procured and then maintained is nevertheless concerning.

6.561 First, the contracts did not comply with the relevant procurement provisions, which required either an open tender or a waiver by Cabinet of such. For the First Contract, valued at $840,000, some efforts were made to find boats which could be used as radar barges (although there was no open tender). Cabinet did not approve the contract until it had three-quarters run its course, half the contract sum had been paid and there was a commitment to pay at least half of the balance (for services already provided) and, in practice, for the whole of the balance. Even when Cabinet approved the contract, it does not appear to have waived the procurement requirements. In respect of the Second and Third Contracts there was no procurement process at all. Furthermore, although Cabinet waived the tender process when it approved each contract, it did not do so until after the contract period had expired and all money due had already been paid. The Premier said that there were regrettable and frustrating delays in getting the relevant papers drafted and submitted to the NSC and the Cabinet, and explained that the delays were a symptom of the under-resourced Public Service[1018]. Whilst public officers were no doubt extremely busy at that time, there is no evidence that they were instructed to action these contracts and simply failed to do so because of lack of resources. In any event, the result was that the procurement process was effectively by-passed: Cabinet had little choice but to approve waiver after the event.

6.562 Second, although the Premier said that he briefed his fellow Cabinet Ministers regularly during this time and they knew such matters would be coming before them subsequently for approval[1019], when they did come before Cabinet (after the public funds had already been committed, and the contracts had been largely (First Contract) or wholly (Second and Third Contracts) performed), Cabinet had little choice but to approve them after the event.

[1015] Elected Ministers' Response to Governor Position Statement.
[1016] For example, see Cabinet Memorandum No 555/2020: Award of New Contract – EZ Shipping Limited dated 30 December 2020 paragraphs 8-9; and Cabinet Memorandum No 73/2021: Additional Award of Contract – EZ Shipping Limited dated 15 February paragraphs 9-10.
[1017] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraphs 20 and 27.
[1018] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 18.
[1019] T52 21 October 2021 pages 192-193.

6.563 Third (and, in many ways, more importantly), under section 60 of the Constitution, the Governor acting on the advice of the NSC was responsible for security including border security[1020]. However, the radar barges were deployed by the Premier without the approval (or even foreknowledge) of Governor, and without the approval of the NSC or the JTF. The Premier maintained that both the NSC and the JTF were "closely involved" in the decision, and the NSC approved the First Contract prior to its signature[1021]. However, at the time of that approval, the NSC had little choice but to endorse the Premier's decision: the radar barges had been deployed, and the financial commitment of the BVI Government to pay for them had been incurred. The NSC only approved the Second and Third Contracts after the whole period of the contract had expired, and EZ Shipping had provided the radar barges that they were committed to provide and had been paid for their services. Therefore, to say that they retrospectively approved the course he took does not fully answer the point[1022].

6.564 As to the point that Governor Jaspert had the constitutional powers to stop the deployment of the radar barges, the former Governor confirmed that he did have concerns over the process by which the radar barges came to be deployed, before the NSC and Cabinet had had an opportunity to consider the arrangement and then being asked to ratify decisions after the fact. He had some concerns over the utility of such deployment. He confirmed that he did consider using his power to make a direction under section 60(8), because he was concerned that the deployment was an overreaching of the Premier's constitutional powers into matters that are reserved to the Governor under section 60. However, he considered that section 60(8) powers should only be deployed as a last resort; and the situation with the radar barges was difficult because the Premier had already given a commitment to EZ Shipping outside of the constitutional arrangements. He said he had weighed up the utility of a more formal approach using his powers under section 60(8) against the reality of EZ Shipping having already been given a commitment to undertake their work and essentially had been given a contract, even if not formally signed until a month later, and indeed performed that contract[1023]. In all the circumstances, although he was disappointed in the way that the Premier deployed the radar barges successively over three periods without the approval of the NSC, he decided that it was not appropriate to exercise his section 60(8) powers.

6.565 Governor Jaspert thought that he had also raised section 57(3) with the NSC, although he said he could not be certain. He accepted that he could have used that section as well to prevent the agreement with EZ Shipping continuing. However, his approach was the same as to section 60(8). The payments to EZ Shipping had already made (or, at least, committed) by the Premier as Minister of Finance. Again, in all of the circumstances, he did not consider it was appropriate to use his powers to stop the arrangement.

[1020] The Premier's position on this was ambivalent. Whereas the Premier argued that he was entitled to deal with a contract for a land-based radar system because border security was a matter for HM Customs (which fell under the portfolio of the Premier as Minister of Finance), the point he made about Governor Jaspert not making a direction, or taking other action under section 60(8) of the Constitution was reliant upon the deployment of radar barges at least being to "involve or affect" the Governor's reserved functions. Whilst, like so many matters, border security involves the functions of more than one arm of the BVI Government, it seems to me to be clear that it is primarily (or, at the very least, significantly) the function of the Governor as falling within "external affairs" and/or "internal security". That was the view of Governor Jaspert (see T52 21 October 2021 at pages 99-103) and Governor Rankin (see T50 19 October 2021 pages 270-271).

[1021] Elected Ministers' Response to Governor Position Statement paragraph 90. This was the case with the First Contract, but apparently not with the Second and Third Contracts.

[1022] Governor Rankin expresses concern that these contracts were awarded without any proper procedure or approval of the NSC and/or JTF prior to signature (Second and Third Contracts) or at least until after the public funds had been committed (First, Second and Third Contracts) (Governor's Position Statement paragraph 62).

[1023] T52 21 October 2021 pages 99-103.

6.566 Governor Jaspert said that, whilst voicing his concerns to the NSC and the Premier/Cabinet, his instinct, approach and principles drove him to support and encourage effective self-determination and good decision-making by the Ministers. He did not consider a Governor should reach for his powers of veto as a starting point, or other than as a last resort. This approach was to try and operate a partnership with the elected Government, raising concerns about (e.g.) governance in private, trying to encourage a better position by working up alternative options etc, rather than jumping straight to constitutional powers[1024].

6.567 Fourth, in terms of governance, there was further concern expressed by Governor Jaspert (and, later, Governor Rankin) and the CoP Michael Matthews as to the efficacy of radar barges and the cost-benefit ratio of deploying them. The Premier recollected the expressions of concern at the time. A cost-benefit analysis has never been conducted. The Premier relied on data which suggested that the amount of sea traffic was reduced following the introduction of the radar barges; but (i) as described above, there were real issues about the availability of interceptor vessels, (ii) the number of interceptions was very low and (iii) there is evidence that illegal imports of substantial amounts of drugs may have been taking place despite the presence of the radar barges, which suggests that illegal entry by people may also have been occurring. I do not have the evidence to determine the efficacy of radar barges in preventing illegal entry into the BVI; but the lack of any proper analysis, either before or after the event, means that efficacy cannot be assumed. There is real concern that, whilst there was reduced sea traffic, the radar barge system would not have prevented those who were determined to gain illegal entry into the BVI.

6.568 Fifth, payments were made to EZ Shipping before the underlying contracts were approved or signed. This was justified by the Premier on the basis that the Financial Secretary, and he believes the Accountant General, would have been aware of the circumstances and would have satisfied themselves they were proper payments[1025]. However, there is no evidence that they did so. In reality, once the Premier had committed the BVI Government in respect of the radar barges, the Finance Secretary and Treasury had little option but to pay.

6.569 Sixth, in respect of the land-based system, the Premier proceeded to tender without consulting the NSC, JTF or the Governor, on the basis that border security falls under the umbrella of HM Customs, and hence the MoF (and, so, under the Premier's control as Minister of Finance). However, I am unpersuaded. Section 60 of the Constitution makes the Governor responsible for security, and hence for border security. As it was, tender documents were put out by or on behalf of HM Customs which did not correspond with the requirements of such a system as discussed previously in the JTF and NSC – and which have been amended substantially since.

6.570 Even given the extraordinary circumstances that gave rise to the need to close the BVI borders, these contracts in my view require further investigation. I consider that, as soon as practical, a full audit of these contracts should be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the circumstances in which the services of EZ Shipping came to be retained by the BVI Government, (ii) the extent to which there was compliance with the procurement regime for major contracts, and the justification for any departure, (iii) why the services were provided prior to the approval of the JTF, the NSC, the Cabinet and/or the Governor, (iv) the policy objectives of the contracts, and the efficacy of the contracts in fulfilling those objectives as revealed by the data, and (v) value for money. Although this will be a matter for the NSC,

[1024] T52 21 October 2021 pages 103-104.
[1025] Premier Response to COI Warning Letter No 6 dated 19 October 2021 paragraph 19.

in my view, consideration of national security should not affect the access accorded to the Auditor General in performing this audit (although it may affect her ability to publish her report in unredacted form). Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

Proposed Reforms[1026]

6.571 As I have described, a series of reports by the Auditor General and the PAC raised serious concerns about and weaknesses in BVI Government procurement procedures both generally and specifically in respect of certain high profile major projects such as the Sea Cow Bay Harbour Development Project and the Cruise Ship Port Development Project[1027].

6.572 In September 2014, the Premier Dr the Hon Orlando Smith with the support of the Governor, Governor Duncan, commissioned the Caribbean Development Bank ("the CDB") to review and make recommendations for improving the procurement process.

6.573 The CDB applied the established Methodology for Assessing Procurement Systems developed by the OECD. Whilst it acknowledged some areas of good practice, its report[1028] also identified a number of areas where significant improvements in procurement were urgently required. It recommended (amongst other things) (i) the need for a stand-alone Procurement Act, supported by appropriate Procurement Regulations and a Procurement Handbook approved under those Regulations, (ii) the establishment of the Procurement Unit within the Regulations, (iii) adopting a competitive tendering process for all procurement exceeding a value of $100,000, and restricting the use of selective and limited tendering options to procurements under that value, (iv) the development of a list of circumstances, justification and procedures permitting the use of waivers of the tendering process, (v) the preparation and maintenance of a register of pre-qualified and graded contractors, and (vi) the development of fraud and corruption provisions within the legal and regulatory framework for procurement for participants in government procurement including public officials[1029]. Other than the enactment of a stand-alone bill and supporting regulations ("medium-term recommendations"), most of these recommendations were said to be "immediate" such that they "should be completed as soon as possible"[1030].

6.574 The Governor commissioned a further report from an independent strategic procurement adviser (N D Hearnden) in respect of whether the CDB report adequately addressed the specific BVI issues in respect of major projects. The report[1031] identified the following issues as having arisen from the reports of the Auditor General and the PAC:

- No clearly defined requirement
- Lack of transparency
- Political interference
- Environmental issues not fully examined

[1026] Dr Glasgow disclosed a helpful Chronology of Recent Public Procurement Reform in the BVI (Dr Drexel Glasgow First Affidavit dated 10 June 2021 Exhibit DG1 pages 494-495).
[1027] For the Sea Cow Bay Harbour Development Project, see paragraphs 6.51-6.96 below; and, for the Cruise Ship Port Development Project, see paragraphs 7.31-7.66 below.
[1028] Country Procurement Assessment Report for the British Virgin Islands (December 2014).
[1029] Paragraph 1.3.
[1030] Paragraphs 7.1 and 7.2.
[1031] Procurement in the British Virgin Islands (10 March 2015).

- No effective project and programme management
- Potential for partner to drive agenda and achieve maximum profit at a cost to taxpayers
- Control and ownership
- Whether the term of any public-private partnership project was in the best interests of the taxpayers.

6.575 The report generally supported the recommendations of the CDB Report. In particular, it identified two matters of concern:

(i) The failure to apply tender requirements even where the prescribed financial level has been exceeded. The lack of guidance in terms of what constitutes grounds for waiver "has almost certainly compromised best practice and the achievement of value for money…".

(ii) The failure clearly to separate political/policy making and operational delivery: "It is critical that a [sic] effective separation of political and administrative accountability is realised".

6.576 In the meantime, the Minister of Finance engaged a former employee of CDB (Norman Cameron) as a consultant to address the recommendations in the CDB Report. He produced draft procurement legislation and a three-volume handbook for adaptation in the BVI. In 2016, the Cabinet accepted the recommendations of the CDB Report; and, on 3 August 2018, instructed the Attorney General to draft appropriate legislation on the basis of the draft produced by the consultant. The Attorney produced a draft in September 2019. In March 2020, at the invitation of the Minister of Finance, CDB engaged the Charles Kendall Group as consultants to prepare a further draft bill and regulations, which it did in May 2020 and September 2020 respectively. Final drafts were produced by the Attorney General's Chambers on 25 May 2021. Cabinet approved both Bill and regulations on 28 May 2021.

6.577 After its readings and debate, the Public Procurement Act 2021 was passed on 3 November 2021; and the Governor's assent was given on 6 December 2021[1032]. However, it is yet to come into force and will only do so when certain administrative arrangements are in place[1033]. No date has been announced for its coming into force.

6.578 The Act will, if and when implemented, effectively replace the procurement regime under the PFMA[1034]. It is said that the Act is designed to, inter alia, promote integrity, fairness and public confidence in the public procurement process through transparency, greater competition and participation in public procurement and fair, equal and equitable treatment of all tenderers[1035]. Although there is still a rule-making provision, much of the detail of the procurement scheme is now set out in the primary legislation itself.

6.579 The main provisions, of what is a detailed scheme, are as follows.

[1032] The Public Procurement Act 2021 has to be read with the Contractor General Act 2021, which establishes the post of Contractor General whose functions include the monitoring and investigation of procurements: see paragraphs 6.581-6.586 below.

[1033] Attorney General's Response to Enumerated Questions in Mr King's Letter of 19 May 2021 in respect of the Legislative Programme on Governance dated 3 June 2021 updated 10 February 2022 ("Attorney General's Memorandum on Governance Measures") paragraphs 74-83. The COI was told that, following a new procedure introduced by the Attorney General's Chambers, a memorandum will be forwarded to the instructing Ministry indicating the need for the Act to be brought into force and requesting a date on which arrangements to be put in place to bring the Act into force (paragraph 83).

[1034] The regime under the PFMA was set out in the PFMR which were made under section 44(1)(b) of the PFMA. That section would be repealed by section 57(1) of the 2021 Act; although section 57(2) retains the PFMR, insofar as they govern the CTB and the procurement process, until revoked and insofar as they are not inconsistent with the 2021 Act. Much of the detail that was in the PFMR is now found in primary legislation, i.e. in the 2021 Act itself.

[1035] Legislative Programme on Governance section 3(4).

(i) The 2021 Act applies to all "procuring entities" and to all "State-Owned Enterprises"[1036]. "Procuring entity" means "any Government Ministry, Department, Unit or Agency, or any subdivision or multiplicity thereof, that engages in procurement"; and "State-Owned Enterprise" is widely defined to include those corporate and legal entities over which the State exercises "a dominant influence" including where "the State holds the majority of the entity's subscribed capital, controls the majority of the votes attaching to shares issued by the entity, or can appoint more than half of the entity's administrative, management or supervisory body"[1037]. Therefore, statutory boards are within its scope.

(ii) Procuring entities and State-Owned Enterprises are subject to a number of overarching, high-level obligations. Section 3(4) provides:

> "In applying this Act, procuring entities and State-Owned Enterprises shall seek to
>
> (a) maximise, the economy and efficiency in public procurement;
>
> (b) foster and encourage participation in public procurement proceedings by tenderers regardless of nationality, thereby promoting international trade;
>
> (c) promote competition among tenderers for the supply of the subject matter of the public procurement;
>
> (d) provide for the fair, equal and equitable treatment of all tenderers;
>
> (e) ensure that BVI tenderers are provided with ample procurement opportunities in order to encourage and support national development;
>
> (f) promote the integrity of, and fairness and public confidence in, the public procurement process; and
>
> (g) achieve transparency in the procedures relating to public procurement."

(iii) Subject to any policy direction given by the Minister of Finance, the Financial Secretary is responsible for the administration of the Act including implementation of the Government's public procurement policies, particularly with regard to public expenditure[1038].

(iv) Section 5(2)-(4) establishes a new CTB, but with the same composition and a similar role as that of the CTB under the PFMR. A new Procurement Unit within the MoF is created to carry out the administrative functions of the CTB, and to conduct any procurement on behalf of the relevant Ministry, Department or any other agency[1039]. The Procurement Coordinator is both the head of the Procurement Unit and acts as Secretary to the CTB[1040]. Each Ministry is required to establish a Procurement Committee which is required both to develop an annual procurement plan for submission to the Procurement Unit and conduct evaluations in respect of individual procurement exercises[1041].

(v) Subject to such requirements and conditions as may be prescribed for the appropriate use of each method of procurement, procurement can be conducted in one of six ways, namely[1042]:

> "(a) open tendering which may be conducted in one or two stages and with or without pre-qualification;

[1036] Section 3(1).
[1037] Section 2.
[1038] Section 3(5).
[1039] Section 5(5).
[1040] Section 5(6).
[1041] Section 5(10).
[1042] Section 6(1).

(b) restricted tendering;

(c) request for quotations;

(d) request for proposals without negotiation;

(e) request for proposals with consecutive negotiations; and

(f) single source procurement".

(vi) However, a procuring entity is required to conduct procurement by means of open tendering unless it falls into one of the exceptions set out in section 8, in which event it may take place by another method. The circumstances in which it is open to use a form of process other than open tender are specifically defined. For example, a procuring entity may engage in single source procurement in "exceptional circumstances", but these are defined to include (e.g.) "where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the procuring entity the products or services could not be obtained in time by means of open or restricted tendering…"[1043]. Provisions in respect of each mode of procurement are set out in Parts III-IV of the Act.

(vii) For domestic procurement, the procuring entity is empowered to select qualified contractors from the CRCS to submit tenders for undertaking certain categories of work without using the pre-qualification procedures specified set out in the Act, the selection of such contractors from that system being determined by the type, cost and complexity of the work to be undertaken and the prescribed procedures for its use[1044]. For these purposes, the Financial Secretary on the recommendation of the CTB is required to maintain a list to be approved by the Minister, of pre-qualified contractors for the procurement of services including construction works[1045].

(viii) A procuring entity is required to keep a documentary record of any procurement exercise[1046].

(ix) Public officers and those involved for procuring entities are required to:

"(a) act diligently, impartially, conscientiously and fairly in accordance with the procedures set out this Act;

(a) at all times act in the public interest;

(b) avoid conflicts of interest, whether actual, perceived or potential;

(c) not commit or abet any corrupt or fraudulent practice, including the solicitation or acceptance of improper inducements; and

(d) subject to this Act, not disclose any information relating to procurement proceedings and to tenders.[1047]"

The provisions relating to conflicts of interest are supplemented by a requirement for a code of conduct. The Financial Secretary is required to issue a code of conduct for officers and employees of procuring entities which shall include at least the following: (a) measures for the prevention of conflicts of interest in procurement; (b) certificates declaring an absence of conflicts of interest to be signed by officers exercising specified

[1043] Section 8, the example being from section 8(3)(a).
[1044] Section 47(1).
[1045] Section 47(12).
[1046] Section 54(1).
[1047] Section 55(2).

roles in the procurement function; and (c) where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in (i) particular procurements; (ii) screening procedures; and (iii) training requirements[1048].

(x) Part VI of the Act sets out provisions enabling a tenderer to challenge the result of a tender process by seeking a review by the procuring entity, by way of appeal to a Procurement Appeals Board (the members of which are appointed by the Minister of Finance) or by way of appeal to the High Court.

6.580 Whilst there are still some unknowns – for example, the prescribed threshold amount is not defined or set out within the Act – the Act appears to set out a sensible and principled approach to the regulation of public procurement. However, so does the PFMA regime; but that is largely by-passed or ignored. It is unclear how this Act will prevent or hinder such conduct in the future. Whilst the statutory wording is more specific in the legitimate grounds for waiver, as the evidence presented to the COI has clearly demonstrated, there has been a consistent pattern of procuring contracts and/or splitting contracts so as to fall below the legislative threshold thereby avoiding scrutiny. It is not clear whether this Act is sufficiently robust to prevent such abuse in the future. The fact that the current administration, whilst passing the new Act, has continued the practice of avoiding open tendering, contract splitting and assigning contracts without applying the principles openness, transparency or otherwise of good governance, does not bode well for the future.

6.581 The Public Procurement Act 2021 has to be read with the Contractor General Act 2021, paragraph 3(1) of which establishes the post of Contractor General. The Attorney General was instructed to draft this bill on 12 June 2020, and her Chambers produced a draft on 21 August 2020. A further draft was produced on 3 May 2021, and there was a period of consultation with stakeholders before it received its Second and Third Readings in the House of Assembly on 13 May 2021. It was passed by the House on 17 June 2021, and the Governor gave his assent to the Act on 5 August 2021. However, as with the Public Procurement Act 2021, this Act has not come into force and, as at February 2022, no date for bringing the Act into effect had yet been announced[1049]. Consequently, no Contractor General has yet been appointed.

6.582 The Contractor General is an independent corporation, appointed by the Governor in agreement with the Premier who is required to consult the Leader of the Opposition[1050]. He or she is to be provided with such staff as the Minister of Finance with the approval of Cabinet may appoint[1051].

6.583 The functions of the Contractor General are set out in section 13(1) of the Act as follows:

> "(a) to monitor the award and the implementation of government contracts with a view to ensuring that
>
> (i) such contracts are awarded impartially and on merit;
>
> (ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve any impropriety or irregularity;

[1048] Section 55(3).
[1049] Attorney General's Memorandum on Governance Measures paragraphs 35-44. On 28 September 2021, the Attorney General's Chamber issued a memorandum suggesting to the MoF 12 October 2020 as the commencement date. However, as at 10 February 2022, no commencement date had been fixed.
[1050] Section 3(2) and (3), and section 4.
[1051] Section 11(1).

(iii) without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof;

(iv) there is no fraud, corruption, mismanagement, waste or abuse in the awarding of contracts by a public body;

(b) to investigate any such fraud, mismanagement, waste or abuse under paragraph (a)(iv);

(c) to develop policy guidelines, evaluate programme performance and monitor actions taken by a public body with respect to the award, execution and termination of contracts; and

(d) to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof."

In performing these functions, he or she has wide powers to call for information and call witnesses to give evidence as part of an investigation[1052].

6.584 After conducting an investigation under the Act, the Contractor General is required to inform the principal officer of the public body investigated with the result of that investigation and make such recommendations as he or she consider necessary. Notably, where the Contractor General is of the opinion that no adequate action has been taken following his/her recommendation, then such findings will be presented to the Minister who will then put the recommendation before the House of Assembly[1053]. This procedure is not dissimilar to that currently in operation with the Auditor General.

6.585 The Act attempts to distinguish between the powers of the Contractor General and those of the existing Auditor General and Complaints Commissioner. It is said that the Contractor General should have particular regard to their activities and functions "with the view to avoiding duplication of functions and ensuring effective coordination and cooperation" between the offices[1054].

6.586 As with other recent legislative programmes, this Act appears to represent a significant step in the right direction. However, having regard to the evidence before the COI, I can only remain concerned. The ability of the Contractor General to function effectively is dependent upon support and resources being made available by the Minister of Finance (i.e. the Premier) as approved by Cabinet. Furthermore, as the Act suggests, there already exist constitutional bodies which are empowered to investigate the matters identified, notably the Auditor General. These offices have done their valiant best to monitor, report and make recommendations on contracts. They have been frustrated by non-cooperation and non-engagement by the contracting arms of government, and their clear and forthright recommendations have been consistently ignored. There is nothing within the Act or in evidence before me to suggest that there has been a fundamental change in approach by the elected Government, or that the Contractor General would not face similar obstacles.

[1052] Sections 13, 17 and 30.
[1053] Legislative Programme on Governance, Part III The Powers and Functions of Contractor General.
[1054] Legislative Programme on Governance, section 21.

Conclusion

6.587 The COI made enquiries into procurement for the above projects as examples of what might be the more general picture. For example, the elected Ministers accept that, in the face of a statutory procurement regime which requires an open tender process for projects valued at more than $100,000 other than in exceptional circumstances and for very good reasons the Cabinet may waive that requirement, there is no open tender in two-thirds of such projects[1055]. It was generally accepted by witnesses that performing projects of more than £100,000 by "contract splitting" into petty contracts, and even works orders, was a widespread practice, and inevitably more expensive than a single contract because of (e.g.) the loss of the savings as a result of bulk purchase of goods/services[1056]. That is evidence of flagrant widespread disregard for the good governance provisions by both the current regime and past administrations.

6.588 The examples that I examined showed a willingness to avoid almost all of the checks and balances in place to support good governance, and thus increase the risk of dishonesty in relation to such procurement. In terms of approach to governance, some of the examples are frankly mind-boggling, to the extent that it is almost impossible to conceive of a credible explanation for the course the relevant Minister followed: for instance, the splitting of the School Wall valued at more or less $1 million into over 70 petty contracts and works orders, at what the Minister knew would be at the cost of extra public funds, or the recent contracts with Mr Skelton Cline that nobody now suggests reflected the work it is now said he was doing.

6.589 It is quite clear that the examples that I investigated are symptomatic of a broad picture of elected Ministers failing to comply with the procurement regime and/or principles of good governance in relation to contracts.

6.590 The Attorney General submitted that this failure was due to a lack of capacity or capability in the Public Service. In the Elected Ministers' Closing Submissions, the Attorney used the example of contract splitting, as follows:

> "72. … It is submitted that the Commissioner alighted on the central issue in the following exchange with the Premier, in his evidence [at T52 21 October 2021 pages 229-230]:
>
> > 'COMMISSIONER HICKINBOTTOM: But can I just take you up for one thing on contract-splitting, what's called 'contract-splitting'?
> >
> > THE WITNESS [i.e. THE PREMIER]: Umhmm.
> >
> > COMMISSIONER HICKINBOTTOM: There would be nothing wrong--in my view, there would be nothing wrong as a matter of policy for a government to take the view that it would be—it's right, as a matter of policy that we split up projects and give it to smaller builders. It may cost more, but as a policy that's a policy that we want to pursue.
> >
> > But if you are going to pursue that policy, wouldn't you have to have some assessment on how much the policy would cost? So, a paper saying, Look, if we do this project with one contractor, it will cost a million dollars. If we do it

[1055] See paragraph 6.26(iii) and footnote 37 above.

[1056] For example, in respect of the School Wall Project, the evidence was that 405 trucking excursions were required because the contract was split into 70 petty contracts/works orders, as opposed to "100 tops" if a single contract had been employed (T19 29 June 2021 pages 81-82).

with 10 contractors or 12 contractors, it will cost more. It will cost $1.3 million. But it's worth it because economically it has advantages, and as policy that's what we want to do.

But on the documents that we have seen, that's not what happened.'

73. That insight is precisely the point the ministers have been making throughout the Inquiry. The effective fulfilment of any government's political priorities depends on the public service's ability to propose and design detailed policy solutions that comply with the principles of good governance and the rule of law and then efficiently implement and evaluate them. For the reasons they have advanced elsewhere, elected Ministers are only infrequently able to count on such support."

6.591 This example features in the conclusions to the submissions. It can safely be assumed that it is an example that was chosen by the Attorney General and her team because it was thought best to illustrate the submission made. However, my comments are taken out of context, and the evidence does not in any event support the submission being made.

6.592 The only insight that I had was to note that, when contract splitting takes place, it happens without the application of any good governance (or even basic economic) principles. The Premier responded by saying that it was the result of a lack of capacity in the Public Service. But that does not seem to me to be the case. The following exchange took place shortly after that set out above (at page 233):

"COMMISSIONER HICKINBOTTOM: But on contract-splitting, you say that the assessment of the cost of contract-splitting is not done because of a lack of capacity in the Public Service, but is that right? I mean, on any project, you will have an architect; but more importantly for these circumstances, you'll have a quantity surveyor, the QS will give you a draft bill of quantities on the base of one contractor, and he or she will give you another bill on the basis of 10 contractors. I mean it's just an exercise. It doesn't require any input from Public Offices [sic], does it?

THE WITNESS [i.e. THE PREMIER]: But that's the key. It requires a policy, so that when they do do it, they know for sure that they have to bring both options."

So, the Premier's point appears to have been that there was no policy to ensure that options were put before the Minister and then Cabinet.

6.593 But the evidence does not support that as being the problem. For example, in respect of the School Wall Project, the Minister decided early that this should be performed by contract splitting and using both works orders and petty contracts. He was told by his public officers that this would be more expensive. However, he pressed forward with that mode of performance, not seeking any alternative way of performing the contract using one contractor or fewer contractors than were eventually used. The First Phase of the project was manipulated to bring it below $100,000, so that the open tendering provisions would not apply. The estimate used in the Cabinet paper was for a single contractor, at a time when the Minister knew the cost would be higher if multiple contractors were used. Unlicensed contractors were used. This was not arguably a case of the principles of governance being missed as a result of a lack of capacity or capability of public officers, who advised the Ministers of the disadvantages of contract splitting.

6.594 The Attorney General does not refer to a single case of contract splitting or tender waiver where the reason given for the splitting and/or waiver was given as any deficiency in the Public Service. I cannot recall any evidence of any such case.

6.595 I do not accept the submission made by the Attorney General that the failure to comply with the open tender requirements for major projects, by contract splitting and/or waiver by Cabinet, is the result of a Public Service lack of capacity or capability. No sensible explanation has been given for the cavalier approach of successive elected administrations to procurement. Successive administrations (including the current elected Government) have, with some determination and despite the Auditor General, IAD Director and successive Governors expressing disquiet, ignored the statutory regime. They have refused to change direction. That is extremely troubling, and raises a real suspicion that procurement decisions are not all being made entirely in the public interest. For the reasons expressed elsewhere in this Report[1057], although new procurement legislation has been passed, I can have no confidence in this or successor governments implementing the new regime with any more rigour than they have implemented the current regime.

6.596 Looking back, all contracts in respect of major projects (i.e. projects valued at over $100,000, even if they have been the subject of contract splitting or sequential contracts) considered by Cabinet (or, if not considered by Cabinet, considered and approved by a Minister) over the last three years should be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit presented to the Governor. The terms of that exercise should include consideration of (i) whether there has been any manipulation of a project to avoid the open tender requirements (e.g. contract splitting, or the use of sequential or otherwise associated contracts for the same substantive project), (ii) any waiver of the open tender process, including the adequacy of any reasons therefor, (iii) the means by which and by whom the contractor(s) were selected, (iv) whether the project was completed and, if not, the estimated costs and likelihood of completion and (v) value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps towards the recovery of public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) can await the outcome of that audit.

6.597 Going forward, if and when the Contractor General Act 2021 is implemented, that may provide a mechanism whereby abuses of the procurement system can be tackled. However, in the meantime, I shall recommend that (i) all government contracts other than major contacts should contain a provision that there are no associated contracts which together would trigger the open tender process for major contracts, and (ii) all Cabinet Memoranda which propose a tender waiver should be provided to the IAD Director in advance so that she can make observations as to the appropriateness of a waiver and also instigate any audit of the project that she considers fit. It is hoped that such measures will stem the abuse of the procurement system whilst a more permanent solution is established.

[1057] See, particularly, paragraphs 13.131-13.142 below.

Recommendations

6.598 I deal with overarching recommendations below[1058]. However, with regard to the procurement of contracts, I make the following specific recommendations.

Recommendation B18

I recommend all contracts in respect of major projects (i.e. projects valued at over $100,000, even if they have been the subject of contract splitting or sequential contracts) considered by Cabinet (or, if not considered by Cabinet, considered and approved by a Minister) over the last three years should be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit presented to the Governor. The terms of that exercise should include consideration of (i) whether there has been any manipulation of a project to avoid the open tender requirements (e.g. contract splitting, or the use of sequential or otherwise associated contracts for the same substantive project), (ii) any waiver of the open tender process, including the adequacy of any reasons therefor, (iii) the means by which and by whom the contractor(s) were selected, (iv) whether the project was completed and, if not, the estimated costs and likelihood of completion and (v) value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps towards the recovery of public money (including recovery from any public official who has acted improperly in enabling and/or making the grant) can await the outcome of that audit.

Recommendation B19

I recommend that (i) all government contracts other than major contracts should contain a provision that there are no associated contracts which together would trigger the open tender process for major contracts, and (ii) all Cabinet Memoranda which propose a tender waiver should be provided to the Director of the Internal Audit Department in advance so that she can make observations to Cabinet as to the appropriateness of a waiver and also instigate any audit of the project that she considers fit.

Recommendation B20

In respect of (i) the Sea Cow Bay Harbour Development Project and (ii) the Virgin Islands Neighbourhood Partnership Project, I recommend that each matter be referred to the appropriate authorities for consideration of whether a criminal investigation and/or investigations in relation to the recovery of the public money expended should be made having regard to (i) all the available evidence including the Auditor General's Report on the project and the information provided to the Commission of Inquiry, and (ii) the dual evidential and public interest tests.

Recommendation B21

In respect of (i) the Elmore Stoutt High School Perimeter Wall Project and (ii) the BVI Airways Project, I recommend that the current criminal investigations (in which there are public officials as persons of interest) are allowed to run their course.

[1058] See Chapter 14.

Recommendation B22

In respect of the government contracts with Claude Skelton Cline since 2019, I recommend that, as soon as practical, a full audit of these contracts be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the evidenced work done by Mr Skelton Cline under these contracts, (ii) the contractual obligations of Mr Skelton Cline under these contracts, and any mismatch between those obligations and the work done, (iii) to the extent that he was not performing his contractual obligations, the circumstances in which Mr Skelton Cline was paid out of the public purse, and (iv) whether the contracts provided value for money. Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

Recommendation B23

In respect of the government contracts with EZ Shipping concerning the provision of radar barges since 2019, I recommend that, as soon as practical, a full audit of these contracts be performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of (i) the circumstances in which the services of EZ Shipping came to be retained by the BVI Government, (ii) the extent to which there was compliance with the procurement regime for major contracts, and the justification for any departure, (iii) why the services were provided prior to the approval of the Joint Task Force, the National Security Council, the Cabinet and/or the Governor, (iv) the policy objectives of the contracts, and the efficacy of the contracts in fulfilling those objectives as revealed by the data, and (v) value for money. Although this will be a matter for the National Security Council, in my view, consideration of national security should not affect the access accorded to the Auditor General in performing this audit (although it may affect her ability to publish her report in unredacted form). Unless in the meantime the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

APPENDIX A

CHAPTER 7:
STATUTORY BOARDS

APPENDIX A

STATUTORY BOARDS

A substantial amount of the work of the government is done through various bodies set up by the legislature specifically for the task, on the basis that the work is done better by an essentially autonomous and independent body than by the executive in the form of the elected Ministers or Cabinet. The powers and duties of these bodies are set out by the House of Assembly.

In this chapter, such statutory bodies are considered and, in particular, two issues which arose in the evidence. First, I consider the processes by which members of such bodies are appointed, and the extent to which they comply with the principles of good governance. Second, I look at the evidence that, contrary to the principle that they should be independent of the executive, there has been deliberate political interference with these bodies.

Introduction

7.1 Many public functions in the BVI are assigned by the legislature to various boards, committees and other bodies (collectively referred to in this chapter of the Report as "statutory boards"). While these entities can engage in both commercial and non-commercial activity, they share the common feature of being established by statute and so have their functions, powers and duties defined by the relevant statutory provisions. They each sit under a particular Ministry and, if not the Cabinet as a whole, the Minister is usually responsible for (e.g.) appointing members to the board in accordance with the applicable statutory provisions[1]; but, subject to any specific provisions of the statutory framework under which they operate, each is a distinct legal entity which is autonomous, i.e. it operates independently of the executive government[2].

7.2 Two overarching issues concerning statutory boards of particular relevance to governance arose in the evidence to the COI, namely (i) the process whereby members are appointed; and (ii) political interference with the boards. Having heard the evidence, it seems to me that these issues are not unrelated; but it will, nevertheless, be convenient to deal with them in turn.

[1] There are a few instances where, under the relevant statute, the Governor can appoint, or the Leader of the Opposition can nominate, a person to serve on a board. Where the Minister has the power to appoint, the convention appears to be that Cabinet will make the appointment upon that Minister's recommendation as set out in a Cabinet paper.

[2] As the Premier put it in Cabinet Memorandum No 103/2019: Revocation of Membership of Statutory Boards under the Premier's Office dated 27 March 2019 (and presented to Cabinet that day), there is a requirement that they are "operationally independent". The Attorney General's Written Submissions on Sections 66 and 67 of the Constitution dated 13 September 2021 cited relevant authorities for the proposition that statutory bodies boards are generally distinct entities from the Government: Tamlin v Hannaford (1959) 1 KB 18 at pages 23-25 per Denning LJ; Perch and Others v Attorney General of Trinidad and Tobago [2003] UKPC 17 at [13] and [15] per Lord Bingham of Cornhill; and Attorney General of Trinidad and Tobago v Smith [2009] UKPC 50 at [16] and [24] per Lord Walker.

Ministerial Responsibility for Statutory Boards

7.3 It is open to an incoming administration to move a statutory board from one ministerial portfolio to another. That happened in the current administration. The table below sets out which Ministries are presently responsible for each statutory board, with the date that each board came within the remit of that particular Ministry. It is based on affidavit evidence given by Permanent Secretaries of the different Ministries[3].

Table 10
Ministerial Responsibility for Statutory Boards

Premier's Office[4]

Statutory Board	Date[5]
Airports Authority	March 2019
Appeals Tribunal	2004
Board of Trustees of the Climate Change Trust Fund	2020
Building Authority	2020
Electricity Corporation	3 September 2019
Gambling (Gaming and Betting Control) Commission[6]	N/A
Planning Authority	2004
Ports Authority	March 2019
Prospect Reef Resort Board	2005
Recovery and Development Agency	12 April 2018
Tourist Board	1 July 1969
Telecommunications Regulatory Commission	3 March 2019
Virgin Islands Trade Commission	N/A

[3] Requests for affidavits addressing specific questions on statutory boards were sent to individual Ministers. At their direction, the current Permanent Secretary in each Ministry signed an affidavit addressing those questions. That involved input from other public officers within the Ministry, not least because, in some instances, the Permanent Secretary concerned was not at the Ministry at the relevant time. The affidavits themselves were drafted, to some degree, by the IRU. Some statutory boards were omitted from the affidavits through a combination of oversight and misunderstanding of the COI's request, which necessitated each Permanent Secretary making a supplementary affidavit. The COI has received no evidence of any further restructuring of statutory boards, so I assume that the position remains as at the dates of the various affidavits and the hearings held on this topic.

[4] Carolyn O'Neal Morton Second Affidavit dated 2 July 2021 paragraph 2.2 and Third Affidavit dated 5 September 2021 paragraph 2.2; and Ronald Smith-Berkeley First Affidavit dated 19 June 2021 paragraph 5. Dr O'Neal Morton's Second Affidavit includes a table which sets out the composition and roles of members of the various statutory boards coming under the Premier's Office. During her oral evidence, it emerged that that table contained some errors (T32 9 September 2021 pages 114-116). Dr O'Neal Morton subsequently provided the COI with a revised table.

[5] Dr O'Neal Morton could not assist as to why a number of statutory boards were transferred to the Premier's Office on, or shortly after, 2019 or if any advice was given with regard to such transfer (T32 9 September 2021 pages 17-19).

[6] The Gambling (Gaming and Betting Control) Commission and the Virgin Islands Trade Commission were not identified as statutory boards in either affidavit signed by Dr O'Neal Morton. They are referred to in the press release of 1 June 2021 issued by Dr the Hon Natalio Wheatley as Acting Premier, and therefore included here (Carolyn O'Neal Morton Third Affidavit dated 5 September 2021 Exhibit COM3 pages 228-229 and https://bvi.gov.vg/media-centre/government-seeks-members-boards-and-commissions).

Ministry of Finance[7]

Statutory Board	Date
Asset Seizure and Forfeiture Management Committee	N/A
BVI International Arbitration Centre	3 January 2014
Central Tender Board	12 October 2005
Financial Services Complaints Tribunal	N/A
Financial Services Commission	27 December 2001
Internal Audit Advisory Committee[8]	1 April 2011
International Tax Authority	4 September 2018
Joint Anti-Money Laundering and Territory Financing Advisory Committee	N/A
National AML/CFT Coordinating Council	N/A
National Bank of the Virgin Islands	1 July 1974

Ministry of Health and Social Development[9]

Statutory Board	Date
Health Services Authority	24 October 2004
Public Assistance Committee	3 February 2004

Ministry of Natural Resources, Labour and Immigration[10]

Statutory Board	Date
Social Security Board	3 April 2020
Immigration Board	1 May 2020
Land Survey Board	July 1970
National Parks Trust of the Virgin Islands	1961

Ministry of Education, Culture, Youth Affairs, Fisheries and Agriculture[11]

Statutory Board	Date
H Lavity Stoutt Community College	14 December 1990
The Recreation Trust	1966
Virgin Islands Festivals and Fairs Committee	2005

Ministry of Transportation, Works and Utilities[12]

Statutory Board	Date
Taxi and Livery Commission	1 March 2019
Wickham's Cay Development Authority	10 May 2021

[7] Jeremiah Frett Second Affidavit dated 2 July 2021 paragraph 2.1, and Fifth Affidavit dated 26 August 2021 paragraphs 2.1-2.3.
[8] The Internal Audit Advisory Committee, established by section 6 of the Internal Audit Act 2011, was not in existence between 31 December 2016 and June 2021 (see paragraphs 1.111-1.115 above).
[9] Tasha Bertie Second Affidavit dated 18 June 2021 paragraph 5, and Third Affidavit dated 6 September 2021 paragraph 2.2.
[10] Joseph Smith Abbott First Affidavit dated 29 June 2021 paragraph 5, and Second Affidavit dated 30 July 2021 paragraph 2.2.
[11] Dr Marcia Potter Second Affidavit dated 25 June 2021 paragraph 5.
[12] Ronald Smith-Berkeley First Affidavit dated 19 June 2021 paragraph 5.

As can be seen, by far, the majority of statutory boards fall within the responsibility of the Premier and Minister of Finance.

7.4 Each statutory board is established and governed by its own statute. That statute typically provides for the relevant Ministry to be represented on the board through the appointment of ex officio members. Ex officio members can include the Permanent Secretary to that Ministry[13] or another public officer[14] (sometimes on behalf of the Permanent Secretary)[15]. Other ex officio members can include the Managing Director or Chief Executive of a statutory board[16] or another employee of that board[17]. The appointment of ex officio members is not at issue here. Rather, I am concerned with the process by which other members are appointed to the various statutory boards.

Process of Appointment

7.5 As I have indicated, under the statutes which establish them, appointments to statutory boards are usually to be made by the Cabinet or by the relevant Minister (often with Cabinet approval).

7.6 Paragraph 6 of the Cabinet Handbook[18], headed "Boards, Committees, Working Groups and Appointments", deals with such appointments, as follows:

> "6.5 Cabinet has a collective responsibility in the establishment of units and the appointment of their membership. Therefore, Cabinet Members should be mindful of approaching potential members so as not to pre-empt the Cabinet decision. It is therefore expected that contact with potential members should be limited to:
>
> (a) ascertain the potential member's willingness to serve with an identified list of potential members;
>
> (b) whether the potential candidate knows of any possible conflicts of interest; and
>
> (c) whether there are any other conditions that might legally prevent the potential member from serving in the position to which he might be appointed to serve.
>
> ...
>
> 6.7 In considering the appointments of persons to boards, committees, working groups, etc, the sponsoring Cabinet Member should be prepared to provide justification for the appointments or re-appointments.

[13] For example, the Permanent Secretary in the Premier's Office is an ex officio member of the BVI Electricity Corporation (T32 9 September 2021 page 61).
[14] The Chief Social Development Officer, head of the SDD within the MHSD, is an ex officio member of the Public Assistance Committee reporting back to the Permanent Secretary (T30 7 September 2021 page 23).
[15] The membership of the BVI Tourist Board includes Jeremiah Frett, appointed at a time when he was still the Deputy Financial Secretary, and Dr Lavon Chalwell-Brewley on behalf of the Permanent Secretary in the Premier's Office (Revised table accompanying Carolyn O'Neal Morton Second Affidavit dated 2 July 2021 page 5).
[16] E.g. the Managing Director of the BVI Ports Authority is an ex officio member (revised table accompanying Carolyn O'Neal Morton Second Affidavit dated 2 July 2021 page 2).
[17] E.g. the Chief Executive Officer and Financial Comptroller of the BVI Health Authority (Tasha Bertie Second Affidavit dated 18 June 2021 paragraph 7).
[18] See paragraph 1.65 above.

6.8 Members are required to adhere to the following procedures for their recommended appointments to be considered by the Cabinet Steering Group:

(a) proposals for placing recommendations for committee membership should reach the Cabinet Steering Group no less than one week before the memorandum is to be considered;

(b) appointment memoranda must indicate the date when the appointment is to become active or when existing membership expires;

(c) all appointments must contain all the specific information requested in the appointments template;

(d) the appointments template must include tenure of appointment, remuneration particulars, members' genders, members' names and full list of other members;

(e) Cabinet Members proposing persons to be appointed are to ensure that those persons being proposed met the requisite qualifications and experience;

(f) Cabinet Members must also pay due regard for Government's present policy of appointing young persons, women and sister Islands' residents;

(g) Cabinet Members must give due regard to selecting persons for appointment from all districts of the Virgin Islands;

(h) proposals requesting appointments must include supporting information such as resumes, work experience, etc;

(i) nominating Cabinet Members should consult with other Cabinet Members who might have the potential appointee already serving an appointment in their portfolio subjects;

(j) in appointing members to boards of enterprises and commissions, Cabinet Members must be consistent with the provisions of the relevant or guiding law; and

(k) nominating Cabinet Members must not make announcements about appointments that pre-empt Cabinet approval of decisions.

6.9 Where any appointment of a close relative of a Cabinet Member, a Member of the House of Assembly, staff members of a ministry or staff of a public enterprise or statutory body is considered, the nature of the relationship must be clearly described in the paper.

6.10 It is inevitable that relatives of Cabinet Members will be appointed to boards, committees and statutory bodies. However, it is important that the appearance of conflict is avoided. Persons involved in the nomination process should not be related to the nominee. This of course means that close relatives should not be nominated without the permission of the Premier. Cabinet Members should excuse themselves when relatives' nominations are being considered."

7.7 The evidence of the witnesses who spoke to how members of boards have been chosen and appointed was consistent in respect of the procedure which applies, namely "the informal process". That term was used by each of these witnesses in their written responses to COI warning letters[19]. The evidence of these witnesses[20] as to the informal process was helpfully summarised by Counsel to the COI and confirmed by the Premier[21].

7.8 Described as "the long-standing approach and practice of the public service and successive governments in appointing members of statutory boards[22]", the informal process is entirely internal. Names are provided by the Permanent Secretary, a Desk Officer or the Minister himself. Other Ministers may make nominations. There is no advertising or publicity of any sort. The Minister may then take informal soundings[23]. Save for any guidance which may be contained within the relevant statute, there is no written guidance or policy covering recruitment, selection and appointment of the members of statutory boards, including in relation to potential conflicts of interest. Further, there are no written criteria by which potential candidates are assessed to see if they are of good character and a fit and proper person[24].

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[19] The concerns and potential criticisms in respect of statutory boards arising out of the evidence before the COI were put to a number of witnesses in individual COI warning letters identifying the evidence giving rise to the concerns and potential criticisms, to which they responded fully in a written response and at an oral hearing. Some of the concerns raised are properly described as systemic. Any criticisms of the recipients of these warning letters are limited to those in respect of which they have had a full opportunity to respond, as described. The recipients were:

(i) Ms Tasha Bertie, MHSD Acting Permanent Secretary. Her COI Warning Letter No 1 was dated 24 August 2021. Ms Bertie's written response was dated 4 September 2021. Ms Bertie gave evidence at a public hearing T30 7 September 2021 pages 3-101.

(ii) Hon Carvin Malone, Minister for Health and Social Development. His COI Warning Letter No 1 was dated 24 August 2021. The Minister's written response was dated 31 August 2021. The Minister gave evidence at a public hearing T30 7 September 2021 pages 123-211.

(iii) Mr Joseph Smith Abbott, MNRLI Acting Permanent Secretary. His COI Warning Letter No 1 was dated 24 August 2021. Mr Smith Abbott's written response was dated 4 September 2021. Mr Smith Abbott gave evidence at a public hearing T31 8 September 2021 pages 39-144.

(iv) Hon Vincent Wheatley, Minister for Natural Resources, Labour and Immigration. His COI Warning Letter No 1 was dated 24 August 2021. The Minister's written response was dated 31 August 2021. The Minister gave evidence at a public hearing T31 8 September 2021 pages 146-230.

(v) Dr Carolyn O'Neal Morton, Permanent Secretary Premier's Office. Her COI Warning Letter No 1 was dated 24 August 2021. Dr O'Neal Morton's written response was dated 4 September 2021. Dr O'Neal Morton gave evidence at a public hearing T32 9 September 2021 pages 10-124.

(vi) The Premier and Minister of Finance. His COI Warning Letter No 1 was dated 24 August 2021. The Premier's written response was dated 31 August 2021. The Premier gave evidence at a public hearing T33 14 September 2021 pages 5-218, and T34 16 September 2021 pages 125-275. The Premier also responded at these hearings on behalf of Cabinet to a COI Warning Letter No 1 dated 24 August 2021, the written response to which was dated 5 September 2021.

[20] T30 7 September 2021 pages 21-23, 24-30, 33-43, 49-50, 54-58, 77-81 and 91-94 (Tasha Bertie); T30 7 September 2021 pages 127-129 (Hon Carvin Malone); T31 8 September 2021 pages 50-60, 63-65, 82-83, 86 and 106-107 (Joseph Smith Abbott); and T32 9 September 2021 pages 19-24 (Dr O'Neal Morton).

[21] T33 14 September 2021 pages 36-39.

[22] See Carolyn O'Neal Morton Response to COI Warning Letter No 1 dated 4 September 2021. The phrase appears in other responses submitted by public officers on this topic.

[23] Hon Vincent Wheatley suggested that a conversation in a corridor could be seen as an interview. He also gave the example of where he needed to identify representatives of employers and employees for the purpose of making appointments to the SSB. He therefore spoke to people he knew and met and asked them who might make a good representative (T31 8 September 2021 pages 222-226).

[24] Dr O'Neal Morton said that public officers would consider a person's "presence in the community". She pointed out that the BVI is a small community (T32 9 September 2021 page 32). Similarly, Dr Marcia Potter, MEC Permanent Secretary said, of those statutory boards for which that Ministry has responsibility, that "while there are no formal enquiries made as to whether a candidate is of 'good character', the recommendations are mainly based on community knowledge as to the contributions of the individual candidates in society" (Dr Marcia Potter Second Affidavit dated 25 June 2021 paragraph 7(a)). Tasha Bertie, MHSD Acting Permanent Secretary said that the phrase "fit and proper person" where it appeared in a statute would require interpretation. Public officers would have to consider factors such as "known standing in society, good standing in the community, good reputation" (T30 7 September 2021 pages 36 and 54-57). According to Ronald Smith-Berkeley, MTWU Permanent Secretary, assessment of "good character" and/or "fit and proper person" are not pre-requisites to appointing the Chair and/or members to a Board (Ronald Smith-Berkeley First Affidavit dated 19 June 2021 paragraph 14).

7.9 Once there is a list, the Minister decides who will be nominated to the particular board. That pool of nominees is then approached, and asked if they are willing to serve; and, if so, they are asked (i) to say whether they consider there might be a conflict of interest if they were appointed, and (ii) to provide a resumé or curriculum vitae ("CV")[25].

7.10 At least in the Premier's Office, convictions and spent convictions are taken into account[26], but there is no formal check: rather, convictions being common knowledge in such a small community, it is considered likely that one of those involved in the appointment process will know of any convictions[27].

7.11 Once CVs or resumés are received, the Permanent Secretary will prepare a draft memorandum for Cabinet, which (as with any paper for Cabinet) goes to the Financial Secretary and the Attorney General for input on any financial or legal implications of the proposal, respectively. The paper is ultimately approved by the Minister and sent to Cabinet: the final list that goes to Cabinet is entirely a matter for the Minister. The approval of the nominations is then listed at a Cabinet meeting as part of its business. It is open to the Cabinet to ask for further information on any nominee or refuse to accept a nominee.

7.12 The informal process appears to have been universally adopted until 2021[28]. However, on 6 April 2021, a brief Information Paper for Cabinet was prepared by the Acting Permanent Secretary Premier's Office, and approved by the Premier that day, indicating that a new policy was being developed under which the public would be informed one month before any statutory board member's tenure was coming to an end, so that anyone who wishes to register an interest to serve could do so as well as current members having an opportunity to express a wish to continue. No member would be allowed to serve more than two terms. The persons who responded to the notice would be vetted by a committee, and recommendations then put forward to the Minister. The detail was thin, and the memorandum indicated that further details would be forthcoming.

7.13 On 1 June 2021, Dr the Hon Natalio Wheatley, whilst Acting Premier, announced a policy decision to advertise vacancies in five statutory boards that fell within the scope of the Premier's Office[29]. The closing date for the five vacancies was 25 June 2021. Dr O'Neal Morton explained that, by the time she came to give her evidence, this recruitment process had reached the interview stage[30]. Candidates had been sent details of the expertise required for the particular board or commission. That expertise and how candidates were shortlisted

[25] However, it seems that not all candidates are asked whether there is a conflict of interest (T30 7 September 2021 pages 91-98; and T34 16 September 2021 pages 138-146); and some are not asked for a CV before being appointed (T33 14 September 2021 pages 181-182).
[26] Carolyn O'Neal Morton Second Affidavit dated 2 July 2021 paragraph 16.
[27] T32 9 September 2021 pages 33-37.
[28] Dr O'Neal Morton said that an interview process had recently been adopted in relation to recruitment to the board of the RDA. The panel included the Governor, Premier, Deputy Premier, Leader of the Opposition and Dr O'Neal Morton herself. Interviewees were from a list compiled by the Governor, Premier and Leader of the Opposition. Dr O'Neal Morton could not say what background checks, if any, were carried out in that recruitment process (Carolyn O'Neal Morton Second Affidavit dated 2 July 2021 paragraphs 10-12; and T32 7 September 2021 pages 29 and 44).
[29] Carolyn O'Neal Morton Third Affidavit dated 5 September 2021 paragraph 4.11, and Exhibit COM3 pages 228-229; and T32 9 September 2021 page 3. Although in her affidavit, Dr O'Neal Morton says that the Acting Premier had made this policy decision, it would presumably have been a decision of Cabinet. The evidence of the Premier, given prior to the Acting Premier's announcement, was that this policy was being considered (T6 18 May 2021 page 214). When he returned to give further evidence, the Premier accepted that a policy decision by Cabinet to pursue this course, as a pilot within the Premier's Office, would have been taken shortly before the announcement of 1 June 2021. He accepted that this policy decision would have been taken by Cabinet in the second half of May 2021 (T33 14 September 2021 pages 53-57).
[30] T32 9 September 2021 pages 26-28.

for interview was determined by reference to the applicable legislation (for example, if that legislation allows for the Leader of the Opposition to nominate someone to a particular statutory board)[31].

7.14 Dr O'Neal Morton said that the policy decision announced on 1 June 2021 applied to all Ministries[32]. However, no other public officer, who gave evidence on the topic of statutory boards, referred to the existence of such a policy. That this initiative has not progressed beyond the Premier's Office (and that the informal process, therefore, operates at least in all other Ministries) is illustrated by the evidence to the COI of other Permanent Secretaries.

7.15 Ms Tasha Bertie, Acting Permanent Secretary MHSD, accepted that there was no prohibition on her Ministry advertising for vacancies on the boards for which it was responsible or requesting CVs at a much earlier stage. She acknowledged that such steps would widen the pool of candidates for a board, and volunteered that the process of preparing an affidavit for the COI had raised matters for consideration "going forward". Ms Bertie said that the Ministry did have experience of using advertising and interviews in other recruitment processes such as a vacant employed position[33]. Similarly, Joseph Smith Abbott, Acting Permanent Secretary MNRLI, recognised that there was no statutory prohibition on advertising[34]. He referred to the Climate Change Trust Fund Board, previously under his Ministry, which, because its governing statute required it, had the hallmarks of a more formal and open process, including the advertising of vacancies and an interview process. He fairly said that his Ministry would, therefore, have experience of both processes[35].

7.16 Dr O'Neal Morton said that the Premier's Office had produced a policy document which governs the general process it would adopt for recruitment – at least for those statutory boards that fall under that Office. The document was intended to set out the "key indicators" required to ensure a more open recruitment process[36].

7.17 Subsequent to her giving evidence on this topic, Dr O'Neal Morton provided a copy of a document headed "Recruitment and Selection Procedures Manual"[37] ("the draft Manual"). This document is undated, it is not clear when it was prepared, and it is expressed on its front cover to be a "working draft" and not a final document. As it is drafted, it would however provide for the following.

(xii) Vacancies would be advertised with stipulated criteria (paragraphs 4 and 6(b)).

(xiii) A "uniformed methodology" would be used for shortlisting candidates for interview (paragraph 7(c)).

(xiv) Candidates would be interviewed more than once (paragraph 9(c)).

(xv) Interviews might be conducted "one-on-one" involving a recruitment manager and the candidate (paragraph 9(a)).

(xvi) One interview would be conducted by a panel comprising between three and five members of whom at least one must be independent (paragraph 8).

(xvii) All candidates would be subject to a "background check" covering criminal records, verification of employment history and credit checks if necessary (paragraph 10).

[31] T32 9 September 2021 pages 28-31.
[32] T32 9 September 2021 page 79.
[33] T30 7 September 2021 pages 42-45, 53-54, 59-60 and 66.
[34] T31 8 September 2021 page 59.
[35] T31 8 September 2021 pages 59, 88, 110-111 and 113.
[36] T32 9 September pages 46-49.
[37] Recruitment and Selection Procedures Manual – Membership of Statutory Boards, undated.

(xviii) Selection would be based on justifiable and objective criteria, and interviewers would use a scoring sheet (paragraph 11(a) and (g)).

(xix) Selection would only be final after the relevant checks have been completed (paragraph 11(i)).

(xx) The result of the process would be an outcome report setting out the selection method used (including criteria or competencies against which candidates were assessed) and the scores for candidates. The candidate with the highest score would be identified. That report would be appended to a Cabinet paper (paragraphs 11(h), 12(a) and 13 (a)-(d)). I assume that, given that recommendations to some statutory boards are stipulated by legislation to be made by the relevant Minister, in circumstances where the Minister is not prepared to nominate the top scoring candidate to Cabinet, then he or she would be required to give reasons in the Cabinet paper.

(xxi) Shortlisted candidates, whether successful or unsuccessful, would only be informed of the outcome of the process once the Cabinet has made a decision (paragraphs 13 (e)-(f)).

(xxii) The successful candidate would be sent an initial offer and, upon acceptance, relevant documents comprising the acceptance include a "Declaration Form" (paragraphs 14(a), 15(a) and 15(a)(iii)). The Manual does not explain the latter, but I assume it refers to the person to be appointed declaring that they have no conflict of interest that may prevent them from serving on the relevant board.

7.18 That some efforts have been made to develop such a protocol is to be welcomed. However, as both Dr O'Neal Morton and the Premier said, the draft Manual is not yet in a final form let alone in use[38]. The form of the final process, therefore, remains to be settled. It certainly requires further thought. For example, the draft Manual makes no reference to a fit and proper person test. Further, if the declaration form is intended to allow a person to declare conflicts that may prevent them from being a member of a statutory board, then deploying it at the very end of a recruitment process may not be the optimal course.

7.19 There are instances, albeit rare, when the Governor or the Leader of the Opposition can select or make an appointment to a statutory board. A ready example is under the Recovery and Development Agency Act 2018[39]. Those appointed to that board include persons selected by the Governor, the Premier and the Leader of the Opposition. In the absence of evidence to the contrary, I have proceeded on the basis that appointments to statutory boards are not routinely advertised, no matter who the appointing person may be.

Concerns

7.20 The lack of any openness, transparency or rigour in the "informal process" of recruitment to statutory boards, adopted in respect of all appointments to statutory boards until very recently, is only too clear. In the process, (i) no competency profile is compiled, (ii) none of the positions is advertised, (iii) there is no independent or transparent process by which a suitable pool of candidates is identified, (iv) there is no independent or transparent process by which suitable candidates are selected, (v) none of the candidates is interviewed prior to appointment, (vi) no proper due diligence is carried out in respect of any of the appointees, (vii) no fit and proper person test is applied and (viii) no conflict checks are carried out. There is no openness or transparency: the process is entirely internal and secret.

[38] T32 9 September 2021 page 49 (Dr O'Neal Morton); and T33 14 September 2021 page 39 (Premier).
[39] No 1 of 2018.

7.21 The pool of candidates is in practice effectively limited to those individuals known to the public officials involved in the recruitment exercise, namely the Minister, the Permanent Secretary and any Desk Officer involved; with, at best, other Ministers occasionally putting forward the name of a candidate. In those circumstances, not only is this extremely poor governance but, as a result, some candidates – including good candidates and sometimes, of course, the best candidate – will inevitably not even have the opportunity of being considered. Thus, the chances of the best available and willing individual for the post being appointed are quite clearly very much reduced[40].

7.22 Furthermore, appointments are not made on the basis of aptitude, expertise or experience as measured against identified objective criteria – of which, other than those set out in the statutory provisions, there is none. The criteria adopted are essentially subjective. This inevitably gives rise to the perception that appointments to statutory boards are made on the basis of personal relationships: indeed, on the evidence, it seems that the informal process relies heavily upon the personal knowledge of the Ministers and other public officials involved in it.

7.23 Therefore, while the adoption of an informal process does not mean that public officers do not make genuine efforts to find suitable candidates, the absence of an auditable, open and transparent process mean that it cannot be said of any appointment that a reasonable effort has been made to find the *best* candidate[41].

7.24 The written response of the elected Ministers and Permanent Secretaries to these criticisms was the same – for the most part, literally word-for-word identical – as follows[42]:

> "During successive governments, over many years, it had not been the practice in the Virgin Islands Government to advertise vacancies on statutory boards or to hold a formal interview process (other than for executive posts). The ministries and departments have invariably applied the criteria specified in the relevant statute. Given the small size of the Virgin Islands and of the suitable pool of possible candidates, desk officers and permanent secretaries in the ministries and departments have been used to holding informal discussions both internal and external to identify willing candidates of appropriate standing and discussing them with the minister, as did ministers with their colleagues. Officials researched, considered and discussed with the minister the known credentials of possible appointees in the light of the functions they were to exercise. By these informal

[40] As the Premier frankly accepted; although with two caveats, namely that (i) the informal process nevertheless produced some good statutory board members, and (ii) a good deal of effort on the part of public officials often went into identifying people to take on these boards (T33 14 September 2021 pages 46-49). However, as Counsel to the COI pointed out, a difficulty with evidencing (ii) is that there are simply no records of the process adopted in respect of any appointment to any statutory board (T33 14 September 2021 pages 52-53). Dr O'Neal Morton accepted that the informal process was "flawed" although she suggested that the result was often an "excellent product" (T32 9 September 2021 pages 77 and 100). Other witnesses were less willing to admit to there being any issues with the process. Responding to the suggestion that no reasonable effort was made to identify the most suitable candidates, Mr Smith Abbott said that a lot of thought is given to the skills and attributes of those nominated to serve on statutory boards (T31 8 September 2021 pages 111-113).

[41] The Elected Ministers' Closing Submissions say that the thrust of the criticism canvassed with witnesses was that "[n]o reasonable effort was made to identify and select the most suitable and qualified candidate" for appointment to statutory boards (paragraph 12). The criticism was not in fact so narrow: but, in any event, given that the lack of governance results in the wholesale exclusion of many potential candidates, the proposition is clearly correct. As I make clear, this does not mean that no effort is made, nor does it mean that there are not many who serve on statutory boards who perform their task diligently and well.

[42] This extract is taken from the Premier's Response to COI Warning Letter No 1 dated 31 August 2021 (BVI Electricity Corporation paragraph 2, which he adopted in relation to the similar criticisms of other statutory boards within the Premier's portfolio). The following public officials submitted similar responses to similar criticisms: Hon Carvin Malone and Hon Vincent Wheatley, Dr O'Neal Morton, Ms Bertie, Mr Smith Abbott (the reference to the Governor and the evidence of the Premier only appears in responses provided by Ministers). The same wording is also found in the Cabinet Response to COI Warning Letter No 1 dated 5 September 2021.

means, officials and ministers sought in good faith to find fit and proper persons to serve in these capacities on this and other Boards. All candidates were asked to submit their CVs prior to the decision of the Cabinet.

There is no basis for the assertion that the steps contemplated by ¶6.8 of the Cabinet Handbook were ignored. Candidates are asked, at the time they are approached to ascertain their willingness to serve, if they might have any conflict of interest, and officials are mindful of the need to avoid such conflicts when considering the suitability of a candidate. The Cabinet Memorandum sets out the information required by the Handbook and the considerations ¶6.8 mandates were part of the informal process of discussion and decision- making that led to the proposals to the Cabinet.

It has always lain within the responsibility and power of the Governor to instigate a change in the standard practice of public officers and the advice given to ministers on this subject. The newly elected and appointed Cabinet was not then (in March and April 2019) advised by the Attorney General, the Governor or the Deputy Governor that all appointments should be advertised, and candidates interviewed, or that the long-standing approach of the public service they inherited, and the advice to ministers in making such appointments, should be replaced by a wholly new system, or that it was or might be unlawful.

It was only in May 2020, that the Governor, who was well aware of the existing practice, suggested a 'shift to a more transparent process' for critical leadership posts such as the Chairmen of Boards. It is notable that even then, the Governor did not extend his recommendation to the appointment of ordinary board members.

As the Premier has explained in his evidence before the Commissioner, the Government fully accepts that the appointments process requires modernisation and has encouraged measures to change government practice by developing a properly recorded process of advertising, interviewing, and 'ranking' candidates for the membership of boards. For example, that process was followed in connection with recent appointments to the Recovery and Development Agency. The Cabinet has suggested the publication of cross-departmental written guidance for public officers in advising ministers on making such appointments similar to the UK Cabinet Office's Governance Code on Public Appointments."

7.25 As to the reference above to the Governor's responsibilities, Hon Vincent Wheatley (who uses the same wording in his written response) said the point went to the Governor's constitutional duty to direct the Public Service: the Minister said that he was not suggesting that the Governor could direct how a Minister should recruit but rather how the public officers (in practice, the Permanent Secretaries) should advise that Minister on the recruitment process[43]. It was not easy to follow the Minister's evidence/submission on this point; but, in any event, it ignores the responsibilities that a Minister has under the Cabinet Handbook and those which may lie on a Minister fulfilling his or her responsibilities under a statute to ensure that (amongst other things) the person selected does have the right attributes for the role.

7.26 As this process cannot be divorced from the second issue in relation to statutory boards, i.e. political interference, I will consider my conclusions and recommendations after I have considered that second issue[44].

[43] T31 8 September 2021 pages 180-184.
[44] See paragraphs 7.145-7.154 below.

Political Interference

Introduction

7.27 Concerns about political interference with independent statutory boards in the BVI are not new: they have been expressed over many years.

7.28 For example, the IAD carried out an audit of the Wickham's Cay[45] Development Authority ("the WCDA") for the period 2010-13. In a report dated March 2014[46], the IAD Director recommended[47]:

> "In an effort to reduce/remove political involvement in the operation of the [WCDA] it is recommended that a Board be established to set the direction and provide the governance structure needed to bring transparency, equity and accountability to the Authority."

7.29 The background to this report was that the WCDA was established on 14 March 1975 under the Wickham's Cay Development Authority Ordinance[48] to promote and manage the development of Wickham's Cay, with power to investigate, formulate and implement plans and projects for the physical layout and development of Wickham's Cay; to negotiate and approve leases of land there; and to arrange for construction and engineering work which may be required to achieve the objectives of the Authority[49]. The WCDA (i.e. a board) was envisaged, but never established; so the powers and functions of the Authority were vested in the Minister to which that statutory board was assigned[50].

7.30 In 2014, the IAD Report was sent to the Ministry of Transportation, Works and Utilities ("MTWU"). That Ministry's Management Response, dated 26 June 2014, responded to the above recommendation by indicating that a new management structure would be introduced by 31 December 2014[51]. I have no further evidence as to any management structure, and it is unclear why a board has not been established; but it seems that the Minister continues to exercise the functions and powers of the WCDA[52].

Cruise Ship Port Development Project: Narrative

7.31 This project[53] was an example of alleged political interference in the operation of a statutory board in respect of which the COI received direct evidence. It concerned efforts to expand the cruise ship pier located on Wickham's Cay I to accommodate the larger ships increasingly

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[45] A cay is an islet or small island. Wickham's Cay and Little Wickham's Cay (Wickham's Cay II), together with Bird Cay and Dead Horse Cay, were islands in Road Harbour which, due to land reclamation, now form part of the port area of Road Town.
[46] Internal Audit Department Final Report (March 2014): Wickham's Cay Development Authority. All references in this section of the Report to "IAD Report" are to this report.
[47] IAD Report 9.
[48] Cap 281. A copy of the Ordinance is exhibited to Ronald Smith-Berkeley First Affidavit dated 19 June 2021 Exhibit RSB1 page 150.
[49] Sections 5 and 6 of the Ordinance; and IAD Report paragraph 1.2.
[50] IAD Report paragraph 9.1.
[51] Management Response of Ministry of Communications and Works (now the MTWU) dated 26 June 2014 page 5.
[52] According to Ronald Smith-Berkeley, MTWU Permanent Secretary, that Ministry managed the WCDA long before it was assigned to the Ministry on 10 May 2021. I take this to mean that it was managed by predecessor ministries. Mr Smith-Berkeley also said that no board had been appointed as there was no legislative provision for such. This is not a point that needed to be explored at a public hearing. However, there is legislative provision for the appointment of persons to the WCDA. On the basis of Mr Smith-Berkeley's affidavit, I take it that there have been no such appointments and the functions of the WCDA remain under the control of the relevant Minister (Ronald Smith-Berkeley First Affidavit dated 19 June 2021 paragraphs 5 and 17(d)).
[53] During the course of the COI's hearings, this project was referenced in different ways (including the Pier Development Project and the Port Development Project), The term Cruise Ship Port Development Project has been adopted for consistency.

being used by cruise ship operators. The project was the subject of reports from the Auditor General[54] and the PAC[55]. On the available information, four phases to the project can be identified:

(i) Phase 1: This extended between 2007 and 2011 and was overseen by the Ports Authority. It culminated in the signing of non-binding heads of agreement on 11 October 2011 with Disney under which the cruise ship pier would be expanded, and a welcome centre constructed. The cost was to be $12 million[56].

(ii) Phase 2: This encompassed the period between November 2011 and July 2012, when the Ports Authority sat under what was then the Ministry for Communications and Works ("the MCW"). The agreement with Disney was terminated and the scope of the project expanded significantly. The plan was not only to expand the pier but, through a Public-Private Partnership, to develop some 4.1 acres of hitherto undeveloped adjacent reclaimed land (the upland). Three proposals from interested companies were obtained. That from Tortola Port Partners ("TP Partners") was accepted and provided for a $57 million investment. That increased in due course to in excess of $70 million. Heads of agreement were executed between the BVI Government and TP Partners on 27 March 2012[57].

(iii) Phase 3: This occupied the period between July 2012 and October 2013. The non-binding agreement with TP Partners was terminated and the MoF then oversaw an expedited tender process which began in late July 2012. This prompted three expressions of interest, including one from TP Partners whose proposal was again selected. This phase was costed at just below $75 million[58].

(iv) Phase 4: In October 2013, the project returned to the Ports Authority, then with an estimated cost of $35 million[59].

7.32 While the Auditor General and the PAC raised concerns about both Phases 2 and 3 of this project, it is the former phase which is of particular interest here. The starting point is the NDP's electoral success in November 2011 which brought the Ports Authority within the ministerial portfolio allocated to Hon Mark Vanterpool[60]. There followed a number of key events.

7.33 On 26 January 2012, Hon Mark Vanterpool informed the Ports Authority Board that development of the upland would be pursued[61]. He was present at a meeting, held on 8 March 2012, at which the Ports Authority Board was told that the agreement with Disney had been cancelled and that the Government had received three proposals for the development of

[54] Auditor General's Report on Port Development Project (31 January 2013). Unless otherwise appears, references in this chapter to the Auditor General's Report are to this report.
[55] Public Accounts Committee Final Report Cruise Ship Port Development Project (13 June 2014). The report was accompanied by a number of appendices including minutes of evidence taken from witnesses. It had been preceded by an interim report dated 9 April 2014, the appendices to which also included minutes of evidence taken. Unless otherwise appears, references in this chapter to the PAC Report are to this report and its appendices.
[56] Auditor General's Report paragraphs 4 to 17; PAC Report paragraphs 5 to 12.
[57] Auditor General's Report paragraphs 18 to 40; PAC Report paragraphs 13 to 36.
[58] Auditor General's Report paragraphs 46-60; PAC Report paragraphs 40 to 6 and 84 to 85.
[59] PAC Report paragraphs 86 to 89.
[60] T40 27 September 2021 pages 10-11. Hon Mark Vanterpool gave evidence in relation to the Cruise Pier Port Development Project on two occasions: 30 June 2021 (T20 30 June 2021 pages 26-122) and 27 September 2021. (T40 27 September 2021 pages 4-89).
[61] Auditor General's Report paragraph 35.

the pier. He is recorded as asking the Ports Authority Board to take an environmental impact assessment forward[62]. Shortly thereafter, the BVI Government, rather than the Ports Authority Board, signed non-binding heads of agreement with TP Partners[63].

7.34 It appears that the project was next discussed at a Ports Authority Board meeting on 12 April 2012. Hon Mark Vanterpool was again present. The minutes of that meeting record: "The Board will be more involved in the details of this project with the guidance of the Minister", and that the Port Authority would bear the cost of the environmental impact assessment[64]. The project was next discussed at a Ports Authority Board meeting on 3 May 2012[65]. The Board minutes for 14 June 2012 record the latter's agreement to enter into a contract with TP Partners in the sum of $3,430,800 to purchase piles for the pier extension. The then Acting Chairman of the Ports Authority Board told the PAC that the MCW had asked the Board to make this purchase while agreements were still being finalised to avoid delay. The Ports Authority Board had agreed to do so on the basis of a letter of credit meaning that no monies would be paid until the piles landed in the BVI[66].

7.35 On 5 July 2012, the Ports Authority Board passed a resolution to enter into an agreement with TP Partners for the development of the cruise pier. On 10 July 2012, Cabinet issued a decision concurring with that resolution and agreeing to proceed with a proposed Public-Private Partnership agreement between the BVI Government, the Ports Authority and TP Partners[67].

7.36 On the available evidence, including the Auditor General's report and the evidence received by the PAC, the manner in which the project was progressed between November 2011 and July 2012 gives rise to the following concerns[68].

(i) Hon Mark Vanterpool, as the responsible Minister, knowingly and unlawfully directed and controlled the project to the exclusion of the Ports Authority, the body with statutory responsibility for making relevant decisions[69]. The Auditor General described this as "a major circumvention of the rules"[70].

(ii) Hon Mark Vanterpool, as the responsible Minister, directed that the scope of the project should be substantially expanded without a prior Cabinet decision[71].

(iii) Hon Mark Vanterpool, as the responsible Minister, engaged a consultant, Claude Skelton Cline, who had no relevant experience[72].

(iv) Despite such a significant change in scope, there was an absence of any comprehensive planning, or a project appraisal or a needs assessment or a cost benefit analysis[73].

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[62] Auditor General's Report paragraph 35; Ports Authority Board Minutes dated 8 March 2012.
[63] Auditor General's Report paragraph 34.
[64] Ports Authority Board Minutes dated 12 April 2012.
[65] Auditor General's Report paragraph 35.
[66] Ports Authority Board Minutes dated 14 June 2012. Minute of evidence of Gregory Adams, former acting Chairman of the Ports Authority dated 15 January 2014 paragraphs 27-38 and 62-82.
[67] Auditor General's Report paragraph 34; and Extract of Cabinet decision: Public-Private Partnership Agreements between Tortola Port Partners Limited, the Government of the Virgin Islands and the British Virgin Islands Port Authority for the Development of Cruise Pier and adjoining Pier Park (Cabinet Memorandum No 191/2012) dated 20 July 2012.
[68] The concerns and potential criticism in relation to the Cruise Pier Port Development Project arising from the evidence before the COI were put to Hon Mark Vanterpool in COI Warning Letter No 1 dated 13 September 2021 to which he responded fully in writing on 23 September 2021 and at an oral hearing on 27 September 2021 (T40 27 September 2021 pages 4-89). The criticisms of Hon Mark Vanterpool in relation to the Cruise Pier Port Development Project are restricted to those in respect of which he has had a full opportunity to respond, as described. Indeed, on 27 September 2021, Hon Mark Vanterpool stressed that his written response had addressed all potential criticisms and he wanted to rely on that without more (T40 27 September 2021 pages 13 and 33-35).
[69] Auditor General's Report paragraphs 31-40; PAC Report paragraph 21.
[70] T19 29 June 2021 pages 55-56.
[71] PAC Report paragraphs 21 and 26.
[72] Auditor General's Report paragraph 20; PAC Report paragraphs 23-25.
[73] Auditor General's Report paragraph 23.

(v) The public procurement process was disregarded with an accompanying lack of clarity as to how the three companies who made submissions were identified and invited to bid[74].

(vi) There was a failure to properly involve other agencies specifically the Town and Country Planning Department ("TCPD")[75]. The Auditor General said this was a significant failure given the project involved the development of "prime property in the middle of town"[76].

(vii) There was a failure to consult stakeholders before the heads of agreement were executed. According to the Auditor General, this meant there was therefore no way of knowing if the TP Partners proposal was, in fact, the best option. When consultation was undertaken it led to changes in the proposal including an increased in the proposed investment to over $70 million[77].

(viii) Independent legal advice provided by Baker and Mackenzie in June 2012, after the heads of agreement were signed, revealed serious flaws in the development documents including that the allocation of risk heavily favoured the developers[78]. The Auditor General said that such a review should not have been undertaken at such a late stage[79].

7.37 Hon Mark Vanterpool described the Cruise Ship Port Development Project as a priority for the NDP, who had given a manifesto commitment to build a year-round cruise tourism sector[80]. Based on his early discussions with the cruise ship industry, it became obvious to Hon Mark Vanterpool that the current plan to expand the cruise ship pier (Phase 1) would not suit the larger ships being operated. In particular, a meeting on 16 February 2012 with the Florida Caribbean Cruise Association Operations Committee had left Hon Vanterpool with the impression that the BVI was perceived by the industry as being uninterested in cruise tourism"[81]. His opinion was that, if the Ports Authority Board had been "paying attention", then they would have been aware of this problem because from what he learned the project as intended would not have been sufficient to meet the needs of the BVI and cruise tourism[82].

7.38 It appears that the project was treated as one to be progressed with urgency. Mrs Arlene Smith-Thompson, then Acting Permanent Secretary MCW, told the PAC that this message had been conveyed to her by other public officers when the Ports Authority was transferred to her Ministry. She was also aware at an early stage that Hon Mark Vanterpool was "in contact with all the major cruise players in the industry that stressed the urgency of the project."[83]. Similarly, Dr the Hon Orlando Smith (then the Premier and Minister of Finance) said that Hon Mark Vanterpool had seen that there was an urgency to "the situation" because if something was not done cruise ship visits would decrease[84]. Neil Smith, then the Financial Secretary, said of Hon Mark Vanterpool that he did not have confidence that the Ports Authority Board would deliver to his deadlines[85].

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[74] Auditor General's Report paragraphs 20-22 and 29-30.
[75] Auditor General's Report paragraph 26.
[76] T19 29 June 2021 pages 52-53.
[77] Auditor General's Report paragraph 27; T19 29 June 2021 page 53-54.
[78] Auditor General's Report paragraphs 28 and 42-45.
[79] T19 29 June 2021 pages 56-58.
[80] T20 30 June 2020 page 40, and T40 27 September 2021 pages 11-12.
[81] T20 30 June 2021 pages 39-41, and T40 27 September 2021 pages 13-20; Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 2-3.
[82] T40 27 September 2021 pages 22 and 26.
[83] Minute of evidence of Arlene Smith-Thompson, former Acting Permanent Secretary MCW dated 29 January 2014 paragraphs 17 and 29.
[84] T40 27 September 2021 pages 171 and 185-186.
[85] T39 24 September 2021 page 144-145.

7.39 When asked about the involvement of the Ports Authority Board in Phase 1, Hon Mark Vanterpool confirmed that he had been aware that it had negotiated with Disney, had signed an agreement with that company on 5 October 2011, and taken the project to a point where it was ready to go to tender[86]. He emphasised that he was not challenging the expertise available on the Ports Authority Board or among public officers. When he became Minister however, he wanted to "consult in a different way". He said this of the situation he inherited as a Minister:

> "The Board that we met was going in one direction along with the Minister who was then responsible for the Project. We came in to office and as Minister we took the opportunity to halt the Project as it was, establish a different scope, investigate how we would go forward with the Project, invite proposals, and then take it forward. The Board I met there was not, in my view, prepared to go along with that kind of project."

His intention therefore was to "develop the scope of the project, receive proposals, establish heads of understanding" and then present a proposed project to the Ports Authority Board and public for consultation. When it was put to him that rather than just establish a new policy, he had decided that he, not the Ports Authority Board, should "run with the policy", Hon Vanterpool pointed to the circumstances. He said of the Ports Authority Board, "30 days before going in one direction, a new administration takes over and immediately wants to change that direction". According, to Hon Mark Vanterpool, there was a judgment to be made as to when to present the project to the Ports Authority Board and to then let them take it forward. That presentation was made in July 2012[87].

7.40 Hon Mark Vanterpool was emphatic about the ambit of his role as the Minister whose portfolio included the Ports Authority. He returned more than once to the same point: He had the responsibility to take forward the policy of the elected Government. While he did not take legal advice at the time, he had familiarised himself with the provisions of the Ports Authority Act 1990[88] ("the Ports Authority Act") as they related to his role. Hon Mark Vanterpool considered that, under this statute, capital projects were within the purview of the Minister. Importantly, he said, the Ports Authority Act gave a Minister the "prerogative" to give directions to the Board[89]. He put in this this way[90]:

> "Government's policy, in my view, by any board, cannot be stymied by a board if they see it differently. That's the way I see it.
>
> …
>
> The Government's policy must be carried out, and that's why the authority--the law gives the Ministry the authority to give the directions to the Board in the interest of the public."

7.41 Asked how he had given such directions, Hon Mark Vanterpool said that he had not given any instructions in writing to either the Chairman of the Ports Authority Board or to the Managing Director of the Ports Authority. He had given the Board an opportunity to question him in July 2012 when he had given them a "full account" of the project, and they had then passed

[86] T40 27 September 2021 pages 20-21 and 23-27.
[87] T40 27 September 2021 pages 25-33.
[88] No 12 of 1990.
[89] T20 30 June 2021 pages 58-59, 73-74 and 105-107; T40 27 September 2021 pages 41-44; and Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 3.
[90] T20 30 June 2021 pages 112-113.

a resolution as requested. Hon Mark Vanterpool said that his appearance at that meeting "in person to give specific directions, in my view sufficed even more than something in writing"[91]. I return to the applicability of the Ports Authority Act below.

7.42 On his own evidence, Hon Mark Vanterpool had an expectation of how the Ports Authority Board should respond to a direction from him as Minister. While initially he said the Board had authority to reject something he put to them[92], Hon Mark Vanterpool continued: "I gave directions to the board to -- we want to move this way in the project, and I expected, based on my authority, to have the board move in that direction"[93]. Later, he said that where there was a project which he as Minister considered key to the public interest, then under the Ports Authority Act, the Ports Authority Board was bound to accept his specific directions and he had the authority to remove them if they did not[94].

7.43 Hon Mark Vanterpool rejected suggestions that he had "commandeered" the Cruise Ship Port Development Project to the exclusion of the Ports Authority Board and reduced it to nothing more than a "rubber-stamping body"[95]. He said that while the Ports Authority Board "may not have been involved in the full research as it were in the hands of those who handled the previous project" (a reference to Phase 1), there had been opportunities for its members to ask questions and make suggestions at the Board meetings he attended. Similarly, the information presented at public meetings was available to the Ports Authority Board[96]. Hon Mark Vanterpool confirmed that he had informed the Ports Authority Board on 26 January 2012 as to the Government's position on the development[97] and, relying on the Auditor General's report, said that the Ports Authority Board had been further informed at meetings in March and May 2012. He accepted that Mr Skelton Cline would at his direction have appraised the Ports Authority Board of the detail of the project including through the presentation of detailed plans and diagrams[98].

7.44 As to the change in the scope of the project, Mrs Arlene Smith-Thompson told the PAC that she had not seen a Cabinet paper addressing that change. She said that the "conscious decision would have been a verbal one" made by Hon Mark Vanterpool. However, he had always told Mrs Smith-Thompson that he was reflecting a "collective decision taken by his colleagues"[99]. Hon Mark Vanterpool rejected the suggestion that the expansion of the project had occurred without Cabinet authorisation. He clarified that in the week following his meeting with cruise operators in Florida on 16 February 2012, he had made a verbal presentation to Cabinet as to the direction he considered should be taken. He added that between December 2011 and February 2012, "we were exploring the Project and getting proposals". He had reported on this to Cabinet. Cabinet did not make a decision on the scope of the project until July 2012 after the Ports Authority Board had passed a resolution[100] (a reference to the Board's resolution of 5 July 2021 and the Cabinet decision of 10 July 2012).

[91] T40 27 September 2021 page 37-39.
[92] T20 30 June 2021 pages 110-111.
[93] T20 30 June 2021 page 112.
[94] T20 30 June 2021 pages 113-115.
[95] T20 30 June 2021 pages 61-64.
[96] T40 27 September 2021 pages 53-54.
[97] T20 30 June 2021 pages 50-51 and 104-106.
[98] T40 27 September 2021 pages 39-41; Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 3.
[99] Minute of evidence of Arlene Smith-Thompson, former Acting Permanent Secretary MCW dated 29 January 2014 paragraphs 65-71.
[100] T20 30 June 2021 pages 36-39, 64-67 and 76-79; and T40 27 September 2021 pages 41-50.

7.45 When asked about the circumstances in which Mr Skelton Cline was engaged, Hon Mark Vanterpool said that his view was that, as a Minister, he had discretion to appoint a consultant using the allocated amount within the ministerial budget. Mr Skelton Cline was contracted to the Ministry and was expected to report to him[101].

7.46 Hon Mark Vanterpool was asked why he had appointed a consultant at $96,000 whose experience was in youth development[102]. He said that, in appointing Mr Skelton Cline, he was not looking for an expert in ports development but rather wanted to appoint someone who would work closely with him and be solely focused on the project. He said that neither he nor his Permanent Secretary nor the Managing Director of the Ports Authority would have had the time to be as focused[103]. He accepted that the recruitment had not been undertaken via a competitive process, but pointed out that governments do appoint consultants to advise them. Hon Mark Vanterpool accepted that Mr Skelton Cline had no relevant experience or qualifications. He said that while others may have been better qualified, it was his prerogative to appoint who he wanted; and he decided he needed someone he was comfortable with and who he could trust to "execute what I wanted to be done"[104]. Hon Mark Vanterpool rejected the notion that there was any impropriety in the appointment of Mr Skelton Cline who had stood unsuccessfully for the NDP at the recent election[105].

7.47 Mr Skelton Cline confirmed that, at the time he took on the role of consultant to Hon Mark Vanterpool, he had no experience as a "port consultant" nor of negotiating with cruise ships operators. He said that he had been recruited because of his experience in "leadership": he had headed a community development corporation in Detroit which had operated through his church of which he was a senior pastor[106]. His role was to assist Hon Mark Vanterpool in expanding cruise tourism in the BVI[107].

7.48 As to the concern over a lack of comprehensive planning etc, Hon Mark Vanterpool said that his first step, with Mr Skelton Cline, had been to gather information to develop the "project scope". There were also discussions with his Permanent Secretary and the leadership of the Ports Authority. In support of his contention that there had been comprehensive planning, Hon Mark Vanterpool focused on a report from BDO, an accounting and consultancy firm, produced in October 2013, but which, as he accepted, was not prepared at the relevant time. The only document Hon Mark Vanterpool could recall being having been produced between November 2011 and July 2012 was the environmental impact assessment which the Board had been asked to obtain. Hon Mark Vanterpool noted that given the project was a Private-Public Partnership, the "selected bidder" was expected to conduct a "complete analysis, planning, and project appraisal" because the "selected bidder" would carry out the project[108]. Mr Skelton Cline could not assist, saying simply that matters such as a needs assessment and a scope development fell outside his role as a consultant[109].

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[101] T40 27 September 2021 pages 54-58. In this respect, the appointment of Mr Skelton Cline can perhaps be seen as a precursor of the Ministerial Political Advisors, whose appointment has recently been approved by Cabinet (see paragraph 1.64). For his part Mr Skelton Cline said under his contract, he reported to the Permanent Secretary (T43 4 June 2021 page 64).
[102] Paragraphs 6.100 and 6328.
[103] Hon Mark Vanterpool rejected the suggestion that he had side-lined the Permanent Secretary saying that all the officers in his Ministry had been involved in the project (T40 27 September 2021 page 37).
[104] T20 30 June 2021 pages 80-82; and Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 4-5.
[105] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 4-5.
[106] T43 4 October 2021 pages 60-71.
[107] T43 4 October 2021 page 90.
[108] T40 27 September 2021 pages 58-63; and Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 5.
[109] T43 4 October 2021 pages 78-80.

7.49 When asked about the absence of a procurement process, Hon Mark Vanterpool said, "it could have been a different procurement process". He accepted that between November 2011 and July 2012, the project was not put out to tender, nor did he seek a tender waiver from Cabinet nor was an invitation for expressions of interest published. Hon Vanterpool did not agree with Mr Skelton Cline's evidence to the PAC that bids were solicited through an electronic bid process. He said that it was "very clear knowledge within the cruise industry" that the Government intended to proceed with a more expansive development of the cruise pier. His recollection was that the three companies who expressed an interest had made the initial approach. He said it was possible that this had been made to him and Mr Skelton Cline in the first instance. Hon Mark Vanterpool justified the process adopted by pointing to the urgent need to progress the project given competition with other ports in the Caribbean[110].

7.50 Hon Mark Vanterpool described Mr Skelton Cline's role as to assess the three bids received, "recommend and take them to Cabinet"[111]. He said that all three companies were invited to present their proposals to Cabinet following which it made a decision in July 2012[112]. The selection of TP Partners had been made for good reasons, but it had not been his decision alone[113]. Mr Skelton Cline said he had not been involved in obtaining bids from any of the three companies involved; that would have been a matter for the Ministry. He recalled having a meeting with TP Partners who had made an unsolicited approach. As to the other two companies, there was an "invitation process"[114].

7.51 According to Hon Mark Vanterpool, Dr Orlando Smith and Neil Smith, the coming into force on 23 April 2012 of the PFEM prompted Cabinet to decide that a tender process, overseen by the MoF (Phase 3), was the better course[115].

7.52 Hon Mark Vanterpool rejected the assertion that the TCPD were not sufficiently involved. He could not recall at what stage of the process they had become involved but said that it had been at some point after January 2012. There had been at least one meeting in his office and Mr Skelton Cline, who was meeting regularly with TP Partners, reported to him that TP Partners had held meetings with the TCPD[116]. As to consultation with stakeholders, it was Hon Mark Vanterpool's position that signing non-binding heads of agreement provided the opportunity to present the project as envisioned to stakeholders and the public. TP Partners did that and it then prompted substantial changes to the proposal[117]. Plans were presented to the public in March and July 2012[118].

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[110] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 6; T20 30 June 2021 pages 88-93 and 101; and T40 27 September 2021 pages 66-72.
[111] T20 30 June 2021 page 101.
[112] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 6; and T40 27 September 2021 pages 67-69.
[113] T20 30 June 2021 pages 93-96.
[114] T43 4 October 2021 pages 71-77. Mr Skelton Cline considered that it was not within his role to advise on the benefits of an open and transparent procurement process. He said he was not aware of any concerns being raised over the process (T43 4 October 2021 pages 77-78 and 80-81).
[115] T40 27 September 2021 pages 34-35 (Hon Mark Vanterpool); T40 27 September 2021 pages 171, 174-175 and 186 (Dr Orlando Smith); and T39 24 September 2021 pages 141-144 (Neil Smith).
[116] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 6-7; T40 27 September 2021 pages 77-80.
[117] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 6; T40 27 September 2021 pages 74-77.
[118] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 5-6; T40 27 September 2021 pages 64-65.

7.53 In relation to the last of the concerns listed above, Hon Mark Vanterpool said that he was aware of negotiations between the Attorney General's Chambers and TP Partners[119], but it was only upon seeing the Baker and McKenzie report that he became aware of flaws in the development documents[120]. Mr Skelton Cline said this was not an issue of which he was aware – he would not have needed to see such documents in his capacity as a consultant [121].

Cruise Ship Port Development Project: The Law

7.54 As indicated above, Hon Mark Vanterpool relied on the power available under the Ports Authority Act to a Minister to give directions to the Ports Authority Board. In this regard, I received written[122] and oral submissions[123] from Mr Denniston Fraser, on behalf of Hon Mark Vanterpool, as to the operative provisions of the Ports Authority Act. It is necessary to refer to some of those provisions.

7.55 The Ports Authority was established as a body corporate by section 3 of the Ports Authority Act[124] to provide, operate and maintain all port and harbour facilities in the harbours listed in Schedule 2 including Road Harbour[125]. Section 4(f) requires the Ports Authority to "perform such acts as the Minister determines …". Section 5 concerns the powers of the Ports Authority and includes, under section 5(d), the power to "co-ordinate and execute any Government project in any specified port" and under section 5(h) the power to enter "into agreement with any person for the … construction of any property real or personal, which in the opinion of the Authority, is necessary or desirable for the purpose of discharging any of its functions". Further, section 19(1) of the Ports Authority Act provides:

> "The Minister may give the Authority general directions in writing as to the performance of its powers under this Act on matters which appear to him to affect the public interest and the Authority shall give effect to such directions."

7.56 Counsel to the COI submitted that there were four aspects to section 19(1), namely (i) the direction given must be "general" (for which the Ports Authority Act gives no definition); (ii) it must be in writing; (iii) it can only be directed to the Ports Authority's performance of its statutory powers; and (iv) it must concern a matter which the responsible Minister considers affects the public interest[126].

7.57 While he referred me to several provisions in the Ports Authority Act, Mr Fraser focused his submissions on section 19(1). The point was therefore a narrow one. Mr Fraser submitted that, while section 19(1) did not give a Minister the power to direct that the Board sign an agreement or resolution, it gave the power to make "the overarching direction". While accepting that there was no evidence of Hon Mark Vanterpool giving directions in writing, Mr Fraser submitted that Hon Mark Vanterpool would have complied with section 19(1) if he

[119] Auditor General's Report paragraph 42.
[120] Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 7; T40 27 September 2021 pages 77-83.
[121] T43 4 October 2021 pages 90-94.
[122] Legal Submission to the COI on behalf of The Honourable Mark Vanterpool dated 24 September 2021. References in this section of the Report to "the Vanterpool submissions" are to these submissions.
[123] T40 27 September 2021 pages 90-107.
[124] The 1990 Act was amended by the British Virgin Islands Ports Authority (Amendment) Act 2017, but only to the relevant extent of changing references to "the Governor in Council" to "the Cabinet", and "Legislative Assembly" to "the House of Assembly".
[125] The functions of the Ports Authority are set out in section 4: this seems to be the overarching function. "Road Harbour" is defined in Schedule 2 as including "all that area of water and foreshore lying to the north of an imaginary line drawn from Burg Point to Hog Point, in the island of Tortola". It therefore includes Wickham's Cay.
[126] T40 27 September 2021 pages 91-95.

had instructed his Permanent Secretary to issue such a direction[127]. There is no evidence of such a written direction having been issued[128]. On the evidence, I find that no written direction was ever given.

7.58 In my view, the powers afforded to a Minister under the Ports Authority Act are very limited, and for the good reason of ensuring the proper independence of the Ports Authority Board. Mr Fraser's submissions on the ambit of section 19(1) departed somewhat from what Hon Marl Vanterpool believed that provision to mean. Be that as it may, it seems to me that what amounts to a "general direction" is to be assessed in the circumstances. What the power to make a general direction cannot do however is undermine section 5(h) to the extent that a Minister is in effect telling the Port Authority what opinion it should have. As I put it to Mr Fraser, the power under section 5(h) is "inherently embedded in the Port Authority Board[129]. In any event, directions have to be in writing. None given by Hon Mark Vanterpool was.

Cruise Ship Port Development Project: Conclusion

7.59 Hon Mark Vanterpool described the PAC Report as "highly politically motivated' and disputed its accuracy[130]. Of course, that does not mean that I can attach no weight to the report. In any event, the PAC Report is not the only evidence before me on these issues. The minutes of evidence given to the PAC are available as is the Auditor General's report[131] [132]. Similarly, minutes of the meetings of the Ports Authority Board and the available Cabinet papers have been obtained[133]. Further, I have Hon Mark Vanterpool's own evidence to the COI to which I can give considerable weight. All that said, upon analysis, few, if any, of the facts were in dispute.

7.60 I accept that an incoming elected government may legitimately take a different policy view in relation to a construction project. I also accept that a Minister could appoint a person with little or no relevant experience to act as a consultant. However, Hon Mark Vanterpool did more here than give the Ports Authority an "overarching direction" as to the implementation of the policy of the Government of which he was a Minister. In my view, having regard to the circumstances, the directions that were given to the Ports Authority Board fall foul of section 19(1) of the Ports Authority Act. It is arguable therefore that Hon Mark Vanterpool acted unlawfully.

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[127] Vanterpool Submissions paragraph 6; and T40 27 September 2021 pages 96-100.

[128] Mr Fraser suggested that there may be such evidence in the minutes of the Ports Authority Board. The COI obtained the relevant minutes and provided them to Mr Fraser with an opportunity to make further submissions on them if appropriate. No further submissions were made (T40 27 September 2021 pages 93-4 and 99-102).

[129] T40 27 September 2021 page 98.

[130] T20 30 June 2021 pages 102-103. Contrary to the finding of the PAC, Hon Mark Vanterpool emphasised that he had not obstructed public officers in his Ministry from cooperating with that committee's investigation. The PAC did not ask him to give evidence himself, although he noted that there were no precedents for a serving Minister doing so. Hon Mark Vanterpool was however able to respond to the PAC Report during the ensuring debate in the House of Assembly (Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 page 7; T20 30 June 2021 pages 117-118 and 120-12; T40 27 September 2021 pages 83-87).

[131] Hon Mark Vanterpool accepted that it was likely that he would have had an opportunity to respond to the Auditor General's report when it was issued in draft (T20 30 June 2021 pages 47-48).

[132] Both the PAC Report (with its appendices) and the Auditor General's Report were provided to Hon Mark Vanterpool and his legal representatives.

[133] In his written response, Hon Mark Vanterpool said that he had been unable to obtain Cabinet papers relevant to the Cruise Pier Port Development Project. The COI therefore sought and received disclosure of the relevant Cabinet apers as well as the minutes of meetings of the Board. These were provided to Hon Mark Vanterpool's legal representative who was given an opportunity to make further representations if he considered it necessary. None followed (Hon Mark Vanterpool Response to COI Warning Letter No 1 dated 23 September 2021 pages 1-2; T40 27 September 2021 pages 3-4 and 99-102).

7.61 Even if I am wrong in that view, on Hon Mark Vanterpool's evidence alone, it is clear that from the beginning he had no confidence in the Ports Authority Board and was determined to take charge of the project. Hon Mark Vanterpool was determined to ensure that the policy of his government was implemented entirely in the way he saw fit. Despite the Board's recent expertise in dealing with Disney, Hon Mark Vanterpool preferred to rely on a consultant, Mr Skelton Cline, who had no experience in port development or the intricacies of Public-Private Partnerships, let alone those involving millions of dollars. On his evidence, the Ports Authority Board had no real opportunity to raise questions until July 2012, when Cabinet decided the scope of the project and TP Partners had, in effect, already been selected.

7.62 In my view, the course adopted by Hon Mark Vanterpool eradicated the statutory autonomy of the Board. It became an interested bystander waiting to be presented with one option at a time of the Minister's choosing. There was no real consultation. This was a glaring example of ministerial overreach into an area which the legislature had assigned to a statutory board.

7.63 As to the way the Cruise Ship Port Development Project was progressed between November 2011 and July 2012, on all the available information, I am satisfied as to the following:

(i) No thought was given to a public procurement process. I recognise that the PEFM only came into force after heads of agreement had been signed with TP Partners. Nonetheless, the PFMA and PFMR had long been in force. As a matter of good practice, regard should have been given to the benefit of an open and transparent process.

(ii) There remains a near complete lack of clarity as to how the three proposals were received. On a generous view, a decision not to invite expressions of interest but to rely on unsolicited approaches when embarking on a multi-million Public-Private Partnership was naïve.

(iii) The evidence strongly indicates that before the heads of agreement were signed there was little, if any, comprehensive planning etc. The failure to involve the TCPD and to engage in consultation at an earlier stage meant a reduced opportunity to consider the benefits and risks of any proposal.

(iv) Given the extent to which he took responsibility for this project, Hon Mark Vanterpool should have been aware of the serious defects in the development documents which carried a detrimental risk to the BVI public.

7.64 There was, on this information, scant regard for the principles of good governance. A perceived need for urgency because of pressure from cruise ship operators is no justification. Commercial ventures, of the size and complexity envisaged here, carry risks. Good governance is likely to reduce such risks.

7.65 I have given anxious consideration as to whether the information in relation to Phase 2 of the Cruise Ship Port Development Project falls within the scope of paragraph 1 of my Terms of Reference in the sense that factors falling outside the broad scope of the public interest may have been taken into account. I have found this a particularly difficult issue. The manner in which the relevant statutory board was marginalised is a particularly stark example of the executive government acting without due regard to proper process. That lack of governance may well have resulted in a substantial amount of public money being expended on this project than would otherwise have been the case. For the reasons I have given, I consider it is likely that Hon Mark Vanterpool acted, not only unwisely, but unlawfully. On any view, he does not come out of this project well. However, after carefully considering all the evidence, I am not persuaded that the information before me is such as to fall within paragraph 1 of my Terms of Reference.

7.66 I have also given careful consideration as to whether it is in the public interest for further steps to be taken in light of my conclusions on Phase 2 of this project. That phase was the subject of an audit and was considered by the PAC (albeit their report is not accepted by Hon Mark Vanterpool). Subsequently, the Cruise Ship Port Development Project was taken in a different direction. It is only that which prevents me from recommending further investigation.

Interference with Appointments to Statutory Boards

7.67 The issue also arose before the COI in the context of information which might suggest political interference in the constitution of statutory boards. There was some information which suggested interference with appointments; but the most striking evidence of political interference concerned the policy of the current administration to revoke the whole membership of all statutory boards (except ex officio members) with a view to reconstituting those boards later with individuals committed to their policy programme.

Removal of Members of Statutory Boards: The Law

7.68 Of course, subject to re-appointment, a board member's appointment ceases when his or her or term ends; and there is usually provision for a member to resign. Further, for most statutory boards, there is express provision in the establishing Act for the removal of members, e.g. on grounds of being unable or unfit to discharge the duties of the office, or misconduct. The grounds on which a member may be removed vary from board to board; but, where there are express statutory grounds, they are construed as being exclusive, i.e. they set out the only powers the Minister (or other appointed person) has to remove a member and the only grounds upon which a member of a board can be removed. There is no additional, discretionary power to remove.

7.69 Where there is no express power of removal, section 20(1)(a) of the Interpretation Act 1985[134] provides:

> "Subject to the Constitution, words in an enactment that authorise the appointment of a person to any office shall be deemed also to confer on the authority in whom the power is vested—
>
> (a) power, at the discretion of the authority, to remove or suspend or otherwise discipline him; …"

7.70 As I have indicated, that discretion only exists where there is no express power. Where the discretion exists, it must, of course, be exercised lawfully, e.g. it must only be exercised in pursuit of the aims and purposes of the main Act[135].

[134] Cap 136.
[135] See paragraph 7.68 above.

The 2019 Policy

7.71 Although not in their manifesto, immediately upon assumption of office in 2019, the Premier established (and the Cabinet adopted) a policy that the entire membership of all statutory boards would be revoked, and each board reconstituted[136].

7.72 There is no document setting out the rationale for the policy, assessing its pros and cons; but on 27 March 2019 the Premier presented a paper to Cabinet seeking approval in principle to pursue a policy to revoke all members of all boards (or at least those in the Premier's portfolio); and, in particular, to seek the revocation of the whole membership (barring ex officio members) of the Tourist Board and the Ports Authority, two statutory boards in respect of which there are no express provisions for the removal of members[137].

7.73 Under the heading "Background Information", the paper said:

> "4) With each new Government Administration it is common practice that some or all current board membership is dissolved and new members appointed to the respective boards. The manifesto of the new government administration calls for innovative, forward and progressive ideas, initiatives and action from each government ministry, department and agency during this recovery period. For those initiatives that must be implemented through a statutory body the same principles for innovative, forward and progressive initiatives and action will be required.
>
> 5) The manifesto of the new government administration places heavy emphasis on youth involvement in every aspect of the development of the Territory. As such the intention is also to appoint a youth representative on each statutory board and committee. In addition, recommendations will be forthcoming for a new policy to amend the membership terms of each board to not extend beyond the terms of the sitting Administration that appointed the board.
>
> 6) As such Cabinet's approval is being sought to revoke the membership of the current statutory boards under the Premier's Office portfolio to allow for the right mix of new innovation and progressive minded members to be appointed that would include representation of youths on each board…
>
> **Purpose**
>
> 7) To dissolve current board membership and appoint new board members"[138].

7.74 As paragraph 7 indicates, the revocation of the membership of boards was an integral part of the policy: it was not (e.g.) simply the means whereby a policy of reinvigorating statutory boards was implemented, and there is no evidence that any course other than complete revocation and reconstitution was considered.

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[136] To put this into context, the elections at which the VIP was returned as the majority party were held on 25 February 2019. The Premier appointed his Cabinet in the second week of March: the Premier recollected that he named his Cabinet on about 12 March or at least sometime in the second week of March 2019 (T33 14 September 2021 pages 6-8). The relevant paper (Cabinet Memorandum No 103/2019 dated 27 March 2019) was drafted by the then Acting Permanent Secretary Premier's Office Ms Elvia Smith-Maduro on 19 March 2019. The Premier said that the memorandum was not preceded by a policy paper. He initially said that this policy was in the VIP manifesto; but, as he accepted, other than a general commitment to youth inclusion, he was mistaken (T33 14 September 2021 pages 67 and 76).

[137] Cabinet Memorandum No 103/2019: Revocation of membership of Statutory Boards under the Premier's Office dated 27 March 2019. These paragraphs were read into the record at a public hearing of the COI (T33 14 September 2021 pages 59-60 and 62).

[138] Some paragraphs are numbered twice on the memorandum with different numbers: only the sequential numbering is used in the quotation.

7.75 The memorandum stated that the Attorney General (then Hon Baba Aziz) had been invited to comment on the paper. The application of the relevant law is dealt with in the memorandum as follows[139] (emphasis as in the original):

> **"Financial Implications**
>
> 9) I have noted the comments of the Attorney General when he stated, 'I have not had the opportunity to review the removal provisions of ALL the Boards (statutory corporation or otherwise)'. To this end, it is critically important that Cabinet satisfies itself that even in the cases of the BVI Ports Authority and BVI Electricity Boards wherein there is express provision for the removal of Statutory Board members and as cautioned by the Attorney General, the discretionary powers of Cabinet must be exercised reasonably.
>
> 10) In the light of the above, before Cabinet takes a decision to remove a Board Director of a Statutory Board, Cabinet must satisfy itself that it not only has the power to do so as per the respective statutes establishing the Boards but that in removing the Directors amass that this will not easily be construed by any arbiter as acting/behaving unreasonable. To act otherwise in these circumstances may expose Government to claims of unreasonable dismissals which in turn could result in huge financial liabilities being attached to Government.
>
> **Legal Implications**
>
> 11) May I note further that there is no provision for revoking the appointment of members of the Tourist Board, but that is cured by section 20 of the Interpretation Act (Cap 136) which authorises an appointing authority to remove an appointee at its discretion. This of course entails compliance with the rule of law requirement I had previously made reference to."

7.76 This is not drafted as well as it might have been – and, from the different uses of the first person singular, it seems that some of the wording is that of the Attorney General and other wording that of public officers in other Ministries – but it is clear from it that, in relation to statutory boards where there is no express provision for removal, the Attorney General's advice was that members might be removed in the discretion of the appointing authority

[139] These paragraphs were read into the COI record at a public hearing (T33 14 September 2021 pages 60-62).

but only if the exercise of that discretion is exercised reasonably and in accordance with the general law relating to the exercise of such a discretion (e.g. as indicated above, the discretion must only be exercised in pursuit of the aims and purposes of the main Act)[140].

7.77 The Attorney General was clearly indicating that, if the Cabinet was to pursue this course, it must have good reason; and he was expressing concern that the reasons that were being relied on may not be regarded as reasonable for the removal of members of all boards en masse. If he had had no such concern, he would not have raised the issue. It is clear that he considered the proposal, in the form it was made, involved considerable risk that it was unlawful, and may, in due course, be held to be so.

7.78 Cabinet Memorandum No 103/2019 was considered by Cabinet at its meeting on 27 March 2019. The minutes of that item[141], under the heading "Deliberation", record:

> "3. The Premier presented this paper.
>
> 4. The Chairman stated that specific reasons or a reasonable justification should be given to remove persons as members of a Board. He asked if there was sufficient reason in this regard.
>
> 5. The Attorney General confirmed that the BVI Tourist Board Ordinance does not reference removal of members from the Board; therefore, in this instance, removal of Members can be carried out on the basis of discretion.
>
> 6. The Chairman reiterated that there is no specific removal power in the Ordinance but that he understands from the Attorney General that such clause is included in the Interpretation Act.
>
> 7. The AG [the Attorney General] said in cases where any powers are conferred by the Legislature, one should provide reasons for removal of persons and suggested that it is better to provide reasons. The AG advised that if this administration wants to be a government consistent with public administration; then reasons must be given for removal of members of boards.
>
> 8. Members asked if there were any precedents of unreasonable exercise.

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[140] The "rule of law requirement" is clearly that to which the Attorney General refers in a Cabinet paper dated 25 March 2019, but not signed off by the relevant Minister (the Minister for Transport, Works and Utilities Hon Kye Rymer) until 15 April 2019. This was Cabinet Memorandum No 115/2019: Revocation of Appointments of Board Members – British Virgin Islands Electricity Corporation. The Attorney General's observations (recorded under the heading "Legal Implications" were read into the COI record (T33 14 September 2021 page 119) and were as follows:

> "10 [& 11]. There are [sic] no expressed provision… in the BVI [Electricity Corporation] Act for the dissolution of the Board of the Corporation. However, Cabinet has a discretion to revoke the appointments of the Members of the Board.
>
> 12. However, in exercising its discretion to revoke the appointment of the Members of the Board, Cabinet must comply with one of essential requirement of the rule of law identified by Lord Bingham; namely that a discretion conferred by statutes on 'Ministers and other public officials, must be exercised reasonably (rationally), in good faith and for the purpose for which the power was conferred and without exceeding the limit of such powers.'
>
> 13. The concept of reasonableness is defined by its opposite; namely Wednesbury unreasonableness. A decision is said [by] Lord Diplock to be unreasonable (irrational) if 'it is so outrageous in its defiance of either logic or morals that no sensible person could arrive at that conclusion on proper application of his mind'."

The quote attributed to Lord Bingham is taken from a lecture he delivered in 2006 (The Rule of Law: The 6th Sir David Williams Lecture (2006)) - see https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf. This memorandum was considered by Cabinet on 22 April 2019. The minutes of that Cabinet Meeting (Cabinet Meeting No 4 of 2019) were read into the COI record. Paragraph 53 of those minutes records:

> "The AG said that the policy would have some challenges because some legislation stated that revocation is made based on specific reasons" (T33 14 September 2021 pages 119-121).

[141] Minutes of Cabinet Meeting No 2 of 2019.

9. The Minister for HSD [Health and Social Development] commented that given its national mandate and that tourism is an economic pillar, it should be deemed reasonable that the Tourism Minister be comfortable with the membership of the BVI Tourist Board to move the sector forward and therefore should be mindful to appoint a Board that reflects his Administration's mandate.
10. The Chairman stated that there should be an avoidance of risk of targeting people. He voiced his concern about the captioned paper, and that he was not against its intention but that he wanted to ensure that there was a demonstration of good governance procedure. The Chairman reiterated that justifiable reasons should be given to remove members from a Board.
11. The Minister for Natural Resources, Labour and Immigration mentioned that the decision was not for the removal of one person but the entire Board membership.
12. The Minister for HSD asked the Attorney General if Board members had a legal recourse for being removed. The Attorney General responded that anyone can go to court whether they have legal recourse or not.
13. The Chairman asked if there were any operational liabilities or risks to revoking the appointments of the Members of the BVI Tourist Board or BVI Ports Authority.
14. The Premier responded there were no risks to either entity if they operated without a Board at this time.
15. The Premier stated that his decision to revoke the membership of the Boards is on the basis that a new government has assumed office with a new mandate, and as a result, he has decided to reassess the membership of all Boards in a manner that will allow the mandate given by the people to be expedited in a transparent and accountable manner.
16. Furthermore, the Premier stated that he would be recommending a policy that the membership on Boards would extend for the duration of the Administration's term in office.
17. ***Action By:***
18. The Premier would instruct his office to prepare a Cabinet paper that the period of appointment of members serving on Boards would be commensurate with the Administration's term in office, in consultation with the Attorney General's Chambers.
19. In support, the Minister for Education, Culture, Agriculture, Fisheries Sports and Youth Affairs [sic] agrees that Boards should not exceed the tenure of an Administration because it can prove to be challenging. The Minister said that despite the possibility of exposing the Government to certain levels of risks, when he weighs the potential for Boards to interfere with the government's mandate, as a Member of the Cabinet, he was willing to be exposed to that risk. He stated that commitment to the current government's mandate from the people must be paramount because incorrect actions of the past and/or an association with a former party or administration could have a real impact on how matters progressed.

20. The Minister for Communications and Works[142] voiced his agreement and support of the sentiments expressed with respect to the revocation of the membership of the captioned Board.

21. Voicing his concerns, the Chairman said that the Cabinet has wide discretionary powers which should be used in accordance with principles of administration and not without justifiable reasons. This he said risks undermining the Cabinet's commitment to good administration and good governance.

22. The Premier thanked the Chairman for noting his concern on the matter but pointed out that the Chairman's definition of justifiable reasons differed from theirs."

It is noteworthy that, in paragraph 15, the decision to revoke membership of the statutory boards is recorded as being that of the Premier. The Cabinet proceeded forthwith to approve the revocation of the appointments of all members (except the ex officio members) of the Tourist Board and the Ports Authority[143].

7.79 In giving evidence to the COI, Hon Carvin Malone, Minister for Health and Social Development, was asked about Cabinet Memorandum No 103/2019 and his contribution to its discussion as recorded in the Cabinet minutes[144]. He referred to the need to make sure that "the mandate that was promised to the people" could be carried out[145]. He described the purpose of the policy set out in the memorandum as "to reconstruct" statutory boards[146]. Asked if he had a concern (as expressed by the Minister for Education, Culture, Youth Affairs, Fisheries and Agriculture) "that an association [of a current Board Member] with a former party or administration could have a real impact on how matters progressed", Hon Carvin Malone said that prospect was a reality, but added that he was "more concerned in terms of having a reorganisation of the Board to fit our particular concept of moving the Government's mandate and so forth"[147]. He described as a "reasonable thought", the proposition that his concern both as a Minister and a member of Cabinet was to ensure that statutory boards were "in line with the Government's mandate and did not seek to frustrate it"[148].

7.80 Hon Vincent Wheatley, Minister for Natural Resources, Labour and Immigration was also asked about the policy[149]. He said that he fully supported the policy, describing its purpose as to reconstitute statutory boards[150]. Hon Vincent Wheatley said that the administration of which he was a member had come in "with a transformative aggressive agenda, and we felt the best thing to do is to find persons who align with our ambitions"[151]. As to the tenure of statutory boards being in line with an administration, he said that the intent of the policy was that no government should be "saddled with an old board" which might have a different agenda[152]. His evidence came to that, while statutory boards would be autonomous in terms of function, members should be appointed not only on competence but also on whether they would carry out a government's mandate, by which he meant that government's political agenda[153].

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[142] This is a typographical error in the minutes themselves. I have taken it to be a reference to Hon Kye Rymer, Minister for Transportation, Works and Utilities.
[143] Expedited Extract of Cabinet decision on Cabinet Memorandum No 103/2020 dated 27 March 2019.
[144] T30 7 September 2021 pages 140-155.
[145] T30 7 September 2021 page 146.
[146] T30 7 September 2021 page 151.
[147] T30 7 September 2021 pages 154.
[148] T30 7 September 2021 pages 155.
[149] T31 8 September 2021 pages 151-166.
[150] T31 8 September 2021 pages 152-153.
[151] T31 8 September 2021 pages 154.
[152] T31 8 September 2021 pages 154-156. Hon Vincent Wheatley said: "A new government with a new mandate needs to be given the option to have its own Board to carry out that new mandate".
[153] T31 8 September 2021 pages 156-166.

7.81 Taking the Cabinet paper with the minutes, the policy of the Premier as adopted by Cabinet had the following strands:

(i) The entire membership of each statutory board (except ex officio members) should be revoked, and each board reconstituted.

(ii) In determining that reconstitution, each member of each statutory board should have a commitment to the new administration and its policy programme.

(iii) The tenure of each statutory board should correspond with the tenure of the government.

(iv) Each statutory board should have youth representation.

7.82 The Premier agreed that these were the strands of the revoke and reconstitute policy[154]. He accepted, as was clearly the case, that removing the entire membership of all statutory boards was an integral part of the policy; although he pointed out that this did not mean that some members might not be reappointed[155]. Describing the policy as being to "reconstruct" or "rejuvenate" statutory boards, the Premier addressed the view that removing all the members of a board would result in a loss of experience by saying that a board would still have the "institutional knowledge" found in the Ministry and with the ex officio members of the board[156]. The Premier did not demur, however, when it was pointed out to him that the relevant Cabinet paper did not use words such as "reconstitute" or "rejuvenate", but rather focused on revocation[157].

7.83 On the available evidence, the policy informed the approach adopted to the revocation of board members on a number of different statutory boards[158]. It is useful to look further at its operation by reference to two different statutory boards: one where the establishing Act did not contain an express power to remove members (i.e. the Ports Authority) and one where it did (i.e. the Board of the Trustees of the Climate Change Trust Fund).

The British Virgin Islands Ports Authority

7.84 As I explained earlier in this chapter, the Ports Authority was established as a body corporate by section 3 of the British Virgin Islands Ports Authority Act 1990[159] ("the Ports Authority Act"), to provide, operate and maintain all port and harbour facilities in the harbours listed in Schedule 2 including Road Harbour[160]. The Ports Authority, with the approval of Cabinet, is required to appoint a Managing Director (who is to act as Chief Executive Officer, charged with the direction of business of the Authority and the exercise of its powers, duties and functions) and a Deputy Managing Director[161].

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[154] T33 14 September 2021 pages 68-69 and 75-76.
[155] T33 14 September 2021 pages 78 and 102. On the latter page, the Premier said that it was "the policy we tried to work from".
[156] T33 14 September 2021 pages 86-87.
[157] T33 14 September 2021 page 93.
[158] During discussion of Cabinet Memorandum No 115/2019, which concerned the revocation of members of the BVI Electricity Corporation, the Premier is minuted as referring to a policy that the term of board members would not extend beyond the term of the government and that members of a board "should represent who recommends their appointment". Hon Carvin Malone is minuted as saying that "that it will be deemed as counterproductive to have Board Members who publicly participated in political campaigns contrary to the Code of Conduct they aspired to continuously serve on Boards during this administration" (T33 14 September 2021 pages 120-121).
[159] No 12 of 1990. The 1990 Act was amended by the British Virgin Islands Ports Authority (Amendment) Act 2017, but only to the relevant extent of changing references to "the Governor in Council" to "the Cabinet", and "Legislative Assembly" to "the House of Assembly".
[160] The functions of the Ports Authority are set out in section 4: this seems to be the overarching function. "Road Harbour" is defined in Schedule 2 as including "all that area of water and foreshore lying to the north of an imaginary line drawn from Burg Point to Hog Point, in the island of Tortola". It, therefore, includes Wickham's Cay.
[161] Section 20(1) and (2) of the Ports Authority Act.

7.85 Again, as I noted above, consistent with its independence, the powers of the responsible Minister[162] in respect of the functions delegated to the Ports Authority are very limited. However, the Minister may direct that he is furnished with accounts etc, may order an investigation into the activities of the Authority[163] and, by section 19(1) of the Ports Authority Act, may give general directions.

7.86 The constitution of the Ports Authority is dealt with in Schedule 1 to the Act. It is to comprise (i) a chairperson appointed by Cabinet on recommendation of the responsible Minister, (ii) six members appointed by Cabinet "having taken into account the desirability of such interests as are affected by the Authority's activities being represented"[164] and (iii) three ex officio members (the Managing Director, the Permanent Secretary of the responsible Ministry and the Financial Secretary)[165]. In the case of appointed (as opposed to ex officio) members, the Cabinet is required to specify periods of appointment so that the periods of not more than one-third of the members shall expire in any one year[166]. Any member may resign; and any member "may be removed by the Cabinet in [its] discretion at any time"[167].

7.87 As I have discussed, on 27 March 2019, in pursuance of the policy described above, the Premier presented a paper to Cabinet with a purpose described as "to dissolve current board membership and appoint new board members" and initially seeking the revocation of the whole membership (except ex officio members) of the Ports Authority and the Tourist Board[168], two statutory boards in respect of which there were no express provisions for the removal of members.

7.88 The relevant parts of the Cabinet paper are set out above, as are the recorded minutes of the Cabinet meeting[169]. In short:

(i) The Premier presented the paper.

(ii) The Attorney General expressed concern that the proposed course may be unlawful, and in the future may be held to be unlawful, because of the lack of compelling reasons for the removal of the members. Those concerns were echoed (twice) by the Governor who clearly did not consider the reasons justified the course of action proposed. Both the Attorney General and the Governor emphasised that it would be poor governance to revoke the board members in the circumstances proposed; and it would (the Governor indicated) likely undermine the elected Government's commitment to good administration and good governance.

(iii) At the Cabinet meeting, the Premier and Cabinet colleagues emphasised that, in respect of the members of statutory boards, a commitment to the new administration and its policy programme was an important requirement – the Minister for Education, Culture, Youth Affairs, Fisheries and Agriculture describing it as "paramount" – for each member of each statutory board.

[162] Until March 2019, the Minister of Communications and Works; since that date, the Premier.
[163] Section 19(2) and (3) of the Ports Authority Act.
[164] See paragraph 7.89 below.
[165] Schedule 1 paragraph 1, the quotation being from paragraph 1(1)(b).
[166] Section 3(1). This suggests that the legislature recognised the benefit of having continuity within the cohort of appointed members.
[167] Section 2.
[168] Cabinet Memorandum No 103/2019 dated 27 March 2019 and Minutes of Cabinet Meeting No 2 of 2019.
[169] See paragraph 7.78.

(iv) The Cabinet did not hesitate: it made the decision to revoke the whole membership (excluding ex officio members) of both the Ports Authority and the Tourist Board with immediate effect. No reasons are given: it has to be assumed that the reasons are those (and limited to those) set out in the Cabinet paper and in the recorded minutes (i.e. the reasons about which the Attorney General had expressed such concern)[170].

(v) The Premier said that he would instruct his Office, in consultation with the Attorney General's Chambers to prepare a Cabinet paper proposing that the tenure of appointments of members serving on boards would be coincident with an administration's term of office.

7.89 Paragraph 1(1)(b) of the First Schedule to the Ports Authority Act provides that appointment of members should be made "having taken into account the desirability of such interests as are affected by the Authority's activities being represented". In a memorandum dated 13 May 2019, addressed to Dr O'Neal Morton, the Permanent Secretary in the Premier's Office, the Attorney General said of this statutory requirement[171]:

> "My understanding of [these] words… is that Cabinet, in appointing Board members, should consider the competence and capability of potential members against the backdrop of the objectives of the British Virgin Islands Port Authority and in particular its functions under section 4…".

7.90 The Attorney General's memorandum was annexed to a Cabinet paper seeking the approval of Cabinet for new appointments to the Ports Authority Board[172]. That paper referred to the "Administration's desire to reshuffle the composition of each board to include youth representation". The Attorney General described this as not required under the First Schedule, and therefore an irrelevant consideration (i.e. a consideration which it would be unlawful to take into account).

The Board of Trustees of the Virgin Islands Climate Change Trust Fund

7.91 The Virgin Islands Climate Change Trust Fund, and the Virgin Islands Climate Change Trust, which runs the Fund, were established by the Virgin Islands Climate Change Trust Fund Act 2015[173] ("the CCTF Act") with the following objectives:

> "The Trust shall
>
> (a) seek to facilitate a link between domestic and international climate change finance sources with national climate change investment strategies;
>
> (b) serve as a catalyst to attract investments to implement a range of priority climate change adaptation and mitigation projects and programmes in the Virgin Islands; and

[170] The Premier gave the imminent Sea Trade Conference as a further reason for the paper, and one which gave it urgency. He linked this to the need to have cross-board representation, so that, for example, the Airports Authority would be represented on the Tourist Board. The contemporaneous papers make no reference to the conference: the Premier suggested that it may have been discussed but omitted from the minutes (T33 14 September 2021 pages 71 and 106-108). The Premier refused to accept that the only reasons for the decision to revoke the membership of the Tourist Board and Ports Authority were those set out in the Cabinet paper and minutes (T33 14 September 2021 pages 110-112).

[171] Memorandum Attorney General to Permanent Secretary Premier's Office: Appointment of New Board Members to the BVI Ports Authority Board dated 13 May 2019.

[172] Cabinet Memorandum No 154/2019: Appointment of New Board Members to the BVI Ports Authority Board dated 6 May 2019.

[173] No 12 of 2015: the Fund and the Trust are established by section 4.

(c) serve as the National Implementing Entity for the Virgin Islands, being the official organisation designated on behalf of the Territory under the [United Nations Framework Convention on Climate Change[174]] to receive direct financing from any external source in order to carry out climate change adaptation and climate change mitigation projects and programmes in the Virgin Islands"[175].

7.92 As the BVI Government website states[176]:

"**The Virgin Islands Climate Change Programme**

The Virgin Islands is responding to climate change through its comprehensive Climate Change Programme managed through the Ministry of Natural Resources and Labour and the National Climate Change Committee. The Climate Change Programme focuses on better understanding climate change impacts, educating the public, reducing local greenhouse gas emissions and adapting to climate change impacts."

"**The Virgin Islands Climate Change Trust Fund**

… The Trust Fund is an independent entity dedicated to raising, managing and disbursing funds to qualified applicants to build resilience to climate change impacts and to reduce carbon emissions. The Trust Fund can support actions by the Government, the private sector and civil society.

The Trust Fund will finance a wide range of adaptation and mitigation measures, including on-the-ground projects, capacity building, education, research/studies, introduction of innovative technologies, changes in legislation, policy/strategy development and establishment of incentive programmes. The Trust Fund will support actions across a wide variety of sectors as guided by the Virgin Islands Climate Change Policy, including actions to:

- Safeguard the environment and fisheries
- Secure critical infrastructure, facilities and communities
- Build the resilience of the tourism industry
- Secure agriculture
- Build a resilient insurance and banking sector
- Build energy security and promote renewable energy/energy efficiency
- Build water security
- Protect human health"

"Governance of the Climate Change Trust Fund

As an independent body, The Virgin Islands Climate Change Trust Fund is governed at its highest level by a Board of Trustees…".

[174] The Convention was adopted by the United Nations on 9 May 1992, signed by the United Kingdom on behalf of itself, the Crown Dependencies and the BOTs on 12 June 1992 and ratified on 8 December 1993.
[175] Section 5 of the CCTF Act.
[176] http://www.bvi.gov.vg/climatechange

As the Trust was part of the European Union Global Climate Change Programme and was going to seek funds from international bodies (such as the Green Climate Fund), its independence[177] and a high level of governance were and remain particularly important[178].

7.93 The management and administration of the Trust (including provisions for the appointment and removal of members of the Board of Trustees ("the CCTF Board") are covered in Part III of the Act.

7.94 The CCTF Board is to comprise nine members, three named officers ex officio (the Permanent Secretary, the Financial Secretary and the Chief Executive Officer of the Trust who serves as Secretary to the CCTF Board) and six other members appointed by the Minister with the approval of Cabinet and each having particular specified experience or expertise: in making appointments the Minister must have regard to specific attributes that a prospective appointee must have[179]. The Minister appoints a Chairperson and Deputy Chairperson from the members of the CCTF Board[180].

7.95 The CCTF Act sets out a minimum appointment procedure that must be followed for non-government members, which includes public advertisement, an opportunity for the public to nominate candidates, three references, a recent police report attesting to any criminal record, proof of belonger status (if the applicant is a belonger), a letter of nomination from a registered organisation operating in a relevant sector as prescribed, public disclosure of nominations, and an opportunity for the public to comment on nominees[181].

7.96 With the side heading "Resignation and Removal", sections 16 and 17 provide:

> "16(1) A member of the Board may resign at any time by notice in writing addressed to the Minister, and such resignation becomes effective upon receipt by the Minister, unless specified to take effect at a specified date.
>
> (2) The Minister may, with the approval of Cabinet, revoke the appointment of a member of the Board, other than a government member if the Minister is satisfied that the member
>
> (a) is guilty of misconduct; or
>
> (b) failed to attend four (4) consecutive meetings of the Board, of which the member had notice except where leave was granted by the Board, or where the member is excused by the Board for having been absent from those meetings; or
>
> (c) knowingly failed to notify the Board of a conflict of interest; or
>
> (d) no longer fulfils the conditions of appointment as set forth in section 12; or
>
> (e) acts in a way that is detrimental to the Trust.
>
> 17(1) The office of a member of the Board becomes vacant if the member

[177] Marked by (e.g.) the fact that the CCTF Act makes clear that the Trust Fund is not a Government fund and neither its capital nor its revenue is public money (section 10(1)); and that the Trust is not a public authority for any purpose (section 10(3)(c)) nor is the BVI Government liable for its debts (section 10(3)(b)). Section 9 of the CCTF Act has the side heading: "Dedication to non-political purposes".

[178] Joseph Smith Abbott, currently the Acting Permanent Secretary MNRLI, had previously been involved with the setting up of the Climate Change Trust Fund when Deputy Secretary. He explained that, as a body which would seek international funding, the Trust Fund enjoyed "another level of scrutiny, another level of autonomy" (T31 8 September 2021 pages 61 and 116).

[179] Section 12(2)-(4) of the CCTF Act.

[180] Section 12(5) of the CCTF Act.

[181] Section 13 of the CCTF Act.

(a) dies; or

(b) completes a term of office and is not re-appointed; or

(c) resigns the office by giving written notice addressed to the Minister; or

(d) is removed from office by the Minister; or

(e) is an undischarged bankrupt or has compounded with his or her creditors; or

(f) has been certified by a medical practitioner to be of unsound mind; or

(g) is convicted of an offence involving dishonesty that is punishable by imprisonment for six months or more, or is convicted of any offence that is punishable by imprisonment for twelve months or more, or is convicted in another country of an offence that, if committed in the Territory, would be an offence so punishable; or

(h) in the case of a member referred to in section 12(2)(d), ceases to be qualified for appointment."

7.97 The reason and need for such procedures for the appointment and removal of members of the CCTF Board are obvious: the Trust intended to seek funding from international climate change bodies who would require good governance and independence of the Board from executive government. These procedures were imperative if the Board, and thus the Trust, were to achieve its objectives. This approach was very different from the informal process otherwise uniformly adopted by the BVI Government in relation to statutory boards.

7.98 Following the February 2019 election, the Trust was transferred from the MNRLI to the Premier's portfolio of statutory boards. At that time, there were six appointed members, each appointed on 15 June 2017 for a term of three years, following a competition held in accordance with the rigorous statutory requirements and involving 27 applicants. Mr Edward Childs was chosen as Chairperson. In his evidence to the COI, Mr Childs described the process he and other applicants went through, which appears to have been rigorous and to have complied with the statutory openness and transparency requirements[182].

7.99 However, on 5 April 2019, in line with the policy of revoke and reconstitute described above, the Premier wrote to each non-government member of the CCTF Board[183], indicating the Government's intention to "restructure the composition of membership on each Board" and that "a new policy attaching time limits on board membership to coincide with the term of the sitting Government…". The letter invited its recipients to resign voluntarily by 11 April 2019. This was the first communication the CCTF Board had had from the Premier's Office, or indeed any Minister[184].

7.100 The CCTF Board discussed the letters; and were concerned that the progress they considered they had made might be stalled. In terms of seeking international funding for climate control projects – which, of course, was being sought by many states – the CCTF Board considered that it (and, thus, the BVI) were ahead of the game. In oral evidence, Mr Childs said that the CCTF Board's primary concerns were that (i) if the entire appointed Board resigned, their collective expertise would be lost in one fell swoop, and (ii) the whole point of the CCTF Act was to set up a mechanism to obtain money from international bodies, which required the Trust to have patent independence: this move, they considered, seemed to be "crossing

[182] T29 6 September 2021 pages 80-83; and see BVI Government's response to COI Request for Information No 2 (Composition of the Climate Change Trust Fund Board).
[183] T29 6 September 2021 pages 93-94 (Edward Childs). The letter was read into the COI record.
[184] T29 6 September 2021 pages 94-95.

the line"[185] and might have a significant adverse effect on the Trust's ability to raise money internationally. They considered there were no legal grounds for removing them under the CCTF Act[186].

7.101 Consequently, on behalf of the CCTF Board, Mr Childs responded by a letter dated 17 April 2019, to the Premier[187], which he delivered by hand, asking for a meeting to appraise him of the achievements of the Board to that date, and stressing that the CCTF Board would like to see that their work would not be lost and there would be no delay in the BVI's ability to tackle climate change at a point when progress was about to be made. On any view, the letter was positive and constructive.

7.102 The letter said that the CCTF Board looked forward to the Premier's response; but none came. Mr Childs never received any further communication from the Premier's Office or any other arm of the BVI Government – Mr Childs learned of the revocation of his appointment only when the Cabinet decision was much later published: he has never been given any reasons for the revocation – and there is no evidence that any other member of the CCTF Board was either[188].

7.103 Instead of responding to the letter, on 23 April 2019, again in pursuance of the policy described above, the Premier submitted a paper to Cabinet entitled "Revocation of the Appointments of the Membership of the Virgin Islands Climate Change Trust Fund Board"[189]. The background was in, essentially, the same terms as in the earlier Cabinet Memorandum concerning the Ports Authority and Tourist Board quoted above[190]: the purpose was, as its title suggested, "… to seek the approval of members to revoke the appointments of the current [CCTF] Board to make way for the appointment of new members at a later stage".

7.104 However, the difficulty in pursuing the policy with the CCTF Board was recognised in the section of the paper, derived from the Attorney General, headed "Legal Implications":

> "7) Section 16(2) provide the grounds for the removal of a Member of the board. These grounds include satisfaction of the Minister with the approval of Cabinet that the member:
>
> i. is guilty of misconduct;
>
> ii. failed to attend four (4) consecutive meetings of the Board, of which the member had notice except where leave was granted by the Board, or where the member is excused by the Board for having been absent from those meetings; or
>
> iii knowingly failed to notify the Board of a conflict of interest;
>
> iv. no longer fulfils the conditions of appointment as set forth in section12; or
>
> v. acts in a way that is detrimental to the Trust.

[185] T29 6 September 2021 pages 98-99.
[186] T29 6 September 2021 pages 97-98.
[187] T29 6 September 2021 pages 99-101.
[188] T29 6 September 2021 pages 101-104. The Premier confirmed that no one ever responded to Mr Childs' letter. He said that no response was sent "because we were doing some reconsidering of how to deal with the matter", and then the COVID-19 pandemic intervened. There is no documentary evidence that there was any reconsideration or what the reconsidered course might have been (T34 16 September 2021 pages 231-232).
[189] Cabinet Memorandum No 122/2019: Revocation of the Appointments of the Membership of the Virgin Islands Climate Change Trust Fund Board dated as drafted and approved by the Premier on 23 April 2019.
[190] Thus, it referred to the need for "innovative, forward and progressive ideas", the desire for youth representation and the new policy that board tenure should not extend beyond that of the appointing administration.

8) It therefore appears from this section that justifiable reasons have to be provided for the removal of members of that Board."

None of the members of the CCTF Board fell within any of those provisions and the paper did not suggest otherwise.

7.105 The paper was considered by Cabinet the following day, 24 April 2019[191]. The Premier presented the paper, informing Cabinet that he had asked the members of the CCTF Board to resign and reiterating the new policy that membership of statutory boards would not extend beyond the end of an administration. The Attorney General is recorded in the Cabinet minutes "[expressing] his concern that in revoking the appointments of members of the Virgin Islands Climate Change Trust Fund Board, that the conditions for removal listed in section 16.2 of that legislation has not been demonstrated to exist". No response to that concern is recorded[192], only the Cabinet decision that the membership of all members of the Board be revoked effective from that day, 24 April 2019[193].

7.106 However, just over a week later (3 May 2019), Ms Elvia Smith-Maduro, Deputy Secretary in the Premier's Office, drafted a further paper for Cabinet, entitled "Amendment to the Virgin Islands Climate Change Trust Fund Act 2015"[194]. This proposed an amendment to section 16 of the CCTF Act to add a clause "that gives Cabinet discretionary powers to revoke the appointment of any member of the Board of Trustees".

7.107 The Premier denied that this paper was intended to rectify the decision to revoke the appointments that had already been made: he said it was rather to make sure that, in the future, the CCTF Board continued to be "energised" and could be "re-energised" by the executive government if needs be by the revocation of appointments and new appointments being made[195]. The paper was approved by the Premier and submitted to Cabinet on 14 May 2019, accompanied by a substantial memorandum of advice from the Attorney General dated 9 May 2019[196], in which, given the purpose for which the CCTF Board was established, the Attorney said he considered that the move may breach the principles of the rule of law notably that: "Ministers and public officials must exercise the powers conferred on them by

[191] Minutes of Cabinet Meeting No 5 of 2019.
[192] The Governor was not at the meeting, which was chaired by the Deputy Governor. He is not recorded as expressing any view.
[193] In his oral evidence (T34 16 September 2021 pages 232-248), the Premier suggested that the Cabinet reconsidered the matter after the decision to revoke; but (i) there is no documentary evidence of any reconsideration, (ii) there is no other evidence of the Premier or the Cabinet considering revoking the Cabinet decision of 24 April 2019; and (iii) there is no evidence as to what alternative course was being considered. Insofar as the Premier suggested that the revocation of the appointments did not take effect until the members of the CCTF Board had been officially notified, (i) the decision of Cabinet of 24 April 2019 was unequivocally clear that the appointments were revoked from that day, (ii) the decision of Cabinet was formally published on the BVI Government website and referred to in the media, (iii) the Premier and the Cabinet never received (nor even sought) any advice (e.g. from the Attorney General), (iv) there is no evidence that the Premier or Cabinet understood the Cabinet decision to be anything other than one which immediately revoked the appointments, (v) the CCTF Board members proceeded on the basis that their appointments had been revoked, (vi) the CCTF Fund itself was moved into a Treasury account under the Ministry of Finance, and (vii) the Premier accepted that the CCTF Board appointments had been "rescinded" and he was considering "re-establishing" the CCTF Board, terms which presumes the Board has ceased to exist. It is true that the Premier said the Attorney General advised Cabinet to bring forward another paper to have the matter reconsidered (T34 16 September 2019 page 234), but that was presumably because Cabinet had made a decision which he had unequivocally advised was unlawful. There is no evidence that any such paper was ever drafted. The Premier said that they were working on a paper rescinding Cabinet's earlier decision, but COVID-19 intervened (T34 16 September 2021 pages 233-234 and 243; and see BVI Government's response to COI Request for Information No 2 (Composition of the Climate Change Trust Fund Board).
[194] Cabinet Memorandum No 155/2019: Amendment to the Virgin Islands Climate Change Trust Fund Act 2015 dated 3 May 2019.
[195] T34 16 September 2021 page 241.
[196] Memorandum Attorney General to Permanent Secretary Premier's Office: Virgin Islands Climate Change Trust Fund Act 2015 dated 9 May 2019 (T34 16 September 2021 pages 251-154).

statute in good faith, fairly, for the purpose for which the powers were conferred, reasonably and without exceeding the limits of such powers"[197]. He emphasised the autonomous nature of the Trust. He summarised his advice as follows:

> "I would strongly advise against the amendment of the Climate Change Trust Fund Act (the Act) by way of substituting 'the removal of members of the Trust Corporation at the discretion of the Minister and Cabinet" for the elaborate basis for removal of the members contained in section 16 of the Act. No reason has been advanced for the proposed amendment."

That advice was, as the Premier accepted, "forthright… and clear"[198].

7.108 At the Cabinet meeting on 15 May 2019[199], the Premier presented the paper, and the Attorney General reiterated his advice against the course proposed and emphasised that the Climate Change Trust Fund was not a government fund. The Premier's response is recorded as follows:

> "In response, the Premier stressed that he would not be party to any organisation or Trust Fund that was established by the Government and thereafter was not under the auspices of or could not be directed by the said Government. However, the Premier said he was willing to have further discussions with the Attorney General on the matter to ensure that both perspectives were taken into consideration."

The matter was deferred for two weeks to allow for those discussions; but there is no further reference to it in the Cabinet papers. In the event, it seems that that proposal was not pursued.

7.109 As a consequence of the decision to revoke all CCTF Board members on 24 April 2019, there has been no functioning board. The position of the elected Ministers is that the failure to reconstitute the CCTF Board was down to (i) the unprecedented challenges of the COVID-19 pandemic, and (ii) that the Cabinet was still considering the policy in relation to the CCTF Act and those discussions have not concluded[200].

7.110 During the COI hearings on this topic and until very recently, the BVI Government website still recorded that the CCTF Board comprised the original appointees, with Mr Childs as its Chair, although all have been removed and not replaced. The Board has not existed for almost three years[201]. The Fund has since lain idle. Any momentum that the Board had in obtaining international funding – or, indeed, any funding at all – has been lost.

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[197] This formulation of the rule of law appeared verbatim in other Cabinet Memoranda containing the Attorney General's comments (see, e.g T33 14 September 2021 pages 119-121).
[198] T34 16 September 2021 page 242.
[199] Cabinet Meeting No 9 of 2019.
[200] Cabinet Response to COI Warning Letter No 1 dated 5 September 2021. The response of the Premier to his COI Warning Letter was word for word identical on this (Premier Response to COI Warning Letter No 1 dated 31 August 2021).
[201] I understand that, on 3 March 2022, the BVI Government published an advertisement seeking new Board members. However, the elected Ministers have not sought to lodge any further evidence or submissions in relation to the CCTF Board.

Concerns[202]

7.111 The overarching concern is that the conduct I have described, including but certainly not confined to the Premier's policy to revoke all members of all statutory boards and replace them with individuals in whom he had confidence, was overt manipulation by the executive of institutions which are established by the legislature to perform identified public functions as autonomous bodies independent of the executive government.

7.112 One strand of this is a practical concern. In terms of the Premier's recent policy, the revocation of all members of a board at the same time (as opposed, for example, to staggering the changes in membership) would break the continuity of experience and expertise. I did not find the Premier's reasoning – that the executive (including in the form of ex officio members) provide that continuity – to be compelling but rather to reinforce the impression of the executive's influence over boards that are intended to be independent of the executive.

7.113 However, of even more importance so far as governance is concerned, is that, with regard to statutory boards in respect of which the Cabinet had a discretion to remove members (such as the Ports Authority Board), the decision to remove all members was in the face of advice from the Attorney General (and concerns expressed by the Governor). The reasons given for the exercise of the discretion appeared inadequate; and, without there being good reason to justify the removal of all members and those reasons being expressed, the course proposed would likely be unlawful. This is not simply an empty governance point. Where Cabinet proceeds with a course having been told that good reasons for that course have not been expressed and rejected the opportunity to reconsider either that course or the expressed reasons or both, that may give rise to a suspicion that other, undisclosed motives might be involved. The coalescence of the tenure of each member of each statutory board with the tenure of the government administration appointing them also suggests an acceptance that the power over appointments to statutory boards is regarded as a political function.

7.114 The evidence on which the Premier relied included a written response addressing a COI warning letter on statutory boards. As to the legitimacy of the revocation policy in respect of the Tourist Board the response was as follows[203]:

> "The policy pursued by the Cabinet of renewing the membership of the statutory boards after the new government had come in was a perfectly good and lawful reason for revocation of [Tourist Board]. The Attorney General did not advise otherwise. He advised that it would be 'better' to give individual reasons and the Cabinet should do so if it wished to be 'consistent with public administration' (sic). When asked if there were precedents for legal challenge and if individuals would have legal recourse for being removed, he replied, 'anyone could go to court whether they had legal recourse or not'. His advice was at best equivocal. The Cabinet took the view that the advantages of the policy of renewing and reinvigorating the membership of this and other boards, which nevertheless envisaged the possibility of reappointment of some of the existing members if needed in the interests of achieving a balance of experience, outweighed the

[202] The concerns and potential criticisms in relation to Statutory Boards arising from the evidence before the COI were put to the Premier in COI Warning Letter No 1 dated 24 August 2021, to which the Premier responded in writing (Premier Response to COI Warning Letter No 1 dated 31 August 2021) and orally (T33 14 September 2021 pages 5-218, and T34 16 September 2021 pages 125-275). The warning letter identified the evidence giving rise to the concerns and potential criticisms. The criticisms of the Premier in relation to Statutory Boards in this Report are respectively restricted to those in respect of which they had a full opportunity to respond, as described.

[203] Premier Response to COI Warning Letter No 1 dated 31 August 2021 dated 31 August 2021; and T33 14 September 2021 pages 11-12.

> legal risks. It is a non-sequitur to assert that the revocation of the existing board meant that the new board could not exercise independent expertise and effective oversight of the Tourist Board's activities, as indeed they have done since their appointment. The Attorney General's advice on the constitutionality of the policy was also equivocal and in any event the revocation was not discriminatory or unconstitutional."

It is noted that responses in respect of statutory boards under the Premier and Minister of Finance where there was a discretionary power to remove members were similar, to the extent of being often word-for-word identical, to the responses of other Ministers in respect of boards in their portfolios and the response of Cabinet.

7.115 In respect of the Ports Authority, the Premier's written response adopted that earlier response, and added the following:

> "The policy was lawful and within the legitimate scope of the political government to decide. The First Schedule was not relevant to the revocation and, as far as the Premier is aware, the Attorney General certainly did not advise the Cabinet that there was no respectable argument that its policy was a lawful basis for the Cabinet's decision or even that, in his opinion, the decision was likely to be held unlawful".

7.116 In his oral evidence, the Premier accepted that he and the Cabinet were advised that the course they were pursuing may be unconstitutional[204]; but he stressed that the Attorney General's advice was equivocal in the sense that he did not unequivocally say that to remove all members of all statutory boards in the manner proposed was definitely unlawful; they wanted a definite "yes" or "no" answer from the Attorney General[205]. In the absence of unequivocal advice that it was unlawful, (i) the Premier appears to have considered it was lawful[206], and (ii) the Premier and Cabinet were prepared to proceed with the course proposed and revoke the entire appointed membership of the relevant boards[207]. If they had been advised that it was definitely unlawful, the Premier said that: "We would have stopped. Most likely we would have stopped[208]"; and he suggested that: "We would have asked [the Attorney General] to advise us on how to proceed… to achieve the government's policy and follow the advice"[209].

7.117 The Premier denied that, given what happened with the CCTF Board, even if the Attorney General's advice had been unequivocal the Cabinet would in any event have gone ahead and revoked the appointments of the boards in respect of which the legal advice as to the lawfulness of revocation was equivocal[210].

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[204] T33 14 September 2021 page 127.

[205] See, e.g. T33 14 September 2021 pages 69-71, 74, 80-86 (notably page 80), 90, 96-98, 108, 112 and 124-128 (re specifically the BVI Electricity Corporation which fell into this category); and T34 16 September 2021 pages 134-135. The point is echoed in the Elected Ministers' Closing Submissions paragraph 18. It says there that, in respect of these revocations, "the Attorney General cautioned that removing directors *en masse* could be construed as unreasonable, but Cabinet did not understand this advice to mean that it could not lawfully revoke the boards". In my view, that does not convey the true purport of the advice: the Attorney's caution was that such removal may be unreasonable in the sense of legally irrational and that, on the basis of the reasons put forward, the revocations might well be held to be unlawful.

[206] T34 16 September 2021 page 133.

[207] See paragraph 7.88 above.

[208] T33 14 September 2021 page 128. This was apparently the reason for urgency in respect of the revocation of all statutory boards.

[209] T33 14 September 2021 pages 70-71 repeated at page 79.

[210] T34 16 September 2021 pages 249-250.

7.118 The Premier said that the revocation of the Ports Authority membership was urgent, because (i) any administration only has a life of four years[211], and (ii) the Sea Trade Conference was due to take place, and he wanted certain statutory boards[212] to be coordinated for that conference as he considered the BVI were losing ground on competitors in the cruise ship business: in particular, he wished to see the chairmen of the relevant boards appointed to other relevant boards[213]. Experience and institutional knowledge would not be lost by an *en masse* removal: it would be retained in the boards by the retention of the ex officio members, usually Permanent Secretaries or their designate, who would, as a constant, overarch different administrations "so that it is one continuum"[214]. The fact that the course was not politically motivated was shown (he said) by the fact that some of the members on the boards as reconstituted had run against the VIP in the 2019 elections[215]. The Premier firmly denied that the policy to revoke and reconstitute was political at all: it was a decision designed to rejuvenate boards, get them to think differently and to save money[216].

7.119 The position of the elected Ministers on whether the revocation decision in respect of the Ports Authority was unlawful was also set out in written submissions provided on behalf of the Attorney General and dated 21 September 2021[217]. In short, the submission was that the decision to revoke was lawful because the Ports Authority Act preserves to the Government wide powers to ensure that its policy objectives are met[218]; the decision was within the scope of Cabinet's discretion subject to an obligation to act rationally[219]; Cabinet was entitled to take the view that its policy provided a sufficient basis for revocation[220]; and the Cabinet weighed relevant considerations, sought legal advice and came to a decision based on policy[221].

7.120 In respect of the CCTF Board removals, the Premier's written response was as follows:

> "The Attorney General advised the Cabinet that it must consider the effect of section 16 of the Act in which the reasons for the removal of Members of the board were clearly stated. There is no basis for the assertion that the Cabinet did not do so. The Attorney General advised the Cabinet of his 'concern' that the conditions for removal were not fulfilled. The Cabinet considered his advice and decided it was nevertheless in the interests of consistent application of its policy to accept the risk, to which the Cabinet Paper referred, that judicial review proceedings would be taken against the decision. The Cabinet was entitled to make this decision. Ministers frequently make decisions to which a high or very high legal risk is attached. In such circumstances, it is for the courts to determine whether their actions are unlawful".

[211] T33 14 September 2021 page 91.
[212] Namely the Tourist Board, the Ports Authority and the BVI Airports Authority: T33 14 September 2021 page 162.
[213] T33 14 September 2021 pages 71-73. The Attorney General, the Premier said, had advised that that could not be done by job description/post without amendments being made to the underlying statute; and so it was proposed to make those appointments by name. The Premier said that this wish to cross-appoint was behind the revoke and reconstitute policy (page 73; but he did not explain why the wish to cross-appoint required the revocation of the membership of all statutory boards, nor how it furthered the other policy goals of (e.g.) reinvigorating the boards or putting a youth representative on each board.
[214] T33 14 September 2021 pages 87-88 and 131-135.
[215] T33 14 September 2021 pages 74, 104-105 and 208-216.
[216] T33 14 September 2021 page 92.
[217] The Attorney General was asked to provide submissions on specific questions (T34 16 September 2021 pages 277-278).
[218] Paragraph 3.
[219] Paragraph 5.
[220] Paragraphs 6-7.
[221] Paragraphs 8-11.

7.121 The steps taken to amend section 16 of the Act to include a discretionary power to remove members of the CCTF Board suggest an attempt either to legitimise the earlier decision or to put in place an alternative mechanism for their removal should the unlawful decision to remove be set aside. The Premier said that the amendment was not intended to have retrospective effect[222].

7.122 However, in respect of the CCTF Board, on the face of the available documents, the Attorney General *did* unequivocally advise that to remove Board members would be unlawful unless they fell into one of the categories in section 16 of the Act. None did.

7.123 On the evidence, it is clear that (and I find that), on the Attorney General's advice, the Premier accepted that he and Cabinet appreciated the decision to revoke would be unlawful; but they proceeded with it anyway, keeping their fingers crossed that nobody challenged it by way of judicial review[223]. The Premier said that Cabinet had considered the advice of the Attorney General and, in the interest of the consistent application of the revoke and reconstitute policy, decided to accept the risk of a legal challenge notwithstanding that the advice given was, as the Premier put it, "unequivocally clear". It was put in terms to the Premier – and he accepted – that the decision was unlawful (as advised by the Attorney General), that he accepted it was and the risk faced was that the decision might be challenged[224].

7.124 Notwithstanding the clear evidence given by the Premier as to his (and his Cabinet's) understanding of the lawfulness of Cabinet's decision to revoke the membership of the CCTF Board, and that those representing his interests at the hearing did not seek to intervene to correct or clarify his evidence, a letter was received from the IRU shortly after the conclusion of the hearing[225]. That letter noted the Premier's surprise at having his evidence on the revocation of the CCTF Board described as "illegal"[226], that he did not accept that as an accurate summary of his evidence and would not accept the view.

7.125 The submissions of 21 September 2021 appear to suggest that the advice given by the Attorney General to Cabinet as regards revocation of the CCTF Board was equivocal. Rather, it was suggested that the Attorney General "did *not* clearly distinguish the [CCTF] Act from the parent acts of the other boards, which the Cabinet had recently decided to revoke, advise that there was no respectable argument that the proposed revocation in this case was lawful or explain the implications of such a course in such circumstances"[227]. In considering any possible legal basis upon which it might not be unlawful, the submission notes that there may be a "stateable case" that a Minister could rely on section 20 of the Interpretation Act – whilst accepting that such an argument lacks merit[228].

7.126 In her closing submissions, the Attorney General argued that the elected Ministers considered the advice they received to be that revocation of the CCTF Board carried a "high legal risk" rather than being "unequivocally unlawful". The submission suggests that some confusion may have arisen during the course of the Premier's evidence but that, in giving that evidence, the Premier had said that he did not consider the revocation to be "unequivocally unlawful" at the time of the decision. It was only after the decision that the then Attorney General's concern became clear[229]. The submission suggested that this increased concern can be linked to the steps taken to amend the CCTF Act.

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[222] T34 16 September 2021 pages 217-218.
[223] T34 16 September 2021 page 227.
[224] T34 16 September 2021 pages 227-229.
[225] Letter from IRU to COI dated 16 September 2021.
[226] T34 16 September 2021 page 276.
[227] Paragraph 17.
[228] Paragraphs 18-19.
[229] The Elected Government's Closing Submissions paragraphs 19-20.

7.127 The submissions made by the Attorney General on this issue were valiant; but on examination, in the face of the law and the evidence, they quickly and fatally founder. They do so on several rocks, including the following:

(i) There is no sensible argument that the executive government, in the form of Cabinet or otherwise, had any power to remove the CCTF Board members. The current Attorney General accepts that the power does not arise under section 20 of the Interpretation Act or otherwise. Had the Attorney General at the time suggested that there was an argument that such a power existed, he would have been wrong.

(ii) However, his advice that there was no such power was, in fact, unequivocal.

(iii) Furthermore, from all of the evidence looked at as a whole (particularly the evidence of the Premier looked at as a whole[230]), it is clear that the Premier understood that advice to be unequivocal. In my view, there is no doubt that the Premier and his Cabinet made the decision to remove all of the CCTF Board members knowing that they had no power to do so.

(iv) Any "risk" involved was not a risk that the course was unlawful – it certainly was – but whether the Cabinet would get away with acting unlawfully, i.e. whether they would, in fact, be the subject of a legal challenge by way of judicial review to quash the unlawful decision.

7.128 Why did they pursue this course? Two reasons have been put forward, namely (i) the Premier said that he wanted to "invigorate" the Board, and (ii) it was a plank of the policy of replacement that the new members of any statutory board supported the policy agenda of the Premier's new administration[231]. Neither of these would, of course, make the decision any less unlawful. But, in any event, no investigation was made into how the CCTF Board as constituted – relatively newly appointed itself, following the most rigorous of processes – had progressed with its work. As the proposed change to the statutory criteria for appointment showed, the Premier's intention was to remove the good governance provisions for appointment found in the CCTF Act, and replace them with discretionary appointments. Far from invigorating the Board, appointments through such a process would likely render the objectives of the CCTF far more difficult, if not impossible, to attain. As it is, the removal of the Board members has been followed by a period of almost three years of complete inertia.

7.129 Whilst the revocation of an entire board by the executive may not necessarily mean that it is logically impossible for a new board to exercise its functions independently[232], in the real world, such a revocation may be one step towards ensuring that, far from being independent of the executive, the board is stacked with those who are allies of, or will otherwise be subject to the influence of, the executive.

7.130 There can be little doubt that the Premier, and the Cabinet following him, wished to have "his own" men and women appointed to the CCTF Board. He has made his discontent known as to the position of the CCTF Fund being independent of executive government. He appears determined that it should not be. That he has not proceeded with the plan appears to have been the result of a belated appreciation that, not only is the course he proposes unlawful, but would inevitably be ineffective in the field of international climate change funding,

[230] See, e.g. T34 16 September 2021 pages 234-236.
[231] There are some other submissions made, but faintly. For example, in respect of the Ports Authority, the Attorney General now seeks to place some reliance on the strategic role of the port; but that is not something referred to in the contemporaneous documents and does not seem to have played any part in the thinking of the Premier or Cabinet.
[232] As it is submitted on behalf of the elected Ministers: see paragraph 7.114 above.

which the CCTF Board was set up to pursue. It does not appear to have been the result of an appreciation that, as a constitutional matter, interference with the independence of statutory boards is fundamentally wrong.

7.131 The approach to the removal of the CCTF Board members raises deep concerns about the lengths to which the executive will go to manipulate the membership of statutory boards. Furthermore, although the Premier said that, if the Attorney General's advice had been unequivocal as to the unlawfulness of the removal of members of those boards in respect of which the Cabinet had a power to remove (e.g. the Ports Authority), the Cabinet would (or, at least, might) not have proceeded to remove them, in my view, the approach of the Premier and his Cabinet to the CCTF Board clearly shows how it is likely they would have proceeded even if such unequivocal advice had been given. They would very likely have continued with the course upon which they were intent, and removed all of those members in any event.

7.132 There is a real (indeed, very clear) possibility that, in pursuing this course, the Premier with his Cabinet following were not only acting unlawfully (which seems all but certain in relation to, say, the CCTF Board) but also knowingly taking into account improper considerations including political allegiance. It is no answer to say – as the Premier and other elected Ministers did – that, in some of statutory boards, they reappointed individuals whose appointments they had previously revoked, or that some of their appointees had, in the past, opposed the VIP in some form or another. That represents a simplistic view of politics in the BVI, where allegiances can and do change. The policy which the Premier adopted towards new appointees was clear.

7.133 In the circumstances, I am satisfied that there is information before me that serious dishonesty in relation to public officials may have taken place; and, particularly, that the conduct in relation to the revocation and replacement of statutory board members after the 2019 election falls within paragraph 1 of my Terms of Reference.

Statutory Boards: Other Governance Issues

7.134 Given the functions undertaken by statutory boards, it is important that in seeking to optimise their financial and operational performance, they have adequate policies in place including those intended to strengthen good governance. That does not always seem to be the case.

7.135 The Auditor General's Annual Report for 2016[233], issued on 21 March 2019, records that in 2016, grants from the BVI Government to statutory boards totalled $67.5 million and accounted for 23% of the Government's recurrent expenditure[234]. Loans negotiated on behalf of statutory boards were usually guaranteed by the Government and in 2016 the contingent liability stood at $79.9 million[235]. In her report, the Auditor General noted a concern that some statutory boards had never undergone an audit review and others were three or more years behind with audits. Thus, as of the time of writing the report (2019), the Ports Authority had last been audited in 2013 and the BVI Airport Authority in 2012. When she gave evidence on 28 June 2021, the Auditor General said that the failure of statutory boards to satisfy the requirement for an annual audit remained an issue. This was particularly so with smaller entities[236].

[233] Auditor General's Report on the accounts of the Virgin Islands for the year ending 31 December 2016 (issued 21 March 2019). References in this section of the report to "the Auditor General's 2016 Report" are to this report.
[234] Auditor General's 2016 Report at page 24.
[235] Auditor General's 2016 Report at page 24.
[236] T18 28 June 2021 pages 62-65.

7.136 The FSC is an example of a statutory board which has policies in place to promote good governance. It has had a functioning policy on conflicts of interest in place since at least 2014. That policy addresses separately conflicts arising from a personal relationship, a professional relationship, a business relationship and a pecuniary interest. It is supported by "Disclosure of Private Interests Forms" applicable to both board members and FSC staff[237].

7.137 That this may not be the case with every statutory board is illustrated by the evidence of Lenius Lendor, who was the Managing Director of the Ports Authority from August 2018 to January 2020[238], and gave evidence concerning the manner in which governmental bodies leased commercial property. Mr Lendor was shown a minute of a Ports Authority Board meeting held on 31 July 2019. That recorded that the Ports Authority's General Counsel had given a presentation in which she referred to a recommendation made in 2016 by the National Risk Assessment Council that the Ports Authority should have in place policies dealing with (i) conflicts of interest, (ii) money-laundering bribery and corruption and (iii) political interference. The General Counsel, who was new to her role, informed the Ports Authority Board that these policies were still in draft. Mr Lendor said that this was still the position in 2020 when he ceased to be Managing Director[239].

7.138 Mr Lendor was also asked about the Ports Authority's lease of premises located at Pasea Place[240]. The sequence of events was as follows. Having received a quote for the leasing of this commercial space from Vernon Lake of VOP Investments Company Limited, on 25 July 2019 the Ports Authority Board agreed to lease Pasea Place from 1 August 2019.

7.139 The General Counsel was then asked to review the draft lease. She reverted to the Chairman of the Ports Authority Board on 30 July 2019 with "pre-contract inquiries/due diligence requisitions". On the following day, the General Counsel was instructed to write to VOP Investments Company limited with her enquiries. On 1 August 2019, she was instructed that the Ports Authority Board wished to proceed with the transaction as soon as possible. Accordingly, she conducted searches with the Land Registry and the Corporate Affairs Registry. In a memorandum dated 8 August 2019[241] addressed to Mr Lendor, the General Counsel raised a question as to the correct name of the lessor (having established it was VOP Investments limited and not VOP Investments Company limited) and whether it could lease the property, since it appeared to be owned by Mrs Pasty Lake. The General Counsel proposed that a number of steps be taken including confirming if any member of the Ports Authority Board or its senior management team had an interest in the transaction.

7.140 Mr Lendor described his receiving this memorandum as "very vivid in my mind". He received it late on a Friday afternoon and provided it to the Ports Authority Board. Mr Lendor said that the memorandum "didn't appear to be well received". A special meeting was convened on the Monday after the weekend. At that meeting the Ports Authority Board resolved to make the post of General Counsel, which had only existed for some eight months, redundant with immediate effect. Mr Lendor said that thereafter there was no further discussion on the memorandum[242].

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[237] Robin Gaul Position Statement paragraph 8 and appendices 1 to 3.
[238] T42 30 September 2021 page 163.
[239] T42 30 September 2021 pages 170-173.
[240] T42 30 September 2021 pages 169 and 174-179.
[241] Memorandum from N Sandiford-Francis, General Counsel to Managing Director Ports Authority dated 8 August 2019: Proposed Lease of 9,861 sq ft of office space situate at Registration Section Road Town Block 2938B Parcel 118 for the sum of $24,652.50 per month VOP Investments Company Limited to British Virgin Islands Ports Authority.
[242] T42 30 September 2021 pages 179-182.

7.141 I do not have sufficient information to determine why the Ports Authority Board took the step of making the position of General Counsel redundant. It is of course possible that this decision was entirely unconnected with the General Counsel's memorandum. But the timing is acute; and at least raises a suspicion that it may have been a curious reaction to legal advice. The wider point is whether all statutory boards have protocols in place to ensure that before they enter into a commercial lease, a due diligence exercise is performed to the same extent as that undertaken by the BVI Government.[243].

7.142 Efforts to optimise the financial and operational performance of statutory bodies are not new. I have been provided with a policy paper dated 1 June 2016 and prepared by the Macro-Fiscal Unit in the MoF[244] ("the policy paper") which discusses a framework developed by the unit to oversee the performance of statutory boards. The policy paper set out the work that had been undertaken since 2014 on developing the framework including surveys of statutory boards, preparing reports on each board and a legislative review. The Macro-Fiscal Unit had received training from CARTAC and BDO, created various databases and developed an action plan. A draft Cabinet paper had been prepared in 2014 seeking approval of the action plan[245]. The concerns over the operation of statutory boards identified in that draft Cabinet paper included delays in the provision of financial information; "no established criterion for determining suitable candidate for Board membership" meaning that these bodies "may not be performing their functions optimally"; that statutory boards were not being efficiently managed with unbudgeted operating expenditure and overspending having to be met by central government; and that central government did not have a "good grasp" as to whether statutory boards were meeting their statutory objectives.

7.143 The policy paper submitted that implementing the framework would ensure that statutory bodies were more accountable and "strengthen government's overall commitment to sound financial management, good governance, accountability, and transparency". A draft Cabinet paper was also prepared in 2016 seeking approval of the framework[246], which it seems was not put before Cabinet[247]. As an example of the capability of the Public Service to produce detailed policy initiatives, the policy paper and the work behind it is impressive. There is no evidence as to why this initiative appears to have foundered in 2016. The work of the Public Service has not been lost entirely, however, since the initiative appears to have informed the Public Service Transformation Framework[248]. The latter is itself the basis for the Public Service Transformation Programme ("PSTP"), a significant piece of reform, which I consider in Chapter 11[249].

7.144 While I have made recommendations intended to secure the success and early implementation of the PSTP, it will take some time. That success will be assisted by a more immediate piece of work. In my view, there is a need for an urgent review of all existing statutory boards to establish the extent to which they are behind in their financial reporting and the extent to which they have policies designed to promote good governance and due

[243] See paragraphs 9.21–9.22 below.
[244] State Owned Enterprises and Statutory Bodies Monitoring Framework Paper dated 1 June 2016 (Jeremiah Frett Second Affidavit dated 2 July 2021 Exhibit JF4 pages 337-350). This policy paper defines those statutory boards which have a non-commercial function as a "Statutory Body" and one which engages in commercial activity as a "State Owned Enterprise."
[245] Draft Cabinet paper: Central Government Oversight of Statutory Bodies No /2014 undated (Jeremiah Frett Second Affidavit dated 2 July 2021 Exhibit JF4 pages 379-380).
[246] Draft Cabinet paper: Central Government Oversight of Statutory Bodies and State Owned Enterprises No. /2016 undated (Jeremiah Frett Second Affidavit dated 2 July 2021 Exhibit JF4 pages 389-392).
[247] Jeremiah Frett Second Affidavit dated 2 July 2021 paragraphs 4.2-4.4
[248] Public Sector Transformation Framework at pages 8, 34 and 47.
[249] See Paragraph 11.51ff.

diligence in place. The review should identify the remedial steps that need to be taken to resolve any deficiencies. The review can be carried by an experienced and senior public officer currently in post or recently retired. I shall make a recommendation accordingly.

Conclusion

7.145 The House of Assembly assigns functions to statutory boards on the basis that such functions are better performed by bodies that are independent of the executive government. In respect of some, such as the CCTF Board, that independence is essential to their practical functioning; but, in respect of all statutory boards, the independence from executive government that has been ascribed by the legislature is constitutionally vital.

7.146 As I have described, in the BVI, the evidence is overwhelming that that independence has been severely – and, at times, cynically and with apparent disdain – eroded. As in other areas of government which the COI has looked at, the executive government appears to take the view that it can treat statutory boards as it wishes.

7.147 In my view, it is imperative that that interference ceases, and steps are taken to protect statutory boards as important, autonomous arms of government. The elected Ministers submit that, whilst they accept there are some flaws in the system of appointments to statutory boards (although not to the extent I have identified), there is "the willingness and capacity to improve the system"[250]; and they are putting in place systems, reflected in the new draft manual, which will make the system for appointments at least adequate. However, whilst I am pleased that some steps have recently been taken that, if followed through, should make the appointments process more open and transparent, the steps have been slow – with recent impetus heavily deriving from the COI's enquiries into this area, and the exposure of the patent inadequacies of the informal system for appointments. Without clear direction and decision, I am unconvinced that properly open and transparent competition for statutory board membership will be adopted in the near (or even foreseeable) future.

7.148 I will consequently recommend the following.

7.149 First, there should be a review of statutory boards, and in particular, in respect of each, the powers that are exercised by the executive government. These powers should be restricted, and clearly delineated by statute. This review could be performed by a senior BVI attorney, or a retired BVI judge.

7.150 Second, consideration should be given to providing an overriding statute that sets out the framework for all statutory boards. The results of the review I propose can of course feed into such a statute. More detailed parts of the framework can be dealt with in regulations and protocols made under the proposed Act. The regulations should provide for the appointment and removal of statutory board members, published and applicable to all such boards.

7.151 Third, in my view, as part of the Constitutional Review I propose, consideration should be given to establishing, within any new Constitution itself, a Statutory Boards Commission which would be responsible for the process of selection and revocation of statutory board membership, and the internal procedures of statutory boards including declarations of interests and conflicts of interest (at least pending effective overarching provisions in, e.g. the Integrity in Public Life Act 2021 and any new Registration of Interests legislation). Whilst this

[250] Elected Ministers' Closing Submissions paragraphs 21-23, the quotation coming from paragraph 23.

Commission could have representatives appointed by (e.g.) the Governor, Premier and Leader of the Opposition, I consider that it should have a majority of members appointed from BVI civic society through an open and transparent process.

7.152 In the meantime, there should be an overarching protocol which makes such provision. On the evidence I have seen, and without undermining, in any way, the tremendous work that is already done by many existing statutory board members, there are huge untapped resources for public service in the form of potential membership of statutory boards. The protocol must allow and encourage such people to come forward, and be given an equal opportunity for appointment. The protocol should, therefore, be based on the principles of good governance, and should include provision for (e.g.) advertisement of posts, appropriate application forms, appropriate checks, interviews before a panel including independent members, restricted circumstances in which the executive cannot proceed with the panel's recommendation, and the rights to an independent appeal in appropriate cases. The protocol should have, as a default, rolling periods of appointment, so that retirements are also on a rolling basis (even if reappointments are allowed). There should not, of course, be periods of appointment linked to the periods of a particular administration.

7.153 Fourth, given my findings in relation to the way in which revocations and appointments have been made since 2019, I am bound to recommend that consideration is given by the Governor (or any independent investigator he might appoint) as to whether further steps should be taken to ascertain whether it is necessary for any appointments made since 2019 to be revoked before their time so that appointments through a more open system can be made.

7.154 As to whether, given my findings, there should be a criminal investigation, is a matter which I leave to the appropriate BVI authorities. Given other priorities I have identified, and without detracting from the seriousness of the conduct, I do not make any positive recommendation in that regard.

Recommendations

7.155 I deal with overarching recommendations below[251]. However, with regard to the statutory boards, I make the following specific recommendations.

Recommendation B24

I recommend that there be a review of all statutory boards to establish (i) the extent to which those boards are behind in their obligations to submit timely financial reports and audits; (ii) the extent to which those boards are applying policies intended to promote good governance such as a conflict of interest policy and a political interference policy; and (iii) the extent to which those boards follow a due diligence policy. The review should be undertaken by a senior public officer and should identify what steps need to be taken to remedy any deficiencies and a timescale in which these steps should be accomplished, in the form of a report to the Governor. The review should be completed within six months.

[251] See Chapter 14.

Recommendation B25

I recommend that there be a review of the provisions under which statutory boards are established and maintained; and in particular, in respect of each, any powers that are exercised in respect of such boards by the executive government, with a view to identifying appropriate powers in statutory provision. This review could be performed by a senior BVI attorney, or a retired BVI/Eastern Caribbean judge.

Recommendation B26

I recommend that there should be an overriding statute that sets out the framework for all statutory boards. The results of the review I propose would feed into such a statute. More detailed parts of the framework can be dealt with in regulations and protocols made under the proposed Act. The regulations should provide for the appointment and removal of statutory board members, published and applicable to all such boards.

Recommendation B27

As part of the proposed Constitutional Review, I recommend that consideration is given to establishing a Statutory Boards Commission, which would be responsible for the process of selection and revocation of statutory board membership, and monitoring the internal policies and procedures put in place by statutory boards (such as declarations of interests and conflicts of interest, at least pending overarching provisions in, e.g., the Integrity in Public Life Act 2021 and new Registration of Interests legislation) intended to strengthen good governance. Whilst this Commission could have representatives appointed by (e.g.) the Governor, Premier and Leader of the Opposition, I recommend that it has a majority of members appointed from BVI civic society. Those appointments should, of course, be the subject of an open and transparent process.

Recommendation B28

I recommend that, pending such overarching provisions and as soon as practical, there should be a protocol for the appointment and removal of statutory board members, published and applicable to all such boards, which should be identified in the protocol itself. The protocol should be based on the principles of good governance, so that appointments and revocations of appointments are based on clearly expressed and published criteria. It should, therefore, include provision (e.g.) for advertisement of posts, appropriate application forms, appropriate checks, interviews before a panel including independent members, restricted circumstances in which the executive cannot proceed with the panel's recommendation, and the rights to an independent appeal in appropriate cases. It should not be necessary for it to include any residual ministerial discretionary powers. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. The protocol should have, as a default, rolling periods of appointment, so that retirements are also on a rolling basis (even if reappointments are allowed).

Recommendation B29

I recommend that consideration is given by the Governor (and any independent investigator he might appoint to consider this matter) as to whether it is necessary for any appointments to statutory boards made since 2019 to be revoked to enable appointments through a more open and transparent system to be made.

APPENDIX A

CHAPTER 8:
DISPOSALS OF CROWN LAND

APPENDIX A

DISPOSALS OF CROWN LAND

In the BVI, land is a particularly precious commodity. Due to historical and social reasons, the ownership of land as a home is particularly significant.

In this chapter, I consider the processes whereby land owned by the Crown is allocated into private ownership; and, in particular, the part played by executive discretion in that process.

Introduction

8.1 Land in the BVI is a scarce resource. The steep topography makes land suitable for development even more restricted and sought after. Furthermore, due to historical factors linked to the purchase of land by former slaves[1], particular social, cultural and symbolic importance is attached to land ownership with its attendant sense of self-reliance, identity, freedom and "belonging". Indeed, the Preamble to the Constitution recognises that the people of the BVI "have a free and independent spirit" and have developed themselves and their country based on a number of qualities including "the ownership of the land engendering a strong sense of belonging and kinship in those Islands".

8.2 About 40% of the land in BVI is Crown Land[2], i.e. land vested in the Crown for the purposes of the BVI Government[3]. Some Crown Land is assigned to a particular use, such as public parks and protected areas[4]; while other parts are available for disposal and development, residential or commercial. From time-to-time, the Crown has obtained land, previously in private ownership, with a view to making that land affordably accessible to belongers, including those in need of social welfare[5]; and the BVI Government has embarked on several land distribution and development programmes[6].

8.3 Although it is the Governor who has the formal power to dispose of Crown Land, he or she exercises that power in accordance with the recommendations of Cabinet, which makes substantive decisions on dispositions, whilst the responsibility of administering Crown Land rests with the Minister for Natural Resources, Labour and Immigration[7].

8.4 The focus of this chapter is on the processes for the disposal of Crown Land; and, in particular, upon the exercise of discretion by the Minister or Cabinet in respect of such disposals.

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[1] See paragraph 1.10 above.
[2] UN Food and Agriculture Organisation https://www.fao.org/3/y1717e/y1717e09.htm
[3] Section 41(1) of the Constitution. Land may also be identified as Crown Land by being registered as such under the Registered Land Ordinance 1970 (Cap 229) ("the Land Ordinance").
[4] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 3.3.
[5] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 14.2, 14.4, 14.10, 14.18 and 14.28. See also paragraph 1.10 above.
[6] Letter Dr Marcia Potter to the Governor dated 18 November 2020 page 1.
[7] Section 41(1) and (2) of the Constitution. In this chapter of the Report, unless otherwise appears, references to "the Minister" are to the Minister for Natural Resources, Labour and Immigration (or its predecessor, the Minister for Natural Resources and Labour: immigration was added to the portfolio of the Minister on 1 March 2019; and references to "the Ministry" are to the MNRLI (or its predecessor, the Ministry of Natural Resources and Labour).

Process

8.5 There is no published guidance or policy setting out the process for the disposal of Crown Land[8]. However, in his evidence, the Acting Permanent Secretary MNRLI Joseph Smith Abbott helpfully set out the relevant process[9].

8.6 General applications for the lease or purchase of Crown Land that does not fall within the remit of an Estate Land Committee[10] may be made at any time to the Ministry, through the Permanent Secretary[11]. Applications are generally required to be accompanied by the following information[12]:

(i) An application letter detailing the applicant's name, his or her immigration status, a preamble setting out the intended use of the land and, if applying for a particular parcel or plot of land, the parcel number, block number and Registration Section[13].

(ii) Proof of immigration status and identity of the applicant, including a copy of the applicant's passport[14].

(iii) Where the applicant is a company, copies of documents related to the business, such as a Certificate of Incorporation and the Memorandum and Articles of Association, and listings of directors and shareholders; and a copy of the proposed business plan[15]. However, the requirement to submit a business plan for commercial applications is not applied strictly by the Ministry – in some cases, a statement of intended use of purposes is considered sufficient – and, in any event, there is no prescribed format or content for a business plan[16].

(iv) Where relevant (e.g. if a commercial lease is sought), a Development Agreement between the Developer and the BVI Government[17].

(v) An Environmental Impact Assessment may be required for some forms of commercial development[18]. Any such report is prepared by the TCPD before being passed to the Ministry for consideration[19].

[8] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 6.1.
[9] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021; and his oral evidence at T48 14 October 2021 pages 6-123.
[10] See paragraphs 8.12ff below.
[11] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.7, 5.9, 5.14 and 5.16; and T48 14 October 2021 pages 20-21. Prospective applicants are able to enquire and conduct land information searches at the Lands and Survey Department to identify available Crown Land (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.5 and 5.12). However, this will not necessarily provide accurate information on the current status of all Crown Land if, for example, Cabinet has decided to grant a particular parcel of Crown Land but, pending conditions being met prior to transfer, that transfer has not yet been executed and registered with the Department.
[12] These requirements are, as a matter of practice, treated as general requirements and are not applied strictly when considering whether an application is complete and valid (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 5.6; and T48 14 October 2021 pages 67-68). Consequently, an application for the purchase of Crown Land may be considered even if some of the requirements are not met.
[13] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.3 and 5.10.
[14] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.4, 5.6 and 5.15.
[15] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.4, 5.11, 5.13 and 8.1.
[16] T48 14 October 2021 pages 65-66.
[17] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 5.4, 5.11, 5.13 and 8.3; and T48 14 October 2021 page 72.
[18] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 8.3.
[19] T48 14 October 2021 page 74.

8.7 Further, non-belongers may not own or lease Crown Land without first obtaining a Non-Belonger's Land Holding Licence, issued by Cabinet[20]. Enforcement is by way of criminal sanctions for breach.

8.8 Applications and accompanying documents are mostly held in hard copy kept on files organised by island[21]. These files are periodically reviewed by the Minister, not on any organised basis but simply at the discretion of the Minister[22,23]. The Minister chooses which applications to progress and recommend to Cabinet; but he or she consults the Permanent Secretary before making recommendations to Cabinet in the form of a Cabinet Paper[24].

8.9 A survey of the relevant parcel or plot of land should be prepared by the Chief Surveyor of the Survey Unit and form part of the Cabinet Paper[25]; and, where required, a valuation report should also go to Cabinet[26].

8.10 Cabinet then considers the Cabinet Paper, and makes a decision, which is recorded and sent to the Ministry which informs the applicant of the decision[27]. The Governor is a member of Cabinet and is the person formally responsible for signing instruments of transfer, but has little sight of Crown Land matters prior to their submission to Cabinet and is only able to raise any queries or concerns at that stage[28].

[20] Sections 3 and 4 Non-Belongers Land Holding Regulation Act 1923 (Cap 122) (as amended by the Non-Belongers Land Holding Regulation (Amendment) Act 1994 (No 6 of 1994) and the Non-Belongers Land Holding Regulation (Amendment) Act 2009 (No 11 of 2009): the 1923 Act has also been amended by other Non-Belongers Land Holding Regulation (Amendment) Acts 1998-2004, but not materially so far as this report is concerned). A company deemed to be owned by non-belongers, as defined in section 6, also requires such a licence. See also Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 9.1-9.2.

[21] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.7(b); and T48 14 October 2021 pages 20-21. This is so where the application is for a particular piece of land. Where applications are made without identifying an interest in a specific parcel or plot of land, it was not clear on the evidence how these applications are organised.

[22] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.7(c); and T48 14 October 2021 pages 21-22. Where applications are made without identifying interest in a particular plot or parcel of land, although processed in the way detailed here, there are no criteria or guidance as to which parcel of land to award to any applicant, the primary (but unpublished) consideration apparently being to allocate Crown Land assigned for particular purposes and according to the applicant's intended use of the land (T48 14 October 2021 pages 22-25 (Joseph Smith Abbott)).

[23] Disposals of Crown Land for agricultural purposes are managed by the Director of the Department of Agriculture, and it is the Minister in charge of that Department and his or her Permanent Secretary MEC who are responsible for assessing these applications. Their recommendations are passed to the MNRLI with the supporting information; and the Cabinet Paper is prepared and presented to Cabinet by that Ministry, although without any further assessment or due diligence, reliance being placed on the information and recommendations provided to it (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 10.1; and T48 14 October 2021 pages 71, 87 and 208-210).

[24] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 4.7(c) and 10.1. This aspect of the process is considered further below (see paragraphs 8.30ff).

[25] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.7(e)(ii).

[26] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 4.7(e)(iii) and 17.4(a) and (b). Valuation reports are dealt with in more detail below (see paragraphs 8.22-8.29).

[27] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.7.

[28] As emphasised by former Governor Jaspert (T52 21 October 2021 pages 61-62). He said:

> "I was concerned about the number of infractions [in relation to disposals of Crown Land], concerned that information had been not given to Cabinet…. It did, of course, raise questions. In my role, I did the best that I could to try to improve the governance around it, but ultimately it is a matter for the Minister as per the Constitution where it constrained… my ability as to what I [could] do on that matter".

One example of a disposal of Crown Land in respect of which the Governor raised concerns is Parcel 310 of Block 2938B, Road Town Registration Section (considered at paragraphs 8.59ff below).

8.11 Once the application has been approved by Cabinet, any pre-conditions of the transfer of land must be met (including those detailed in the Cabinet decision)[29]. The Attorney General's Chambers will assist with drafting the appropriate instrument of transfer. This is sent to the applicant to sign before being sent to the Governor's Office for execution by way of signature and seal[30]. The transfer of land is then recorded on the Land Register[31].

8.12 Although responsibility for the administration of the residential land distribution and development programmes has always rested with the BVI Government (and, since the advent of ministerial government, with the Minister responsible for land), the increasing demand and number of applications for land led to the establishment of Estate Land Committees, tasked with processing, assessing and making recommendations on the applications for land in a particular estate[32]. The recommendations would be made to the Minister, who in turn would make recommendations to Cabinet as above[33].

8.13 Over the years, Estate Land Committees have been active in the following principal estates namely Spooner's, Stevens, Nibbs and Long Look (all on Tortola), Coppermine and North Sound (Virgin Gorda) and Anegada. Their work appears usually to be time limited: the Committee considers applications, and makes recommendations for allocations (with the unsuccessful applicants forming a reserve list), before being disbanded. However, there have been instances where the Ministry has found it necessary to re-establish a particular Committee in order to assist with further allocations at a later date. For example, an Anegada Land Development Advisory Committee was appointed in 2008 to assist with allocation of Crown Land on Anegada, with further Committees being appointed in 2011, 2016 and most recently on 6 July 2020[34]. This is the only extant active Estate Land Committee[35].

8.14 There is no budget or funding assigned to an Estate Land Committee: all members operate on a voluntary basis[36]. Members are approved by Cabinet based on recommendations made by the Minister, each Committee typically including at least one representative of the Ministry as well as members with particular local knowledge of the particular estates[37]. The Terms of Reference for an Estate Land Committee are usually initially drafted by the Ministry, with the Committee itself suggesting amendments, and the Cabinet approving the final version[38]. The application forms used by the Committees are usually (though not always) drafted by the Ministry[39].

8.15 Applications for disposals where there is an Estate Land Committee are usually made to the Ministry, which collates them and passes them on to the relevant Committee for processing; although, in some cases (including the current Anegada Advisory Land Committee), applications are sent directly to the Committee[40].

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[29] In accordance with section 85 of the Land Ordinance: see Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 19.2.
[30] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.10.
[31] Thus, completing the transfer: Sections 83 and 85 of the Land Ordinance 1970, and Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 19.2.
[32] Letter Dr Marcia Potter to the Governor dated 18 November 2020 pages 1 and 3. Although Estate Land Committees are primarily concerned with the allocation of Crown Land for residential purposes, they are sometimes asked to consider allocation of lots for commercial and/or agricultural purposes, or for (e.g.) the expansion of the district road network which the Nibbs Estate Land Use Committee considered in 2011 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 14.7, 14.19 and 14.33).
[33] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.12.
[34] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 14.36-14.39.
[35] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 7.1.
[36] T48 14 October 2021 pages 53-55.
[37] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 7.2(h) and 14.19: T48 14 October 2021 page 53; and letter Dr Marcia Potter to the Governor dated 18 November 2020 page 1.
[38] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.3; and T48 14 October 2021 pages 52-53.
[39] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 4.12(a) and 7.3; and T48 14 October 2021 page 49.
[40] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.12(a); and T48 14 October 2021 pages 50-51.

8.16 Applications are considered by the Committee with reference to criteria they have drafted, based on its Terms of Reference[41]; and it prepares a report for the Ministry setting out its recommendations with a list of successful applicants and pricing structures (usually prices per square foot), and sometimes recommending lots it considers particularly suitable for certain applicants[42]. Restrictive covenants may be recommended (e.g. that land cannot be resold within seven years)[43]. Copies of the relevant Committee minutes are attached[44]. Cabinet considers the applications in the same way as general applications, and the process following a Cabinet decision is also similar[45].

8.17 Unsuccessful but eligible applicants are placed on a deferred or reserve list[46].

8.18 Once an Estate Land Committee is terminated, any applications for land within that particular estate are sent directly to the Ministry for consideration[47]. There are two particular circumstances in which this might occur, namely (i) if grants of land approved by Cabinet are later revoked (e.g. as a result of default on payments[48]), and (ii) where a successful applicant wishes to re-dispose of land awarded to them[49]. Where grants of land are later revoked, the applicants may be placed on the reserve list[50].

8.19 When applications are received by the Ministry in respect of Estate Land after the Estate Land Committee has been disestablished, whilst these are treated as general applications, it is open to the Minister to consider an allocation to a person on the reserve list produced by the Estate Land Committee, although he or she is not bound to do so: recommendations for allocations may also be suggested by the District Representative for the district where the relevant estate is or by Cabinet in its discretion[51]. When the Minister does consider those on a reserve list, he or she may look to the original Estate Land Committee's criteria as a guide, although this is not mandatory and may not be practicable[52]. The Minister appears routinely to make a selection on the basis of unpublished, discretionary, subjectively-based criteria[53]. For example, in considering allocations of land within the Spooner's Estate in 2019, the selection of applicants was based on the applicants' number of dependents, access to land, and inability to qualify for a loan due to limited income[54]. These factors broadly reflect the original criteria used by the Spooner's Estate Land Advisory Committee in 2007. However, in his oral evidence given to the COI, the Minister Hon Vincent Wheatley said that, from those who met the criteria he set, successful applicants were selected randomly and/or on recommendations from his colleagues[55]. The Minister appears to exercise a discretion which is effectively unfettered.

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[41] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 7.2(d) and 14.2-14.3.
[42] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 4.12(a), 7.4 and 14.22.
[43] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.19.
[44] Letter Dr Marcia Potter to the Governor dated 18 November 2020 page 2.
[45] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 4.12(d) and (e); and Letter Dr Marcia Potter to the Governor dated 18 November 2020 page 2.
[46] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 7.5.
[47] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.17; and T48 14 October 2021 pages 58-60.
[48] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 7.5 and 14.16.
[49] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.19; and T48 14 October 2021 pages 112-114.
[50] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 7.5. This appears to have been the case with 14 applicants granted land within the Spooner's Estate who had their grants revoked and were placed on the deferred list (Cabinet Memorandum No 440/2019 Revocation of Land in Spooners Estate dated 7 January 2020).
[51] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.17; and T48 14 October 2021 pages 58-59.
[52] For example, one of the criteria used by the Spooner's Estate Land Advisory Committee in 2007 was to allocate land to BVIslanders residing in the BVI with minor children. When 14 grants of land within the Spooner's Estate became available in 2019, assessing the reserve list against the original criteria ran across the issue that applicants that had satisfied the criteria in 2007 on the basis that they had minor children, no longer qualified in 2019 as those children were no longer minors (Spooner's Estate Advisory Land Committee Report dated 18 May 2007; and Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.11).
[53] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 13.1-13.3; and T48 14 October 2021 pages 178-186.
[54] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.17.
[55] T48 14 October 2021 pages 183-186.

8.20 Where there are conditions imposed on the sale or the lease of Crown Land, it is the responsibility of the Ministry to monitor compliance. Conditions may include, for example, the payment of rent or a covenant prohibiting the resale of the property within a specified period of time[56].

8.21 However, the evidence suggests that the monitoring of compliance is less than optimal, and somewhat poor. Hon Vincent Wheatley said, that although the failure of leaseholders to pay rent for Crown Land was prevalent, research would need to be done to gauge the extent of the issue[57]. Where failure to comply with the conditions is identified, there appears to be a lack of effective enforcement[58].

Valuation

8.22 Historically, valuation reports have generally not been required for residential disposals because most residential disposals took place as part of a land development and distribution programme where sale prices below market price were used to enable and encourage land ownership by belongers[59].

8.23 Where an Estate Land Committee is involved, then the primary consideration is for the Committee to recommend a sale price, based on local knowledge and circumstances, which is affordable for belongers[60]. Thus, the fee for grant for disposal of plots in the Long Look Estate in the 1960s was $25, which rose over time to $150: in Anegada in 2003 a rate of $1 per half acre was used; for North Sound plots, a rate of $500 (about $0.05 per sq ft) was used in 1986 and 1989, increasing to $0.25 per sq ft for residential disposals (and $0.50 for commercial disposals) in 2014; and in 1998 the Stevens Land Subdivision Committee set a rate of $1 per sq ft for residential disposals (and $1.20 per sq ft for commercial disposals), whilst Cabinet approved rates for Stevens Estate Land of $0.70 and $0.90 respectively in 2003 and considered $1 per sq ft for residential disposals appropriate in 2019[61]. Prices for residential disposals to belongers that fall outside the remit of an Estate Land Committee are sometimes based on the Spooner's Estate model[62].

8.24 In February 2021, Hon Vincent Wheatley made it a requirement that valuation reports be prepared for all residential applications, and submitted to Cabinet as part of the relevant Cabinet Paper. These are not used to determine sale or rental prices, but rather to allow the Ministry and Cabinet to calculate and take into account the cost of the policy (i.e. the difference between the market value and the disposal price)[63].

[56] T48 14 October 2021 pages 14-16.
[57] T3 7 May 2021 pages 88-90.
[58] For example, see the revocation of 14 grants at Spooner's Estate for failure to make payments. In respect of one parcel of land, there is evidence that the leaseholder did not make relevant payments for at least four years (Memorandum Permanent Secretary Ministry of Natural Resources and Labour to the Attorney General dated 4 July 2011) (undated bundle of documents disclosed by Ms Maya Barry page 192).
[59] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 17.1-17.2.
[60] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.5.
[61] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 17.5-17.10.
[62] T3 7 May 2021 page 67 (Joseph Smith Abbott). As Estate Land Committee recommendations are based on the history and characteristics of the land in the particular estate as well as the circumstances of the local applicants, the justification for applying this model to other Crown Land is not entirely clear: but, broadly it represents the adoption of an enabling approach.
[63] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 17.3 and 17.13; and T48 14 October 2021 pages 105-107.

8.25 Valuation reports have been required for commercial applications since the 1970s[64], although it seems that, in practice, valuation reports are sometimes not prepared prior to consideration of Cabinet. In some cases, the Cabinet decision has made a valuation report a pre-condition of the transfer of land.

8.26 However, even where a valuation report is prepared, there is no set policy or guidance and no consistent practice as to how the valuation should be applied.

8.27 For example, in December 2020 Hon Vincent Wheatley presented to Cabinet a paper seeking approval of a lease of 1.289 acres of Crown Land at Paraquita Bay for the purposes of the commercial production of eggs[65]. An independent valuation report was attached, which gave a market value for the property for these purposes of $75,000[66]. The rent amount ultimately determined by Cabinet was $750 per annum, calculated as one percent of the appraised market value in the valuation report[67]. In determining that rent, the Cabinet referred to the following "precedents":

(i) A 25-year lease of 4.69 acres of Crown Land for agricultural purposes dated 20 May 1996 for $5 per acre (i.e. $23.45) per year with rent reviews to "be assessed at 1% of the value of the land"[68].

(ii) In 2018, Cabinet approved a 15-year lease of three acres of Crown Land at Paraquita Bay for commercial agricultural purposes. The valuation report prepared for this application concluded the annual rental market value for the property for these purposes was $43,000[69]. The proposed tenant, however, made a counteroffer of $2,400 per annum[70], which was accepted by Cabinet[71].

(iii) Earlier in 2020, Cabinet approved a 15-year lease of 1.289 acres of Crown Land also at Paraquita Bay for commercial poultry[72]. There was no valuation report. In determining the rental rate, the Cabinet paper asked Cabinet to consider a "subsidy" similar to that awarded to the tenant in 2018. As the rental amount was then $2,400 per annum for three acres of land, the rental amount recommended for 1.289 acres was $800 per annum. Cabinet approved the recommendation agreed to the rental amount of $800 per annum[73].

8.28 In calculating $750 per annum rental, Cabinet appears to have considered the 1996 lease as a precedent amounting to a policy for applying a rate of 1% of the value of the land[74]. However, Hon Vincent Wheatley was unable to explain the policy, or why a policy was still being followed almost 20 years after it is said that it was first applied without having been reviewed. Indeed, the former Financial Secretary Glenroy Forbes accepted that:

> "Perhaps it is high time that Government review and modernise its leasing policy of Crown properties.[75]"

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[64] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.12. With respect to agricultural applications, the practice is less clear; but where commercial agricultural applications are made, valuation reports seem generally to be required as with applications for land for other commercial development.
[65] Cabinet Memorandum No 480/2020 "Lease of Crown Land at Paraquita Bay for Agricultural Purposes – Daniel Cline Poultry Farm" dated 4 December 2020.
[66] Smiths Gore BVI Limited: Appraisal Report for Parcel 145, Block 3238B, Long Look Registration Section dated 12 November 2020.
[67] Cabinet Memorandum No 480/2020 paragraph 18; and Expedited Extract 12 February 2020.
[68] Lease Agreement dated 20 May 1996 (Instrument No 2219/2001).
[69] Smiths Gore BVI Limited: Market Rent Report dated May 2018.
[70] Letter John Cline to Permanent Secretary MNRLI Ronald Smith-Berkeley dated 26 June 2018.
[71] Recorded in Expedited Extract dated 28 November 2018.
[72] Cabinet Memorandum No 56/2020 dated 12 February 2020.
[73] Record of Cabinet Decision dated 19 February 2020.
[74] Cabinet Memorandum No 480/2020 paragraphs 11-18.
[75] Cabinet Memorandum No 56/2020 dated 12 February 2020.

> "A review and modernisation of leasing policies for Crown properties should occur with the view of amending existing leases to ensure that rent is closer to market value."[76]

8.29 There is also no consistent approach as to who bears the cost of any valuation report: in some cases, the applicant is required to pay the fee[77], whilst in others, the BVI Government covers the cost[78].

Assessment of Applications

8.30 Although any Estate Land Committee will make recommendations, the Minister (in consultation with his or her Permanent Secretary) is responsible for assessing applications for Crown Land and making recommendations to Cabinet[79].

8.31 There are no published or set criteria or policies that are used in such assessments[80]. Rather, there is an unfettered discretion. It seems that, sometimes, the Minister will take into account criteria used by Estate Land Committees as a rough guide, and each Minister will apply his or her considerations based on the economic, social and political agendas of their respective administration[81]. For example, the current Minister Hon Vincent Wheatley has imposed the following requirements in respect of applications for Crown Land for residential use; the applicant must:

(i) be a first-time homeowner;

(ii) have a genuine intention to develop the property for residential use within a reasonable time; and

(iii) be able to demonstrate an ability to develop the property for residential use, e.g. by showing that he or she has the necessary financial means[82].

8.32 However, there is no general due diligence process conducted by the Ministry, in respect of either residential or commercial applications. For example, the provision of financial information is not itself a requirement and, despite requirement (iii) above, it is not generally sought[83]. Further, where any due diligence is carried out, there are no parameters prescribed as to what should be covered or the stage at which steps should be taken[84]. The evidence suggests that, at least, this may lead to delays or disruption to transfers[85].

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[76] Cabinet Memorandum No 529/2020 dated 22 December 2020.
[77] See, for example, Expedited Extract for Cabinet Memorandum No 529/2020 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 pages 927-929) paragraph (c).
[78] See, for example, Cabinet Memorandum No 480/2020 paragraph 22.
[79] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 10.1.
[80] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 11.1 and 13.1.
[81] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 11.2-11.3 and 13.3; and T3 7 May 2021 pages 73-77 and T48 14 October 2021 pages 91-93
[82] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 11.2 and 12.2-12.3. Whether a company has the resources to develop the land is also a consideration used in assessing commercial applications (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 11.3).
[83] T48 14 October 2021 pages 88, 95-96 and 151.
[84] T48 14 October 2021 pages 23 and 45-46.
[85] For example, the lease of Crown Land to Pond Bay Development Corporation Limited which was struck off after a Cabinet decision to grant a lease of Crown Land to it (see Cabinet Memorandum No 531/2020: Lease of Crown Land on Virgin Gorda to Pond Bay Development Corporation Limited dated 22 December 2020).

8.33 Equally, there are no published or set criteria or policies in respect of the exercise of discretion by Cabinet when considering disposals of Crown Land[86].

8.34 The Ministry is understood to be reviewing the framework, mechanisms and overall governance of Crown Land with a view to bringing the management of Crown Land within a statutory framework. This has been, at least in part, as a result of encouragement of former Governor Jaspert, who pressed for issues of governance in relation to Crown Land disposals to be addressed. In his evidence, Hon Vincent Wheatley said:

> "The Ministry is in the process of producing guidelines to applicants for publication and has noted the suggestions of the former Governor made in his letters to me and to the Ministry dated 16 November and 18 December 2020. We will also consider producing guidelines for the Ministry and Cabinet"[87].

In his letter dated 16 November 2020, Governor Jaspert requested that comprehensive guidelines be put in place to provide a benchmark for those involved in decision making in respect of Crown Land disposals, and to serve as an aid for the Attorney General's Chambers when providing relevant legal advice[88]. In his letter dated 18 December 2020, he reiterated the need for comprehensive guidelines and, in particular, criteria for use by the Minister when using discretion to assess applications for Crown Land[89].

8.35 The lengthy background to this initiative is, briefly, as follows[90]:

(vii) The Virgin Islands Land and Marine Estate Policy ("the 2018 Land Policy") addresses land administration and management, including sustainable land management and natural resource management within the BVI[91]. In particular, it sets out the need for a National Physical Development Plan ("the NPDP") under a suitable Natural Resource Management Framework and wider National Development Plan ("the NatDP"), as well as the need for a Crown Land Management Plan.

(viii) At the time of drafting of the 2018 Land Policy, the NPDP was being finalised; and it is currently in use[92]. The NPDP sits parallel to the wider NatDP, which has been developed pursuant to the Sustainable Development Goals[93]. The NPDP sets out where certain areas of land (including Crown Land) have been assigned for particular purposes (e.g. tourism, residential, protected areas). However, these designations are not binding, and applications for other uses may be negotiated in liaison with the Planning Authority[94].

(ix) With respect to Crown Land specifically, the 2018 Land Policy found that "there exists no Management Plan to provide for the sound and sustainable acquisition, distribution and use of Crown Lands" and recommended the following policy option:

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[86] As in other areas, the evidence also suggests that Cabinet Papers concerning disposals of Crown Land are frequently not available to Cabinet members two working days before the relevant Cabinet meeting as required by 4.11 of the Cabinet Handbook. It is, therefore, questionable whether Cabinet members are afforded adequate time to consider the recommendations for Crown Land disposals submitted to them.

[87] Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021 page 2 paragraph b.

[88] Letter Governor Jaspert to Hon Vincent Wheatley dated 16 November 2020.

[89] Letter Governor Jaspert to Permanent Secretary MNRLI Dr Marcia Potter dated 18 December 2020.

[90] T48 14 October 2021 pages 25-43 (Joseph Smith Abbott).

[91] The Virgin Islands Land and Marine Estate Policy was developed in 2018 as part of the BVI's participation in an EU-funded Global Climate Change Alliance Project with technical assistance from the Organisation of Eastern Caribbean States ("the OECS") as part of the OECS Project for Island Resilience.

[92] T48 14 October 2021 pages 31-32.

[93] T48 14 October 2021 page 35.

[94] T48 14 October 2021 page 25.

> "Enact legislation that requires the Ministry… to develop and implement a comprehensive Crown Lands Management Plan, including plans for the short and long-term suitable uses of Crown Lands within the framework of a wider [NatDP], and the identification of additional Crown Lands that are required for essential public purposes. The Crown Lands Management Plan should include plans for the acquisition and disbursement of Crown Lands, and define sustainable financing mechanisms for Crown Land acquisition and the creation of a Land Bank."[95]

The 2018 Land Policy gave an implementation start date of 2019-20 for this policy option. It is understood that the Crown Land Management Plan is still under development by the Ministry[96].

(x) In parallel with the 2018 Land Policy, in 1996 a paper was presented by the Minister to the Executive Council recommending that it adopt certain policies for the future management and administration of the seabed, including that belonging to the Crown ("the 1996 Marine Estate Policy")[97]. This policy was updated and developed into the Marine Estate Administration Policy in 2020[98]. This provides policy and operational guidance related to the issuance of licenses, permits and leases for the seabed and other marine estate matters. On 24 June 2020, Cabinet approved this policy, and instructed the Attorney General's Chambers to vet a draft Virgin Islands Marine Estate Administration and Coastal Zone Management Bill for submission to Cabinet for approval[99].

(xi) Further, Hon Vincent Wheatley said that the Ministry intends to produce a Land Distribution Programme to be part of the upcoming budget[100]. He said that this would deliver a mechanism for the disposal of Crown Land within broader policy objectives[101].

(xii) In developing the various policies and framework concerning Crown Land, the Ministry is also considering other matters such as the role of Estate Land Committees[102] and the consolidation of information concerning disposals of Crown Land that is currently spread across government departments[103].

This is a work in progress.

8.36 The Ministry has identified two particular issues as needing to be addressed.

8.37 First, there is the issue of a belonger obtaining Crown Land at a heavily subsidised price (usually through an Estate Land Committee programme), and then making a windfall profit on an onward sale of that property ("flipping")[104]. Mr Smith Abbott said that the Ministry has recently begun to take steps to address this issue. For example, the original Terms of Reference for the new Anegada Advisory Land Committee included the following recommended condition of transfer in an effort to avoid abuse of the process:

[95] Virgin Islands Land and Marine Estate Policy at paragraph 3.1.
[96] T48 14 October 2021 pages 36-38.
[97] Executive Memorandum No 133/96: Policy for Management and Administration of the Marine Estate dated 14 May 1996.
[98] Marine Estate Administration Policy; and T48 14 October 2021 pages 32-34. The version of the Marine Estate Administration Policy provided to the COI is recorded as having been last revised on 16 July 2021.
[99] Expedited Extract for Cabinet Memorandum No 222/2020 dated 24 June 2020.
[100] Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021 paragraph n.
[101] T48 14 October 2021 page 188.
[102] T48 14 October 2021 pages 38-42.
[103] T48 14 October 2021 pages 42-43.
[104] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.20; and T48 14 October 2021 pages 111-113.

> "Additionally, after seven (7) years of ownership, if persons wish to part with possession of said land, the land must remain in the possession of a member of the family household. They will be required to refrain from selling and to seek other options i.e. leasing, renting, or transfer to a relative of the same family line, whichever is possible"[105].

8.38 Second, there have been many cases where there has been a disposal of Crown Land for an agreed development (whether residential or commercial) but that development has not in the event been carried out, even years after the transfer of the land has been executed. This leaves the land undeveloped, and prevents it from contributing to the BVI economy as intended[106]. To address this, the Ministry has begun to consider whether the ability of the applicant to develop the land should not be a formal criterion when considering applications for Crown Land[107]. As explained above[108], however, this criterion is not yet fully developed.

8.39 Outside this general and loose framework, the Cabinet may award Crown Land at its own discretion in recognition of a particular achievement or to fulfil a particular policy objective[109]. There are no criteria by which such an achievement or policy objective is judged: this is left solely to the discretion of the Cabinet[110].

8.40 For example, Chantel Malone won a Gold Medal in the Women's Long Jump event at the Pan American Games in 2019. In recognition of this achievement, the Premier made a request to the Ministry to grant her a parcel of Crown Land. Following the presentation of a Cabinet Memorandum, Cabinet determined to award the freehold interest in a parcel of Crown Land within the Spooner's Estate Development Subdivision measuring 0.4775 of an acre for the sum of $1. If sold, the value of the land on resale was estimated at $20,800[111].

8.41 Discretionary recommendations may also be made by District Representatives for disposals of Crown Land in their District where a previously-functioning Estate Land Committee is no longer in place[112].

8.42 For example, in the case of the Spooner's Estate, the Spooner's Estate Advisory Land Committee submitted a report dated 31 May 2007 to the Ministry. On 20 September 2007, the Second District Representative used the same criteria as the Committee to recommend allocations to a further 74 persons who should have been part of Phase I of the distribution, and to recommend four persons to be placed on the supplementary list of the Phase I distribution. The recommendations of the Committee and the Second District Representative were approved by Cabinet and recorded in Cabinet Memorandum No 185/2008 on 5 June 2008[113].

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[105] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 17.19.
[106] T48 14 October 2021 page 151.
[107] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 11.3 and 12.2-12.3.
[108] Paragraphs 8.34-8.35.
[109] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 4.3(c).
[110] T48 14 October 2021 page 57.
[111] Cabinet Memorandum No 26/2020 dated 4 February 2020 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 pages 121-130).
[112] Letter Dr Marcia Potter to the Governor dated 18 November 2020 page 3; and T48 14 October 2021 pages 57-59.
[113] Cabinet Memorandum No 185/2008 dated 5 June 2008 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 page 338); and Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraph 14.14.

Disclosure in relation to Crown Land Disposals

8.43 Therefore, in respect of disposals of Crown Land there is a distinct lack of guidance, and much depends on the exercise of effectively unfettered discretion by the Minister and Cabinet. In those circumstances, as part of the Inquiry, I was anxious to have evidence as to how the process worked in practice.

8.44 That proved extremely difficult to obtain. The fact that the decision making process is essentially discretionary, and often not recorded, made the task in any event challenging. But the manner in which disclosure was given by the BVI Government through the IRU made anything like full investigation impossible. The disclosure obtained was the result of the hard work and persistence of the COI team, and, even then, the results were usually scant and often incomplete. This can be illustrated by the disclosure sought in respect of a single plot, namely Parcel 310 of Block 2938B, Road Town Registration Section ("Parcel 310").

8.45 On 9 March 2021, the COI sent a letter to the Minister Hon Vincent Wheatley requesting information regarding Crown Land. Amongst other things, as Question 2, the letter asked for "details of all disposals of Crown Land (including the disposal of a lease or other interest in the land) in the last 3 years to date including the papers upon which the BVI Government made the decision to dispose including all valuations relied upon and the rationale for the disposal"[114]. The Minister failed fully to comply with that request. An undated memorandum was sent to the COI, apparently specifically produced in response to the COI request, which listed disposals, and identified (but without disclosing copies of) the relevant Cabinet Memoranda, including three apparently in respect of Parcel 310[115]. Expedited Extracts of Cabinet decisions concerning Crown Land were disclosed, but no other documents.

8.46 Following the oral evidence concerning Crown Land given on 7 May 2021 by the Permanent Secretary for the Ministry at the time (Dr Marcia Potter) and Hon Vincent Wheatley, the COI sent a letter dated 10 May 2021 asking them to provide, amongst other information, the following:

> "A full response to question 2. As you both acknowledged without hesitation, there had been a failure to respond properly to this aspect of the request. The response as disclosed comprises a table found in an undated Memorandum prepared for the purpose of responding to the request… and a number of Expedited Extracts of Cabinet decisions. While the Commissioner has in mind Dr Potter's evidence that some of the relevant documents may be held in hard copy in another building, he notes, as you both agreed, that a significant number of the items listed in the table occurred at a time when the Excotrack system was in use. It should be possible to more easily retrieve the documents relating to those transactions"[116].

[114] Letter of Request No 2 to the Minister for Natural Resources, Labour and Immigration dated 9 March 2021.
[115] Undated memorandum from the Ministry with the outline response to the COI Letter of Request No 2 to the Minister. The Cabinet Memoranda that appeared to relate to Parcel 310 were (i) Cabinet Memorandum No 396/2019: Application to Lease Parcel 310 of Block 2938B, Road Town Registration Section – Bevis Sylvester; (ii) Cabinet Memorandum No 29/2020: Amendment – Application to lease Parcel 310 of Block 2938B, Road Town Registration Section – Bevis Sylvester; and (iii) Cabinet Memorandum No 386/2019: Sale of Crown Land – Nature's Way Limited. None was dated.
[116] Letter COI to Hon Vincent Wheatley and Dr Marcia Potter dated 10 May 2021.

8.47 Over the period 18-24 May 2021, further disclosure was given by the IRU, including various Cabinet papers in respect of the disposals listed in the undated memorandum. The disclosure was disorganised, and (for example) did not make clear which appendices related to any particular Cabinet Memorandum. Following a further request, the disclosure was re-sent on 15 July 2021 in a more coherent form.

8.48 Meanwhile, on 26 June 2021, the COI requested an affidavit from, or on behalf of, the Minister in respect of disposals of Crown Land and, in particular, it asked for details of 13 sample disposals taken from the list provided in the earlier memorandum, as follows[117]:

> "Taking each disposal in turn, please set out the process, to date, which was followed in dealing with these individual matters… your affidavit should exhibit all relevant documents, including, but not limited to:
>
> 1. Relevant law and written policies/ procedures.
> 2. Details of any policy (published or otherwise) that is in place for the monitoring and management of the transfer or lease of Crown Lands.
> 3. Pre-application, application and post-application correspondence (formal and informal) between the BVI Government (including your Ministry and any departments and public bodies/authorities that fall under its remit such as the Land and Survey Department) and applicants in relation to the lease or sale of Crown Land.
> 4. Details of and all documents upon which the BVI Government (including your ministry) relied upon in making decisions to approve leases or sales of Crown Land, including how multiple applications were analysed and decided.
> 5. Cabinet papers, memorandums (including annexes), minutes and the record of any decision made if published in a form other than approved minutes.
>
> …
>
> 6. Any and all contracts of sale and lease agreements between the BVI Government and the applicants".

One of the sample disposals listed in this request was that of Parcel 310. The request required the affidavit to be lodged by 7 July 2021.

8.49 In response to this request, the Acting Permanent Secretary Joseph Smith Abbott provided an affidavit dated 2 September 2021[118]. At the outset of the affidavit, he indicated some of the challenges he had met in giving the disclosure sought:

> "I have served in this capacity since 17 May 2021. The statements made in this Affidavit derive from information and documents reviewed during the course of my role as Acting Permanent Secretary, and are true to the best of my knowledge, information and belief.
>
> …
>
> I should explain that in searching for documents during the preparation of this affidavit, my team in the Ministry have encountered significant challenges. The basement of the Ministry's previous offices at the Ralph T O'Neal Administration Complex at Road Town, Tortola were flooded during the hurricanes of 2017. All archives held in the basement were therefore lost. The Ministry did not have

[117] Letter of Request for an Affidavit COI to the Minister dated 26 June 2021.
[118] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021.

a complete electronic archive. Therefore, the electronic record is only partial. Further, in August 2020 the Ministry relocated to its current offices at the Pusser's Building (Lower Estate). During the process of relocation, the Ministry's surviving historic files were placed in a restored pool of documents which has proved hard to use as there is no index and the software with which it was scanned does not facilitate easy searches"[119].

8.50 With respect to Parcel 310, Mr Smith Abbott set out, at some length, the history of the matter as he had it pieced together from the documents he had found, which he exhibited[120]. This described disputes over Parcel 310 between a company called Nature's Way Limited ("Nature's Way") (a company incorporated in 1992, of which Mrs Joan Penn was the owner and Managing Director) and Mr Bevis Sylvester, which was resolved by (i) Nature's Way being sold another parcel of Crown Land (namely a 0.33 acre plot known as Parcel 251, Block 2837E, Road Town Registration Section ("Parcel 251")) valued at $600,000 for $1, and (ii) Mr Sylvester being granted a 50-year lease of Parcel 310 for an annual rent of $800 per year. Both arrangements appeared to be at least generous towards the named protagonists: the sale price of Parcel 251 was nominal, and the Minister readily accepted that the rent for Parcel 310 was well below the market rent. Neither the affidavit nor the accompanying supporting documents in the exhibit made any mention of the involvement of Delta Petroleum (BVI) Limited ("Delta Petroleum") in this matter. Mr Sylvester is the Regional Director of Delta Petroleum.

8.51 In parallel with this disclosure given by the Ministry, on 18 June 2021 the COI obtained disclosure concerning Parcel 310 from the Governor's Office. This revealed the involvement of Delta Petroleum in the matter, including an expulsion notice addressed to Delta Petroleum in respect of Parcel 310 dated 18 January 2019.

8.52 On 21 September 2021, the COI wrote a Warning Letter to the Minister Hon Vincent Wheatley setting out potential criticisms which appeared to arise from the evidence obtained in respect of Crown Land disposals generally and the circumstances of Parcel 310 in particular[121]. The date for submission of a written response was 28 September 2021, ahead of the COI hearing on the topic of Crown Land, which had been fixed for 1 October 2021 at which (the letter said) the Minister would be called to give oral evidence. On 28 September 2021, the IRU, on behalf of the Minister, sought an extension to lodge the written response until 29 September 2021, which I granted that same day. On 30 September 2021, the Minister through the IRU requested a further extension, and, later that same day, provided a response to the warning letter and an accompanying bundle of supporting documents[122]. This response included some documents and information pertaining to Parcel 310 not previously disclosed to the COI, but the disclosure did not, even yet, appear to be complete. Given the late submission of the response hours before the proposed hearing, and the disclosure of new and apparently

[119] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 2 and 2.3.

[120] Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 23.93-23.119 and Exhibit JSA6 pages 1084-1144.

[121] COI Warning Letter No 3 to Hon Vincent Wheatley dated 21 September 2021. On that same day, the COI also wrote warning letters to the Cabinet and to Mr Smith Abbott as the Acting Permanent Secretary for the Ministry. The response of the IRU was as follows:

"Mr Smith Abbott has read and agrees with the Minister's Response, and does not intend to submit a separate response" (Email IRU to COI dated 30 September 2021).

"In relation to the Commissioner's request below regarding any response from Cabinet in relation to the Warning Letter it received on the subject of Crown Lands, we are instructed that the Government had insufficient time to coordinate a separate response from the whole of the current Cabinet, and it is anticipated that in any event Cabinet would have little to add to the Minister's Response on this topic" (Email IRU to COI dated 1 October 2021).

[122] Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021, and accompanying bundle of documents.

incomplete evidence in support of the response, I reluctantly rescheduled the COI hearing on Crown Land to 14 October 2021. At that hearing, it was intended to take evidence from Hon Vincent Wheatley and Mr Smith Abbott[123].

8.53 On 2 October 2021, the COI wrote to the Minister requesting full disclosure by 7 October 2021. On 7 October 2021, the IRU wrote to the COI requesting an extension until 8 October 2021, which I granted that same day. The Minister through the IRU provided further disclosure dated 7 October, but it was not in fact sent to the COI until 9 October (the signed version being sent on 10 October 2021). Once again, this disclosure provided information and documents (in particular, concerning the involvement of Delta Petroleum) not previously disclosed to the COI.

8.54 On 7 October 2021, the COI also wrote to Mr Bevis Sylvester to request information and/or documents concerning Delta Petroleum and Parcel 310[124]. Mr Sylvester was also summoned to give evidence to the COI at a hearing on 15 October 2021. He declined to comply with the summons[125]. Subsequently, on 22 October 2021, the COI asked Mr Sylvester to provide an affidavit on these matters by 5 November 2021. On 5 November, Mr Sylvester's legal representatives requested an extension until 10 November 2021, which I granted. Mr Sylvester's affidavit and accompanying exhibit of supporting evidence was received by the COI on 10 November 2021[126].

8.55 On 10 November 2021, the COI wrote to Ms Maya Barry of the Attorney General's Chambers, who had provided legal advice to the Ministry in relation to Parcel 310, summoning her to attend a hearing on 24 November 2021 and requesting disclosure and an affidavit in relation to Parcel 310 by 17 November 2021. Ms Barry responded the same day, saying that she would be unable to attend the hearing on 24 November 2021 because she was attending a close family relative's funeral out of the jurisdiction; and she asked for an extension of time to produce an affidavit until 30 November 2021.

8.56 On 17 November 2021, Ms Barry provided her written response to the request for disclosure, which included the following:

> "In the course of searching for the notes relating to the advice referred to in paragraph 3(c), files of the [Ministry] which touch and concern Parcel 310 were found at Chambers.
>
> These files should have been disclosed to the COI by the [Ministry] when the said Ministry was served with a request for disclosure but it appears that unbeknownst to both the Ministry and these Chambers, the said files were with Chambers"[127].

Ms Barry confirmed that she would send the files to the COI through the IRU, and the IRU sent the files to the COI on 22 November 2021. This disclosure included evidence not previously provided to the COI, primarily concerning the involvement of Mrs Joan Penn and Nature's Way in this matter.

8.57 Ms Barry's letter of 17 November 2021 said that she recollected attending one meeting at which Parcel 301 was discussed, attended by Hon Vincent Wheatley and Mr Smith-Berkeley. She could not recall the date, except to say that she thought it was between March and September 2019. She gave no indication of recalling what advice she might have given. In the

[123] The hearing duly took place that day, and both the Minister and Mr Smith Abbot gave evidence on issue of Crown Land including Parcel 310 (T48 14 October 2021).
[124] Email COI to Bevis Sylvester dated 7 October 2021.
[125] Email exchange between COI and McW Todman & Co dated 7-12 October 2021.
[126] Bevis Sylvester Affidavit 10 November 2021 and Exhibit.
[127] Letter Maya Barry to COI dated 17 November 2021.

event, she did not produce an affidavit by 30 November 2021, but did so two months later on 2 February 2022, well after time for evidence had closed, as the result (she said) of pressures at work and at home[128].

8.58 Further to the oral evidence from the Minister and Mr Smith Abbott at the hearing of 14 October 2021, on 5 November 2021 the IRU for the Ministers applied to the COI to rely on an affidavit from Ronald Smith-Berkeley concerning Parcel 310[129]. Mr Smith-Berkeley was the Permanent Secretary at the Ministry from 2 May 2011 to 6 September 2019. On receipt of this evidence, I considered it necessary to hear oral evidence from Mr Smith-Berkeley, which he gave at the hearing on 24 November 2021.

Parcel 310

8.59 Having dealt with the unhappy (but, regrettably, not untypical) tale of disclosure in relation to Parcel 310, I now turn to consider what that evidence revealed.

8.60 As indicated above, in late 2019, on the recommendation of the Minister Hon Vincent Wheatley and with Cabinet approval, Parcel 310 was leased by the BVI Government to Bevis Sylvester on a 50-year lease at considerably below the market value. Whilst the position with regard to that parcel appears to have been clear and straightforward by late 2019, the Minister justified this arrangement by reference to a dispute over the parcel. It is, therefore, necessary to deal with the history of that dispute in some detail.

8.61 On the basis of the evidence before the COI, as detailed above, the background and chronology of this matter appears to be as follows.

8.62 Egypt Construction Company Limited ("Egypt Construction") owned land to the east of Road Town. It leased part of the land (Parcels 79, 147 and 148, Block 2938B, Road Town Registration Section) to Delta Petroleum for a period of 20 years. At some stage, Delta Petroleum took a charge over parcels of land retained by Egypt Construction, including Parcel 221.

8.63 In 1992, Delta Petroleum made an application to the Ministry for permission to reclaim and lease 1.24 acres of the seabed adjacent to these parcels[130]. The Ministry responded, negatively, as follows:

> "It is also noted that at question #6 you indicated that the frontage to the sea is owned by the applicant. However, according to the plans submitted the property adjacent to which the reclamation is to take place is described as Parcels #79, #147 and #148 Block 2938B Road Town Registration Section and research has revealed that this property is owned by Egypt Construction Limited and is leased to Delta Petroleum (Caribbean) Limited for a period of twenty years. In keeping with Government's policy with regard to reclamation of the sea bed, the right of first refusal to reclaim must be given to the landowner adjacent to the sea bed and in this case Egypt Construction Limited applied since 1982 to carry out some reclamation there" [131].

8.64 The BVI Government embarked on a series of land exchanges in order to obtain land for the construction of a dual carriageway running east out of Road Town (now James Walter Francis Drive). Some of the land owned by Egypt Construction was required for the project.

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[128] The substance of this affidavit is dealt with below: see paragraphs 8.103-8.107. Having received an application to admit this evidence out of time, I made an order accordingly (Order No 26).
[129] Application dated 5 November 2021 to rely on Ronald Smith-Berkeley Fourth Affidavit dated 26 October 2021.
[130] Delta Petroleum Application to Reclaim and Lease Portion of Sea Bed dated 10 January 1992.
[131] Letter Ministry of Natural Resources and Labour to Gerard St C Farara (Delta Petroleum's legal adviser) dated 31 August 1992.

Therefore, an exchange was negotiated whereby Egypt Construction was given 0.34 acres from Parcel 221 Block 2938B in exchange for 0.33 acre of land in Parcel 222 in the same block which it owned and was land required for the road[132]. In addition to this exchange, the BVI Government offered Egypt Construction an option to buy or lease at market value 0.58 acres of reclaimed land adjacent to Parcel 221. These were recorded in an Expedited Extract of the Cabinet's decision as follows:

> "Council advised that:
>
> ii) Egypt Construction Co Limited be permitted to reclaim 25,467.17 sq ft or 0.58 acres of land over and above the exchange of land between itself and the Government;
>
> iii) Freehold title be issued for the reclamation of 14,516.95 sq ft in exchange for the company's private property;
>
> iv) A lease of the seabed be issued OR freehold title be given at market value for the reclaimed area of 0.58 acres, the option to remain with the Company.
>
> v) If freehold title is to be issued for the 0.58 acres, that the sum of $186,672.00 be paid by the company"[133].

Egypt Construction was informed of these Cabinet decisions in 1997, but had not acted on them as of October 2005.

8.65 Mrs Joan Penn was one of the directors of Egypt Construction, and she explained the inaction as follows:

> "For the past eight years I have been in negotiation with the other director of Egypt Construction (Mrs Eugenie Christopher) in an effort for us to settle the matters relating to the company; hence the inability to conclude the transaction. As an end result the company was put into liquidation by Mrs Christopher and in February 2004 the court ordered the winding up of the company and sale of its assets. Government's consent to the lease or sale was not a part of the winding up proceedings"[134].

8.66 In October 2005, Egypt Construction formally went into liquidation. By order of the Eastern Caribbean Supreme Court, the liquidator was permitted to sell Parcels 221, 223, 224, 79 and 147 of Block 2839B, Road Town Registration Section to Delta Petroleum as chargee for the sum of $1.1 million[135]; but no rights to the reclaimed land passed. As and when reclaimed, the land adjacent to Parcel 221 was therefore Crown Land once more available for disposal[136]. Although not a belonger company, Delta Petroleum had not been required to obtain a Non-Belonger Land Holdings Licence for the land it did obtain, because these properties had been obtained by them pursuant to their rights as chargee[137].

8.67 On 22 February 2006, Mrs Joan Penn, on behalf of Nature's Way, applied to the Ministry (with supporting documents, such as the company's Certificate of Incorporation) seeking to lease or purchase Lots 3 and 3A of Block 2938B[138]. On 26 January 2007, the Minister Hon Eileene L Parsons circulated an Executive Council Memorandum concerning the application,

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[132] Recited in the Background Section of Executive Council Memorandum No 28/2007 26 January 2007.
[133] Expedited Extract for Cabinet Meeting on 19 March 1997.
[134] Recorded in a memorandum Attorney General to Permanent Secretary Ministry of Natural Resources and Labour "Acquisition of Land formerly offered to Egypt Construction Co Limited – Joan Penn" dated 26 January 2006.
[135] Order of Indira Charles J dated 23 November 2005.
[136] Memorandum Attorney General to Permanent Secretary Ministry of Natural Resources and Labour: Acquisition of Land formerly offered to Egypt Construction Co Limited – Joan Penn dated 26 January 2006.
[137] Section 3(c) of the Non-Belongers Land Holding Regulation Act 1923 (Cap 122).
[138] Letter Joan Penn to Sheila Brathwaite dated 22 February 2006.

setting out the history and being accompanied by various documents including a valuation (which, assuming the lots would have the benefit of access over Parcel 221, valued the lots at $519,000 in aggregate) and a memorandum from the Financial Secretary agreeing to the lease in principle, but pointing out that the proposed rent ($1,000 per annum) was very low as the reclamation was in fact done, not by the proposed tenant, but by the BVI Government[139]. It seems that consideration of this paper was deferred due to queries raised with regard to possible rights of Delta Petroleum over the lots; but a memorandum dated 15 March 2007 from the Permanent Secretary to the Governor confirmed that the property in question did not form part of the land earlier purchased by Delta Petroleum and requested the proposal be resubmitted to the Executive Council[140].

8.68 On 25 July 2007, the Executive Council determined formally to revoke the earlier decision to lease the land to Egypt Construction, and to lease Lots 3 and 3A (now referred to as the proposed Lot 2 of Block 2938B) to Nature's Way, as follows:

"Council:

g) Revoked Executive Council's decision in relation to item (iii) of Memorandum No 95/97 since the decision was never acted upon and the firm Egypt Construction Company Limited no longer exists; and

h) Agreed that the proposed Lot 2 of Block 2938B in the Road Town Registration Section which measures approximately 0.526 of an acre, be leased to Nature's Way Limited, subject to the following conditions:

i) The Ministry of Natural Resources and Labour with the assistance of the Land Registry and Survey Departments have a parcel number assigned to the lot;

ii) An easement be registered over Parcel 252 Block 2938B in the Road Town Registration Section on the eastern side to ensure access to the lot;

iii) The Crown be granted an easement to traverse over the property now identified as proposed Lot 2 to the sea;

iv) The Instrument of Lease and the Grant of Easement be prepared by the Ministry and forwarded to the Attorney General for vetting to be executed simultaneously;

v) The terms of the lease be as follows:

Term: 50 years in the first instance with an option to renew for a further period of 25 years

Rent: $800.00 annually

Rent review period: every five years

Rent revision: 5% of the unimproved value of the leased area

Rent cap: nil

Late payment: 2% above New York Prime rate

Period for payment: 30 days

[139] Executive Council Memorandum No 028/2007: Request for Permission to Lease Lots 3 and 3A of Block 2938B in the Road Town Registration Section – Nature's Way Limited dated 26 January 2007.
[140] Memorandum Permanent Secretary Ministry of Natural Resources and Labour to the Governor dated 15 March 2007.

> Subletting: 2.5% of rent collected from sublease agreement in addition to the rent
>
> Payment due date: 1 January each year"[141].

Importantly, it is to be noted that the lease of Lot 2 to Nature's Way had two preconditions, namely (i) that there be a formal survey and allocation of a parcel number, and (ii) that there be an easement over adjacent land to allow access to Lot 2 (which was otherwise landlocked).

8.69 On 1 August 2007, the Ministry wrote to Mrs Penn, as Managing Director of Nature's Way, to inform her of that decision[142]. On 20 August 2007, Mrs Penn acknowledged receipt[143]. Mrs Penn also requested that a copy of the Instrument of Lease be forwarded on as soon as possible in order to conclude the matter.

8.70 In parallel with this, the Executive Council determined to lease proposed Lot 1 of Block 2938B to a Mr Garvin Ishmael Stoutt Sr[144]. This was subject to conditions including a parcel number being assigned to the lot and the Crown being granted an easement to traverse over the property to the sea. A memorandum from the Chief Surveyor to the Permanent Secretary dated 18 December 2006 stated:

> "The proposal as outlined by Mr Stoutt to grant access for consideration of acquiring part of the remaining land is presented for your information"[145].

The map attached to this memorandum shows a proposed right of way leading from the road, across Parcels 252 and 309, to give access to proposed Lot 2. The evidence suggests that this land was therefore awarded to Mr Stoutt on the basis of his agreement to grant an easement over the adjacent property which he owned (Parcel 252) in order to provide access to Lot 2. However, that arrangement does not appear to have been perfectly incorporated into the Executive Council decision with respect to Mr Stoutt's lease of proposed Lot 1.

8.71 There then followed a decade of correspondence, in which Mrs Penn for Nature's Way pressed for the preconditions for a lease of Lot 2 to be satisfied and Mr Sylvester pressed for a lease of that same Lot 2.

8.72 As an example of the latter, on 17 September 2007, Mr Sylvester on behalf of Delta Petroleum wrote a letter to the Ministry expressing interest in leasing the property adjacent to and sea-side of Parcel 221 (i.e. proposed Lots 1 and 2) for a period of 50 years[146]. The letter stated that the intention was to build a four-storey building with one floor for parking to house the Delta Petroleum headquarters. It is not clear precisely how this application was dealt with; but it appears to have been considered, as there is evidence that a draft Cabinet Paper was prepared by the Ministry and sent to the MoF and the Attorney General's Chambers for comment.

8.73 A further example is a letter of 31 May 2011, in which Mr Sylvester again applied for a lease of Lot 2:

> "As a local resident and entrepreneur, I would like to request the opportunity to lease land in Pasea Estates, specifically Lot 2, which is owned by the Crown.

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[141] Expedited Extract for Cabinet Memorandum No 490/2007 dated 18 July 2007 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 pages 1091-1092).
[142] Letter Olga Rabsatt to Joan Penn dated 1 August 2007 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 pages 1093-1094).
[143] Letter Joan Penn to Josephine Callwood dated 20 August 2007.
[144] The COI has not been provided with the relevant Cabinet documents, but the decision was conveyed to Mr Stoutt in a letter dated 1 August 2007 which has been provided.
[145] Memorandum Chief Surveyor to Permanent Secretary Ministry of Natural Resources dated 18 December 2006.
[146] Letter Bevis Sylvester to Ministry dated 17 September 2007.

> My interest in leasing Lot 2 from the Crown is for the purpose of future developments in the BVI. It is further my request to be granted a 50-year lease for Lot 2, which ensures that I can contribute economically to the territory"[147].

This letter was not written on a Delta Petroleum letterhead nor does it mention the company. However, Mr Sylvester did sign off the letter as "Regional General Manager". A Cabinet Paper written in 2019 states that "upon submission of that request, no decision was made as it was recognized that the land was already awarded [to Nature's Way]"[148].

8.74 During this period, Delta Petroleum began unlawfully to occupy Lot 2.

8.75 As to the preconditions of the lease to Nature's Way, in respect of the survey, following much correspondence, on 7 June 2011, the BVI Survey Department prepared a survey for the subdivision of the reclaimed land adjacent to Parcels 221 and 252[149] and on 15 June 2011, the subdivision of Parcel 308 of Block 2938B was authorised, which resulted in the deletion of Parcel 308 and the creation of Parcels 309 (formerly Lot 1) and 310 (formerly Lot 2)[150]. This fulfilled the requirement of (b)(i) of Cabinet Memorandum No 490/2007 with respect to the lease to Nature's Way. The only outstanding matter was consequently the grant of an easement to allow access to Parcel 310.

8.76 Delta Petroleum still continued to press for a lease of what was now Parcel 310; and, from time-to-time, the BVI Government appear to have considered ways in which that might be done. On 17 December 2013, Delta Petroleum filed an application for judicial review, seeking a declaration that the decision by the Minister not to grant it (Delta Petroleum) a lease of Parcel 310, but instead to grant that parcel to a third party, was irrational and should there be quashed; and that Delta Petroleum had a legitimate expectation that it would be granted a lease over Parcel 310[151]. That claim was discontinued by Delta Petroleum on 13 March 2014[152]. The reason for the discontinuance was not given in the notice; but, in his evidence, Hon Vincent Wheatley said that the application had been regarded as premature because no lease of Parcel 301 had yet been awarded[153]. Mr Sylvester also said that the claim was declared premature[154].

8.77 On 25 July 2017, Mr Stoutt agreed to a Grant of Easement in favour of Parcel 310 to pass and repass over Parcel 309[155]. That gave land-side access to Parcel 310; and consequently had the effect of satisfying the last precondition for a lease of that parcel to Nature's Way as set out in Cabinet Memorandum No 490/2007. The Ministry was therefore in a position to progress and execute the lease with Nature's Way for Parcel 310. Indeed, on 17 May 2018, the Permanent Secretary Mr Smith-Berkeley wrote to Ms Barry at the Attorney General's Chambers saying:

> "The decision was made with a condition that Mrs Penn would sort out access, which she was able to accomplish with the help of another land owner in the same area. AS Penn will commence the process which will lead ultimately to the

[147] Letter Bevis Sylvester to Hon Ralph O'Neal dated 31 May 2011.
[148] Cabinet Memorandum No 396/2019: Application to lease Parcel 310 of Block 2938B, Road Town Registration Section – Bevis Sylvester dated 15 November 2019.
[149] Survey map prepared by the Survey Department for the Subdivision of Reclamation adjacent to Parcels 221 and 252 dated 7 June 2011.
[150] Mutation No 81/2011 dated 15 June 2011.
[151] Judicial Review Claim No BVIHCV 2013/0379 dated 17 December 2013.
[152] Notice of Discontinuance for Claim No BVIHC 2013/0379 dated 13 March 2014.
[153] Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021 paragraph v at page 7.
[154] Bevis Sylvester Affidavit dated 10 November 2021 paragraph 8.
[155] Grant of Easement Instrument No 1068/2017 dated 25 July 2017.

> execution of a lease between Mrs Penn and the Crown. While that is in progress, we ask if you can write to Delta Gas Station via their attorney asking them to cease use of the said parcel of land"[156].

The last sentence of course refers to Delta Petroleum's continued unlawful occupation of Parcel 310.

8.78 On 27 June 2018, Ms Barry on behalf of the Attorney General wrote to Delta Petroleum confirming that they had no permission to utilise the land and demanding the evacuation of the land in 14 days failing which the BVI Government would "be forced to take such further action as is deemed expedient without any further reference or notice to Delta"[157].

8.79 Legal representatives for Delta Petroleum responded on 11 July 2018 asking for an extension to 15 August 2018 in order to comply with the request; and asking whether there was the possibility of a "short term lease, or other suitable arrangements" of Parcel 310 in favour of Delta Petroleum[158]. On 1 October 2018, Ms Barry responded as follows:

> "We have now had an opportunity to take full instructions on the matter and I am now able to advise that Government is not in a position to discuss a lease of the subject parcel. In fact a decision to lease the said parcel to other persons was taken by Cabinet in 2007, but never actually finalised for various reasons. However, steps has continuously been taken since that time in order to finalise, and both parties are now ready and able to do so.
>
> …
>
> In light of the foregoing, I am instructed to demand that Delta ceases use of the property no later than 1 November 2018. Please note that if Delta should fail to adhere to our demand, without reasonable excuse, Government will be forced to take such further action as is deemed expedient without further notice to Delta"[159].

There was no suggestion here – by Ms Barry or Delta Petroleum – that Delta might have any rights or claim over the land from which they were being asked to leave.

8.80 Delta Petroleum did not adhere to the request to stop its unlawful occupation of Parcel 310; and, on 18 January 2019, no doubt at the request of the Ministry through the Attorney General (although there does not appear to be any documentary evidence of such a request), Governor Jaspert signed an expulsion notice in respect of Parcel 310[160]. The notice requested that Delta Petroleum remove its chattels and cease use of the land on or before 1 February 2019. Delta Petroleum did not comply with that expulsion notice. But, again there was no suggestion here – by Ms Barry or Delta Petroleum – that Delta might have any rights or claim over the land from which they were being evicted.

8.81 On 25 February 2019, Hon Vincent Wheatley took office as the new Minister[161]. On 12 June 2019, Mr Sylvester wrote a letter in his personal capacity addressed to Hon Vincent Wheatley. The letter said:

> "I write with respect to Lot 1 and 2 outside of block #2938 and Parcel 221 and 222.

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156 Email Ronald Smith-Berkeley to Maya Barry dated 17 May 2018.
157 Letter Maya Barry to Robert Liburd dated 27 June 2018.
158 Letter Veritas Law to Baba Aziz dated 11 July 2018.
159 Letter Maya Barry to Veritas Law dated 1 October 2018.
160 Expulsion Notice to Trespasser Occupying Crown Land Parcel 310, Block 2938B, Road Town Registration Section addressed to Delta Petroleum (BVI) Limited dated 18 January 2019.
161 T3 7 May 2021 pages 46-47.

> Please note that I hereby advise that I am requesting to apply to lease the said crowned [sic] property for a period of 99 years.
>
> I look forward to your favourable response on this matter"[162].

Yet again, there was no suggestion here by Mr Sylvester that he or Delta Petroleum might have any rights or claim over the land. On its face, it was simply a request for a lease.

8.82 A week later, on 20 June 2019, a draft Cabinet Memorandum was prepared on behalf of the Minister, which sought the revocation of Cabinet Memorandum No 490/2007 and that Parcel 310 instead "be granted to Mr Bevis Sylvester as a lease for Commercial Purposes"[163]. The lease to Mr Sylvester was to be for a period of 50 years with an option to renew for a further 25 years, at an annual rent of $800 plus 5% of the undeveloped value on review. Subletting by Mr Sylvester was contemplated, because the rent included 2.5% of any rent collected under a sublease.

8.83 The draft Cabinet paper noted that Delta Petroleum had agreed to reduce its debt to the BVI Government[164]. It also stated:

> "Cabinet is asked to note that through no fault of her own Mrs Penn, one of the directors of Nature's Way Limited or the Ministry that the issues were not resolved in as timely a manner as was anticipated. The matter was referred to the Attorney General for action on four (4) different occasions. After each request, the appropriate action was initiated by the Chambers. Members are asked to note that to avoid legal action against the Crown for opportunity lost as a result of the property being awarded to Delta be awarded [Lot 1 of Parcel 171 of Block 2838F in Road Town Registration Section which measures 0.500 acre] under the same conditions as the previous offer".

8.84 The draft paper was accompanied by observations by the MoF and the Attorney General's Chambers, respectively[165], as follows:

> **"Financial Implications**
>
> It is the view of the Ministry of Finance that without proper negotiations and or an amicable settlement, the decision sought could give rise to Government having to pay compensation as a result of Cabinet's decision being judicially reviewed. As such, it is important that…the business plan is provided to Cabinet for their consideration before any decision is made. Furthermore, the draft paper says nothing about how the persistent and continuing contraventions by Delta Petroleum Caribbean Ltd is to be resolved. The decision being sought, without more, exposes Government to too much avoidable risks.

[162] Letter Bevis Sylvester to Hon Vincent Wheatley dated 12 June 2019.
[163] Draft Cabinet Paper: Application to revoke – request for permission to lease proposed Lot 2 (formerly part of Lots 3 and 3A) of Block 2938B in the Road Town Registration Section – Nature's Way Limited Memo No 490/2007 dated 20 June 2019.
[164] This agreement has not been disclosed.
[165] These were set out in an email from Ronald Smith-Berkeley to Hon Vincent Wheatley dated 23 July 2019, and then circulated to Cabinet. The email does not say who from the Attorney General's Chamber wrote the paragraph on "Legal implications"; but Ms Barry accepts that she wrote it (Maya Barry Affidavit dated 2 February 2022 paragraph 4.2).

Legal Implications

These Chambers are not currently in possession of the file relative to this Paper, and we would wish to be provided with same so that we may prepare a legal opinion relative to the Decision Sought herein. However, from the facts known to us, we are concerned that Government may be estopped from going back on the promise to lease to Mrs Penn by virtue of the doctrine of proprietary estoppel".

Further to the comments provided by the MoF, the Permanent Secretary wrote to Mr Sylvester to request a business plan for the development of the reclamation[166]. There is no evidence of any having been provided. Nor, despite the wording of the paragraph on legal implications, is there any evidence that any written legal opinion had been or was being provided. It is clear from this memorandum that no legal advice was given, in writing or orally, before the proposal that Mr Sylvester be granted a lease over Parcel 310 was put forward by Hon Vincent Wheatley.

8.85 Therefore, it was proposed that Nature's Way would be deprived of the lease of Parcel 310 (which was to be leased to Mr Sylvester in his personal capacity), but it was to be granted a lease of a different parcel of land "under the same conditions". There were subsequent negotiations with Nature's Way. It seems that Hon Vincent Wheatley offered to lease Nature's Way 0.33 acres of land elsewhere and arrange the rental of a kiosk at TPP in exchange for Nature's Way agreeing to waive its interest in Parcel 310. Mrs Penn wrote to the Minister on 31 July 2019 with a counteroffer that the proposed 0.33 of an acre of land be transferred to the company outright and immediately as a freehold interest; and that a ground level space at the TPP be granted to the company at a "significantly reduced rate". Hon Vincent Wheatley then met with Mr Vance Lewis, CEO of TPP, and negotiated a reduced rate for a kiosk for an initial period of five years[167].

8.86 On 7 November 2019, on the Minister's recommendation, Cabinet approved (i) the revocation of Cabinet Memorandum No 490/2007 in its entirety; and (ii) the sale of the 0.33 acre Parcel 251 (now Parcel 290) of Block 2837E, Road Town Registration Section to Nature's Way for a sum of $1[168]. Under the heading "Financial implications", the Financial Secretary observed: "… the merit on which the land was granted for $1 was not supported in the Paper…". At the request of Governor Jaspert, a valuation report for Parcel 290 was prepared by Smiths Gore BVI Limited dated 6 October 2020, which assessed the value of the parcel at $600,000[169].

8.87 Another Cabinet Memorandum seeking leasing Parcel 310 to Mr Sylvester "for commercial purposes" at a rent of $800 per year was presented to Cabinet by Hon Vincent Wheatley on 15 November 2019[170]. Cabinet approved this on 22 November 2019[171].

[166] Letter Ronald Smith-Berkeley to Bevis Sylvester dated 25 July 2019.
[167] Written Resolution of the Sole Ordinary Shareholder for Tortola Pier Park Limited dated 2 October 2019.
[168] Cabinet Memorandum No 386/2019: Sale of Crown Land – Nature's Way Limited dated 7 November 2019.
[169] Valuation Report for Parcel 290, Block 2837E, Road Town Registration Section prepared by Smiths Gore BVI Limited dated 6 October 2020.
[170] Cabinet Memorandum No 396/2019: Application to lease Parcel 310 of Block 2938B, Road Town Registration Section – Bevis Sylvester dated 15 November 2019.
[171] Expedited Extract for Cabinet Memorandum No 396/2019 dated 22 November 2019 (Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 Exhibit JSA6 pages 1136-1138). This decision was later amended by Cabinet to include certain time frames for conducting rent reviews as part of the terms of the lease (recorded in Cabinet Memorandum No 29/2020 dated 6 February 2020, for which the Expedited Extract was issued on 7 February 2020).

8.88 There can be no doubt that the rent was significantly undervalued for commercial land such as Parcel 310. As a commercial application, a valuation was required as part of the Ministry's process – Hon Vincent Wheatley accepted that a valuation ought to have been obtained[172] – but no valuation report was ever commissioned for the lease of Parcel 310 to Mr Sylvester. However, Hon Vincent Wheatley accepted that the true value of the parcel would have been very much higher:

> "A 99-year lease? [Nature's Way] could have sold that lease for millions of dollars? That 99-year lease would have had a value that she could have re-sold for millions of dollars"[173].

Even if that is not literally true – and there is no valuation evidence as to how much the lease is actually worth – it is clear that Hon Vincent Wheatley, rightly, accepted that the lease of Parcel 310 to Mr Sylvester was at a massive undervalue.

8.89 Hon Vincent Wheatley suggested that the reduction in rent might be justified by the fact that Delta Petroleum had wanted a lease of Parcel 310 for many years, and had been prevented from building their headquarters building by the delay in obtaining a lease[174]. However, (i) their lease has simply been moved forward in time, and they have not lost any "lease time" – indeed, if anything, by being moved forward without any reflection in the price, the lessor had a significant gain; (ii) the Minister's suggestion would only have force if Delta Petroleum had had some right to a lease, which they did not; and (iii) in any event, the lease was granted, not to Delta Petroleum, but to Mr Sylvester personally.

8.90 When asked to sign the lease, the Governor raised queries about the rent. In a letter dated 3 June 2020, he said:

> "I have examined the licence [for Parcel 310 in favour of Bevis Sylvester] and the supporting documents on the file. The supporting evidence on the file seems to highlight some apparent anomalies. The last valuation carried out on the said property was done 23 years ago. I found no evidence on file indicating that a new assessment was carried out on the property, nor was it submitted to Cabinet for their consideration. Therefore, the current value of the property is unknown.
>
> On 18 January 2019, I signed an Expulsion Notice to Trespasser Occupying Crown Land regarding the same property, and this also was not brought to Cabinet's attention when this matter was discussed. It is essential when a matter is brought to Cabinet for a decision they are presented with the necessary documents required to allow sound decisions to be made. This will also assist me in my role as signatory.
>
> I have signed the attached licence and it would be appreciated if going forward that the required documents are presented Cabinet level to avoid delay in the process"[175].

8.91 The lease was, nevertheless, approved by Cabinet. Mr Sylvester completed the application to register the transfer with the Land Registry on 19 May 2020[176].

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[172] This was confirmed by both Hon Vincent Wheatley and Mr Smith-Berkeley (T48 14 October 2021 pages 249 and 255, and T55 24 November 2021 pages 129-130).
[173] T48 14 October 2021 page 247.
[174] T48 14 October 2021 page 255.
[175] Memorandum Governor Jaspert to the Permanent Secretary MNRLI dated 3 June 2020.
[176] Application to Register/Change Address completed by Bevis Sylvester dated 19 May 2020.

Concerns[177]

8.92 On its face, the disposal of these two plots of prime commercial land by the BVI Government for a nominal amount is inexplicable.

8.93 Unless there is good reason in the public interest for such an arrangement, it is an obvious matter of concern that the BVI Government leased Parcel 310 to Mr Sylvester at much below a market rent. The following four reasons were suggested as good cause.

8.94 First, in his evidence, Mr Smith-Berkeley appeared to suggest that the unlawful occupation of the land by Delta Petroleum somehow prevented the execution of the lease. However, when asked why that would be so, he accepted that:

> "Well, practically it wouldn't, but I think at the time, the thinking in the Ministry was we needed the parcel to be cleared, so to speak, but, you know, there isn't anything that I could think of that would have—stop that other than seeking to ensure that the parcel was free and clear"[178].

8.95 Of course, for the BVI Government to give Nature's Way vacant occupation, Delta Petroleum would have had to be evicted; but, as I have described, on 18 January 2019 the BVI Government had obtained an Expulsion Order from the Governor requiring Delta Petroleum to vacate the land. It is not clear why steps were not taken to enforce that order. Mr Smith-Berkeley said that, once the Expulsion Order was obtained, it was for the Attorney General's Chambers to take the necessary steps to enforce the order and that beyond asking Delta Petroleum to vacate the property through the Attorney General's Chambers, no further steps were taken by the Ministry itself[179]. However, the Attorney General would only enforce if she had instructions to do so; and Ms Barry said that she had no such instructions[180]. Hon Vincent Wheatley said that, although he had read the file, he did not see the Expulsion Order[181], and was unaware of it until 17 December 2020 when it was brought to his attention by Governor Jaspert[182]. When asked whether Mr Smith-Berkeley or Ms Barry, both of whom had been involved and appraised of this matter for a number of years, had brought the Expulsion Notice to his attention, he only reiterated that the first he heard of it was from Governor Jaspert on 17 December 2020[183]. He did not think to ask the Financial Secretary about the reference in Cabinet Memorandum No 396/2019 where the Financial Secretary mentions "the persistent and continuing contraventions by Delta Petroleum Caribbean Ltd"[184].

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[177] The concerns and potential criticisms in relation to Disposals of Crown Land arising from the evidence before the COI were put to Hon Vincent Wheatley in COI Warning Letter No 3 dated 21 September 2021, to which he responded in writing (Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021) and orally (T48 14 October 2021 pages 124-266). The concerns and potential criticisms in relation to Disposals of Crown Land arising from the evidence before the COI were put to Acting Permanent Secretary Joseph Smith Abbott in COI Warning Letter No 2 dated 21 September 2021. Mr Smith Abbott did not provide a written response to his Warning Letter but instead adopted Hon Vincent Wheatley's response dated 29 September 2021. Mr Smith Abbott provided oral evidence (T48 14 October 2021 pages 5-123). The warning letters identified the evidence giving rise to the concerns and potential criticisms. The criticisms of Hon Vincent Wheatley and Mr Smith Abbott in relation to Disposals of Crown Land in this Report are respectively restricted to those in respect of which they had a full opportunity to respond, as described. A COI Warning Letter No 3 dated 21 September 2021 was also sent to Cabinet, which received no separate response.

[178] T55 24 November 2021 pages 110-111.

[179] T55 24 November 2021 pages 109-113.

[180] Letter Maya Barry to COI dated 17 November 2021.

[181] Although Hon Vincent Wheatley repeatedly asserted that he had not seen the Expulsion Notice in the files presented to him by Mr Smith-Berkeley when he first took office, Mr Smith-Berkeley confirmed in his oral evidence to the COI that the Expulsion Notice would have been in the files (T55 24 November 2021 page 112).

[182] T48 14 October 2021 page 262.

[183] T48 14 October 2021 pages 262-266.

[184] Cabinet Memorandum No 396/2019: Application to lease Parcel 310 of Block 2938B, Road Town Registration Section – Bevis Sylvester dated 15 November 2019.

8.96 On all of the evidence, I do not accept the evidence of Hon Vincent Wheatley that he did not know of the Expulsion Notice in early to mid-2019. It seems inconceivable that he would not. The Notice was on the file, which he considered. It was an important matter of the history of the matter. I do not accept that the Minister was less than diligent in bringing himself up to speed on this matter before taking important, and valuable, decisions in respect of it; or that his public officers were less than diligent in ensuring that this was the case.

8.97 Second, it was suggested that the long-standing dispute over Parcel 310 explained the arrangement[185]. However, on the evidence taken as a whole, this too is unconvincing.

8.98 As I have described, once the Grant of Easement over Parcel 309 was obtained in 2017, landward access to Parcel 310 had been arranged. All preconditions for the lease of Parcel 310 to Nature's Way had therefore been satisfied. There was no reason to deny Nature's Way the lease for which it had been waiting for over a decade.

8.99 Hon Vincent Wheatley suggested that it was the threat of legal action by Delta Petroleum that prevented the execution of the lease with Nature's Way[186]. He said:

> "…I requested that the advice of the Attorney General's chambers should be sought. I attended a meeting in mid or late 2019[187] with my Permanent Secretary and some others, when I was advised by counsel of the competing claims to the land and that both parties appeared to have reasonable claims.
>
> I was advised that Delta's claim was seen to be based in part on the way Parcel 310 has been reclaimed, preventing Delta's access to the sea. It was also seen to be based on Appendix C paragraph 1 of the [1996 Marine Estate Policy[188]], which has been approved in 1996 and publicised".

8.100 Mr Smith-Berkeley's evidence supported that of the Minister: he said that the advice was as the Minister recalled it, namely that both Delta Petroleum and Nature's Way had "potentially strong competing claims to a lease of Parcel 310". His written evidence also agrees with Hon Vincent Wheatley that it was advised that a sensible way to resolve the competing claims might be to explore with Mrs Penn whether Nature's Way would be prepared to relinquish their claim to Parcel 310, in return for a grant of Crown Land elsewhere[189]. Ms Barry's late evidence also said that she advised that Delta had "a potentially strong claim" to a lease, and that a sensible way to resolve what she considered were competing claims would be to explore with Nature's Way whether it would be amenable to relinquishing the claim to Parcel 310 in return for a grant of Crown Land elsewhere[190].

8.101 However, I find this evidence full of difficulties.

8.102 First, although in his affidavit Mr Smith-Berkeley confirmed Hon Vincent Wheatley's evidence as to the advice received, during his oral evidence, he repeatedly said that he did not in fact remember the specifics of the advice:

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185 The submissions made by the Attorney General in the Elected Ministers' Closing Submissions paragraphs 46-51 focus upon this.
186 Hon Vincent Wheatley Response to COI Warning Letter No 3 dated 29 September 2021 paragraphs r-dd.
187 This suggests that it was after the draft Cabinet Memorandum of 20 June 2019, and possibly in response to the paragraph in that paper on "Legal implications" in which Ms Barry suggested that the Attorney General's Chambers should prepare a legal opinion on the matters raised. Neither Mr Smith-Berkeley nor Ms Barry could recall the date; but agreed that it was probably after, and in response to, the June 2019 paper (Ronald Smith-Berkeley Fourth Affidavit dated 26 October 2021 paragraph 4.3, and Maya Barry Affidavit dated 2 February 2022 paragraph 4.2).
188 See paragraph 8.35(iv) above.
189 Ronald Smith-Berkeley Fourth Affidavit dated 26 October 2021 paragraphs 3.5 and 3.6.
190 Maya Barry Affidavit 2 February 2022 paragraphs 3.16-3.17.

"Yes, I've said that before, and I said it like three or four times. I do not recall specifically what the discussion was"[191].

8.103 Second, Ms Barry's recollection of her advice was very late. She did not refer to any recollection of the advice she might have given in (e.g.) her letter of 17 November 2021. Her affidavit was lodged two months after the close of evidence. Whilst one can only sympathise with her workload and family issues, I do not see why she could not have confirmed the advice she gave as recalled by Hon Vincent Wheatley and Mr Smith-Berkeley much sooner had she been minded to.

8.104 Third, the advice that she says she gave had the potential for a significant loss of Government revenue from the sale of Crown Land. It would have been extraordinary for her to have given such advice orally. Given that, in the draft Cabinet Memorandum in June 2019, Ms Barry had advised that the Attorney General's Chambers "prepare a legal opinion" on the issues raised – which can only have referred to a written opinion – the extraordinariness of her giving the advice orally is only compounded.

8.105 Fourth, the evidence of the three witnesses (Hon Vincent Wheatley, Mr Smith-Berkeley and Ms Barry herself) appears to have been that the meeting was held and the advice given after the June draft Cabinet Memorandum. That is, of course, apparent from the face of the memorandum itself[192]. However, if that were so, the advice could not have driven the decision – because the draft Cabinet paper had set out Hon Vincent Wheatley's proposal that a lease of Parcel 310 should be granted to Delta Petroleum/Mr Sylvester, with Nature's Way being granted another parcel of Crown Land elsewhere. Furthermore, it was not Ms Barry who raised the possibility of Nature's Way relinquishing its claim to Parcel 310: that too had been in the June 2019 proposal. If the evidence of these three witnesses as to timing is right, then Hon Vincent Wheatley came to an initial decision on the proposal without the benefit of any legal advice.

8.106 Fifth, there are no notes of the advice given, but Ms Barry recollects that, in the 2019 meeting, she had in mind three possible bases of claim to a lease of Parcel 310 by Delta Petroleum, namely (i) that the original Cabinet decision to grant Nature's Way a lease was unreasonable and/or ultra vires; (ii) Delta had rights because of the loss of sea access when land was reclaimed to the seaward side of (its) Parcel 221; and (iii) legitimate expectation on the grounds of (a) "various representations made by Government to delta over the years" and (b) the 1996 Marine Estate Policy. On their face, none is compelling.

(i) No basis for an argument that the Cabinet decision to grant a lease to Nature's Way was unlawful has been suggested. Certainly, Ms Barry did not raise any such basis when taking steps to expel Delta Petroleum from Parcel 310. On the face of it, she would have been under a duty to have raised such an issue with the Governor when advising upon the expulsion. She raised no such issue.

(ii) No basis for an argument that Delta Petroleum had rights over Parcel 310 because of its ownership of the landward parcel has been suggested, other than under the 1996 Marine Estate Policy (see below)[193].

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[191] T55 24 November 2021 page 135.

[192] See paragraph 8.84 above.

[193] The Attorney General submitted that "Delta's claim included an asserted breach of a right of first refusal in respect of waterfront property…", but does not consider the basis of the claim (except to suggest that it is, indeed, based on the 1996 Marine Estate Policy. It appears not to have impressed those in her Chambers previously. She also refers to Delta's claim being on the basis of deprivation of the sea access for which they had paid a premium in acquiring the freehold of Parcel 222, but (i) this does not appear to have featured in Ms Barry's advice, and (ii) the legal basis of the claim is neither clear not considered by the Attorney. Again, any such claim appears to have left the Attorney General's Chambers previously unimpressed.

(iiia) In respect of legitimate expectation on the grounds of promises made by public officials to Delta Petroleum, any such promise has to be clear and unequivocal. No details are given as to what promises were made and by whom. If a promise was made by an unelected official, it begs the question of what he or she was doing undermining a Cabinet decision. The same applies to an elected official; but, if the promise were made by an elected official, that would also raise other potentially difficult questions.

(iiib) The possibility that the 1996 Marine Estate Policy may have had any relevance to Parcel 310 was first raised in Hon Vincent Wheatley's Response to COI Warning Letter No 3 dated 29 September 2021[194]. Any rights Delta Petroleum might have had to Parcel 310 on the basis of this policy were apparently not addressed prior to 2019 by any entity, including the Ministry and the Attorney General's Chambers (including by Ms Barry), even though the policy had been in place since 1996. For example, it was not addressed in any of the following: (i) the advice from the Attorney General's Chambers in 2006 on application from Nature's Way to lease Parcel 310; (ii) when in consideration of Cabinet Memorandum No 490/2007, the Governor deferred the Cabinet Paper, raising queries regarding any rights of Delta Petroleum to Parcel 310 upon which he was reassured by the Ministry that they were not an issue (i.e. that Delta Petroleum had no such rights); (iii) the Cabinet Memorandum dated 17 August 2012 entitled "Lease of Crown Land, Parcel 310, Block 2938B, Road Town Registration Section to Joan Penn dba as Nature's Way Ltd" where the 1996 Marine Estate Policy was specifically addressed under the "Financial Implications" section; and (iv) Cabinet Memorandum No 396/2019. In the letter outlining the Ministry's response to COI Letter of Request No 2, the 1996 Marine Estate Policy was not listed under the response to Question 1 which asked for details and copies of the guidance and criteria used in the disposal of Crown Land. This policy was also not mentioned in Mr Smith Abbott's affidavit concerning Crown Land. If it has any relevance, the absence of any contemporaneous or earlier consideration is certainly curious.

But, in any event, there is no explanation by Ms Barry and/or by or on behalf of Hon Vincent Wheatley as to why it is relevant. Policy R1 Appendix C of the Policy states:

> "The reclamation of the seabed supports the economic development of the British Virgin Islands by increasing the stock of land suitable for development. Government therefore encourages the reclamation of the seabed provided the following criteria can be met:
>
> 1. The applicant owns or has long-term tenure over the dryland immediately adjacent to the foreshore;
>
> …
>
> Recommendations on allocation are made following technical review of the application. The decision to allow reclamation is a matter of Government discretion. Even if an application meets all the policy criteria, Government reserves its right to reject the application".

This, therefore, appears to concern applications to reclaim the seabed, rather than the disposal of land already reclaimed. Any further reclamation would have Parcel 310, not land already owned by Delta Petroleum, on its landward side. In any event, the policy makes clear that the ultimate decision is a matter for the discretion of Cabinet: it does not amount to a strict rule to be applied by the

[194] Mr Smith-Berkeley appears to have accepted that it was not raised before the Minister's Response to the Warning Letter (T55 24 November 2021 pages 135-136).

> Ministry when deciding on whether to dispose of reclaimed land. It is therefore not clear how Delta Petroleum could be found to have legal rights to Parcel 310 over Nature's Way, who had already had a decision of Cabinet to award it a lease. Mr Smith-Berkeley appeared to accept that the policy gives no right to own or occupy land[195]. In any event, if the policy were to apply, the beneficiary of it would be Delta Petroleum and not Mr Sylvester (also considered further below).

8.107 The circumstances surrounding any advice given are, therefore, far from clear. However, on the basis of the evidence, what is clear is that, whatever advice was given, it does not appear to have driven the decision to grant the lease of Parcel 310 away from Nature's Way. Subject to Cabinet approval, that provisional decision had already been taken by the Minister, Hon Vincent Wheatley.

8.108 In any event, none of this explains why the lease was granted to Mr Sylvester rather than Delta Petroleum. The lease of Parcel 310 was progressed on the basis of the letter of application dated 12 June 2019. That letter was written by Mr Sylvester in his personal capacity. It is noteworthy that advice from the Attorney General's Chambers from August 2011, on this point, said that the lease should be to Delta Petroleum[196].

8.109 When asked why the lease was entered into in Mr Sylvester's name, Hon Vincent Wheatley said it was because the company had indicated that this was its wish, and pointed to the letter dated 18 April 2010 from Spiros Milonas, the director of Delta Petroleum, making such a request[197]. It is clear that this would be an advantageous arrangement for Delta Petroleum as Mr Sylvester, as a belonger, would be able to enter into the lease on advantageous terms, e.g. he would not need to apply for a Non-belonger Land Holding Licence and (it seems) the rent was assessed on the basis that the tenant was a belonger. Hon Vincent Wheatley simply said that this was what Cabinet had agreed; and referred to the original Cabinet decision to lease Parcel 310 to Nature's Way for $800 rent per annum as per Cabinet Memorandum No 490/2007[198].

8.110 As I have indicated, the advice to that date had been that it should be to Delta Petroleum. In her recent affidavit, Ms Barry accepts that she had concerns about the assignment of the lease to Mr Sylvester; but it was her view that it was up to Mr Sylvester and Delta Petroleum to arrange their affairs, if they could, to prevent a criminal offence being committed by Delta Petroleum, as a non-belonger company, holding land without a licence[199]. Given that it was known that the land was wanted to enable Delta Petroleum to build a headquarters building, this approach appears, at least, strange.

8.111 Third of the good cause reasons put forward for the lease to Delta Petroleum, Mr Sylvester said:

> "Upon receiving the lease, the survey points revealed that the land was not 22937 sq ft but rather was less by 4745.625 sq ft. This means that the reclamation was not complete. To my understanding, I will have to go back to the crown to seek permission to complete the reclamation. Because the reclamation involves

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[195] T55 24 November 2021 page 139.
[196] Memorandum Karen Reid to the Permanent Secretary for the Ministry dated 9 August 2011.
[197] T48 14 October 2021 pages 244-245 and 251.
[198] T48 14 October 2021 page 248.
[199] Maya Berry Affidavit 2 February 2022 paragraphs 3.23-3.24. It is an offence under the Non-Belongers Land Holding Regulation Act 1923 (Cap 122): see paragraph 8.7 and footnote 20 above. Ms Barry's expressed view seems to be consistent with the submissions of the Attorney General (Elected Ministers' Closing Submissions).

> the sea, the same will be very costly. The COVID-19 pandemic commenced, and everything changed, preventing me the opportunity to revisit my plans for that area"[200].

However, even if Mr Sylvester's understanding is correct, on the evidence, this was not part of the Minister's thinking; and it was only considered by Mr Sylvester after the event. There are no valuations in evidence which suggest that $800 per year for this land in the current circumstances would be an appropriate market rent.

8.112 Fourth and finally, it cannot be said that by entering into this lease with Mr Sylvester, a public benefit was gained in respect of Nature's Way. It was part of the overall arrangement that Nature's Way was sold land worth $600,000 for a nominal $1 (as well as advantageous terms on a TPP kiosk, although I accept that that element does not appear to have adversely borne upon public finances).

8.113 In his explanation for this, Hon Vincent Wheatley stated the following:

> "A. She lost a lot. A 99-year lease.
>
> Q. But she lost that because Delta Petroleum were occupying her land.
>
> A. No.
>
> Q. So, how did you come, then, to value her loss?
>
> A. She should have been over on 310 for the last 20 years. She had not had a chance to develop her dreams. You had to compensate her for the time loss".

8.114 However, Mrs Penn did not suffer a "time loss": instead of a 99-year lease, she was given a freehold, a very significant "time gain". It is true that entering into her interest in the land had been delayed; but she had never asked for compensation for the delay in granting her a lease, and no effort was made to value any loss she suffered as a result of that delay. It is clear that this grossly undervalued sale, together with the rental of a TPP kiosk at significantly reduced rate, were measures necessary to induce Nature's Way to relinquish its rights to Parcel 310 in order to make the property available to be leased to Mr Sylvester/Delta Petroleum. They make the arrangement with Mr Sylvester only the more extraordinary, and the more difficult to justify in the public interest.

Conclusion

8.115 The disposal of Crown Land is another area where decisions are taken by Ministers without any published criteria in relation to the assessment of applications: assessments are made in the unfettered discretion of the Minister, approved by Cabinet in their unfettered discretion. Under pressure from successive Governors (who have consistently expressed concern about the lack of proper process for these disposals), the Ministry is now reviewing the framework, mechanisms and overall governance with a view to bringing the management of Crown Land within a statutory framework. Such a review is long overdue.

8.116 For the reasons set about above, the COI was generally unable to investigate individual disposals. However, the enquiries made into Parcel 310 suggest that the open discretion of the Minister may well have been exercised other than in the public interest. Any public interest in these two grossly undervalued disposals is very difficult to discern. I can discern none. In my

[200] Bevis Sylvester Affidavit dated 10 November 2021 paragraphs 10 and 16.

view, in respect of Parcel 310, there is information that serious dishonesty in relation to public officials may have taken place. It is certainly a specific matter which, in my view, cries out for further investigation.

8.117 Furthermore, whilst for the reasons I have already set out, I have been limited in my ability to enquire deeply into other transactions, the information taken as a whole (including the absence of any controls over the disposal of Crown Land and the way in which the disposal of Parcel 310 was approached) persuades me that an audit of disposals of Crown Land over, say, the last three years is urgently required.

Recommendations

8.118 I deal with overarching recommendations below[201]. However, with regard to the disposals of Crown Land, I make the following specific recommendations.

Recommendation B30

I recommend that there should be a wholesale review of processes for the disposal of Crown Land, to ensure that such disposals are the subject of an open and transparent process. This review could (and, in my view, should) be led by a senior public officer. Without restricting the ambit of any such review, it seems to me that that review should include consideration of (i) an independent body or independent bodies being established to consider applications for Crown Land disposals for domestic and/or commercial use; (ii) the degree and nature of the involvement of members of local community in an advisory capacity; (iii) criteria for the disposal of Crown Land for domestic and commercial use (including whether applications for domestic and/or commercial Crown Land by non-belongers ought to be entertained and, if so, the criteria for such grants), which should be both published and applied; and (iv) whether there should be any executive discretionary powers in relation to Crown Land disposals. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance.

Recommendation B31

I recommend all disposals of Crown Land, whether outright, by lease or otherwise, over the last three years be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of the following (i) the extent to which a body independent of the executive (such as an Estate Land Committee) was involved in the selection process and, if so, the nature and extent of that role; (ii) any criteria applied in consideration of the application and by whom; and (iii) whether the executive exercised any discretion in relation to the selection process and, if so, how it was exercised and whether any guidance or criteria were applied. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps including any criminal investigation and steps to recover public money (including recovery from any public official who has acted improperly) can await the outcome of that audit.

[201] See Chapter 14.

Recommendation B32

In respect of the disposal of Parcel 310 of Block 2938B, Road Town Registration Section, I recommend that the matter be referred to the appropriate authorities for consideration of whether a criminal investigation and/or investigations in relation to the recovery of the public money expended should be made having regard to (i) all the available evidence including the information provided to the COI; and (ii) the dual evidential and public interest tests.

CHAPTER 9:
LEASES

APPENDIX A

LEASES[1]

The largest property portfolio in the BVI is that of the BVI Government. Whilst the Government's long-term intention is to increase the proportion of its accommodation that it owns by reducing the number of leases it holds, there is still heavy reliance on rented property, particularly since the 2017 hurricanes which rendered the Central Administration Complex more or less unusable.

This chapter looks at the processes whereby the BVI Government rents property.

Introduction

9.1 By far the largest accommodation portfolio in the BVI is that of the BVI Government. It consists of property both Government-owned (approximately 100 buildings) and Government-rented (approximately 75 buildings)[2].

9.2 The BVI Government's long-term intention is to reduce the number of leases so that the balance is in favour of BVI Government-owned property; but, central to that plan, is the restoration of the Central Administration Complex (the Ralph T O'Neal Administration Complex) which was severely damaged by the 2017 hurricanes[3]. In the meantime, there is reliance on rented property.

9.3 Rental accommodation falls into three categories: office accommodation (used for the delivery and administration of services to the public), housing accommodation (provided to, e.g., senior members of the judiciary and public officers assigned to work on the sister islands on a temporary basis, such as teachers, fire officers, immigration officers, customs officers and members of the RVIPF and storage accommodation (for the storage of files and records but also equipment, supplies or items that need to be kept under controlled conditions, e.g. dangerous chemicals)[4].

9.4 Concerns have recently focused on the increasing amount of real property held by the BVI Government and its increasing cost. The Central Administration Complex, completed in 1993, was the last significant project in public office building; and, from 2000, there was an

[1] The evidence before the COI on this topic comprised (i) disclosure in response to two requests, namely Minister of Finance Request for Information/Documents No 14 dated 16 March 2021, and Cabinet Secretary Request for Information/Documents No 17 dated 16 March 2021, (ii) Acting Financial Secretary Jeremiah Frett Sixth Affidavit dated 9 September 2021 and Exhibit JF9 to that affidavit, produced in response to Premier and Minister of Finance Request for an Affidavit No 2 dated 7 June 2021 and (iii) oral evidence on 30 September 2021 from (a) Carolyn Stoutt-Igwe Permanent Secretary Deputy Governor's Office August 2016 to September 2019, (b) Sharleen Dabreo-Lettsome MBE Permanent Secretary Deputy Governor's Office September 2019-date, (c) Glenroy Forbes Financial Secretary 2017-December 2020, and (d) Jeremiah Frett Acting Financial Secretary January 2021-date (T42 30 September 2021 pages 6-161). Shortly before the hearing, the COI was provided with some additional documentation, notably a flowchart that was prepared by Mrs Dabreo-Lettsome for the purposes of the hearing, which helpfully set out the government lease process clearly and concisely. (See also T42 30 September 2021 pages 23-24).

[2] T42 30 September 2021 pages 35-36 (Carolyn Stoutt-Igwe and Sharleen Dabreo-Lettsome, the Permanent Secretary Deputy Governor's Office 2016-19 and 2019-date, respectively).

[3] T42 30 September 2021 pages 101-102.

[4] Each category is defined in the Accommodation Management Framework paragraph 1.4. See also T42 30 September 2021 pages 112-113, where Mrs Dabreo-Lettsome gave further details of the housing accommodation requirements.

"explosion" of demand for Government-rented accommodation that continually rose[5]. So, in 2017, in a paper by the then Premier and Minister of Finance, Dr the Hon Orlando Smith[6], it was recorded that:

> "The rent expenditure for the Government has increased exponentially over the past decade, and if allowed to continue to grow at the current rate without strict administration, will become unsustainable in the near future"[7].

In 2018, the Central Statistics Office estimated annual rent expenditure to be approximately $6.4 million. That estimate was based on information provided by the Deputy Governor's Office ("the DGO"), and was considered to represent "only a fraction of the money spent on accommodation"[8]. There is nothing to suggest that that picture has substantially changed; in fact, by 2020, BVI Government rental commitments had, if anything, risen further[9].

9.5 The leasing of accommodation by the BVI Government is subject to an overarching framework policy document (Accommodation Management Framework (September 2018) ("the AMF")), and general operating procedures for the acquisition and management of Government-rented properties (Guidelines for Procurement of Office and Housing Accommodation, Tenancy Agreements and Lease Management (1 December 2020) ("the Accommodation Guidelines")).

9.6 Within the procedures set out in these documents, a number of BVI Government stakeholders are involved in the leasing of accommodation to the Government. In about 1991, the Government Office Accommodation Committee ("the GOAC") was established in the Department of Personnel Services, with the Chief Personnel Officer chairing; its task being to receive and review applications for rental of office space and then make recommendations to the Minister of Finance who had the final say on approval. However, the GOAC stopped meeting in 2002, from when most Government departments made their own accommodation arrangements, liaising directly with the MoF[10].

9.7 In 2006, the DGO took over residual responsibility for accommodation from the Department of Human Resources. It re-established the GOAC, and it arranged for the AMF and the Accommodation Guidelines to be produced.

9.8 The DGO is still key. It oversees the BVI Government's accommodation portfolio and maintains its records, and is responsible for the lease management process. It facilitates the preparation of leases for Government-rented accommodation; and is available to assist where there are issues that arise with the accommodation or problems with the landlord/tenant relationship (although these issues are usually dealt with by the Tenant Department in the first instance)[11]. It collects observations on the AMF, which it furnishes to the GOAC which is responsible for reviewing and revising the AMF[12].

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[5] Cabinet Memorandum No 013/2007: Office Accommodation: Policy, Procedures and Management dated 8 October 2007.
[6] Cabinet Memorandum No C00/2017: Relocation of High Court Registry to SAKAL Building Agreement for Revised Heads of Terms dated 18 July 2017.
[7] Cabinet Memorandum No C00/2017 dated 18 July 2017 paragraph 8. The paper particularly concerned the relocation of the High Court Registry.
[8] Accommodation Management Framework (September 2018) paragraph 1.2.
[9] T42 30 September 2021 page 107.
[10] Recorded in Cabinet Memorandum No 013/2007: Office Accommodation: Policy, Procedures and Management dated 8 October 2007, a paper prepared by the DGO.
[11] AMF General Introduction pages 6-8, paragraphs 1.9.2 and 2.5, and Appendix 1.
[12] AMF paragraph 2.7.

9.9 Other arms of government involved in the leasing of any accommodation include:

(xiv) The Tenant Department (i.e. the arm of the BVI Government to whose use the accommodation is to be put). In the usual course of events, the Tenant Department will identify when accommodation is needed, and source the property; but, otherwise, it does not play any substantive part in the letting process itself (which is primarily a matter for the DGO). However, once accommodation is leased, the Tenant Department is responsible for its day-to-day management (including health and safety), and for the performance of the tenant's covenants. That extends to the use of the space (e.g. retrofitting or agreeing any arrangements as regards sharing the accommodation with other Government departments) and resolving any issues with the landlord about its performance of the landlord's covenants/obligations under the lease[13]. The AMF expects close cooperation between the Tenant Department and the DGO. For example, it recommends the appointment of liaison officers:

> "Who are responsible for interfacing with the [DGO] in order to facilitate efficient processing/management of leases, accurate and timely reporting on accommodation matters and easy resolution of matters concerning the tenancy agreement. The [DGO] will provide training/sensitisation sessions for liaison officers"[14].

Tenant Departments are also required to keep the DGO updated on any significant matters relating to the management of the lease[15].

(xv) The GOAC is responsible for reviewing requests for new accommodation, renewal and termination of leases and making recommendations to the MoF regarding the acquisition and management of government accommodation[16]; but, in practice, it has a much wider role which "encompasses all aspects of accommodation management"[17], including setting standards for acceptable accommodation (including occupational health and safety, security and fit out), supporting lease negotiations, reviewing and updating the AMF, developing standards and guidelines for the efficient and effective use of space, conducting inspections and site visits, and ensuring that departments have adequate strategic, disaster and contingency plans in place. It is chaired by the Permanent Secretary DGO, and the MoF is represented on it by the Financial Secretary (or, more usually in practice, the Deputy Financial Secretary)[18].

(xvi) The MoF. The MoF is involved at the approval stage, and presents the relevant paper to Cabinet for its approval. In addition, the Project Support Services Unit[19] falls within the MoF, and it assists with retrofitting, fit out and other significant capital projects. It may also have a role in the lease process by reporting on trends and providing recommendations to the GOAC[20].

(xvii) The Attorney General. The Attorney General's Chambers vet any lease.

(xviii) The Cabinet. Cabinet ultimately approves and authorises any lease.

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[13] AMF paragraph 1.9.6.
[14] AMF paragraph 1.9.8.
[15] AMF paragraph 1.9.6.
[16] AMF paragraph 1.9.3.
[17] AMF Appendix 1.
[18] AMF paragraph 1.9.3 (which has a full list of members) and Appendix 1; Jeremiah Frett Sixth Affidavit dated 9 September 2021 paragraph 2.2; and T42 30 September 2021 pages 10 and 121-122. There is a useful summary of the role of each member in Appendix 1 of the AMF.
[19] See paragraph 6.151 and footnote 285 above.
[20] AMF paragraph 1.9.5.

(xix) The Premier. The Premier formally signs any lease.

(xx) The Inland Revenue Department and Land Registry are also involved in respect of collecting stamp duty and registering any lease, respectively.

Accommodation Management Framework

9.10 The AMF was produced under the DGO in 2018, with the intention that it should be formally reviewed and revised every five years[21]. It was developed by the GOAC with contributions from various arms of government, including the Premier's Office, the Cabinet Office and the Environmental Health Division[22]. It applies primarily to leased accommodation, although it is said that some of the information may be relevant to the management of Government-owned accommodation[23]. It does not apply, however, to real property owned or leased by statutory boards.

9.11 Heavily influenced by the structure of the Office Accommodation Management Framework of the Government of Australia[24], the purpose of the AMF is to:

> "Provide clear and well documented guidelines for the management of the accommodation function, and to seek to standardise the approach to accommodation management across government agencies and across time"[25].

9.12 The expected "Outcomes and benefits" are described as follows[26]:

> "It is anticipated that a well-prepared and current accommodation management framework should result in the following:
>
> - A clear delineation of responsibilities among stakeholders in the process.
> - Best practices in space management.
> - Improved workspaces for public officers.
> - Improved accommodation-related experiences for customers.
> - Enhanced service delivery.
> - Enhanced landlord/tenant relationships.
> - More strategic management of funds allocated to acquisition, retention and maintenance of accommodation".

9.13 The AMF is divided into two main sections:

(i) Section 1 is headed "Context/Purpose/Scope/Operating Principles/Roles and Responsibilities"; and its purpose is said to be:

> "… to clearly define the breakdown of responsibilities among various stakeholders in the accommodation management process" [27].

[21] AMF General Introduction page 10, and paragraph 2.7. The review is to be undertaken by the GOAC.
[22] AMF Acknowledgements page 4.
[23] AMF paragraph 1.6.
[24] AMF Acknowledgements page 4.
[25] AMF General Introduction page 8.
[26] AMF paragraph 2.4.
[27] AMF paragraph 1.3.

This is done by explaining the particular roles of the DGO, the GOAC, the MoF, the Project Support Services Unit, Cabinet and Tenant Departments, in the context of various "operating principles", e.g. that accommodation should be safe, secure, accessible, functional and aesthetically pleasing; that the BVI Government should receive value for money; that Government departments should not compete in the marketplace; and that the overall accommodation needs of the Public Service take precedence over the needs of any specific unit[28].

(ii) Section 2 is headed "Accommodation Management Processes and Strategies", and it provides some overarching guidance to those responsible within arms of government for sourcing accommodation in respect of (e.g.) planning (acquisition), site visits, space management and fit out. It emphasises the need for periodic reviews of accommodation requirements and for careful planning: departments are encouraged to adopt an open space policy, and there is a focus on flexibility (such as shared meeting rooms and multifunctional spaces to maximise the use of the space and reduce outfitting costs). It also goes through the occupation process, and deals with matters such as insurance and emergencies.

9.14 Finally, there are three appendices which provide additional detail, and are intended to be used as working documents[29].

(i) Appendix 1 is headed "Roles and Responsibilities of the Government Accommodation Committee"[30]. It provides a breakdown of the work of the GOAC and its membership.

(ii) Appendix 2 contains eleven checklists designed to be used at various stages of the process, covering such areas as layout and design, occupational health and safety, and maintenance[31]. There is a finance checklist[32] which deals with budget allocation, rent and other fees/charges (such as services charges, relocation costs, outfitting costs and penalties); a checklist of information that should accompany an application for a new lease or a lease renewal[33]; a checklist of key clauses to be included in every lease[34]; and a list of the different stages of the process, from application to occupation[35]. A number of Departments have contributed to the checklists, including the Fire and Rescue Service, the Department of Human Resources, the Environmental Health Division, the PWD, and the MTWU.

(iii) Appendix 3 confirms that the "preferred rent range" for office accommodation is $20-30 per square foot; and that all leased office accommodation should meet certain minimum standards (air conditioning, fire suppression, finished floors etc.)[36].

[28] AMF paragraph 1.8.
[29] AMF General Introduction page 10.
[30] AMF Appendix 1.
[31] AMF Appendix 2.
[32] AMF Appendix 2 Checklist 5.
[33] AMF Appendix 2 Checklist 7.
[34] AMF Appendix 2 Checklist 8.
[35] AMF Appendix 2 Checklist 9.
[36] AMF Appendix 3.

Guidelines for Procurement of Office and Housing Accommodation, Tenancy Agreements and Lease Management

9.15 The Accommodation Guidelines are also issued by the DGO and, according to their Preamble:

> "Outline the general operating procedures for the management of Government rented properties, including the application processes for the acquisition of office space, housing accommodation and lease agreements"[37].

9.16 The document begins by setting out three general, overarching principles[38]:

> "1) All Government rented accommodation, including office and housing accommodation, should have valid lease agreements.
>
> 2) All leases, whether office accommodation or housing accommodation, must be handled by the [DGO].
>
> 3) All leases for government rented properties, including office and housing accommodation, must be vetted by the Attorney General's Chambers."

9.17 There follows:

(i) A detailed summary of the process for the acquisition of office accommodation[39].

(ii) A step-by-step guide to the actions that need to be taken pre- and post-execution, as well as when renewing and terminating a lease[40]. This covers matters such as title searches and land registry checks. There is guidance on how to deal with liens/charges against the property, what steps to take if the landlord is a company, and how to proceed if the registered owner is deceased or a married female who wishes to have the lease executed in her married name. It also outlines what should be included in leases, and explains how to refer a lease to the Attorney General for vetting.

(iii) An Office Relocation Checklist produced by the MoF PMU, directed mainly towards Tenant Departments to assist them with negotiating leases and with arranging office furnishings, security systems etc[41].

(iv) A checklist which sets out the criteria for housing accommodation for resident judges provided by the Eastern Caribbean Supreme Court[42].

(v) The "Government-Rented Housing Policy" which deals with matters such as furnishings, visitors, inspections, use of the property, utilities and repairs, to be signed by the tenant which acknowledges the requirement to quit the premises for any infraction of the rules provided or on the loss of eligibility[43].

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[37] Accommodation Guidelines: Preamble page 2.
[38] Accommodation Guidelines: Leases: General Principles page 3.
[39] Accommodation Guidelines pages 3-7.
[40] Accommodation Guidelines pages 7-16.
[41] Accommodation Guidelines pages 16-18.
[42] Accommodation Guidelines pages 19-24.
[43] Accommodation Guidelines pages 25-27.

The Process in Practice

9.18 The process of obtaining leased accommodation is commenced by the head of the Tenant Department, through his or her Permanent Secretary, making a written request to the Permanent Secretary DGO[44]. The request is required to include the following basic information[45]:

(i) justification for new or alternative accommodation (including information on what other options were considered, how the lease will improve service delivery and productivity, and why the lease was considered the best option available);

(ii) history of present accommodation (e.g. date of initial occupancy, maintenance issues);

(iii) staffing complement;

(iv) identification of funding/budgetary provision;

(v) projection of preliminary costs other than rent (e.g. fit out costs, relocation, retrofitting, security deposit, service fees and maintenance costs);

(vi) description of accommodation;

(vii) land registration information;

(viii) landlord name and contact information;

(ix) heads of terms of lease/draft lease;

(x) length of lease; and

(xi) information on other Government departments in close physical proximity with which services can potentially be shared, such as internet services, conference rooms etc.).

The Tenant Department must also ensure that funding is available, from either the Tenant Department's own budget or the DGO's budget, to meet rental payments, security deposits and any other expenses[46].

9.19 When it comes to considering alternative premises, as noted above, the AMF provides useful guidance[47]. It recommends that each Tenant Department should periodically evaluate its space needs and make projections for the future. If it is considered that more space is required, the starting point is to look at how the existing space could be reorganised, refitted or reconfigured. Efforts should be made to acquire additional space within Government-owned or -leased accommodation before seeking to commit to a new commercial lease; and, if it is determined that additional space is necessary, a comprehensive, fully costed plan should be developed.

9.20 Commercial property is usually sourced by the Tenant Department, assisted by both the AMF and the Guidance which reinforce the importance of strategic planning and the need for close collaboration with the DGO. On occasion (and at the request of the Tenant Department), the DGO will identify suitable property; but, even in those circumstances, the Tenant Department will have to justify the need for new/alternative accommodation and provide much of the

[44] Accommodation Guidelines: Process for Acquisition of Office Accommodation paragraph 1. See also T42 30 September 2021 page 15.
[45] AMF Appendix 2 Checklist 7. See also Accommodation Guidelines: Process for Acquisition of Office Accommodation paragraph 1, and T42 30 September 2021 pages 18-19.
[46] Accommodation Guidelines: Lease Management paragraph 18; and T42 30 September 2021 page 19 (Mrs Dabreo-Lettsome). Mr Frett was adamant that the funding source should be identified before negotiations on a potential lease even begin (T42 30 September 2021 pages 125-126). See also AMF Appendix 2 Checklist 5.
[47] AMF paragraph 2.3.1.

required information (including staffing complement, details of square footage and length of lease). Housing accommodation is also sourced directly by the DGO which maintains relationships with landlords and real estate companies for that purpose[48].

9.21 When the application arrives in the DGO, it is stamped, recorded and allocated to a desk officer who is responsible for preparing the file for the GOAC[49]. This includes carrying out due diligence on both the landlord and the property, including at least the due diligence required by the Accommodation Guidelines[50]:

> "In preparation for the Office Accommodation memorandum, the desk officer undertakes the following actions.
>
> ii) Ensures that the information identified in [paragraph 9.18 above] are included in the request.
>
> iii) Obtains the heads of terms for the proposed property.
>
> iv) Verifies the proposed property's parcel, block and registration information with the Land Registry Department.
>
> v) Verifies with the Land Registry Department the name in which the property is registered….
>
> vi) Verifies with the Land Registry Department whether the property is in good standing, i.e. there are no liens/charges against the property…".

9.22 If, during this process, it appears that there is some fundamental flaw in the application – such as exorbitant rent[51] or no budget to cover the lease – the DGO will inform the Tenant Department that the matter will not be taken forward and that it needs to reconsider. In this way, the DGO also acts as a filter between the Tenant Department and the next stage of the process[52]. A request for reconsideration is, however, relatively rare: usually, the DGO sends the file on to the GOAC, which (as noted above) is responsible for making recommendations to the Minister of Finance (and ultimately to Cabinet).

9.23 Upon receipt of the file, the GOAC will conduct a site visit to assess the proposed properties' suitability, and complete a site assessment report. The relevant considerations for this assessment are set out in the Accommodation Guidelines[53]:

> "In consideration of a request for new accommodation, the [G]OAC should bear in mind the following considerations:
>
> i) whether the proposed premises are suitable;
>
> ii) whether the proposed rent is in keeping with the rent ceiling set by the Government;
>
> iii) identify associated costs with procuring the requested premises, such as configuring and outfitting the office space, monthly rent and security deposit etc;
>
> iv) whether the Department has the financial resources to cover rent costs, or whether funding would be required. If funding is required, ascertain how the funding will be met;

[48] T42 30 September 2021 pages 17 and 111.
[49] Accommodation Guidelines page 3.
[50] Accommodation Guidelines: Process for Acquisition of Office Accommodation paragraph 5, and Lease Management page 7ff. See also AMF Appendix 2 Checklist 9; and T42 30 September 2021 pages 105-106 and 109 (regarding 'certificate of occupancy').
[51] Mrs Dabreo-Lettsome explained that there is a preferred rent range or cap on the amount of rent that can be paid for office accommodation, which is approximately $10 below market value (T42 30 September 2021 page 33).
[52] T42 30 September 2021 pages 37-39.
[53] Accommodation Guidelines: Process for Acquisition of Office Accommodation paragraph 5. See also AMF paragraph 2.3.2.

v) ensure that the proposed building meets with Building Authority approval and that the building is fully compliant with the appropriate building standards;

vi) ensure that the proposed building meets the Virgin Islands Fire and Safety code;

vii) whether alternative and/or more cost-effective arrangements could be made;

viii) ensure that adequate parking space will be made available for use by the Department or at least senior officers and clients;

ix) consider what the Government's responsibilities are in relation to the lease agreement; and

x) review the requesting Departments 5-10 year staff projections, if this information is provided."

The GOAC is assisted in this undertaking by the various checklists in Appendix 2 of the AMF[54].

9.24 The GOAC then either meet face-to-face or, if there is an urgent need, round robin discussions will take place on the basis of an information paper that will have been circulated in advance. Minutes are taken with final recommendations signed by each member of the Committee, and these are incorporated in a memorandum/paper which is forwarded to the MoF[55] for approval[56].

9.25 The Minister of Finance (or the Financial Secretary, as the case may be) may refuse the recommendations, in which case the matter is sent back to the GOAC and the process effectively "starts again"[57]. If, however, the recommendations are approved, the MoF takes carriage and sees the matter through Cabinet. Responsibility therefore effectively shifts at this stage from the DGO to the MoF, because of the financial implications[58].

9.26 Cabinet is then asked to approve the renting of the accommodation. If it does not approve it, then, again, the matter goes back to the GOAC; and the process starts again. If the accommodation is approved, the draft lease is submitted to the Attorney General for vetting, a crucial step involving (amongst other things) the identification of any onerous or unusual clauses, or hidden charges[59].

9.27 Once the lease has been vetted, it is sent to the Premier and the landlord to sign. If an issue with the lease or property arises in the period between Cabinet authorisation and execution, another Cabinet Paper will be prepared by the DGO and taken back to Cabinet through the MoF[60]. The Premier usually signs every lease on behalf of the BVI Government[61]; and the Accommodation Guidelines set out who should sign on behalf of the landlord (and the authority the signatory will require)[62].

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[54] As noted above at paragraph 14(ii), these checklists cover areas such as design and layout, occupational health and safety, electronics, policy and legislation, maintenance, and environmental sustainability. See also T42 30 September 2021 page 19.

[55] Some of the documents refer to "the Premier's approval" (e.g. AMF Appendix 2 Checklist 9, and Jeremiah Frett Sixth Affidavit dated 9 September 2021 paragraph 2.4). This was canvassed at the hearing (T42 30 September 2021 pages 51-54 (Mrs Dabreo-Lettsome and Mrs Stoutt-Igwe), and 123-124 (Mr Frett)). The position appears to be that the paper goes to the Premier's Office; but the Premier's Office does not have any input. Rather, it is only a conduit to get the documents to the MoF. In recent times, of course the posts of Premier and Minister of Finance have been held by the same person.

[56] Accommodation Guidelines: Process for Acquisition of Office Accommodation paragraphs 10 and 11; and T42 30 September 2021 page 20.

[57] T42 30 September 2021 page 20.

[58] T42 30 September 2021 pages 20, 47-49, and 123-124.

[59] Accommodation Guidelines: Lease Management paragraph 12; and T42 30 September 2021 page 20.

[60] T42 30 September 2021 page 91.

[61] Mrs Stoutt-Igwe confirmed that the Premier should sign every lease on behalf of the BVI Government (T42 30 September 2021 pages 54-55. See also Accommodation Guidelines: Lease Management paragraph 16).

[62] Accommodation Guidelines: Lease Management paragraphs 7-10.

9.28 The Accommodation Guidelines stress the importance of commencement date for the lease:

> "The commencement date of a lease agreement is of utmost importance. Leases should not be executed until the premises are ready to be accommodated. The rent is normally payable once the keys are handed over. Therefore, signing of leases and moving into a new accommodation must be carefully and properly coordinated to avoid having to pay rent for a building for periods in advance of being able to take up occupancy and commencing full operations"[63].

9.29 Otherwise, upon receipt of an executed lease, the DGO:

(i) notarises the lease[64];

(ii) updates the relevant Tenant Department, so that the payment process can be initiated[65];

(iii) sends a copy of the lease to Inland Revenue with a request for stamp duty exemption[66];

(iv) registers the lease at the Land Registry in the High Court, if required (leases that are beyond two years are required to be registered, leases that are two years and below, are not required to be registered)[67];

(v) inputs the lease into a database[68]; and

(vi) sends original leases to the landlord, the Head of Tenant Department and to the relevant departmental file: copies are sent to the IAD, the Treasury Department and the MoF[69].

9.30 The building is then ready for occupation. This is preceded by a walkthrough of the building, attended by representatives of the landlord, the tenant and the GOAC/DGO. If all is in order, the keys are handed over to the Tenant Department.

9.31 Thereafter, the role of the DGO is limited to arranging site visits[70]. Visits should be conducted annually by an authorised officer within the DGO (usually the desk officer for office accommodation), together with the head of the Tenant Department and the landlord. The purpose is to inspect the general condition of the accommodation and premises and identify/resolve any issues. A checklist is used, signed off by all parties and saved to file. Any maintenance issues are highlighted and documented; and the matter is kept active until it is satisfactorily resolved. It falls to the Tenant Department to liaise with the landlord in the first instance: the DGO may become involved if the dispute becomes protracted[71].

9.32 The Accommodation Guidelines also cover the renewal or termination of a lease[72]. The database maintained by the DGO flags when a lease is due to expire. Instructions are then taken, in writing, from the Tenant Department.

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[63] Accommodation Guidelines: Lease Management paragraph 28.
[64] Accommodation Guidelines: Lease Management paragraph 24.
[65] T42 30 September 2021 page 20.
[66] Accommodation Guidelines: Registration of Lease paragraph 1; and see also T42 30 September 2021 page 21.
[67] Accommodation Guidelines: Registration of Lease paragraph 2; and see also T42 30 September 2021 page 21.
[68] The database is used to generate monthly, quarterly and annual reports (T42 30 September 2021 page 21).
[69] Accommodation Guidelines: Distribution of Executed and Registered Leases pages 14-15; and T42 30 September 2021 page 21.
[70] Accommodation Guidelines: Office and Housing Accommodation Site Visits paragraphs 1-8; and T42 30 September 2021 pages 21-22.
[71] As happened with the lease of Cutlass Tower and the relocation of the Virgin Islands Shipping Registry, when negotiations between the Tenant Department and the landlord over unpaid rent had stalled and the DGO stepped in to help resolve the situation (see T42 30 September 2021 pages 68-80).
[72] Accommodation Guidelines: Renewal of Leases paragraphs 1-9 and Termination of Leases pages 15-16; and T42 30 September 2021 pages 22-23 (Mrs Dabreo-Lettsome).

(i) If the Tenant Department wishes to renew the lease, then the DGO will liaise with the landlord and agree any changes. The matter then follows the same procedure as outlined above for a new lease, i.e. the GOAC conducts a site visit and makes recommendations to the Minister of Finance. The only difference is that renewals do not require Cabinet authorisation: if approved by the Minister of Finance, the lease goes straight to the Attorney General for vetting and then on to the Premier to sign[73].

(ii) If the instructions are to terminate the lease, notice is served in accordance with the lease agreement and the property is vacated. A Surrender of Lease form is submitted to the Chief Register of Lands and, 30 days after termination, the DGO will request the return of the security deposit.

Conclusion

9.33 Since 2006, when it became the department effectively overseeing the provision of Government accommodation, the DGO has produced both a policy framework and operational guidance, designed to obtain accommodation of reasonable quality whilst achieving value for money.

9.34 However:

(i) There does not appear to be a uniform level of knowledge of these policies throughout the BVI Government. Both Glenroy Forbes and Jeremiah Frett, each of whom have served as Financial Secretary, appear to have been unaware of the AMF; and Mr Frett agreed that there needed to be better dissemination of the role of the DGO in respect of accommodation and the process generally[74].

(ii) Despite the Accommodation Guidelines emphasising the importance of not executing a lease until the premises are ready for occupation[75], there are several examples of significant gaps between the commencement date of the lease and the date of occupation[76]. When these issues were canvassed at the COI hearing, Mrs Dabreo-Lettsome explained that:

> "What we have been doing is to have deeper discussions with Department Heads about ensuring that we receive as much information from them as possible, if they are the ones that are engaging the landlords before we are"[77].

[73] T42 30 September 2021 pages 22-23.
[74] T42 30 September 2021 pages 126-127, 155-157 and 159-160.
[75] Accommodation Guidelines: Lease Management paragraph 28 (quoted at paragraph 9.28 above).
[76] For example, the lease of part of Cutlass Tower to the Premier's Office for use of the MoF following the 2017 hurricanes, when concerns were raised about the BVI Government incurring financial obligations for some months in advance of occupation (see, e.g., T42 30 September 2021 pages 12-19). It appears that problems generally arise when the DGO is essentially excluded from the process (as it was in respect of the lease of Cutlass Tower). At the time, it was suggested that the DGO issue guidelines for Public Service engagement with landlords (Email Permanent Secretary Premier's Office Kedrick Malone to Deputy Secretary DGO Helen Durante-Seymour dated 7 January 2020).
[77] T42 30 September 2021 page 17.

(iii) It is possible to circumvent the process, as for example happened with the lease for office space at TPP for the MoF following a period of working in the Central Administration Complex devastated by the 2017 hurricanes. Whilst there were clearly strong mitigating circumstances[78], this lease did not go through the DGO, it was not signed by the Premier, and it does not appear to have been authorised by Cabinet. Moreover, the space was occupied for almost eight months before a written agreement was signed and the lease was somewhat belatedly vetted by the Attorney General[79].

9.35 Nevertheless, these are minor criticisms of a system that appears relatively sound from a governance point of view. There are generally policies and procedures in place to ensure transparency, accountability and oversight of the BVI Government's leasing of privately owned accommodation. The system has a certain level of in-built checks and balances that enhance both transparency and accountability.

9.36 Further, the DGO continues to review and monitor the system and is willing and able to make improvements where necessary. For example, Mrs Dabreo-Lettsome explained that though the overarching lease process has not changed since 2018, there are reforms in train and work is afoot on a new "Public Estate Framework", with the objective to streamline the entire Government accommodation portfolio, to put a money value on it, and to put this information in a database that can then be made available to Departments/Ministries to assist them when making decisions about future use of space or sourcing accommodation. A Public Estate Manager was recruited two years ago, with the aim of presenting the new framework to Cabinet by the end of 2021. The long-term intention is to decrease the amount that is spent on leases and bring Government-owned buildings to the same standards as privately owned buildings[80]. The system thus continues to evolve and develop, with input from across Government.

9.37 Those responsible for leasing of property by the BVI Government, notably the senior public officers, are (like many other such officers in the Public Service) experienced and dedicated. There is no suggestion that, stretched as they might be, difficulties are encountered as a result of a lack of capacity or capability in respect of policy formulation and implementation.

9.38 Though no doubt, as with any system designed to deliver good governance, improvements can be made, on the evidence I have seen, the governance in relation to BVI Government leases provides a good example of how the Public Service in the BVI is capable of developing and operating a coherent system that ensures a substantial degree of transparency and effective use of public money.

[78] The Permanent Secretary DGO Mrs Dabreo-Lettsome explained that the losses caused by the 2017 hurricanes and associated flooding were in excess of $900m; that 58 per cent of the buildings in the Territory were classified as having major damage; and that a majority of BVI Government-owned and a large percentage of Government-leased buildings fell into that class (T42 30 September 2021 page 34). She explained the difficulties that were faced in sourcing alternative accommodation and the pressure there was to vacate a building that continued to deteriorate to the point where works actually commenced despite some officers remaining, which in turn became a major health and safety issue in its own right (T42 30 September 2021 page 66). The former Financial Secretary Glenroy Forbes also explained the appalling conditions that MoF staff were confronted with in the Central Administration Building (T42 30 September 2021 pages 144-145).

[79] T42 30 September 2021 pages 143ff.

[80] T42 30 September 2021 pages 11-12 and 42-46.

CHAPTER 10:
RESIDENCE AND BELONGERSHIP STATUS

APPENDIX A

RESIDENCE AND BELONGERSHIP STATUS

The BVI is a small Territory. However, for many, it is a particularly attractive place to live. The right of residence – and belongership status, which gives not only a right to reside but also the right to vote in elections and privileges in respect of (e.g.) the acquisition of land and employment – is highly prized. The Minister for Natural Resources, Labour and Immigration Hon Vincent Wheatley described belongership as "a sacred gift"[1].

Whilst there are statutory provisions and procedures which govern residence and belongership, these privileges are ultimately in the hands of Cabinet which has a discretion as to whether to make a grant or not. This chapter looks particularly at the processes involved in making and determining applications for residency and belongership, and notably the part that exercise of discretion plays.

Legal Framework

10.1 British nationality is exclusively the province of the UK Parliament.

10.2 It is unnecessary for the purposes of this Report to set out in any detail the history of the nationality status enjoyed by people in what are now BOTs[2]. Briefly, by virtue of the British Nationality and Status of Aliens Acts 1914-48[3], people with defined connections with the UK or its territories overseas (i.e. its colonies and dependent territories) had a common status termed (in the British Nationality Act 1948) "citizen of the United Kingdom and Colonies". However, so far as people from these territories overseas were concerned, that position was severely qualified by immigration restrictions imposed by the Commonwealth Immigrants Acts 1962 and 1968[4], and then by the Immigration Act 1971[5], which generally restricted the right of abode in the UK to citizens of the UK and Colonies who had defined connections with the UK. Other such citizens generally required leave to enter or remain in the UK.

10.3 That provision was effectively reversed so far as citizens of BOTs are concerned by the British Overseas Territories Act 2002[6] ("the 2002 Act"), which not only replaced the term "British Dependent Territory" with "British Overseas Territory", but also introduced the status of citizen of a BOT; and granted British citizenship by deemed descent to all BOT citizens (except those who were such only as the result of a connection with a Sovereign Base Area, not relevant for the purposes of this Report)[7]. Although, under the 2002 Act, citizenship by descent can only be passed to one generation, a person born in a BOT becomes a British citizen if, at the time of the birth, his or her father or mother is either a British citizen or settled in the territory[8]. The 2002 Act also provides detailed rules for the grant of citizenship to those with other connections with a BOT, e.g. by adoption or descent.

[1] T41 28 September 2021 page 154.
[2] A full history can be found in Hendry & Dickson pages 212-220, for which I express my appreciation.
[3] 1914 c17, 1918 c 38, 1922 c 44, 1933 c 49, 1943 c 14 and 1948 c 56.
[4] 1962 c 21 and 1968 c 6.
[5] 1971 c 77.
[6] 2002 c 8.
[7] Section 3.
[8] Paragraph 1(2) of Schedule 1.

10.4 The 2002 Act did not substantively affect the provisions of the British Nationality Act 1981 in respect of the acquisition of BOT citizenship in accordance with the criteria as set out in Part II of that Act, which broadly reflect the means of acquiring British citizenship. BOT citizenship can therefore be acquired by descent from a BOT citizen, or by birth, adoption, registration or naturalisation in a territory.

10.5 As a result of the 2002 Act, the majority of the inhabitants of BOTs have both British citizenship (with the right of abode in the UK) and BOT citizenship.

10.6 In addition, through the constitution or local legislation, most BOTs have established a local, privileged status for people who satisfy particular criteria of connection with the territory, often referred to as "belonger status"[9]. Some BOTs have no such status. Those that do, define the status by reference to different criteria; but generally they fall into two broad categories:

> "(1) those who are regarded as sufficiently indigenous to the territory and are thus belongers by operation of the relevant legislation; and (2) those who have been granted belonger status by means of a process and machinery established by the legislation. In the second category commonly falls outsiders who have resided in the territory for a certain period and who have applied for belonger status, and in some cases outsiders who have married belongers."[10]

10.7 In addition to the right of abode in the territory, it is common to find that the incidents of belonger status include privileges with regard to employment, business activities and property (notably real property) rights, and political privileges, such as the right to vote and stand as an election candidate[11].

10.8 Prior to the 1976 Constitution, there was no reference to "belongership" in the BVI: the 1967 Constitution merely set out (fairly short) residence and domicile qualifications for voting and being elected to the Legislative Assembly[12]. Section 2(2) of the 1976 Constitution "deemed" certain British subjects as belonging to the BVI (i.e. those who were born in the BVI, those whose father or mother were born in the BVI and those who had obtained the subject of British citizen by grant of certificate by the Governor of the BVI).

10.9 Section 2(2) of the 2007 Constitution now defines the category of person "belonging" to the BVI in the following terms:

> "For the purposes of this Constitution, a person belongs to the Virgin Islands if that person—
>
> (a) is born in the Virgin Islands and at the time of the birth his or her father or mother is or was—
>
> (i) a British overseas territories citizen (or a British Dependent Territories citizen) by virtue of birth, registration or naturalisation in the Virgin Islands or by virtue of descent from a father or mother who was born in the Virgin Islands; or

[9] The law and process of obtaining belonger status in the BVI was covered in evidence by the Acting Permanent Secretary MNRLI, Joseph Smith Abbott, in his Fourth Affidavit dated 26 August 2021 and Seventh Affidavit dated 10 September 2021; and by Mr Smith Abbott and the CIO, Ian Penn, in oral evidence (T41 22 September 2021).

[10] Hendry & Dickson pages 212-220. The authors consider "belonger status" in some detail at pages 220-225, from which I have gratefully drawn.

[11] Hendry & Dickson page 224.

[12] Sections 30 and 27(1) of the 1967 Constitution as amended by the Virgin Islands (Constitution) (Amendment) Order 1970 (SI 1970 No 1942).

(ii) settled in the Virgin Islands; and for this purpose 'settled' means ordinarily resident in the Virgin Islands without being subject under the law in force in the Virgin Islands to any restriction on the period for which he or she may remain, but does not include persons on contract with the Government of the Virgin Islands or any statutory body or Crown corporation;

(b) is born in the Virgin Islands of a father or mother who belongs to the Virgin Islands by birth or descent or who, if deceased, would, if alive, so belong to the Virgin Islands;

(c) is a child adopted in the Virgin Islands by a person who belongs to the Virgin Islands by birth or descent;

(d) is born outside the Virgin Islands of a father or mother who is a British overseas territories citizen by virtue of birth in the Virgin Islands or descent from a father or mother who was born in the Virgin Islands or who belongs to the Virgin Islands by virtue of birth in the Virgin Islands or descent from a father or mother who was born in the Virgin Islands;

(e) is a British overseas territories citizen by virtue of registration in the Virgin Islands;

(f) is a person to whom a certificate has been granted under section 16 of the Immigration and Passport Act 1977 of the Virgin Islands (in this subsection referred to as 'the Act', and references to the Act or to any section thereof include references to any enactment amending, replacing or re-enacting the same) and has not been revoked under section 17 of the Act; and (without prejudice to the right of any person to apply for the grant of such a certificate under the Act) a British overseas territories citizen by virtue of naturalisation in the Virgin Islands has a right by virtue of this Constitution to apply for the grant of such a certificate;

(g) is the spouse of a person who belongs to the Virgin Islands and has been granted a certificate under section 16 of the Act; or

(h) was immediately before the commencement of this Constitution deemed to belong to the Virgin Islands by virtue of the Virgin Islands (Constitution) Order 1976."

By sections 3 and 16(9) of the Immigration and Passport Act 1977 ("the 1977 Act")[13], a person who is deemed to belong to the BVI in accordance with section 2(2) of the Constitution is a "belonger".

10.10 These provisions reflect the categorisation referred to above. In addition to the criteria as to connection with the BVI, which give a right to belongership status (i.e. the criteria in (a)-(e) and (g)-(h)), by paragraph (f), a person can obtain belonger status by obtaining a certificate under section 16 of the 1977 Act. Section 16, so far as relevant, provides:

"(1) Subject to the provisions of this section, the Cabinet, after consultation with the Board, may upon application being made in the manner prescribed grant a certificate that the person who applied for the same belongs to the Territory for the purposes of this Act.

(2) A person may be granted a certificate referred to in subsection (1) where—

[13] The Immigration and Passport Ordinance 1977 (No 9 of 1977) was amended by the Immigration and Passport (Amendment) Act 1990 (No 11 of 1990), the Immigration and Passport (Amendment) Act 2000 (No 12 of 2000), the Immigration and Passport (Amendment) Act 2003 (No 8 of 2003) and the Immigration and Passport (Amendment) Act 2006 (No 11 of 2006). The consolidated version in regular use, dated 2013, incorporates amendments to 2013 only; but, except where otherwise appears, none of the later amendments is relevant to the issues raised in this Report.

(a) the person qualifies under subsection (3);

(b) there has been an exercise in relation to the person of the power set out in subsection (4); or

(c) the person is a spouse of a belonger and meets the requirements set out in subsection (6) and is not disqualified thereunder.

(3) Subject to subsection (4), a person may be granted a certificate referred to in subsection (1) where the person—

(a) is of good character;

(b) is not less than 18 years of age;

(c) has been ordinarily resident in the Territory for a period of not less than 10 years immediately prior to his or her application;

(d) has held a certificate of residence granted under section 18 for a period of not less than 12 months immediately preceding the date of the application; and

(e) has, in his or her application, restated his or her intention of making the Territory his or her permanent home and has satisfied the Board that it is his or her intention so to do.

(4) Where, in the exceptional circumstances of any case, the Cabinet considers it fit to do so, it may, after consultation with the Board, grant a certificate referred to in subsection (1) to any person who is of good character and who is at the date of making the application for such a certificate ordinarily resident in the Territory and who has been so ordinarily resident for the period of not less than 7 years immediately prior to his or her application.

(5) Where, in the exceptional circumstances of any case, the Cabinet considers it fit to do so, it may, in its own discretion and without requiring the submission of an application, grant a certificate referred to in subsection (1) to any person who, in its opinion, has made significant and consistent contributions to the economic and social development of the Territory over a period of at least 50 years.

(5a) Where Cabinet considers it fit to do so, it may, in its own discretion grant a certificate referred to in subsection (1) to a person who is a great grandchild of a person who belongs to the Virgin Islands by virtue of section 2(d) of the Constitution, upon application for same in the prescribed manner.

(6) Subject to subsection (7), a spouse of a belonger may be granted the certificate referred to in subsection (1) where he or she has been ordinarily resident in the Territory with his or her spouse who is a belonger, and they have been living together as husband and wife, for at least 5 years, unless within that period of 5 years the spouse of the belonger has been sentenced to imprisonment in any country for a criminal offence for a term of more than one year.

(7) Where the spouse who is a belonger dies before his or her spouse completes the period of 5 years' residence referred to in subsection (6) and at the time of death the spouses were living together in the Territory as husband and wife for a period of at least 2½ years before the death of the belonger spouse, the Cabinet may, upon application, grant the surviving spouse the certificate referred to in subsection (1) as if he or she had completed that period of residence."

10.11 In terms of definitions within this section:

(i) "Certificate of residence" in section 16(3)(d) is distinct from a certificate of belongership, and is a reference to a certificate under section 18(1) of the 1977 Act, which (as substituted by the Immigration and Passport (Amendment) Act 2000[14]) provides (so far as relevant):

> "… [T]he Cabinet may, after consultation with the Board, grant a certificate of residence to any person who applies for the same in the prescribed manner and who—
>
> (a) is of good character; and
>
> (b) in his or her application has stated an intention to reside permanently in the Territory."

(ii) "The Board" is the Board of Immigration established under section 13 of the 1977 Act[15], whose functions are set out in section 14:

> "(1) Subject to the provisions of section 15 ["Information and statistics relating to designated matters"] the Board shall be advisory and consultative and shall have no executive or administrative functions.
>
> (2) It shall be the duty of the Board to advise upon all questions concerning or connected with the entry of persons into the Territory, and the residence and occupation in the Territory of persons who do not belong to the Territory…. which may be referred to the Board by the Minister or the Chief Immigration Officer, and further it may be competent for the Board to make recommendation to the Minister or the Chief Immigration Officer in connection with such questions without previous reference."

(iii) In practice, the Immigration Department on behalf of the Chief Immigration Officer ("the CIO") refers each residence and belongership application to the Board, which makes a recommendation to the Minister. The Minister then submits a paper to Cabinet with his or her own recommendation, which usually reflects that of the Board[16].

(iv) "The Minister" is the Minister from time-to-time charged with portfolio responsibility for immigration and passport matters. Until 1 March 2019, that was the Premier. Since that date, it has been the Minister for Natural Resources, Labour and Immigration.

(v) "Good character" (a precondition under subsections (3) and (4) and, in relation to certificates of residence, section 18(1)) is not defined.

(vi) "Ordinarily resident" (a precondition under subsections (3), (4) and (6)) is defined in section 16(9) and (10) (as substituted by the 2000 Act), as follows:

> "(9) 'ordinarily resident' means that the applicant was in the Territory at the beginning of the relevant period specified in subsection (3), (4) or (6) ending with the date of the application, and that—
>
> (a) the number of days on which he or she was absent from the territory in that period does not exceed—

[14] No 12 of 2000.
[15] In this section of the Report, references to "the Board" are to this Board of Immigration.
[16] See paragraph 10.29 below.

(i) in the case of subsection (3), 900 days;

(ii) in the case of subsection (4), 630 days; and

(iii) in the case of subsection (6), 450 days;

(b) the number of days on which he or she was absent from the Territory in the period of 12 months so ending does not exceed 90;

(c) he or she was not, at any time in the period of 12 months so ending, subject under the immigration laws to any restriction on the period for which he or she might remain in the Territory; and

(d) he or she was not, at any time in the period so ending, in the Territory in breach of the immigration laws….

(10) Notwithstanding the definition of 'ordinarily resident', an applicant shall be deemed to be ordinarily resident in the Territory where he or she proves to the satisfaction of the Cabinet that he or she has been absent from the Territory on grounds of illness, study, Government service or service in the armed forces or Her Majesty's Government."

10.12 It is important to emphasise that, under section 16, even where an individual can satisfy the preconditions set out in subsections (3)-(7), he or she is not entitled to belongership as of right. Satisfaction of those conditions merely gives the Cabinet, in its discretion, a power to grant belongership (hence, in (1), "Subject to the provisions of this section, the Cabinet… *may* … grant a certificate…; and, in (2), "A person *may* be granted a certificate…")[17]. Although it may be required to consult with the Board and it must exercise the power lawfully, the exercise of this discretion is entirely in the hands of Cabinet. However, in exercising the power, in certain circumstances the Cabinet is bound to take into account some statutory considerations. By section 16(8):

"In deciding whether a certificate should be granted pursuant to subsection 2(a) or (b) in respect of any applicant [i.e. where the applicant relies upon satisfying the preconditions set out in subsection (3) or (4)], the Cabinet shall consider whether—

i) the economic situation in Territory is such that the grant of a certificate to the applicant will prejudice the protection afforded under this Act to other persons engaging in the trade or profession in which the applicant is engaged or in which he is likely to engage;

j) the applicant has established a close personal connection with the Territory;

k) the applicant's character and previous conduct are unexceptional; and

l) the applicant's continued residence in, and association with, the Territory may afford some advantage to the Territory."

Thus, Cabinet is required by statute to assess, and then take into account, whether an applicant's character and previous conduct are "unexceptional".

[17] The same is true of the Cabinet's power to grant a certificate of residence under section 18(1): subject to the preconditions being met, "[T]he Cabinet *may*… grant a certificate of residence…".

10.13 Section 17 of the 1977 Act sets out the circumstances in which a belongership certificate granted under section 16 either ceases to exist[18] or is otherwise revocable[19]. In terms of the latter, a certificate granted under section 16 is revocable in four sets of circumstances, which include where the individual has, within five years of grant of such certificate, been sentenced to imprisonment in any country for a criminal offence for a term of more than one year, or where the certificate has been obtained by fraud, false representation or concealment of any material fact[20].

10.14 For a limited period expiring on 1 February 2020[21], to facilitate the so-called "Fast Track" process, sections 2(b) and (c) of the Immigration and Passport (Amendment) Act 2019[22] ("the first Amendment Act") and section 2 of the Immigration and Passport Act (Amendment) (No 2) 2019[23] ("the second Amendment Act") (i) replaced section 16(4) and (5) (concerning belonger status) and (ii) inserted a new section 18(1A) (concerning certificates of residency) in the 1977 Act in the following terms:

> "16(4) Where in the exceptional circumstances of any case or for any other reason, Cabinet considers it fit to do so, it may, in its own discretion grant a certificate referred to in subsection (1) to any person who applies for the same in the prescribed manner and who
>
> (a) is of good character;
>
> (b) is at the date of making the application for such certificate, ordinarily resident in the Territory; and
>
> (c) has been so ordinarily resident for the period of not less than 7 years immediately prior to his or her application.
>
> (5) Where in the exceptional circumstances of any case, the Cabinet considers it fit to do so, it may, in its own discretion grant a certificate referred to in subsection (1) to any person who applies for same in the prescribed manner and who, in its opinion,
>
> (a) has made significant and consistent contributions to the economic and social development of the Territory; or
>
> (b) has been ordinarily resident in the Territory, for a period of at least 20 years."
>
> "18(1A) Where in the exceptional circumstances of any case, or for any other reason, Cabinet considers it fit to do so, it may, in its discretion grant a certificate of residence referred to in subsection (1) to any person who applies for the same in the prescribed manner and who—
>
> (a) is of good character; and
>
> (b) in his or her application has stated an intention to reside permanently in the Territory; and
>
> (c) has been ordinarily resident in the territory for a period of at least 19 years."

[18] Section 17(1).
[19] Section 17(2).
[20] Similarly, section 19 sets out the circumstances in which a section 18 certificate of residence may be revoked by Cabinet, i.e. where the individual (i) is ordinarily resident outside the Territory continuously for more than three years, (ii) is convicted and sentenced to a term of imprisonment of one year or more and (iii) where his or her conduct is considered not to be in the public interest.
[21] Section 6 of the first Amendment Act terminated the limited period on 1 October 2019, which was extended to 1 February 2020 by section 2(a) of the second Amendment Act.
[22] Immigration and Passport (Amendment) Act 2019 (No 5 of 2019), gazetted on 18 June 2019.
[23] Immigration and Passport (Amendment) (No 2) Act 2019 (No 6 of 2019), gazetted on 2 September 2019.

These changes enabled Cabinet to determine applications for belongership without the applicant being interviewed; and without the Board assessing the application, making a recommendation or indeed playing any part at all. It also enabled an applicant to make a joint application for a residence certificate and belongership, if he or she had been ordinarily resident for the specified period (although the definition of "ordinarily resident" did not change). This Fast Track process is dealt with below[24].

10.15 In response to a request from the COI, the Attorney General said that, in the absence of the laws of the BVI in up-to-date, comprehensive and searchable form, she was unable to give a definitive list of the benefits of belongership[25]. However, the following appear to be the main privileges and benefits:

(i) the right to vote[26];

(ii) qualification for election to the House of Assembly, which is restricted to belongers who are Virgin Islanders[27] (and who are not disqualified by the further statutory restrictions)[28];

(iii) preference in the acquisition of land and acquisition of land on beneficial terms[29];

(iv) preference in employment[30];

(v) differential (lower) fees for trade licences[31];

(vi) exemption from customs duties on construction materials for first-time home owner[32];

(vii) exemption from customs duties on personal and household effects when returning to the BVI and the person (a) has resided abroad for at least three years and (b) intends to reside in the BVI for at least 12 months[33];

(viii) exemption from stamp duty on sale of land to a belonger during the COVID-19 pandemic[34]; and

(ix) qualification for appointment as Attorney General (for which being a belonger is a mandatory criterion, unless there is no person falling within section 2(2) who is suitably qualified and able and willing to be so appointed)[35].

10.16 In addition, belongers share certain privileges and benefits with other groups, including:

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[24] See paragraphs 10.38-10.44.
[25] Letter Attorney General to the COI dated 23 April 2021 (amended 26 April 2021).
[26] Section 68 of the Constitution.
[27] Although, in less formal contexts, the term is often more loosely used, section 65(2) of the Constitution defines "Virgin Islander" as a subset of "belongers", as follows:

> "… [A] person who belongs to the [BVI] by birth or descent who was—
> (a) born in the [BVI] of a father or mother who at the time of the birth was a [BOT citizen] by virtue of birth in the [BVI] or by virtue of descent from a father or mother who was born in the [BVI];
> (b) born in the [BVI] of a father or mother who at the time of the birth belonged to the [BVI] by birth or descent; or
> (c) born outside the [BVI] of a father or mother who at the time belonged to the [BVI] by birth or descent."

The term "BVIslander" is also used, but does not appear to be formally defined. It appears to be generally used to mean "belonger" or "Virgin Islander".
[28] Section 65 of the Constitution.
[29] Non-belongers are not permitted to purchase Crown Land without first obtaining a licence (see paragraph 8.7 above). See also Joseph Smith Abbott Sixth Affidavit dated 2 September 2021 paragraphs 9.1-9.6; and T48 14 October 2021 pages 66 and 70-71.
[30] Section 117 of the Labour Code 2010.
[31] Section 8 of and the First Schedule to the Business, Professions and Trade Licence Act 1991.
[32] Section 22 of the Customs Management and Duties Amendment Act 2011.
[33] Ibid.
[34] Stamp Duty (Amendment) Act 2020.
[35] Section 95(6) of the Constitution.

(i) in common with persons holding a certificate of residence, the right to enter and leave the BVI, and immunity from expulsion from the BVI[36];

(ii) in common with other groups exempted by statute or (the Attorney General says[37]) "as a matter of policy and practice" (including persons holding a certificate of residence, members of HM Forces and those accredited to the BVI by HM Government or the Government of any Commonwealth or foreign State, those married to a Virgin Islander, persons who have been educated in the BVI), exemption from obtaining a work permit to engage in employment or self-employment[38]; and

(iii) in common with other groups, such as the children of persons holding a certificate of residence or ordinarily resident in the BVI, persons employed in government service and diplomats, children of a belonger are entitled to admission as a student of a school within the state education system[39].

Policy

10.17 In respect of the grant of residence status and belongership, there is very little guidance in support of the statutory provisions.

10.18 However, on 27 October 2004, following reports from the Board and an ad hoc committee under Mr Edward Maduro addressing (amongst other things) what was described as an "unacceptable" backlog of residence and belongership applications, the Executive Council recognised the need to formulate immigration policy, on the basis of statistical data, as part of the Territory's national goals and objectives[40]; and approved a number of "administrative guidelines for the Board of Immigration in the processing of applications for Residence and Immigration Status". The guidelines were as follows[41]:

"(a) in the case of applicant who had applied before 1 January 2003, recommendations for residence status should be made for all those who had lived continuously in the Territory for over 20 years, and who qualify after the normal screening process;

(b) the outstanding backlog of such applications (approximately 365) should be submitted in chronological order and in batches of 50 by date of application to the Chief Minister in the course of 2005;

(c) once the backlog of those identified at (b) had been cleared, the Board should make recommendations as applicants reached the 20th anniversary of their arrival in the BVI after the normal screening process;

(d) in the case of those who had applied after 31 December 2002 recommendations for Residence Status should be for no more than 25 person per year; and

(e) in the case of applications for Belonger Status, the Board should make recommendations in respect of no more than 25 persons per year from those already in possession of a Certificate of Residence; and

[36] Section 18 of the Constitution.
[37] Letter Attorney General to the COI dated 23 April 2021 (amended 26 April 2021).
[38] Section 170 of the Labour Code 2010.
[39] Regulation 27 of the Education Regulations 2016.
[40] Executive Council Minutes 27 October 2004: Policy on the Grant of Residence and Belonger Status paragraph 1345(a).
[41] Paragraphs 1345(a) and 1347 of the Executive Council Minutes, following consideration of Executive Council Memorandum No 367/2002, set out in a document sent to the Permanent Secretary Chief Minister's Office dated 24 August 2005, entitled "Extract from the minutes of a meeting of Executive Council of the British Virgin Islands held at the conference room Governor's office of 27 October 2004". The guidelines are set out in full in paragraph 1347.

(f) in all cases, periods of continuous residence in the Territory means a maximum of 90 days absence in any calendar year excluding absence to pursue further education."

10.19 Although they have never been published[42], these policies (and, certainly, the policy in paragraph (c)) were applied from 2004 or 2005[43]. However, the evidence before the COI was to the effect that only the policy at paragraph (c) (the so-called "20-year threshold"[44]) is still applied[45]. Paragraphs (a) and (b) are no longer relevant, as the backlog of applications referred to in those provisions has been dealt with[46]; the quotas in paragraphs (d) and (e) have not been applied in recent years[47]; and paragraph (f) simply mirrors section 16(9)(b) of the 1977 Act[48].

10.20 The same Executive Council Minutes of 27 October 2004 invited the Attorney General to draft various amendments to section 16, including amendment to "increase the qualifying period for Belonger Status from 7 and 10 years to 25 years"[49]. That appears to recognise the tension between, on the one hand, a statutory provision having a minimum period of ordinary residence as a condition of belongership and, on the other hand, a policy that applications will not be considered until an applicant has been ordinarily resident for a longer period than that stipulated by statute, such as 20 years. It is not clear why this invitation referred to a period of 25 years, whereas the policy in paragraphs (a) and (c) referred to 20 years. It may have been that it was intended that the ultimate goal was a 25-year period: but, in the absence of any legislative change, the period of 20 years set out in paragraph (c) of the Minutes has been applied.

10.21 Before the COI (for apparently the first time), it was suggested that the policy in paragraph (c) was not in conflict with section 16(3)(c) of the 1977 Act, for three reasons. First, the Attorney General (supported by Dr Orlando Smith) submitted that, as matter of construction, the statute and the policy are not inconsistent: section 16(3)(c) merely sets a minimum period of ordinary residence and gives Cabinet the latitude to make a policy setting a longer period[50]. Second, the Attorney General and Dr Orlando Smith relied on the fact that the Board was master of its own procedure, and the policy did not say that an applicant could not apply

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[42] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraphs 21.1-21.2; and Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraphs 13 and 21. The Premier expressly adopted these submissions (Premier Response to COI Warning Letter No 2 dated 28 September 2021).

[43] Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraphs 12 and 27; Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 10.10, and T41 28 September 2021 pages 42-44, and 55-56; and Hon Vincent Wheatley Response to COI Warning Letter No 2 dated 24 September 2021 page 4.

[44] Insofar as the IAD Report, Immigration Board: Belonger Application Process dated June 2012, suggested that a benchmark of 25 years had been used (see, e.g., paragraph 9.10; and see also the IAD Follow-up Report, Follow-up Audit Review: Immigration Board: Belonger Application Process dated January 2014 page 3), that does not correspond with the evidence before the COI: Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.3(c) and 10.10, T24 8 July 2021 page 17 (Dr Orlando Smith) and Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraph 8.

[45] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.3 especially paragraph 9.3(c); and T41 28 September 2021 page 56.

[46] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.3(e); and T41 28 September 2021 pages 51-52. Fresh backlogs have, of course, arisen since.

[47] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.3(a). Mr Smith Abbott said that the quota for Residence Certificates was abandoned because it was causing a large back-log of applications Seventh Affidavit dated 10 September 2021 paragraph 9.3(f). Mr Penn said that the quotas set out in paragraphs (d) and (e) ceased to apply before he became CIO in 2014 (T41 28 September 2021 pages 52-54).

[48] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.3(f); and T41 28 September 2021 page 56.

[49] Paragraph 1348(d) of the Executive Council Minutes.

[50] Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraphs 22-23, 31 and 32; and T24 8 July 2021 pages 22-24.

after 10 years, merely that the Board would only make a recommendation after the 20th anniversary of residence had passed[51]. Third, the Attorney General (supported by the Acting Permanent Secretary MNRLI Joseph Smith Abbott) submitted that the policy no more than prioritised applications, and it did not prevent applications of those with under 20 years' ordinary residence being determined[52].

10.22 However, none of these submissions is compelling. The policy only applied after the 2004 backlog had been cleared. When it applied, it did not merely give guidance as to priority: it imposed a bar on the granting of any application for belonger status before the applicant had 20 years' continuous ordinary residence. It is well-established that an administrative body to whom applications are to be made has a duty to determine those applications: they must determine applications within a reasonable time, and cannot merely "shelve" them[53]. There is no evidence that the Immigration Department ever considered an application prior to the 20-year threshold having passed – and, if they had a discretion to do so outside the policy, they would be bound at least to consider it. The evidence is that they never did consider the exercise of discretion in respect of an application in those circumstances[54]. It has been treated as an inflexible rule. It was, and is, thus unlawful[55].

10.23 The policy was also unlawful because it was not published[56,57]. The CIO Ian Penn said that, whilst the guidance had not been published, the BVI was a small community and people would have been aware through word of mouth that a 20-year ordinary residence requirement was being applied, and that they should therefore not submit their application until the 20th anniversary of residence. He stated that he could not recall tenure applications for belongership being submitted where the applicant had only seven or 10 years of residence[58]. However, whilst that underscores the rigour with which the 20-year threshold rule was applied, a general assumption of the application of a 20-year threshold rule is unlikely to avoid a conclusion of unlawfulness on the grounds of non-publication, particularly given the difficulties in proving and challenging an unpublished policy.

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[51] Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraph 29; T24 8 July 2021 pages 9-11 (Hon Vincent Wheatley); and T41 28 September 2021 pages 43-44 (Joseph Smith Abbott).

[52] Attorney General Written Submissions in Response to COI Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraphs 7, 31 and 34; and Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 10.10.

[53] This is an uncontroversial proposition of law; but, if authority is required, see (e.g.) R (O and H) v Secretary of State for the Home Department [2019] EWHC 148 (Admin) at [67] and the authorities referred to at [68]-[71].

[54] Attorney General Written Submissions in Response to Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraph 33.

[55] As the Attorney General all but accepted. She said:

> "… [I]f the Benchmark was applied without exception, or continued beyond the existence of a backlog, the Attorney General would accept that raises significant questions as to its lawfulness, either because the Act may imply a right to have an application considered once the minimum criteria are fulfilled, or because to apply the Benchmark in an inflexible manner was to fetter the Department's discretion." (Attorney General Written Submissions in Response to Warning Letters No 2 to Hon Vincent Wheatley No 2, Cabinet and the Premier and Minister of Finance dated 24 September 2021 paragraph 35).

Mr Smith Abbott acknowledged that it was "unfortunate" that a longer period has been imposed for the consideration of applications, as distinct from grant of applications (T41 28 September 2021 page 61).

[56] Mr Smith Abbott was unsure whether it had been published or not (T41 28 September 2021 pages 56-57); but there was no evidence that it had, and significant evidence that it had not been published (see Hon Vincent Wheatley Response to COI Warning Letter No 2 dated 24 September 2021 page 4, and T41 28 September 2021 page 63 (CIO Ian Penn)).

[57] It should be noted that, concerningly, it was also accepted that the 1977 Act itself is not published in a manner that is readily accessible to the public. Mr Penn said that, if someone wished to have access to a copy of the Act, they would have to go to the Immigration Department or to the Attorney General's Chambers and ask for it: T41 28 September 2021 page 66. But that route of access does not appear to be publicised.

[58] T41 28 September 2021 page 63.

10.24 The risk that the 20-year threshold policy was unlawful, as being inconsistent with section 16(3)(c), has long been recognised. As described above, the Executive Council Minutes for the 27 October 2004 meeting (at which the 20-year threshold policy was adopted), invited the Attorney General to draft amendments to the 1977 Act, including an amendment to increase the qualifying period for belonger status from seven and 10 years to 25 years[59], an amendment that would not have been necessary had the policy been consistent with the extant section 16(3)(c).

10.25 Further, in 2012, the IAD conducted a performance audit of belongership applications, producing a report in June 2012[60]. In respect of the time threshold issue, the IAD Report highlighted the priority being given to the policy over the law, saying:

> "… [W]e found that as a result of the use of policy guidelines issued by Cabinet instead of the law, applicants were not considered by the Board who did not meet the twenty-five (25) year requirement as stated in the policy. We found that this practice may deny applicants a right duly theirs as the law makes them eligible to apply for status after ten (10) years."[61]

10.26 In its recommendations, the IAD said that section 16 of the 1977 Act should be amended in accordance with the "policy decisions" in Executive Council Minutes to ensure that policy and law were in sync[62]. The IAD suggested that realistic timeframes be developed, and noted that the ongoing application of the policy (over the law) may deny applicants their rights[63]. The Management Response agreed, with an anticipated completion date for the required change to the legislation of March 2013. The IAD Follow-up Report in January 2014 said that the Premier's Office had indicated that work had commenced on amending the law to bring the law and the policy into alignment; but that had not been done to date nor had the recommendations been adopted, and so the use of the "illegal" criterion of 20 years continued[64]. No amendment has yet been made in that regard.

10.27 Mr Smith Abbott agreed that it was regrettable that the IAD's first two recommendations, including that relating to the change in residence years, had not yet been implemented. He said that the immigration law in the BVI is currently under review, and that funding exists for a consultant to assist with this process, although they await guidance from the Attorney General as to a possible candidate to act as a consultant[65]. At the time of him giving evidence before the COI, this advice had not yet been received[66].

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[59] Paragraph 1348(d). As to the reference to 25 years, rather than 20 years, see paragraph 22 above.

[60] IAD Report, Immigration Board: Belonger Application Process dated June 2012, considered further below (paragraphs 10.51-10.57). This report is referred to in footnote 44 above. References to "the IAD Report" in this chapter are to this report.

[61] IAD Report paragraph 9.10.

[62] IAD Report paragraph 10.2. The Management Response agreed, with the anticipated completion date of March 2013. The IAD produced a follow-up report, Follow-up Audit Review Immigration Board: Belonger Application Process dated January 2014. This report is also referred to in footnote 44 above. References to "the IAD Follow-up Report" in this chapter are to this report. It indicated that, in respect of this point, no action had been taken; and so, "The use of [the 25 years criterion] continues to be illegal". The Premier's Office had indicated that a Policy Officer had recently been engaged to remove the inconsistency, but no time frame had been indicated. The Premier (Dr Orlando Smith), however, did not consider that the law and policy were inconsistent or in any way in disconnect; and he explained the response to the IAD Follow-up Report as a comment from his administrators (notably, his Permanent Secretary who clearly did consider there was a disconnect) and not on behalf of himself as Premier or the Cabinet; and his administrators did not raise the issue with him and he did not know about the work being done to correct the perceived disconnect (T24 8 July 2021 pages 13-16).

[63] IAD Report paragraph 1.1.6, 9.1 and 9.10.

[64] IAD Follow-up Report page 3. The failure to adopt the recommendations disappointed the IAD Director, particularly given the agreement to the recommendations and the steps that had been identified to put them into effect. However, without the IAAC, the IAD found themselves at a "roadblock". The IAD Director dealt with this in her evidence at T22 6 July 2021 page 46ff.

[65] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 9.4(g).

[66] T41 28 September 2021 page 58.

10.28 Mr Smith Abbott said that, further, it is proposed to bring in a National Development Process within a broader National Development Plan strategy, which is currently being formulated and which may lead to the development of immigration policies within a wider context in the future, e.g. the number of persons who could and should be permitted into the BVI as part of a long-term sustainable plan for the development of the BVI[67].

Standard Process

10.29 The process of obtaining belonger status in the BVI was helpfully summarised by Mr Smith Abbott, as follows[68]:

(i) Once an application is received, an Immigration Officer is assigned to acknowledge it and file it.

(ii) The application is processed by a member of the Immigration Status Unit reviewing the form to ensure that all necessary documentation has been provided. Because of a sizable queue of pending applications, an application may not be processed straight away. If significant time has elapsed since the application was submitted, the Immigration Department will request a fresh police check, bank records and photos as appropriate. The applicant will be told if any further information is required. Where an applicant has not reached the requisite number of years of ordinary residence, he or she will be informed that the application will be placed on hold until the appropriate period can be demonstrated[69].

(iii) If all is in order, the applicant is then called for an interview which is attended by a member of the Board and one or two officers. It is minuted. In the interview, each applicant is "scored" on a points-based system (see below[70]).

(iv) On the day of the interview, the applicant will be required to undergo a cultural test, which is administered by a member of the Immigration Status Unit[71]. The purpose of the test is to assess the applicant's knowledge of the BVI and its culture, history and government; and thus determine his or her commitment and desire to make the BVI their home[72]. There are several versions of this test to limit the scope for cheating[73]. The test consists of 10 questions, marked out of 20, which applicants are given 10 minutes to complete. Although there is a prescribed "pass mark" of 10, a lower score does not necessarily result in failure of the application: the cultural test merely forms part of the overall points system and the Immigration Department adopts a fairly flexible approach to the test, particularly in cases where an applicant may have a disability or lack of aptitude which affected their ability to take, or pass, the test[74]. There is, however, no guidance as to how, or when, this discretion or flexibility should be exercised.

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[67] T41 28 September 2021 pages 47-50. This was also canvassed with the Minister for Natural Resources, Labour and Immigration Hon Vincent Wheatley (T41 28 September 2021 pages 143-144).
[68] Joseph Smith Abbott Fourth Affidavit dated 26 August 2021 paragraph 16; Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 15; and T41 28 September 2021.
[69] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 15.3; and T 41 28 September 2021 page 67.
[70] See paragraphs 10.30ff.
[71] T41 28 September 2021 page 68-69.
[72] Ibid.
[73] Joseph Smith Abbott Seventh Affidavit of dated 10 September 2021 paragraph 15.10; and T41 28 September 2021 page 69.
[74] T41 28 September 2021 page 72 (Ian Penn). See also paragraphs 10.33-10.34 below.

(v) Following the interview, the applicant's file (i.e. his or her application form and notes) is placed in a queue to go before the Board (there being separate queues for applications based on tenure and those based on marriage)[75]. It is then presented to a meeting of the Board, which considers and votes on the application.

(vi) Once the Board has made its recommendations, the applicant's profile is prepared, which together with the cultural test and any other relevant information is put in a memorandum by the Minister to Cabinet for decision[76].

(vii) The Cabinet usually agrees with the Board's recommendation; but occasionally it does not[77].

(viii) After Cabinet has made a decision, either to grant or to refuse the application, a copy of the Cabinet extract and decision are sent to the Ministry, and then to the Immigration Department. Upon receiving this, departmental officials will notify the individual applicant of the outcome. If the application is approved, the applicant is asked to come to the Immigration Department to pay the fee ($500 for a standard application), and thereafter called to receive his or her certificate and belonger identification[78].

10.30 The points-based system is an assessment against criteria set out in the "Belonger Status/ Residence Assessment Form" (or "points system form")[79], which was first introduced in 2010. The form sets out 10 factors for which points are given (or, in some cases, deducted), namely employment status, knowledge/experience, financial assessment, funds and salary, contributions to local community, assimilation, culture/knowledge, general, BVI police record and surveillance. Guidance is given to the assessors on the face of the form that they complete. The form appears to correlate to an extent with section 16 of the 1977 Act, and particularly the criteria that the Cabinet is required to consider as a result of section 16(8), namely economic balance and prejudice to those in the same trade in the BVI, personal connections to the BVI, character and conduct, and whether an applicant will afford any benefit to the BVI. It also seeks to verify that the applicant has a genuine intention to reside in the BVI[80].

10.31 The form sets out the number of points an applicant may achieve under a specific factor. For example, with respect to employment status, the applicant is assessed as unemployed, in full-time or part-time employment, or a retiree. A retiree is given 10 (of a maximum of 20) points. The interviewers have to allocate points on a discretionary or assessment basis for full-time, part-time or unemployment. Although the CIO Ian Penn said that unemployment attracts zero points[81], that is not expressed on the face of the form, which in fact states that "no points for failure to secure employment with no reasonable explanation", suggesting that an applicant who has failed to secure employment with reasonable explanation (e.g. due to business being closed during COVID-19) may be awarded some points against the criteria[82]. Whilst there is an explanation section under this factor, which sets out some considerations, what it does not do is provide any useful guidance as to how points should be allocated (other than for retirees). Similar discretion is given in respect of other factors.

[75] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 15.4; and T41 28 September 2021 page 67.
[76] T41 28 September 2021 pages 75, 91 and 96.
[77] T41 28 September 2021 page 96. The role of Cabinet, and its decision-making, is further covered later in this chapter (see paragraphs 10.46-10.49 below).
[78] T41 28 September 2021 page 126.
[79] A copy of which was produced by Mr Smith Abbott: Seventh Affidavit of Joseph Smith Abbott dated 10 September 2021 Exhibit JSA7 pages 213-218. As its name suggests, it is used for both belongership and residence applications.
[80] T41 28 September 2021 page 74 (Ian Penn).
[81] T41 28 September 2021 page 76 (Ian Penn).
[82] T41 28 September 2021 page 76-77 (Ian Penn).

10.32 The points system form also allows for points to be deducted, for example, stating: "Deductible points for failure to assimilate and also for criminal convictions". The schedule to the form sets out the range of points that may be deducted based on the nature of the offence, e.g. immigration offences, sexual offences and forgery can attracta deduction of between nil and 30 points, whilst customs offences a deduction of between nil and 20 points. However, again, where an individual does have a police record, there is no guidance around how interviewers determine the number of points to be deducted for his or her offence. Mr Penn just said that consideration would generally be given to the seriousness of the offence and, depending on the matter, further discussion may be had with himself as CIO[83]. There is also no guidance as to how these (discretionary) points deductions correlate with the (mandatory) statutory requirement for an applicant to be of "good character" for certain sets of criteria (including those in section 16(3) and (4) of the 1977 Act); and neither Mr Penn nor Mr Smith Abbott was able to explain it[84]. Hon Vincent Wheatley gave evidence that good character was usually approached through personal knowledge of the applicant and the application[85].

10.33 Once the interview is complete, the interview panel will calculate the final score, which is out of 150. It is noted that the points system form states:

> "Applicant should obtain at least 50% of points from areas which are applicable to them for application to be considered further".

However, in relation to the relevant pass mark for the points system, Mr Smith Abbott said:

> "…The current practice is that a score of 75 points, in other words 50%, is desirable for 'tenure' applications. I note the Internal Auditor's evidence that an applicant has to achieve 50% marks on all areas applicable to that applicant in order that the Board make a positive recommendation to Cabinet… However, the Board is not now so confined in the recommendations it might make. I note that low scores do sometimes appear in respect of Applicants recommended for Belonger Status… If a low score is based on lack of employment or low income, for example due to being a full time student, the Board may find that a positive recommendation can still be made, as the individual's particular circumstances provide such relevant mitigation…"[86].

10.34 During his evidence before the COI, Mr Penn stated that there are cases where the applicant falls below the minimum (50%) points threshold in respect of one or more of the assessed subjects, but the Board discusses each application and considers them on a case-by-case basis. The Board may recommend grant, even where the threshold is not met. There is no evidence of any written guidance or criteria which the Board apply when making recommendations to Cabinet in such cases[87].

10.35 Mr Penn further said that he was not aware of circumstances in which the points system was not applied; but the evidence not only suggests that there have been circumstances in which the points system has not been applied (i.e. individuals have been treated as totally or partially exempt from the points system), but that it is not exceptional or uncommon for the Board to make recommendations to Cabinet that a person be granted belonger status despite not meeting the minimum points. However, whilst there are no written criteria to guide them, the

[83] T41 28 September 2021 page 80.
[84] T41 28 September 2021, pages 82-83; and T41 28 September 2021 pages 81-82.
[85] T41 28 September 2021 page 203. This does not suggest an objective, thorough or robust approach to the issue of good character.
[86] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 15.8(e).
[87] T41 28 September 2021 pages 89-90.

Board usually give some form of general reasons why they recommend applicants in these cases, e.g. the applicant had had difficulties related to unemployment due to studies or a natural disaster, perhaps coupled with support from a spouse[88].

10.36 The COI did not receive detailed evidence in relation to the process for obtaining residence certificates, but the broad scheme appears to be the same, i.e. an application is made which is assessed by officials at the Immigration Department before going to the Board which makes a recommendation to the Cabinet which, exercising its discretion, then grants or refuses it.

10.37 I should also briefly refer to two IAD Reports in relation to applications for work permits. I merely record them for completeness: I received no detailed evidence on them, and I make no findings in relation to either.

(i) In 2009, an IAD Report on the work permit process concluded that the lack of assessment standards for applications "have rendered the process extremely subjective" [89].

(ii) The Labour Code Act 2010 codified the law, including provision for the exemption of four classes of migrant employees from having to obtain a work permit. Section 172(d) of the Act gave the Cabinet power to exempt an employee. There was in place a policy (the Work Permit Exemption Policy) which set out a limit of 200 work permits per year under the exemption, and established three subcategories of exemption under which a migrant might apply, namely (a) marriage, (b) enrolment in the school system and (c) "Other (Minister's Discretion)". The process was the subject of an IAD Report in August 2013, which audited the exemption in the period 2007-11[90]. As the report emphasised, the power to exempt migrants under section 172(d) was in all cases discretionary, but the policy set out how that discretion was to be exercised. "Other (Minister's Discretion)" was misleading because the policy made clear that there was one criterion, namely that the applicant had lived in the Territory for 20 years or more. The audit found that (a) the annual limit under the policy of 200 was breached: over 300 work permits were granted under this policy exemption in 2011; and (b) of a sample of 304 exemptions, 67% of the applicants did not meet the relevant criteria. The report concluded[91]:

> "Although Cabinet approved a policy by which Work Permit Exemption process would be guided, Cabinet has on numerous occasions approved exemptions on a discretionary basis contrary to the established policy. This practice has negated the intended purpose of the Work Permit Exemption Policy which was to bring both transparency and equity in the awarding of exemptions. Based on our sample examination, approximately 67 per cent of exemptions issued were issued outside the established criteria by Cabinet, the Ministry of Natural Resources and Labour and the Labour Department."

[88] The many examples include (i) Cabinet Memorandum No 244/2019: Applications for Certificates of Belonger Status (September 2018-April 2019 Recommendations) dated 29 July 2019 refers to seven applicants scoring below the minimum required points, primarily because two applicants were attending university and were therefore unemployed, and other applicants were unemployed, particularly due to businesses being affected by the 2017 hurricanes; and (ii) Cabinet Memorandum No 268/2020: Applications for Belonger Status (July and October 2019, and February 2020 Recommendations) dated 13 March 2020 refers to nine applicants scoring below the minimum required points, with the primary reasons for this being lack of employment, retirement, or the decision to be home makers; but they were recommended by the Board given the spouses of all nine applicants supported their applications.

[89] IAD Report, Labour Department: Work Permit Process and ID Card System Security Audit dated July 2009: the quote is from paragraph 9.1.

[90] IAD Report, Ministry of Natural Resources and Labour: Work Permit Exemptions dated August 2013.

[91] Paragraph 10.5.

It recommended that the issuing of exemptions under special consideration by the Minister be discontinued as they were not assessed in a transparent or equitable manner, and that all such grants be revoked and reconsidered[92].

Fast Track Process

10.38 In addition to the standard schemes described, as indicated above, in July 2019, the BVI Government announced a programme referred to as "Fast Track" and, in two statutes, passed the necessary, temporary legislative provisions for an alternative process scheme for those seeking belongership status[93].

10.39 This temporary scheme was introduced to alleviate a backlog of applications that had again accumulated. At the time the Fast Track process was introduced, there was said to be a backlog of both belonger and residence applications[94]. The Minister for Natural Resources, Labour and Immigration Hon Vincent Wheatley said that there had been a "human resources deficiency" (i.e. staff shortage) in the Immigration Department for many years, with there being usually only one person (and, at most, two) processing applications[95]. Once the new administration came in, they began work right away to try and address this. The Fast Track scheme was the result. Hon Vincent Wheatley said that, whilst he could not be sure that the backlog had been entirely eradicated, as a result of the scheme, it had significantly reduced[96].

10.40 The policy reasoning behind the initiative was directed at tenure-based applicants – the process for applying for residence or belonger status on the basis of (e.g.) marriage remained unchanged[97]. The process was designed by public officials: Hon Vincent Wheatley said that "the technocrats" were directed to design a scheme to fast track individuals who had been living in the BVI for a certain period of time[98]. In the event, it was particularly aimed at those who had resided in the Territory for over 20 years[99]: indeed, virtually all of the applications

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[92] Paragraphs 11.5 and 11.6.

[93] Set out in paragraph 10.14 above. During the period that Fast Track scheme was in place, applications could still be made under the standard scheme, although there were different application forms (T41 28 September 2021 pages 124-125). Clearly most, if not all, applicants chose to apply under the Fast Track scheme, which had obvious advantages including the criteria that were easier to meet.

[94] Joseph Smith Abbott Fourth Affidavit dated 26 August 2021 paragraph 17; and T41 28 September 2021 page 124.

[95] Hon Vincent Wheatley said that he considered that the number of persons who were permitted to come into the country and how long they were permitted to stay before they could qualify for belonger status also contributed to the backlog (T41 28 September 2021 page 150). Until they were abandoned, no doubt the quotas introduced in 2004 also led to something of a backlog because the evidence suggests that more people wished to apply than the quotas allowed.

[96] T41 28 September 2021 pages 145 and 149. As the Fast Track scheme was primarily aimed at reducing the backlog of applications, it is curious that it took the form it did, which encouraged new applications. Hon Vincent Wheatley accepted that, whilst some of the individuals who had made applications for belonger status under the Fast Track had already made applications under the standard process, others were entirely new applicants (although he could not say how many of those dealt with in the Fast Track system had previously made a standard scheme application, and therefore the extent to which the backlog was in fact reduced). He was, however, confident that the Fast Track process did in fact remove a significant number of persons from the backlog (T41 28 September 2021 pages 179-180).

[97] T41 28 September 2021 pages 180-181.

[98] T48 14 October 2021 pages 270-271.

[99] Joseph Smith Abbott Fourth Affidavit dated 26 August 2021 paragraphs 17 and 33.7. Hon Vincent Wheatley said that the 20-year residence benchmark was fixed upon after consultation with the public, which considered a range of periods between 10 and 25 years (T41 28 September 2021 pages 184-185). The Cabinet Memoranda in respect of applications under the Fast Track scheme did not refer to any particular subsection of the amended section 16; but they each contained the following paragraph under the heading "Purpose":

> "To allow for persons who have resided within the Territory for a period exceeding twenty (20) years to become regularized by obtaining Residence and Belonger Status."

See, e.g. Cabinet Memorandum No 289/2019: Applications for Certificates of Belonger Status (Immigration Regularization Batch No 01) dated 20 August 2019 paragraph 4. It was thus clear that the grants were being made by reference to section 16(5). Hon Vincent Wheatley gave evidence that the grants were made under section 16(4) (which required residence of seven years, but had other criteria too) (T41 28 September 2021 pages 189-190): but this is not borne out by any of the contemporaneous Cabinet documents, and seems to be a mis-recollection.

evidenced before the COI were made under that limb of that section, which required an applicant to show only 20 years' ordinary residence as a condition before the Cabinet exercised its discretion to grant or refuse the application[100].

10.41 The main differences between the Fast Track scheme and the standard process were that:

(i) In the Fast Track scheme, there was no interview or points-based system, and the Immigration Board played no part in the process: the Immigration Department checked that the documentation and information was complete and that the applicant had been ordinarily resident in the BVI for 20 years[101], but otherwise the assessment of the application was solely down to the Cabinet[102]. The Immigration Department prepared a brief profile for each applicant, which gave the following information: (a) file number, (b) application date, (c) place of birth, (d) date of birth, (e) physical address, (f) marital status, (g) date of "Res" (i.e. when the period of ordinary residence in the Territory began), (h) employment status, (i) occupation, (j) immigration status, (k) police record, (l) investments in the country, (m) trade licence, (n) absence from the Territory and reason for the same and (o) the cultural test result. The Cabinet made its decision on any application on this information alone, without any further checks, information or assessment.

(ii) For those without a residence certificate, a joint residence-belongership application could be made.

(iii) The fee was substantially more than for a standard application – belonger-only applications attracted a fee of $810, and a combined residence-belonger application a fee of $1,510[103] – and the fee had to be paid in advance (thus defraying the costs of the additional staff required to deal with the applications).

(iv) Under this process, applicants were given only limited time to submit their forms and documents[104].

10.42 However, many aspects of the scheme remained unaltered. The process still required the applicant to make a formal application, submit the same necessary information and documentary evidence, to complete a cultural test[105]. Importantly, (i) each of the sets of criteria in amended section 16(4) and (5) required "exceptional circumstances"; and (ii) the ordinary residence test in section 16(9) (with its requirement for continuity) remained unchanged.

10.43 During the Fast Track scheme period, the Immigration Department brought in substantial extra staffing to assist in dealing with the increased number of applications[106]. These departmental officers were responsible for looking at all the relevant material from applicants before preparing the short profile of the applicant referred to above. The applications were then submitted in batches of (usually) about 50 to Cabinet for decision.

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[100] It is not clear why applications that did not satisfy the 20-year residence requirement were not considered under the amended section 16(4), under which the length of residence had to be only seven years (although there were other preconditions, such as being of good character). Nor were any applications apparently considered under the amended alternative limb in section 16(5) (significant and consistent contribution to the economic and social development of the Territory) under which there was no requirement for the individual to have been ordinarily resident in the Territory for any period of time.

[101] The CIO Mr Penn said that approximately 46 applicants under the Fast Track scheme did not comply with the requirements, notably the 20-year residence requirement. Where this was the case, he said they would be "weeded out" by the Immigration Department, which involved sending the applicant a letter and refunding the fee which had been paid up front (T49 15 October 2021 page 32-33).

[102] T41 28 September 2021 pages 128-129.

[103] Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 33.7(a).

[104] Cabinet Memorandum No 289/2019; and T41 28 September 2021 page 130.

[105] Cabinet Memorandum No 289/2019; Joseph Smith Abbott Seventh Affidavit dated 10 September 2021 paragraph 33.7(a); and T41 28 September 2021 pages 129-130.

[106] Joseph Smith Abbott Fourth Affidavit dated 26 August 2021 paragraph 17; and T41 28 September 2021 pages 133-134.

10.44 Where an individual applied under the Fast Track scheme before the 1 February 2020 cut-off date, but the application had not been determined by that date, the application would still be considered under the amended Fast Track legislation[107].

Concerns[108]

Introduction

10.45 The process for residence and belongership applications, as set out above, gives rise to several concerns.

10.46 First, applications for belongership on the basis of tenure are measured against a 20-year residence requirement, which Cabinet has required to be applied since 2004, although it is contrary to the statutory criteria in section 16(3) of the 1977 Act. The "guidance" or "policy" is in fact a rule, as it is applied inflexibly with applications not being considered until the 20th anniversary of residence, even if lodged earlier. The policy is unpublished, and unpublicised: on the evidence, it appears to be a policy which has not been publicly recognised until this COI. It is unlawful. Since 2004, Cabinets of successive VIP and NDP administrations have known of this mismatch, and have singularly failed to bring the policy in line with the law, either by requiring the Immigration Department and Board to apply the law or bringing forward legislation to change the requirement to one of 20 years. It would be a simple legislative change. There is no compelling evidence that such a change has been inhibited by (e.g.) a lack of House of Assembly time, or public resources. It seems that the situation has been allowed to continue because the executive has known that, in practice, this policy would not be challenged by (e.g.) a judicial review – indeed, as it is a policy that has been unpublished, unpublicised and thus secret, such a challenge would have been very unlikely indeed. The fact that statutory criteria have been ignored in favour of an inconsistent policy of the executive does not appear to have concerned any of the successive administrations. The attempts to justify the policy before the COI, as consistent with the statutory provisions, rang hollow. The elected Ministers now say they accept that this anomaly should be resolved by an amendment to the legislation[109]. Steps should be taken, forthwith, to remedy this incongruity and to publish the criteria against which applications for residence and belongership will be assessed.

10.47 I do not accept the submissions of the Attorney General insofar as they suggest that the absence of a published policy on the criteria used for determining belongership applications is the result of a lack of capacity or capability within the Public Service and/or the absence of a government unit devoted to the formulation of policy[110]. That is simplistic, and does not accord with the evidence.

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[107] T41 28 September 2021 pages 25-26.

[108] The concerns and potential criticisms in relation to Residency and Belongership Status arising from the evidence before the COI were put to Hon Vincent Wheatley in COI Warning Letter No 2 dated 15 September 2021, to which he responded in writing (Hon Vincent Wheatley Response to COI Warning Letter No 2 dated 24 September 2021) and orally (T41 28 September 2021 pages 136-214, and T48 14 October 2021 pages 267-304). The concerns and potential criticisms in relation to Residency and Belongership Status arising from the evidence before the COI were put to Premier in COI Warning Letter No 2 dated 15 September 2021, to which he responded in writing (Premier Response to COI Warning Letter No 2 dated 28 September 2021) and orally (T46 11 October 2021 pages 137-214, and T52 21 October 2021 pages 114-123). The Premier's response to COI Warning letter No 2 dated 21 September 2021 and his response at the hearing also responded to a COI Warning Letter No 2 to the Cabinet dated 15 September 2021 on the same subject. The warning letters identified the evidence giving rise to the concerns and potential criticisms. The respective criticisms of Hon Vincent Wheatley and the Premier in respect of Residency and Belongership Status in this Report are restricted to those in respect of which they had a full opportunity to respond, as described.

[109] Elected Ministers' Closing Submissions paragraph 42.

[110] Elected Ministers' Closing Submissions paragraphs 42-43.

10.48 20-year residence is a requirement for applications for belongership based on tenure: it is imposed by the Cabinet. The Immigration Department and Board have otherwise commendably introduced a process for assessing residence and belongership applications, involving interviews and a points-based system, which has elements of transparency and objectivity within it. Compared with many other decision-making processes in the BVI, the process adopted has firm strands of good governance within it: the roles played by the Immigration Department and (especially) the Board give some significant robustness to the process in governance terms. That has properly been recognised by the IAD. However – and this is my second concern – there is a lack of internal policy guidance in respect of some aspects of the system applied by the Immigration Department and Board, which results in officials (whilst no doubt doing their best) necessarily having to take a subjective approach to assessment of applications. For example, there is no guidance given to interviewers as to how to conduct and mark an interview as part of the points-based system (which drives interviewers to use their own subjective discretion); no guidance is given to assessors as to how to approach (e.g.) the issue of good character, both in respect of criteria which have "good character" as a mandatory requirement and those where it is a material consideration to the making of any assessment; and a "flexible" and subjective approach is taken to a failure to achieve sufficient points in a part of the assessment, including in the cultural test. Guidance should be given to interviewers and other assessors, and policies adopted to ensure that, whilst any necessary flexibility is maintained, the approach to the assessment of applications is consistent.

10.49 The third concern (and, in the context of my Terms of Reference, the most important and worrying), is that the Cabinet retains the ultimate power to determine any residence or belongership application, irrespective of the work, assessment and any recommendation made by the Board. Under both the standard and the Fast Track processes, the Cabinet decides whether to grant or refuse an application, but they exercise their discretion on the basis of limited information and without any guidance. Under the Fast Track scheme, the burden on the Cabinet is particularly onerous, as they are the sole assessors of the application: they do not have the benefit of a prior assessment of (and recommendation by) the Board which they do under the standard regime. In my view, this has nothing to do with any failings in the Public Service or the absence of a policy formulation unit within government: the evidence suggests that it is a quite deliberate decision by the executive to retain such a discretion.

10.50 Generally, the information relating to individual applicants was not disclosed to the COI ostensibly on the basis that it comprised sensitive personal data (and notwithstanding that any disclosure would have been to the COI alone in the first instance). Nonetheless, there was sufficient information (some of which came fortuitously to the COI) to show how Cabinet has exercised its discretion. I focus on three examples with which I will deal in turn.

The 2011 Grants of Belongership Status

10.51 In the light of complaints about the length of time applications for belonger status were taking, and a lack of information as to the progress of an application in that period, as indicated above[111], in 2012 the IAD conducted a performance audit of immigration processes for the period 2009 to 2011, with the object of giving assurance that (i) the system for processing belonger status applications was transparent and equitable, (ii) the controls in place were adequate to safeguard the system from abusive practices and (iii) that the Board

[111] See paragraph 10.25. The audit was the subject of the IAD Report produced in June 2012, and later the IAD Follow-up Report produced in January 2014. The IAD Director Ms Dorea Corea gave evidence to the COI on both reports: T22 6 July 2021 page 27ff.

was functioning effectively and in accordance with statutory and policy requirements[112]. The draft report received a Management Response essentially agreeing with its recommendations and setting a timetable for compliance[113].

10.52 The Cabinet did not grant the IAD access to all relevant information, as it had an obligation to do[114]. Paragraph 8.1 of the IAD Report set out this limitation on the audit which had been identified:

> "This review was limited to reviewing the process as far as the recommendation phase as auditors were not allowed access to the Cabinet Papers approving individuals for Belonger Status as they were deemed confidential. The lack of information and documentation required to thoroughly assess the process limited the team's ability to adequately assess the entire process, especially at the approval phase or Cabinet level."

10.53 Two of the IAD's findings are particularly relevant.

10.54 First, the IAD commended the Board's adoption and implementation of a three-phase process for applications for belonger status described above[115], namely (i) the points system based on 10 different criteria, (ii) an interview by a panel of Board members and senior staff from the Immigration Department and (iii) the completion of a cultural test. The IAD found that these tools "are yielding the desired results", and it commended the Board for adopting them[116]. However, (i) it said that the length of time taken by the process, and the lack of communication to the applicant in the meantime, gave rise to the public perception that the process was "frustrating and inefficient"[117]; and (ii) as described above[118], the Board did not use the statutory qualification period in section 16 of the 1977 Act, but rather the inconsistent "policy" arising from an Executive Council Minute; and section 16 of the 1977 Act should be amended to accord with the "policy decisions" in the Executive Council Minute to have a longer period of ordinary residence as the threshold for belongership status by tenure[119].

10.55 Second, the IAD Report identified several anomalies in relation to grants of belonger status by the Cabinet in 2011. It is not easy to reconcile the numbers; but it is clear that, in 2011[120], at least 224 individuals were granted belonger status "outside the framework of the law", i.e. they did not go through the statutory process including the Board, but were rather simply "added at Cabinet level based on personal recommendations by Members [of the Cabinet]" without any due diligence or process[121]. The IAD team identified 32 individuals who applied before their belonger status was approved but whom the Board did not recommend, one individual who submitted their application after belonger status was granted, another individual who already held belonger status, and 190 individuals who had not even submitted

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[112] An earlier IAD Report of July 2009 on the Immigration Department also concluded that immigration control services were an "area of the department is a strong one and has a relatively high rate of efficiency despite the growing volume and limited human resource to process such a need" (IAD Report, Immigration Department dated July 2009 paragraph 10.1).

[113] The draft report was produced after the November 2011 election, when the NDP was returned as the largest party and its leader, Dr Orlando Smith, became Premier and Minister of Finance. At that time, immigration fell within the Premier's portfolio, not being transferred to the MNRLI until 1 March 2019. Dr Orlando Smith said that he did not see the draft report: his Permanent Secretary and the Immigration Office Desk within the Premier's Office would have responded to it – and he did not see the report until it was in its final form (T24 8 July 2021 page 7). He did not recall being told that 224 people had been awarded belonger status without going through due process (ibid page 8).

[114] Section 12 of the Internal Audit Act 2011 (T22 6 July 2021 pages 31-32).

[115] See paragraph 10.29.

[116] IAD Report paragraphs 9.1-9.2.

[117] IAD Report paragraph 9.

[118] See paragraphs 10.25ff.

[119] IAD Report Paragraph 10.2.

[120] The status was granted to these individuals before the election held on 7 November 2011 of that year (T2 26 July 2021 page 5).

[121] IAD Report paragraphs 9.11-9.12.

an application – they were simply added to the list at the Cabinet stage. The IAD could not go behind the figures, because, as I have indicated, it was not allowed access to the Cabinet papers[122].

10.56 In addition to those data:

(i) The IAD Report refers to another list of 52 individuals who were granted belonger status in 2011, of whom only 20 were recommended by the Board. 29 were persons who had made an application but had not been recommended by the Board, and three already possessed belonger status. It is not clear how these figures correlate with the figures set out above (although they may well be included).

(ii) The COI obtained a copy of Cabinet Memorandum (and Extract) No 139/2011[123]. The Extract indicates that Cabinet added the names of 30 individuals, said to be eligible persons, to the list of those to be granted belonger status: these were not referred to in the Cabinet paper presented to Cabinet by the then Premier Hon Ralph O'Neal.

(iii) The COI obtained a copy of Cabinet Memorandum (and Extract) No 430/2011[124]. The memorandum, again presented to Cabinet by Hon Ralph O'Neal, stated that:

> "At the Cabinet meeting held on 28th September 2011, it was agreed that the names of persons recommended for belongership should form a separate paper and brought back to Cabinet for consideration. Each member of Cabinet would submit their names to the Premier who would of course be responsible for presenting the Cabinet paper."

The paper then goes on to list 190 names. The related Cabinet Extract, which recorded Cabinet's decision, noted that Cabinet agreed to grant belonger status to the 215 individuals (including the 190 named).

10.57 The IAD Follow-up Report indicated that, following the 2011 election which brought in a new administration, some of those who had been granted status without the application of the relevant criteria had had their status revoked and had been required to go through the Immigration Board process; but only six are mentioned. It is not known how many had their status checked or revoked by the new administration[125].

10.58 Therefore, although it is difficult to reconcile the figures on the available data, it is clear that over 200 individuals were introduced by Cabinet, at the Cabinet stage: and these individuals did not go through the standard statutory assessment process. The vast majority of these had not made an application at all. Mr Smith Abbott was taken to these Cabinet papers during the hearing, and agreed that these were examples of Cabinet adding names of its own volition[126]. He said the Ministry was aware of the need to ensure that such situations did not reoccur, and they made every effort to ensure that they did not[127]. However, in 2011, the introduction of the individuals who had not been through the relevant processes was not accidental: it was by a deliberate decision of the executive.

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[122] T22 6 July 2021 page 39.
[123] Cabinet Memorandum No 139/2011: Applications for Belonger Status dated 7 April 2011; and Cabinet Paper Record and Extract from the Minutes of the Meeting dated 27 April 2011.
[124] Cabinet Memorandum No 430/2011: Belonger Status dated 19 October 2011; and Cabinet Paper Record and Extract from the Minutes of the Meeting dated 1 November 2011.
[125] Dr Orlando Smith (the Premier from November 2011) said that he did not recall this issue; but, he said, although it might refer people to the Board for consideration, his Cabinet simply approved or rejected recommendations from the Board: it did not approve anyone who had not been through the Board process (T24 8 July 2021 pages 8, and 19-23).
[126] T41 28 September 2021 page 121.
[127] T41 28 September 2021 page 97.

10.59 In response to the potential criticism arising from this evidence set out in warning letters sent to the Cabinet and the Premier (who, as then Minister of Education and Culture, was a member of the Cabinet in 2011)[128], that, by granting belongership status to these 224 individuals, the Cabinet had acted ultra vires the 1977 Act, the Premier (on behalf of himself and the Cabinet) said[129]:

(i) The events were over 10 years ago, and he had not had an opportunity to recollect and establish what happened by reference to documents. His recollection was limited.

(ii) The then Premier, the late Hon Ralph O'Neal, had been concerned about the backlog of belongership applications, and he told Cabinet that he intended to bring before it the cases of persons so affected before the end of his term of office, and invited members of the Cabinet to bring such persons to his attention. The current Premier Hon Andrew Fahie, then a Cabinet Minister, could not recall if he had himself brought any names forward.

(iii) On the submission of the paper to the Cabinet by the then Premier, it was decided to grant the status to various persons between April and October 2011. The paper did not indicate the views of the Attorney General, but neither did he (or the Governor) express any objection.

(iv) However, some time after the Cabinet's consideration of those persons, the current Premier believed the Attorney General did advise that the grants were unlawful; and, as far as he could recollect, the decisions were not confirmed. He understood that these applications were then later (under the new administration) processed by the Immigration Board in the normal way.

(v) He denied that the grants were made for electoral reasons. Although made shortly before the 2011 election, the grants were not made in time for the beneficiaries to be registered to vote in the election that year. The decision was taken by the then Premier because of his acute concern about the injustices that a prolonged backlog of applications had caused and wanted to remedy some of those injustices before the end of his term of office[130].

10.60 I appreciate that these events were some years ago, but I am not wholly persuaded by the Premier's explanation. The Premier's memory appears to be incorrect in recalling that none of these applicants had their applications granted: the evidence is that, although some may have had their grants later revoked by the incoming administration, the grants were made. Further, 190 of the 224 individuals identified in the IAD Report were introduced at Cabinet level and had not in fact made any application at all. Granting them belongership could not assist in reducing the backlog at all. How it might do so was a question to which the Premier was unable to provide an answer, he said as a result of the passage of time[131]. However, this issue does not rely on memory, but rather a comparison of the expressed purpose of the initiative and the means employed.

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[128] COI Warning Letter No 2 to the Cabinet dated 15 September 2021; and COI Warning Letter No 2 to the Premier dated 15 September 2021.

[129] Premier Response to COI Warning Letter No 2 dated 28 September 2021. He confirmed that the response was also on behalf of Cabinet (T46 11 October 2021 page 138).

[130] In the Elected Ministers' Closing Submissions, it was submitted that there are no grounds for finding an objective basis for conduct falling within paragraph 1 of my Terms of Reference, because of (i), (iii) (the Attorney General did not advise that the grants were unlawful before the decision was made) and (v). The submissions did not otherwise make any comment on the unfettered discretion of Cabinet to make such decisions on belongership; and made no submissions on the more recent examples of the use of that discretion dealt with below.

[131] T46 11 October 2021 page 164. He said it would have been better if the question could have been put to the late Hon Ralph O'Neal.

10.61 In any event, by by-passing the statutory requirements (as was apparently recognised shortly after the event), these grants appear clearly to have been made as the result of an unlawful exercise of discretion by the Cabinet acting outside the requirements of the statutory scheme.

The Case of Mr A

10.62 During the Fast Track scheme, Hon Vincent Wheatley as Minister for Natural Resources, Labour and Immigration submitted a paper to Cabinet dated 21 November 2019 for Cabinet to consider 100 applications for belongership under the amended second limb of section 16(5) (20 years' ordinary residence)[132], which was considered by Cabinet at its meeting on 22 November 2019[133].

10.63 The paper was introduced at the Cabinet meeting by Hon Vincent Wheatley. One of the applicants was a person to whom I shall refer as Mr A. His profile indicated that his "physical address" was in the BVI, and that he had been resident in the Territory for over 20 years. It was said he was "Unemployed". His police record was "Clear". The result of the cultural test was said to be "Unavailable". "Absence from the Territory", and "Reason" therefor, were left blank. Given that the Immigration Department was tasked with weeding out those who had not been ordinarily resident for 20 years, the profile did not suggest that the application did not comply with the mandatory criteria or that there was anything else amiss with it[134].

10.64 However, at the Cabinet meeting, the Attorney General (Hon Baba Aziz) is recorded as raising a concern because, coincidentally, he happened to know of Mr A's circumstances. Had he not raised this concern, there is nothing to suggest that the application would not have simply been granted with the rest. The record of the meeting is as follows:

> "36. The Attorney General raised the issue of the applicant [Mr A] who was currently imprisoned in [another jurisdiction] and serving a 10-year sentence for rape.
>
> 37. The Premier responded that the applicant's parents had made representation and informed him that the [court of the other jurisdiction] had indicated that they would allow the applicant to serve out his sentence in the Territory. The Premier made it clear that he was not condoning the crime but that the BVI was the only place that the applicant knew.
>
> 38. The AG said that the Cabinet has discretion but as the Attorney General he has brought this matter to the Cabinet's attention that this is the status of the imprisoned applicant.
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> 39. The Premier mentioned that there was another case involving [Mr B], who would be applying for a similar consideration. [Mr B] was not born in the Territory but had lived here for over 30 years[135].

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[132] Cabinet Memorandum No 405/2019: Applications for Certificates of Residence and Belonger Status (Immigration Regularizations Batch No 04) dated 21 November 2019.

[133] Recorded in Cabinet Meeting Minute No 32 of 2019 dated 22 November 2019. On this occasion, the meeting was not chaired by the Governor or Deputy Governor.

[134] Although the fact that the result of the cultural test was "Unavailable" might in retrospect be regarded as a flag for concern, the profile was not unique in that respect.

[135] Hon Vincent Wheatley gave evidence that he had known Mr B all his life, and he also knew Mr A's parents (whom he described as upstanding persons) very well; and said that Cabinet was trying to be sympathetic to their cause to have their son in the BVI with them. Upon being asked whether a good character assessment had in fact been carried out for either individual, he said it had, notwithstanding the situation they were in. He said that it was a sympathy call more than anything else to bring some relief to their families (T41 28 September 2021 pages 197-198). However, it was clear from this Cabinet Minute that Mr B had not yet made an application: and the IRU on behalf of Hon Vincent Wheatley later confirmed that Mr B had in fact been granted belonger status well before the Cabinet meeting in November 2019 (Email Withers to the COI dated 13 October 2021).

40. The Chairman said while we want to be sympathetic to these persons, what was the plan for further rehabilitation for them. The Chairman stated that the BVI should not be a dumping ground for persons who did not behave in a good manner while overseas or considered a place that was a home for non law abiding citizens.

41. The Premier and his Ministers conferred on the matter and agreed that the applicant be deferred.

42. Cabinet decided on the 99 applicants but deferred approving the application for [Mr A] for three (3) weeks."

10.65 In terms of the representations made by Mr A's parents, in response to a request for further information, the IRU responded as follows[136]:

"1. The Honourable Premier recalls a chance encounter with [Mr A's] father. He cannot recall the time or place, only that it was not a formal meeting. During that encounter [Mr A's father] informed the Premier that his son's application for Belonger Status had been submitted and that he was informing the Honourable Premier so that it would not come as a surprise. The reason provided to the Honourable Premier for the application was that the [foreign Court that had convicted and sentenced him] had indicated that [Mr A] could serve half his sentence in [that other jurisdiction] and half in their country of status and that his family would wish for him to serve half his sentence in the BVI.

2. The Honourable Premier vaguely recalls a second encounter with [Mr A's father] a few months after the Cabinet meeting in question. Again, he cannot recall the time or place of that encounter, which was not a formal meeting. During the course of the encounter, [Mr A's father] brought up his son's application once again and the Honourable Premier recalls saying to [A's father] that he '…wouldn't put any hope on it'."

None of this was contemporaneously recorded in writing. There is no evidence of any further representations, written or oral.

10.66 There are several obvious concerns about this application, and how the Cabinet dealt with it.

10.67 First, as the Minister Hon Vincent Wheatley accepted[137], it is clear that the information provided to Cabinet in Mr A's profile – e.g. concerning his physical address (which was not in the BVI, but in a foreign prison), whether he had a police record (none in the BVI, but a conviction for a very serious offence in another country[138]) and absence from the Territory (which had been extensive, and for a reason not covered by any section 16(1) exemption) – was incomplete and/or wrong and/or misleading. Hon Vincent Wheatley accepted that errors were found in respect of other applicants on the basis of the happenstance that a Cabinet member knew of the applicant's circumstances, which led to their applications not being accepted by Cabinet; and he could not vouch for the accuracy of other profiles. The mistakes which have been found have been largely fortuitous, and have been found despite the Fast

[136] Email from Withers to COI dated 8 October 2021.
[137] T48 14 October 2021 pages 281-289.
[138] The CIO Ian Penn said that, if the applicant did not have a police record in the BVI, then in the profile it would appear as 'clear'. However, as the amended second limb of section 16(5) (under which all of the relevant applicants were being considered) required continuous ordinary residence in the BVI for 20 years, a disclosed break in that continuity would make it appropriate to ask questions about the applicant's overseas offences for which the applicant may have been imprisoned. In any event, Mr Penn considered that a foreign police record would render the person incapable of applying for belonger status due to the good character requirements (T49 15 October 2021 pages 15-18). Whilst good character was not a pre-condition in the version of section 16(5) applicable to Fast Track applications, it was clearly an important factor to take into account in assessing whether discretion should be exercised in favour of granting an application, particularly as an application under that provision could only be granted in "exceptional circumstances".

Track system rather than because of it. He said that he had spoken with his departmental officials asking them to slow down the process, and try to be accurate[139]: but he said he could not vouch for the accuracy of the profiles of those applicants who had been granted belonger status: as he put it, "That was the danger of this", i.e. the danger of excluding the Board from assessing the applications and leaving that exercise to Cabinet on the basis of very limited information[140]. He agreed that this naturally raised concerns regarding the other applications[141].

10.68 Those concerns are compounded by the fact that, under the Fast Track process, applications were considered by Cabinet in large batches of (usually) around 50. The practical effect of taking the Board's role out of the process meant that a greater onus to ensure applications were complete and correct fell on the Cabinet. Whilst the applications were submitted to and processed by the Immigration Department, as made clear by CIO Ian Penn, the role of departmental officials was only administrative in nature[142]. This gives rise to the concern that the applications were not properly assessed.

10.69 Cabinet Memorandum No 443/2019[143] is one of several Cabinet papers seeking approval of applications for belongership and residence under Fast Track. Under the heading "Legal Implications", it is stated on behalf of the Attorney General's Chambers:

> "9) The size of the number of applicants (in this case 67) and the short notice for comments on the Cabinet Paper does not provide me with the requisite opportunity to determine whether or not the applicants have qualified for the grant of resident or belonger status and that there are no disqualifying factors such as criminal convictions, frauds etc whether in or outside the Virgin Islands, which is a relevant consideration in these matters.
>
> 10) I proceed on the assumption that the Ministry has conducted the application and that they do in fact qualify under the Immigration and Passport Act for the status that they have applied for. In any event, a certificate granted is subject to revocation for fraud, false representation or concealment of material fact and imprisonment among other considerations".

Similar concerns were raised in other similar papers, including Cabinet Memorandum No 444/2019 with 48 applicants[144], which has the same date as Cabinet Memorandum No 443/2019. On 5 December 2019, two Cabinet papers were thus circulated with a combined total of over 100 applicants.

10.70 Although the Cabinet Handbook requires Cabinet papers to be submitted to Cabinet at least two days before the Cabinet meeting, Hon Vincent Wheatley accepted that that was not always the case. In the case of the Cabinet paper relating to grants of belonger status under Fast Track, sometimes the Cabinet paper would arrive late – sometimes a day before, and sometimes not even until the night before[145].

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[139] Hon Vincent Wheatley did not say to whom he spoke. The CIO Ian Penn, perhaps a likely candidate, was unable to recall having any conversation with him about the profiles being inaccurate. He said that, normally, the profiles were completed by the Immigration Department; but, for the Fast Track period, they were assisted by other personnel from the Ministry (T49 15 October 2021 page 10).
[140] T48 14 October 2021 page 288.
[141] T48 14 October 2021 page 285.
[142] T41 28 September 2021 pages 131-132.
[143] Cabinet Memorandum No 443/2019: Applications for Certificates of Residence and Belonger Status – (Immigration Regularization – Batch No 06) dated 5 December 2019 prepared by MNRLI.
[144] Cabinet Memorandum No 444/2019.
[145] T48 14 October 2021 page 271-272. The CIO Ian Penn said that he could not recall whether this concern had been fed back to the Immigration Department (T41 28 September 2021 page 133). Hon Vincent Wheatley said that he was unable to recall any discussions at Cabinet level regarding this, although he was sure it would have been discussed (T41 28 September 2021 page 192).

10.71 The second concern about the way in which Mr A's application was handled is that, although under the amended section 16(5) good character was not a pre-condition, a conviction for a very serious crime is clearly a matter that Cabinet would be required to take into account in exercising its discretion; and, particularly as a grant can only be given in "exceptional circumstances", it would take powerful factors in favour of grant to enable the discretion to be exercised in favour of an applicant who had committed such an offence. The evidence does not suggest any such factors here. General sympathy of particular Cabinet members for Mr A's parents would not be such a factor. Hon Vincent Wheatley did not request any kind of risk assessment in relation to Mr A returning to the BVI, and did not recall anyone else doing so[146]: indeed, there is no evidence that any form of risk assessment was even considered. Given the nature of Mr A's offence, that in itself is remarkable.

10.72 But in any event, third, Mr A was in prison in another jurisdiction[147], and had been for some time: he clearly could not satisfy the mandatory statutory ordinary residence requirements. As a matter of law, his application was bound to be refused on that ground. The Minister said that he assumed that the reason Mr A had not been granted status and the application was deferred was because all fields in the information notes had not been filled in[148]. However, that does not appear to have been considered as a reason for deferral at the time. It is unclear why the application was deferred, and not simply refused.

10.73 The Extract records that Mr A's application be deferred for three weeks. However, following the hearing, in a response to my directions dated 28 September 2021 (amended the following day)[149], the IRU on behalf of Hon Vincent Wheatley said that Mr A's application had never returned to Cabinet for consideration[150]; and, on 6 October 2021, they sent a further email[151] attaching a copy of a letter sent by the CIO Ian Penn[152] to Mr A dated 17 December 2020 informing him that his application for residence and belonger status under Fast Track was unsuccessful as he did not meet the 20-year residence requirement[153].

10.74 Given that the Cabinet was responsible for making decisions to grant or refuse applications for belonger status, the COI requested by email dated 7 October 2021[154] that the Minister explain the basis on which Mr A's application was refused by the Immigration Department, and who authorised the Immigration Department to send the letter.

10.75 On 13 October 2021, the IRU on behalf of the Minister Hon Vincent Wheatley responded[155], stating that:

> "Due to the length of time since the end of the Fasttrack scheme in relation to Belongership, the Department of Immigration determined that the letter should be issued and the application fee returned. This procedure was followed with other unsuccessful applicants".

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146 T41 28 September 2021 page 208-209.
147 Hon Vincent Wheatley said that, whilst Mr A had been sentenced to 10 years' imprisonment, it was not made clear that he was already in prison (T41 28 September 2021 page 201). However, (i) the profile had not indicated that Mr A had been sentenced to 10 years' imprisonment, and (ii) if there was doubt, then an enquiry could have been made. This does not appear to have been in anyone's mind at the time. The possibility that someone convicted of rape and sentenced to a 10-year prison term would not be required to start serving the sentence immediately would seem, at best, to be a remote one. There was no evidence to suggest that he was not serving the sentence.
148 T48 14 October 2021 page 280.
149 Emails COI to Hon Vincent Wheatley dated 28 and 29 September 2021.
150 Email Withers to the COI dated 1 October 2021.
151 Email Withers to the COI dated 6 October 2021.
152 The letter was in Mr Penn's name, but signed by another public official on his behalf.
153 Letter CIO Ian Penn to Mr A dated 17 December 2020.
154 Email COI to Withers dated 7 October 2021.
155 Email Withers to COI dated 13 October 2021.

Giving oral evidence the following day (14 October 2021), Hon Vincent Wheatley said that, once something is deferred and is not returned to Cabinet, it is simply a "dead issue"[156]. It seemed that it had been refused by the CIO as an administrative matter.

10.76 However, later in his evidence the Minister accepted that the Immigration Department could not make a decision on the application and, once it had been submitted to Cabinet, it had to come back to Cabinet for a decision to be made[157]. Further, Mr Penn confirmed in his evidence the following day that, where an application was sent to Cabinet and then deferred, it would always need to go back to Cabinet[158]. Therefore, although the letter of 17 December 2020 rightly said that Mr A did not satisfy the 20-year ordinary residence requirement, as Mr Penn himself understood matters, on his own evidence, that letter appeared to have been ultra vires. Only the Cabinet had the power to refuse the application.

10.77 However, on 21 October 2021, there was a further twist. The IRU on behalf of Mr Penn wrote to the COI to say[159]:

> "It has since been noted that due to the haste during preparing of the letters a human error was made in the wording within [Mr A's] letter. The word 'denied' should have read 'deferred' as this was the only application deferred under the program the oversight was easily made. Under the Fast-Track programme the department was expected to facilitate an unusual process where the collection of funds was concerned. Due to the fact that payment were made upfront it resulted in the need for refunds to take place prior to the end of the fiscal year in 2019. An action such as the issuance of the letters were standard procedure to accompany any form of refund from the Department, as is the case where the refund of Bonds are concerned. Therefore, it was important that the already late refund checks to persons be accompanied by a cover letter. Therefore, there were no specific and direct instructions necessary as this was standard."

It is not clear what the "haste" was. In any event, Mr A's application was (and is) thus still extant.

10.78 It is evident from the plain reading of subsection 16(10) that imprisonment overseas is not an exception to the ordinarily residence requirement, which Mr A was unable to meet. In any event, on the evidence before me, there is nothing to indicate that the ordinary residence requirements were considered by the Cabinet.

The Case of Ms C

10.79 The final example also concerns an applicant who has a criminal record, Ms C.

10.80 On 14 June 2021, Hon Vincent Wheatley circulated a Cabinet Memorandum concerning applicants for residence certificates[160]. The paper recorded that the Board had assessed 188 candidates, and had recommended that they each be granted residence status; but, in respect of one applicant (Ms C), it had recommended refusal because she had a criminal record for offences, including handling stolen goods, and this did not satisfy the mandatory requirement of section 18(1) of the 1977 Act of being of good character. In the paper, the Minister equated

[156] T48 14 October 2021 page 282.
[157] T48 14 October 2021 pages 282-283.
[158] T49 15 October 2021 page 31. Mr Penn said that it should go back to Cabinet within the stipulated time, although that did not of course happen in this case.
[159] Email Withers to COI dated 21 October 2021.
[160] Cabinet Memorandum No 262/2021: Applications for Certificates of Residence Status – January, March and April 2021 dated 14 June 2021. These applications were made under the standard process, not the Fast Track.

"good character" as not having any BVI convictions[161]. The Attorney General had reviewed the paper, and had not raised any points on it. In line with the Board's recommendation, the Minister recommended refusal of that application.

10.81 The paper was considered at the 16 June 2021 Cabinet Meeting, but was deferred for a week. It was reconsidered on 23 June 2021. The discussion in Cabinet is recorded as follows[162]:

> "23. Following up from last week's discussion, the Minister for NRL and Immigration said that he had further researched the matter on the applicant, [Ms C], and had discovered that she did not serve a jail term. He added that her police record showed that she was charged because of her association with an offender.
>
> 24. The Chairman acknowledged the Minister's comments but reiterated his position that if [Ms C] applied to become a BOTC [i.e. BOT citizen] by naturalisation, he would not approve her application at this time. He said that records show that [Ms C] was convicted of an offence and that it was unlikely that the courts would have found her guilty, if the matter was only by association.
>
> 25. The Premier supported that [Ms C] be afforded a second chance in light of the circumstances that her crime was by association. He added that looking at the facts, it would seem prudent to deny the application; however, considering [Ms C's] family situation, the Premier was inclined to afford her a chance.
>
> 26. The Chairman asked the AG to remind the Cabinet of section 18.1 of the Immigration and Passport Ordinance.
>
> 27. The Chairman stressed that the courts would have found reason to convict [Ms C], and if there was no evidence, she would not have been convicted. The proposed approach was also directly contrary to the recommendation of the Immigration Board.
>
> 28. The Deputy Premier and Minister for Education stated that good character was not absolute. He added that there was a difference between poor character and a lapse in judgment.
>
> 29. Members concluded that the subject Minister had carried out the required and adequate assessment of the matter at hand. Therefore, they were satisfied that [Ms C's] application should be reconsidered.
>
> 30. The AG said there was scope for the Cabinet to decide based on the paper before them.
>
> 31. There was consensus not to accept the Board's recommendation but instead for the Cabinet in its discretion to grant a Certificate of Residence to [Ms C].
>
> 32. It was noted that items c. and d. of the decision sought would be amended accordingly."

10.82 Cabinet accordingly granted a Certificate of Residence to Ms C although she did not comply with the mandatory good character requirement.

[161] Paragraphs 1 and 3.
[162] Recorded in Cabinet Meeting Minute No 26 of 2021 dated 23 June 2021 page 7.

Conclusion

10.83 Whilst in respect of most residence and belongership applications, the Board is allowed to play its full role, and the Cabinet follows the Board's recommendation in most cases, evidence was presented to the COI that shows that Cabinet has been and is prepared to exercise its discretion in a legally arbitrary way – and, if necessary, in a manner which is inconsistent with the statutory criteria for these important statuses. On the evidence, it seems quite clear that at least 224 applicants for belongership were granted that status "outside the framework of the law" in 2011. Even if in 2011 Cabinet was moved by the failure to process applications promptly – which does not seem to fit in with the system they adopted, which involved considering those who had made no application – their willingness to move outside the framework of the law to do it is worrying. In the event, the unlawfulness appears to have been recognised by the succeeding administration, and at least some audit of the relevant applicants was done against the statutory criteria.

10.84 The cases of Mr A and Ms C are strongly suggestive that Cabinet is willing to act outside the statutory criteria where it wishes to do so. In each case, the grounds for doing so appear to have been based upon the personal knowledge of the applicant by one or more Cabinet members. Cabinet appears to be willing to act in a legally arbitrary manner.

10.85 The exercise of this discretion in the context of the Fast Track process (into which Mr A, of course, fell) was even more concerning, because in that process there was no assessment of applications by the Board.

10.86 Whilst the intention to clear the backlog of applications was understandable –– even, commendable – the method in which it was done was curious. First, as I have described, as with the 2011 initiative, it did not focus on the backlog. It focused on all people who had 20 years' residence, whether they had previously applied (and thus formed part of the backlog) or not. Whilst the Premier suggested that the manner in which the Fast Track scheme was designed was restricted by a lack of policy formulation or implementation capacity in the Public Service, if it had been the intention to clear the backlog, it did not need any great input to exclude those not within the backlog. Second, the primary reason given by Hon Vincent Wheatley for the backlog was a lack of staff in the Immigration Department. It is not clear why the backlog was not cleared by simply retaining more such staff (as was, in fact, done in the Fast Track scheme). That would not have involved any policy planning or implementation resources. There does not appear to be any evidence that delays were caused at the stage of assessment by the Board, which was the stage omitted in the Fast Track process compared with the standard system. Again, focus on the reason for the delays and backlog did not require any input from the public officials: it was fully recognised during the Fast Track scheme, when substantial more staff were drawn in to assist the Immigration Department not only with the backlog but also the new applicants that the Fast Track scheme encouraged to apply.

10.87 In any event, the result was that, on scant information (some of which, the Minister accepted, was incorrect even as to whether the 20-year residence criterion was satisfied), the Cabinet exercised its unfettered discretion. The consideration Cabinet members could give to any particular applicant was constrained by the limited amount of information provided to them and the limited time they had to consider it. Any consideration appears to have been based on the happenchance of personal knowledge a Cabinet member (or the Attorney General advising Cabinet) had of an applicant. Therefore, in the Fast Track scheme, whilst the discretion exercised by the Cabinet was the same (i.e. unfettered), it was exercised on less

information and absent any assessment such as the Board would usually perform. The result was that the process involved an even greater exercise of discretion, with greater risks of errors, inconsistent decision making and, indeed, dishonesty.

10.88 It is unknown whether there are any applicants under the Fast Track scheme still in the system and, if so, how many; but the Fast Track scheme has more or less run its time-limited course. However, (i) granting the Cabinet this sort of discretion, at the cost of any proper assessment of applications, is something which the House of Assembly will wish to consider very carefully if it is asked again to give the executive these sorts of powers over such an important aspect of government decision-making; and (ii) given that the Minister accepts that mistakes may have been made in the information upon which Cabinet made decisions on applications, it seems to me to be vital that an independent audit is performed on the Fast Track scheme and on each of the applications that ran through that scheme. I understand that that course may cause some successful applicants anxiety; but such an audit would not only be in the interests of good governance in such an important area of public life as belongership, but also in the interests of those successful applicants themselves, upon whose status the Minister has cast a shadow of doubt. It is vital for them that the "sacred gift" that they have been given is not subject to any such shadow.

Recommendations

10.89 I will deal with overarching recommendations below[163]. However, with regard to residency and belongership processes, I make the following specific recommendations:

Recommendation B33

I recommend that there should be a review of processes for the grant of residency and belongership status, and in particular the open discretion currently held by Cabinet to make grants. Any such powers should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance. This review could (and, in my view, should) be led by a senior public officer. As part of that review, the position with regard to the length of residence required for belongership applications based on tenure should be clarified and in due course confirmed by statute.

Recommendation B34

I recommend that all applications for and grants of residency and belongership status under the Fast Track scheme be the subject of a full audit performed by the Auditor General or some other independent person or body instructed by her, and a report on that audit be presented to the Governor. The terms of that exercise should include consideration of the following (i) the extent to which the statutory criteria were applied to the application, and by whom, (ii) whether the executive exercised any discretion in relation to the selection process and, if so, how it was exercised and whether any guidance or criteria were applied, and (iii) whether, in terms of governance, there were any inherent weaknesses in the Fast Track scheme. Unless, in the meantime, the relevant BVI authorities consider otherwise, further steps including any criminal investigation can await the outcome of that audit.

[163] See Chapter 14.

APPENDIX A

CHAPTER 11:
THE PUBLIC SERVICE

APPENDIX A

THE PUBLIC SERVICE

An independent and functional Public Service, able to give impartial advice to elected officials without fear of sanction, is essential to good governance. In this chapter, I consider where the Public Service sits within the Constitution, and issues raised before the COI concerning aspects of the Public Service which were alleged to undermine its ability to function as proper support for the elected Government, such as the lack of funding and reform.

Constitutional Allocation of Responsibility

11.1 The Constitution defines the Public Service as "the service of the Crown in a civil capacity in respect of the [BVI] Government", and "public office" as "any office of emolument in the public service or any office of emolument under any local government council or authority in the [BVI]"[1]. A "public officer" is therefore any unelected person who holds, or has been appointed to act in, such an office[2].

11.2 Under the Constitution, the power to make and revoke appointments of, and to exercise disciplinary control over, public officers generally resides with the Governor. However, the Governor's power of appointment is not without its constraints in that, in respect of many appointments, the Constitution imposes a requirement that the Governor seeks the advice of one of four commissions (the Public Service Commission ("the PSC"), the Teaching Service Commission, the Judicial and Legal Services Commission and the Police Service Commission, collectively "the Commissions") and/or, in defined circumstances, other actors.

11.3 Thus, under the heading "Power to appoint, etc, to public office", section 92 of the Constitution provides:

> "(1) Subject to this section and to the other provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Governor, acting in accordance with the advice of the [PSC]; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice Her Majesty's service.
>
> (2) Before exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the [PSC] back to the Commission for reconsideration by it.

[1] Section 2 of the Constitution. In this Report, I use the term "Public Service" to mean the service as described in this section – what is called "the Civil Service" in some other countries – rather than the concept of public service. The term in the institutional sense, however, is not always initial capitalised, particularly in statutes. Where I have quoted from these, I have kept the original form.

[2] In this Report, the term "public officer" is used to describe non-elected employed public officials working in government – termed "civil servants" in some other countries. Section 3(1)(b) of the Constitution specifies that a person who receives any remuneration or allowances when holding the office of Minister, Speaker, Deputy Speaker or member of the House of Assembly or as a member of the PSC, the Teaching Service Commission, the Judicial and Legal Services Commission, or the Police Service Commission shall not be considered to hold a public office. In this Report, unless otherwise specified, in line with section 79(1) of the Criminal Code, the term "public officials" is used to include both elected and non-elected public officials (see paragraph 2.3 and footnote 1 above).

(3) If the [PSC], having reconsidered its original advice under subsection (2), substitutes for it different advice, subsection (2) shall apply to that different advice as it applies to the original advice.

(4) Before appointing any person to the office of head of department or any more senior office, the Governor shall in addition consult with the Premier.

(5) Power to make appointments to the office of Cabinet Secretary is vested in the Governor, acting in accordance with the advice of the Premier; but the Governor, acting in his or her discretion, may decline to act in accordance with that advice if he or she determines that compliance with that advice would prejudice Her Majesty's service.

(6) Where the Governor declines to act in accordance with the advice of the Premier under subsection (5), he or she shall refer the matter to the Premier requesting advice on the appointment, pursuant to subsection (7), of another person to the office of Cabinet Secretary and the Governor shall act in accordance with that advice.

(7) Whenever occasion arises for making an appointment under subsection (5), the [PSC] shall submit to the Premier a list of persons who appear to the Commission to be qualified and competent for the appointment, and the Premier shall advise the Governor to appoint a person whose name appears on the list, provided that the Premier may request once an additional list of persons from the [PSC] from which to advise an appointment.

(8) The Governor, acting after consultation with the [PSC], may, by regulations published in the Gazette, delegate to any member of the Commission or any public officer or class of public officer, to such extent and subject to such conditions as may be prescribed in the regulations, any of the powers vested in the Governor to make appointments to public offices and to remove or exercise disciplinary control over persons holding or acting in such offices; and except in so far as regulations made under this subsection otherwise provide, any power delegated by such regulations may be exercised by any person to whom it is delegated without reference to the [PSC].

(9) The Premier may from time to time request a report from the [PSC] about the functioning of the public service.

(10) This section does not apply to—

(a) any office to which section 95 applies; or

(b) any office in the Police Force."

In respect of most public offices, this section therefore imposes upon the Governor a requirement to seek, and generally act upon, the advice of the PSC3 (or, sometimes, the Premier).

11.4 There is a similar requirement in relation to the office of teacher in the Government Teaching Service, but with the requirement to seek advice from the Teaching Service Commission[4].

[3] The PSC is established under section 91 of the Constitution. It has five members, all appointed by the Governor but one of whom is appointed in accordance with the advice of the Premier, another in accordance with the advice of the Leader of the Opposition and a third following consultation with the Civil Service Association.

[4] Section 93(2). The Teaching Service Commission is established by section 93 of the Constitution. It has three members, all appointed by the Governor. Of these, one is appointed by the Governor acting in his or her discretion, one in accordance with the advice of Cabinet and the third after consultation with the BVI Teachers' Union.

11.5 The reference to section 95 in section 92(10)(a) quoted above is to the provision in the Constitution that gives the Governor, upon the non-binding advice of the Judicial and Legal Services Commission[5], power to appoint, remove and exercise disciplinary control over persons holding certain legal offices, including that of Attorney General and the DPP. Similar powers are afforded to the Governor under section 97, which concerns appointments to offices in the RVIPF, where the Governor has the benefit of advice from the Police Service Commission[6] and the NSC[7].

11.6 The Governor's power to appoint does not extend to employees of a statutory board. As described in Chapter 7, such appointments are normally made by the Cabinet or relevant Minister, as provided for in the statute setting up the board.

11.7 As to a Governor's responsibility for the Public Service, section 60(1)(d) of the Constitution[8] states that:

> "The Governor shall be responsible for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including the administration of any department of government, with respect to…
>
> (d) the terms and conditions of service of persons holding or acting in public offices, without prejudice to section 92…"[9].

11.8 However, it is important to note that the constitutional responsibility for formulating and implementing policy (with which the Public Service, whilst remaining independent, is of course bound to assist the elected Government in delivering its policy agenda) does not lie with the Governor. As indicated above[10], whilst by virtue of section 46 of the Constitution executive power in the BVI is generally vested in the Governor, that is subject to the terms of the Constitution which, at section 47(3), provides that:

> "The Cabinet has responsibility for the formulation of policy, including directing the implementation of such policy, insofar as it relates to every aspect of government, except those matters for which the Governor has special responsibility under section 60, and the Cabinet shall be collectively responsible to the House of Assembly for such policies and their implementation".

Therefore, whilst the Governor has responsibility for the terms and conditions of public officers, those officers answer to the Cabinet (and, in practice, to the Minister of the Ministry to which they are assigned) in respect of policy formulation and implementation.

11.9 As to this relationship between the Public Service and Ministers, section 56 provides as follows:

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[5] Established under Section 94 of the Constitution, the Judicial and Legal Services Commission is chaired by the Chief Justice of the Eastern Caribbean Supreme Court and additionally comprises a judge of the Court of Appeal or High Court, the Chairman of the PSC and two other members appointed by the Governor acting in accordance with the advice of the Premier and the Leader of the Opposition who can each nominate a member.

[6] The Police Service Commission is established by section 96 of the Constitution. It has five members, all appointed by the Governor. Two members are appointed by the Governor acting in his or her discretion, one is appointed in accordance with the advice of the Premier, a fourth in accordance with the advice of the Leader of the Opposition and the last after consultation with the Police Welfare Association.

[7] The NSC is established by section 57 of the Constitution. It is chaired by the Governor, and its membership consists of the Premier, one other Minister appointed in accordance with the advice of the Premier, and the Attorney General and CoP (both as ex officio members).

[8] Section 60 of the Constitution is set out above: paragraph 1.52.

[9] Other matters reserved to the Governor under section 60 are external affairs, defence including the armed forces, internal security including the Police Force, and the administration of the courts (see paragraph 1.52 above).

[10] See paragraph 1.60.

"(1) The Governor shall, acting in accordance with the advice of the Premier, by directions in writing, assign to any Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including responsibility for the administration of any department of government.

(2) Without prejudice to section 60(2), (3) and (4), a Minister shall not be assigned responsibility under this section for any of the matters mentioned in section 60(1)[11].

(3) The Governor may not confer on any Minister Authority to exercise any function that is conferred or imposed by this Constitution or any other law on the Governor or any person or authority other than a Minister; but nothing in this subsection affects the power of the Legislature under section 71.

(4) For the avoidance of doubt, subject only to subsections (2) and (3), any matter may be assigned to a Minister under subsection (1).

(5) Where a Minister has been assigned responsibility under this section for the administration of any department of government, the Minister shall (subject to this Constitution and any other law) exercise direction and control over that department, including directing the implementation of government policy as it relates to that department, and, subject to such direction and control, the department shall, unless otherwise agreed between the Governor and the Premier, be under the supervision of a permanent secretary who shall be a public officer; but two or more departments of government may be placed under the supervision of one permanent secretary.

(6) A Minister assigned responsibility for any matter under this section shall exercise his or her responsibility in accordance with the policies of the Government of the Virgin Islands as determined by the Cabinet and in accordance with the collective responsibility of the members of the Cabinet for the policies and decisions of the Government.

(7) The Governor, acting in his or her discretion, may at any time request from a Minister any official papers or seek any official information or advice available to that Minister with respect to a matter for which that Minister is responsible under this section, and shall inform the Premier of any such request."

11.10 There was broad agreement among witnesses as to the ambit of Section 56(5). In short, a Permanent Secretary is responsible for the operation of a Ministry, but subject to the direction and control of the relevant Minister. The latter takes forward the policies approved by Cabinet, but will have the advice of the Permanent Secretary and other public officers within the Ministry both with regard to policy formulation and implementation[12]. However, given section 56(6), a Minister cannot formulate and implement policy independently of Cabinet. Under the Constitution, Cabinet has an independent legal personality[13], and is responsible for policy.

11.11 Returning to the Governor's responsibilities in this area, Governor Rankin said of section 60:

[11] Section 60 of the Constitution is set out above: paragraph 1.52.

[12] T3 7 May 2021 pages 109-111 (Dr Marcia Potter, Permanent Secretary MEC); T6 18 May 2021 pages 10-11, T32 9 September 2021 pages 15 (Dr Carolyn O'Neal Morton, Permanent Secretary Premier's Office); T20 30 June 2021 pages 68-73 (Hon Mark Vanterpool, Minister for Communications and Works between 2011 and 2019); T21 1 July 2021 pages 101-102 and T36 20 September 2021 pages 8-16 (Myron Walwyn, Minister for Education and Culture between 2011 and 2019); T30 7 September 2021 page 134 (Hon Carvin Malone, current Minister for Health and Social Development); T30 7 September 2021 page 6 (Tasha Bertie, Acting Permanent Secretary MHSD); T31 8 September 2021 (Joseph Smith Abbott, Acting Permanent Secretary MNRLI).

[13] See paragraph 1.60 above.

> "In that context the Governor seeks to ensure an apolitical, professional Public Service adhering to core principles of integrity, honesty and impartiality"[14].

In practice, the Governor assigns day-to-day responsibility in respect of public officials to the Deputy Governor, who was identified by some witnesses as the de facto head of the Public Service[15]. Governor Rankin described the Deputy Governor as playing a coordinating role in the management of the Public Service[16]. That the Deputy Governor should exercise such a function is not specified in the Constitution, but it falls within the broad scope of section 38 which sets out the functions of the Deputy Governor as to assist the Governor in the exercise of his constitutional functions[17]. The current Deputy Governor, David Archer Jr, said his role was to look after overall good governance in the Public Service[18]. His involvement in coordinating the Public Service occupies the majority of his time[19].

General Orders[20]

11.12 The General Orders were issued in 1971 and revised in 1982, and set out in detail rules and procedures relating to employment within the Public Service. The matters covered include appointment, promotion and transfer, the conduct to be expected of public officers[21], travelling and subsistence expenses, and leave provisions.

11.13 As I have indicated, the General Orders were last updated 30 years ago, but they are still key to the operation of the Public Service. They were memorably described by Dr Marcia Potter, an experienced and senior public officer, as "the Bible for the… Public Service, at this time"[22], and by the Deputy Governor as "a ruling guide". He explained that the General Orders are supported by other policies "which guide the operations of persons within the Public Service". He gave the example of policies on sexual harassment and conflict of interest[23]. A search of the BVI Government website reveals guidance for public officers on a whole range of matters.

11.14 Further, the General Orders are supplemented by, for example, the PFMR, which are of particular relevance to any public officer who acts as the Accounting Officer for a Ministry or department[24]. There are also the Service Commissions Act 2011[25] and the Service Commission Regulations 2014[26], which set out the processes by which the Commissions advise the Governor on matters such as selection, appointment, promotion, transfer, retirement, the

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[14] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.1. The concerns and potential criticisms in respect of the function of the Governor and arising out of the evidence before the COI were put to Governor Rankin in his COI Warning Letter No 1 dated 30 September 2021 (which identified the evidence giving rise to the concerns and potential criticisms), to which the Governor responded fully in writing (on 14 October 2021) and at an oral hearing (T50 19 October 2021 pages 64-273). The Governor was also cross-examined on behalf of the Attorney General and elected Ministers (T55 24 November 2021 pages 4-95). Some of the concerns raised are properly described as systemic. Any criticisms of the Governor are restricted to those in respect of which he has had a full opportunity to respond, as described.

[15] T1 4 May 2021 pages 81-82 (Sandra Ward); T3 7 May 2021 pages 48 and 112 (Dr Marcia Potter); and T36 20 September 2021 pages 12-13 (Myron Walwyn).

[16] T50 19 October 2021 page 185.

[17] See paragraph 1.44 above.

[18] T17 23 June 2021 page 259.

[19] T17 23 June 2021 pages 219-220.

[20] General Orders for the Public Service of the British Virgin Islands 1971 (revised in 1982).

[21] Such as hours of work (paragraph 3.2), absence without permission (paragraph 3.4), declaring private interests (paragraph 3.6), engagement in political activity (paragraph 3.16), and acceptance of gifts (paragraph 3.18).

[22] T3 7 May 2021 page 113. At the time she gave evidence, Dr Potter was the Permanent Secretary MNRLI. She is currently Permanent Secretary MEC.

[23] T17 23 June 2021 page 225.

[24] See paragraph 1.165 above.

[25] No 8 of 2011.

[26] VISI 2014 No 48.

grant of study leave and the award of scholarships and also when dealing with disciplinary proceedings. Scheduled to the 2014 Regulations is a table setting out suggested penalties for diverse types of misconduct[27].

11.15 Separately, and further to the power under section 92(8) of the Constitution and as set out in Appointment to Public Office (Devolution of Human Resources Functions) Regulations 2008 ("the Devolution Regulations")[28], some of the Governor's powers are delegated to named authorised officers: the Attorney General, the Cabinet Secretary, the Financial Secretary, Permanent Secretaries and the CoP[29].

11.16 The Devolution Regulations are expressed to apply to the recruitment, selection and appointment of officers, the administration of disciplinary proceedings for minor offences committed by officers and the development and implementation of career development and succession plans for officers[30]. The Director of Human Resources also has certain functions under these Regulations[31]. Regulations 52 to 83 concern discipline and disciplinary proceedings. Regulations 84 to 87 fall under a section headed "Code of Conduct and Work Ethics". Again, there are schedules setting out the penalties for various types of minor and gross misconduct"[32].

11.17 The Deputy Governor described the General Orders as being part of an existing framework to ensure good governance[33]. They do not, however, address the independence of the Public Service. I discuss the proposals to replace the General Orders below[34].

Funding of the Public Service

11.18 The Governor has responsibility for the "terms and conditions" of the Public Service; but that does not give him control of its budget, including in relation to levels of remuneration[35]. The Governor's powers in relation to the Public Service have to be read in conjunction with (i) section 47(3) of the Constitution[36] whereby Cabinet is responsible for policy, including policy with regard to the Public Service, and (ii) section 56(5) and (6) of the Constitution[37] which provide that, within a Ministry, the Minister exercises direction and control in accordance with policies determined by Cabinet. Further, the budget for the Public Service is set by the elected Government of the day, subject to approval by the House of Assembly. It is the elected Government, therefore, that determines the funds that will be available to the Public Service for staff, facilities, equipment and training.

11.19 The effect is that those parts of the executive which are under the control of the Governor – and, thus, form part of what is known as "the Governor's Group"[38] – must, alongside other executive entities employing members of the Public Service, seek an allocation of public funds

[27] Regulation 46 and Schedule 1 to the Service Commission Regulations 2014.
[28] No 19 of 2008.
[29] Regulation 5 of the Devolution Regulations.
[30] Regulation 5 of the Devolution Regulations.
[31] See for examples Regulations 22, 23, 25 and 27 and 88 to 97. Regulation 89 provides, "The Director shall develop, implement, monitor and update Human Resources Management policies, procedures and guidelines necessary to ensure a highly qualified, motivated and customer-oriented Service".
[32] Regulation 55 to 57 of and Schedules 1 and 2 to the Devolution Regulations.
[33] Deputy Governor Position Statement page 15; and T17 23 June 2021 pages 222-223.
[34] See paragraphs 11.46ff.
[35] The absence of budgetary controls extends to the Commissions. Section 6 of the Service Commissions Act 2011 provides that members of a Commission shall be paid such remuneration as Cabinet may determine.
[36] Quoted at paragraph 1.60 above. I deal with this aspect in greater detail below in respect of responsibility for Public Service reform (see paragraphs 13.74ff).
[37] Quoted at paragraphs 1.61 and 11.9 above.
[38] See paragraph 1.53 above.

as part of the Government's budget[39]. The budget is set by Cabinet, but subject to approval by the Standing Finance Committee of the House of Assembly ("the SFC") and, ultimately, by the House of Assembly itself. The SFC hears from representatives of individual Ministries and Departments (notably, those who have the role of Accounting Officer), and subjects them to questioning before approving the budget[40], which then goes to the House of Assembly for its approval.

11.20 However, approval of a budget does not mean that a Ministry or department will have access to the approved funding, because the further approval of the MoF is required for draw down. As the IAD Director explained it, the approved budget is therefore a "paper budget": it may turn out, particularly as the fiscal year progresses, that funding previously allocated in the budget does not materialise for one reason or another. As Neil Smith, a former Financial Secretary put it, "the public might be… shocked at this but when you put your budget at the beginning of the year, the money isn't in the Treasury". He confirmed that money already allocated in budgetary terms could be stopped[41].

11.21 Many of those in Public Service told stories of difficulties in obtaining funding even when it has budgetary approval[42]. Governor Rankin gave an example. Counsel to the COI put to the Governor a point raised by the elected Ministers, namely that, during the last budgetary discussions, the outgoing CoP had been asked what funding was required for the RVIPF and was allocated that funding in the budget to begin to make up the deficiency in police numbers. Governor Rankin said that, while the allocated budget may have been sufficient to pay for recruitment, when a post became available through retirement or resignation, current arrangements meant that the CoP could not advertise the vacancy and have funds released to him to pay for a new recruit. Rather, permission to advertise a vacancy and the decision to release the necessary funds lay with the MoF. That had in practice resulted in police numbers still being well short of those for which the budget had been set and those in fact required[43].

11.22 This point was revisited when Governor Rankin was cross-examined on behalf of the Attorney General and elected Ministers. It was put to him that the Deputy Governor's Office or the Governor's Group (which, for these purposes, I take to include the RVIPF) had not made any request "for funding for any issue which has been substantively declined". Governor Rankin described the position as "a bit like the Cheshire cat… the Budget is there and then somehow not there and not available for the [CoP]"[44].

11.23 The issue was also addressed in an affidavit dated 12 November 2021 from the Acting Financial Secretary Jeremiah Frett[45]. I shall have to return to that evidence later; but, on this issue, Mr Frett said that, if the Governor's point was that the Premier and MoF were refusing to fill important posts in the RVIPF, Magistracy or Attorney General's Chambers, then it was one he could not accept. He accepted, however, that there was a delay in filling police vacancies. Mr Frett said that the RVIPF is given "budgetary priority, although we are constrained by the funds available to us". He recalled a meeting in September 2020 at which

[39] See, e.g., the Budget for the 2017 fiscal year (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF-14 pages 253, 255 and 343).
[40] See, e.g., T16 22 June 2021 pages 38-39 (Attorney General), T17 23 June 2021 pages 85-87 (DPP), and T21 1 July 2021 pages 53-54 (Erica Smith-Penn Complaints Commissioner).
[41] T22 6 July 2021 pages 16-17 (IAD Director); and T39 24 September 2021 pages 132-135 (Neil Smith).
[42] See, e.g., see T16 22 June 2021 page 16 (Attorney General), T17 23 June 2021 page 17 (CoP), T17 23 June 2021 page 86 (DPP) and T17 23 June 2021 page 177 (HMC Commissioner).
[43] T50 19 October 2021 pages 222-223; and Elected Ministers' Response to the Governor Position Statement paragraphs 45-47. Former Governor Jaspert gave evidence to similar effect (T51 20 October 2021 pages 146-149). Governor Rankin added that the UK had in the last calendar year provided $530,000 to fund additional police officers and provide wider investigative support (T50 19 October 2021 pages 225-226).
[44] T55 24 November 2021 pages 60-61.
[45] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021.

the former CoP had asked to fill all vacant posts in the RVIPF but, because of "the current state of Government finances", had been asked to identify essential requirements. Mr Frett's evidence on these matters was caveated with an explanation that time constraints and other demands had meant that he had not had opportunity to verify details[46].

11.24 Mr Frett's evidence, to my mind, falls short of undermining that given by the Governor. In any event, this does not require further consideration or resolution. On all the evidence before me, I am satisfied that the example I have set out above remains illustrative of a wider approach adopted to releasing funds to requesting arms of government, and the difficulties to which it gives rise.

11.25 The elected Ministers relied on the fact that, if the Governor required funding to ensure that his section 60 functions were properly carried out, he was able to draw down on the Consolidated Fund directly under section 103 of the Constitution[47]. Funding was thus, they contended, ultimately in the Governor's own hands.

11.26 However, asked about the potential to use this power in these circumstances, Governor Rankin described it as an "extraordinary power", and "a power of last resort" to be used in "extreme situations". He referred to a previous Governor (Governor Duncan) using the power in 2017 to provide for the RVIPF, in circumstances in which he did not consider the elected Government had made sufficient provision to enable the force properly to perform its function, as a decision which prompted controversy[48].

11.27 In my view, Governor Rankin's cautious approach to the exercise of his section 103 power is clearly appropriate. For a Governor to treat the provision otherwise, or to use it other than as a last resort, would be inconsistent with the need to respect the elected Government's devolved powers in relation to finance and the general policy making power afforded to Cabinet under the Constitution.

11.28 The approved budget for Government employee emoluments is considered by many to be high, both as a proportion of total recurrent expenditure and in actual terms[49]. The elected Government has from time-to-time taken or considered taking steps (usually, temporary) to control the personnel costs of the Public Service. Mr Frett gave a number of examples[50]:

(vii) In March 2010, a paper entitled "Growth in the Public Service" prepared by the Department of Human Resources was presented to Cabinet. It referred to the Government's Manifesto on the Public Service, and set out several strategies for managing "the growth and reducing costs within the Public Service"[51]. Mr Frett does not explain which of these strategies, if any, were adopted by Cabinet.

(viii) On 16 July 2010, Cabinet decided to suspend all honorariums[52].

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[46] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraphs 5.1-5.10.
[47] See paragraph 1.54 above, and see Elected Ministers' Response to Governor Position Statement paragraph 48.
[48] Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 4.2-4.3, and T50 19 October 2021 pages 72, 186 and 232-235.
[49] See paragraph 1.155 and footnote 228 above. The actual spend on employee salaries and allowances for the years 2017-2020 was as follows: $119,476,569 (2017), $111,722,435 (2018), $114,954,607 (2019) and $110,234,085 (2020). The approved budget for employee compensation for those years ranges between 41% and 43% of total recurrent expenditure (Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(a) and (f)).
[50] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(f).
[51] Cabinet Paper: Growth in the Public Service dated 11 February 2010 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 pages 2587-2591).
[52] Human Resources Circular No 10 of 2010: Suspension of Honorariums dated 16 July 2010 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 page 2597).

(ix) Between 2010 and 4 May 2012, Cabinet decided to impose an external hiring freeze in the Public Service (a revised external hiring process which allowed recruitment in exceptional circumstances being in place from 4 April 2012)[53].

(x) A circular dated 9 January 2012 informed all public officers of Cabinet's decision to reduce performance increments by 50% and the operating expenses of Ministries and Departments by 7% in the 2012 fiscal year. The circular referred to the fiscal constraints experienced by the BVI Government in recent years[54].

(xi) In a Cabinet Paper dated 9 October 2017, the then Premier and Minister of Finance Dr the Hon Orlando Smith cited employee compensation as "by far the largest recurrent expenditure item", and proposed a number of "cost-saving measures", including adjustments to public officers' allowances, temporary pay cuts, limited new hires to roles/ skills critical to the post-hurricanes recovery, reducing consultancies and other contracts, reducing the number of public officers via retirement and reducing the number of hours worked[55].

11.29 Mr Frett concluded this part of his evidence by suggesting that freezing employee compensation has led to a "brain drain" in several critical Government Departments. He said:

> "… a balance must be achieved with managing employee cost while recruiting and attracting talent into the Public Service and funding other critical areas such as infrastructural development within limited budgetary resources. It is through sound and sometimes difficult policy decisions, in the midst of challenging economic times, that we will get closer to achieving a balance that is desirable."[56]

11.30 Mr Frett also referred to a Cabinet Memorandum dated 28 May 2018 brought to Cabinet by former Governor Jaspert. That recommended Cabinet should decide to cease non-essential external hiring. The memorandum referred to previous decisions to impose a hiring freeze (set out above) and recommended "that voluntary measures are taken to cease non-essential hiring in the Public Service and to stabilise employment costs to redirect savings to the areas of highest priority and to avoid payless paydays". The paper had the support of the Financial Secretary and senior managers in individual Ministries[57].

11.31 Former Governor Jaspert was asked by Counsel to the COI about this paper. He said that it had been prepared in response to requests from Cabinet for proposals as to how costs could be reduced. At the time, the BVI was still in "recovery mode" following the 2017 hurricanes and there was genuine concern, expressed by the then Premier and Minister of Finance and the then Financial Secretary, over the state of the Territory's economy[58].

11.32 While stating that he accepted that there had been support from the FCDO in helping to improve the BVI Public Service, which did at times include questioning its size, Governor Jaspert rejected the proposition advanced by the elected Ministers[59] that his memorandum

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[53] Human Resources Circular No 5 of 2012: Update: External hiring within the Public Service dated 4 April 2012 and Human Resources Circular No 6 of 2012: Cessation of Hiring Freeze dated 4 May 2012 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 pages 2598-2601).

[54] Ministry of Finance and Human Resources Circular No 1 of 2012: 2012 Expenditure Cuts dated 9 January 2012 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 page 2602).

[55] Cabinet Memorandum No 253 of 2017 dated 9 October 2017 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 pages 2603-2605).

[56] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(g).

[57] Cabinet Memorandum No 146 of 2018 dated 28 May 2018 (Jeremiah Frett Tenth Affidavit dated 24 September 2021 Exhibit JF14 pages 2592-2596).

[58] T51 20 October 2021 pages 135-140.

[59] Elected Ministers' Response to Governor Position Statement paragraphs 24-25.

was an example of the FCDO pressing the Government to reduce the size of the Public Service. He maintained that the proposal had been brought forward by him as Governor in response to the Cabinet[60].

11.33 In fact, the elected Ministers attribute not only the decision of May 2018, but also the recruitment freeze between 2010 and 2012 to FCDO pressure to reduce the size, growth, operating costs and wages bill of the Public Service. However, that proposition suffers from a number of difficulties.

11.34 First, there is a lack of evidence as to any malign involvement of the FCDO. In support of a statement that the FCDO continually stated or inferred that the BVI Government should reduce personal emoluments, Mr Frett exhibits the note of a teleconference on 28 October 2010 attended by the then Governor Boyd McCleary, the then Financial Secretary Neil Smith and representatives of the FCDO (then the Foreign and Commonwealth Office)[61]. This records:

> "Personal emoluments are 46% of the total Budget; the Premier is not willing to cut this. Recent increases in personnel costs result from making non established employees permanent (with particular impacts on increasing BVIG contributions to employee pension funds). There is currently a freeze on external recruitment, so any increases in costs are due to performance and seniority. There should be a slowing in the rate of increase of personnel costs."

In his subsequent affidavit of 12 November 2021, Mr Frett expresses the opinion that views expressed by the FCDO can be difficult to resist[62]. I recognise that given his present and previous roles, Mr Frett will have experience of dealing with the FCDO. Nonetheless, I do not find the document he exhibits persuasive. Even if it could be said to show the FCDO applying pressure in 2010 – which I do not accept is necessarily the case – this was successfully resisted by the then Premier.

11.35 His proposition implies a policy decision being imposed by Governor Jaspert (presumably as an agent of the FCDO) in circumstances where, on the contemporaneous documents, Cabinet made the decisions. Indeed, the evidence is to the effect that the then Premier and Minister of Finance and his Cabinet saw the public interest advantages of controlling the cost of the Public Service in the BVI; and the impetus to do so in 2017, although supported by the Governor, came from them. It is not suggested that the cost-saving measures proposed by Dr the Hon Orlando Smith in October 2017 were prompted by FCDO pressure.

11.36 The spending on the Public Service in any event was not reduced. The measures Mr Frett listed were temporary. A KPMG report dated April 2012 and commissioned by the BVI Government suggested that the size of the Public Service in the BVI was high based on projected population numbers, and that a medium- to long-term aim would be to reduce that ratio[63]. Employee compensation for the years 2017, 2018, 2019 and 2020 was 43%, 41%, 43% and 42%, respectively, of the total recurrent expenditure[64], which is not indicative of a sharp reduction.

11.37 Under the 2007 Constitution, the amount spent on the Public Service is essentially a matter for the elected Government. There is nothing in the evidence that I find compelling suggesting that the BVI Government has spent more or less on the Public Service than it has chosen to do.

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[60] T51 20 October 2021 pages 140-141.
[61] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(h)(i) and Exhibit JF14 pages 2621-2623.
[62] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraph 4.3.
[63] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 Exhibit JF17 page 39.
[64] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(f).

11.38 Second, Mr Frett's own statement that the "high cost of employee compensation has remained a concern for several successive governments"[65] is difficult to reconcile with the elected Ministers' position in respect of the actions of the FCDO.

11.39 Third, the Attorney General and elected Ministers chose not to formulate the proposition as a potential criticism of Governor Jaspert, or to seek to question him on it.

11.40 Fourth, neither did the Attorney General seek (or invite the COI) to ask Dr Orlando Smith or Neil Smith about the matter. As the Premier and Minister of Finance and Financial Secretary during some portion of the hiring freeze, they may have had information as to the role of the FCDO – information that would not be within the direct knowledge of the current elected Ministers.

11.41 Governor Jaspert said that the most recent freeze in recruitment occurred in March 2019, shortly after the most recent General Election in the BVI. The elected Government's decision to freeze the budget meant difficulties in making appointments across the service[66]. In his affidavit of 12 November 2021, Mr Frett said that the current administration had not instigated a recruitment freeze, but had "been confined to implementing" a process involving a system which had been part of Governor Jaspert's 2018 "cost cutting initiative". He notes a similar process was used in 2012, and continues that it was recognised in 2019 that care needs to be taken in managing resources such that previous controls had to be retained[67].

11.42 The reference to a "cost cutting initiative" of the former Governor is a poor choice of words, since it ignores the fact that, as I have described, the relevant decision was made in 2018, not by the Governor, but by the Cabinet. That aside, at first blush, Mr Frett's affidavit gives the impression that the current administration was merely continuing a process implemented by Governor Jaspert in 2018. That is not so. Mr Frett exhibits a MoF circular dated 2 May 2019 which sets out for Accounting Officers the "new procedure for the filling of vacant posts effective immediately"[68]. That circular explains that all funding in relation to vacant posts was to be "reserved". Such posts could only be filled following written approval for funding or "dereservation of funding" from the Minister of Finance. It appears the current government used a pre-existing process to police how vacant posts would be filled.

11.43 In the circumstances, in my view, the evidence put forward by Mr Frett does not support the proposition that constraint in recruitment for the Public Service was the result of any FCDO pressure, or other pressure external to the elected Government, to reduce the size, growth, operating costs and wages bill of the Public Service.

11.44 Mr Frett's observation as to the need to strike a balance is more realistic. The contemporaneous documents which he exhibits show that, consistent with the Constitution, decisions as to the funding of the Public Service have been made by Cabinet which, like all governments, has attempted to balance competing demands for public funds. In making that balance, the elected Government has chosen to prioritise things other than the Public Service.

11.45 In summary, in respect of the funding of the Public Service:

[65] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(f).
[66] T51 20 October 2021 pages 122 and 133-135.
[67] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraph 4.4.
[68] Ministry of Finance Circular No 1 of 2019: 2019 Budget Estimates – Vacant Posts dated 2 May 2019 (Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 Exhibit JF17 page 80).

(i) Whilst the Cabinet is responsible for policy (including policy with regard to the Public Service), and individual Ministers are responsible for the management and administration of their respective Departments, the Governor is responsible for the terms and conditions of public officers (including pay), and for ensuring that public officers are appropriately independent from the executive.

(ii) However, in seeking to perform his obligations towards the Public Service, the Governor, as other arms of government have to do, has to seek an allocation of public funding from the Cabinet as approved by the House of Assembly. The elected Government thus maintains control over what is spent on the Public Service, and how it is spent.

(iii) That requires the elected Government to prioritise expenditure of public funds. That is essentially a matter of policy. Expenditure of the Public Service has not always been a high priority of the sitting government.

(iv) Whilst successive Governors and the FCDO have at times urged restraint in public spending, they have not asserted any undue pressure to restrict either the size of the Public Service or expenditure upon it. The decisions made in those regards have been freely made by Cabinet as approved by the House of Assembly: none has been the result of FCDO pressure.

(v) Whilst it might have been open to the Governor to exercise his constitutional rights to direct funding from the Consolidated Fund to enable him to meet his constitutional obligations, that has been regarded by Governors as a last resort. The cautious approach of Governors to exercise those rights is not only understandable but right, given that finance is a matter generally devolved to the elected Government. A direction from the Governor that would have the effect of diverting Government funds away from other Government targets, better to fund the Public Service (already regarded by some as overfunded), would undoubtedly be considered an improper incursion into the devolved powers of the elected BVI Government. I deal below with the distinct, but associated, issue of Public Service reform[69].

Public Service Development Initiatives

11.46 The development of a Public Service will inevitably be an evolutionary process through a series of initiatives.

11.47 Governor Rankin highlighted several Public Service initiatives which have taken place over the last 20 years, namely:

(ii) the Public Service Development Programme operating between 1999 and 2005;

(iii) the establishment of the Department of Human Resources in 2000;

(iv) the establishment of the Complaints Commission in 2003;

(v) the reform of public finances from 2013;

(vi) the improvement of service delivery from 2013; and

(vii) Public Service transformation from 2017[70].

To that list can be added the National Integrated Development Strategy 2000[71].

[69] See paragraphs 11.56-11.99 below.
[70] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.5; and T50 19 October 2021 page 194.
[71] The British Virgin Islands National Integrated Development Strategy (November 2000), a paper authored by Otto O'Neal, Head of Planning Unit, MoF.

11.48 The elected Government of the day has also from time to time declared its intent to take legislative steps which would reform the Public Service (including in relation to its terms and conditions). Under the heading "Integrity in Public Life", a memorandum dated 7 November 2013 notes that the BVI Government was in the process of incorporating the Seven Principles of Public Life[72] into a new Public Service Code and Public Service Act, which were to be completed in January 2014. The memorandum recorded an intention to establish a "Centre of Excellence" to ensure comprehensive and continuous reform within the Public Service. The Deputy Governor's Office was to lead on training within the Public Service[73].

11.49 Similarly, Speeches from the Throne between 2013 and 2018 all contained a commitment to introduce a Public Service Bill (subsequently described as a Public Service Management Bill) to provide a framework for the management, organisation and control of the Public Service, together with a Public Service Code to replace the General Orders and provide for the terms and conditions for public officers.

11.50 This proposed legislation was also to govern the performance and personal conduct of public officers. The Speech delivered in March 2018 indicated an intention to review the legislation regarding "upholding integrity in public office", including the Register of Interests Act 2006. That was said to be necessary "if the public service is to be transformed with good governance as its foundation". The Speech delivered six months later (September 2018) expressed an intention on the part of the elected Government to introduce an Integrity in Public Life Act which would establish an Integrity Commission. This was to be the means by which the integrity of public officials and institutions was to be promoted and preserved[74].

11.51 The most recent initiative identified by Governor Rankin was the Public Service Transformation Programme ("the PSTP") launched in March 2018. The Deputy Governor said he was assigned responsibility for developing this programme shortly after he assumed his position in March 2018[75]. He explained that the PSTP adopted the principles of the FCDO's Good Governance Framework for the Overseas Territories as a checklist[76]. The Deputy Governor published a report on his first six months in office, which explained that the impetus behind the PSTP was Cabinet approval of a proposal intended to produce a more efficient Public Service, and to develop policies that would give cost-savings of no less than 25%[77]. That is echoed in Dr the Hon Orlando Smith's 2018 Budget Address which noted that the "Public Sector Transformation process is aimed at containing the operational costs of the public service while moving towards improved efficiency and effectiveness"[78].

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[72] This is a reference to what are commonly described as "the Nolan Principles". First set out in the first report of the UK Committee on Standards in Public Life (1995), the seven principles are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Named after Lord Nolan, the first chair of the Committee, the principles are widely accepted as setting the benchmark for the ethical standards to which those working in the public sector should adhere. See https://www.gov.uk/government/publications/the-7-principles-of-public-life.

[73] Progress made on the commitments in the 2012 Joint Ministerial Council Communiqué dated 7 November 2013.

[74] Speech from the Throne: Moving Forward Strategically, delivered by His Excellency the Governor Boyd McCleary CMG CVO, First Sitting of the Third Session of the Second House of Assembly, 7 October 2013; Speech from the Throne 2014: Stimulating/Fixing the Economy, delivered by His Excellency the Governor John Duncan, First Sitting of the Fourth Session of the Second House of Assembly, 10 November 2014; Speech from the Throne 2016: Securing Our Future, delivered by His Excellency the Governor John Duncan OBE, First Sitting of the Second Session of the Third House of Assembly, 22 September 2016; Speech from the Throne 2018: Building BVI Stronger, Smarter, Greener Better Through Legislation, delivered by His Excellency the Governor Augustus Jaspert, First Sitting of the Third Session of the Third House of Assembly, 1 March 2018; Speech From the Throne: Building BVI Stronger, Smarter, Greener Better Through Legislation, delivered by His Excellency the Governor Augustus Jaspert, First Sitting of the Fourth Session of the Third House of Assembly, 13 September 2018.

[75] T17 23 June 2021 pages 220 and 228.

[76] Deputy Governor Position Statement page 5; and T17 23 June 2021 pages 228-230.

[77] Deputy Governor's Report 2018: 6 Months in Office March-August 2018 page 3.

[78] 2018 Budget Address: Resilience Beyond Recovery (Jeremiah Frett Tenth Affidavit Exhibit JF14 page 63).

11.52 On the evidence I have seen, the PSTP was and is ambitious. It is intended to apply across the whole of government administration with the aim of producing a "world class" Public Service. The Deputy Governor's report on his first full year in office described the PSTP as moving from an initiative to a programme, and one which would take three to five years to show visible results. It identified eight broad areas of focus: redesign of the Public Service, good governance, e-government, improved customer service, greening the Public Service, rebuilding security, public/private sector partnership and alignment of statutory agencies[79].

11.53 Whilst the Deputy Governor led the work, the PSTP was essentially promoted by the previous administration. That was no doubt the result of both elected Government and the Governor/ Deputy Governor appreciating that, although the Deputy Governor may lead on an initiative, the reform of the Public Service requires at least positive and active support from the elected Government which has to adopt any reform programme as a policy and ensure that funding is available to implement it. It is noteworthy that elected Governments had been slow to provide such support in the past, and, because of continuing concerns, the UK Government imposed a condition on the proposed loan guarantee after the 2017 hurricanes that the Public Service in the BVI would be reformed[80].

11.54 The current elected Government has approved the continued work on the PSTP, albeit as discussed later in this chapter, issues arose as to the appropriate lead Ministry, which caused some disruption. The PSTP has been developed using internal and external expertise[81] and through engagement with senior officers within the Public Service[82]. It envisages that Ministries will, in developing their own transformation plans, be supported by a permanent Public Service Transformation Unit[83]. This reflects the fact that Public Service reform is not a one-off event: it is an on-going evolutionary process.

11.55 The PSTP is based on the Public Service Transformation Framework, a document endorsed not only by former Governor Jaspert but also by the Premier, which explains that, inspired by developments in the UK which were adopted in Australia and Canada, the PSTP is a departure from earlier approaches to Public Service administration reform. The drivers for the PSTP (described as "unprecedented", and ones which forced the BVI to move away from "business as usual") were identified as[84]:

> "• The flooding and hurricanes of 2017….
>
> • Increased regulatory requirements by the principal rule-setting bodies for financial and tax rules, namely the Organisation for Economic Cooperation and Development (OECD), its sister organisation, the Financial Action Task Force (FATF) and the European Union Commission.
>
> • Increased costs to comply whilst revenues related to offshore banking and International Business Incorporations is slowing down across the Caribbean Region and challenges with Correspondent Banking Relationships which facilitates international trade and tourism.
>
> • Climate change ….
>
> • Globalisation has made the world much more inter-connected and the British Virgin

[79] Deputy Governor's Report 2019: 1 Year in Office dated March 2019 pages 5-8.
[80] See paragraph 13.56 below.
[81] Deputy Governor's Report 2019: 1 Year in Office dated March 2019 pages 6-7.
[82] A "Visioning Day" was held in July 2018, the report of which is Annex 3 to the Public Service Transformation Framework 2019 which starts at page 53 of the Deputy Governor's Second Year in Office Report dated 3 January 2020.
[83] Deputy Governor's Second Year in Office Report dated 3 January 2020 pages 5-10 (and, especially, see Appendix A to the Report: Public Service Transformation Framework 2019 page 53).
[84] Public Service Transformation Framework 2019 pages 5-6.

> Islands can no longer look to their immediate neighbours (US Virgin Islands or other Caribbean Islands) as partners or competitors. In addition, technology has led to a rapid rate and pace of change."

Responsibility for Public Service Reform

11.56 The elected Ministers placed heavy reliance on the current state of the Public Service as the reason why governance is so extremely poor in the BVI. They say that the Public Service is suffering from "chronic neglect" and is not fit for purpose. Their complaint has two particular strands, namely (i) there is no facility for policy formulation, development, coordination, monitoring or evaluation, either centrally or within the Ministries, and (ii) there is a chronic lack of institutional capacity to implement the elected Government's objectives.

11.57 The Ministers deny that these failings within the Public Service have been caused by any elected Government. Rather, they say that they are the result of "decades of neglect of a critical constitutional responsibility"[85] of successive Governors.

> "Neither the House of Assembly nor an elected minister have the power to initiate alterations of the General Orders, or in the internal organisation and methods of the public service, which have remained essentially unreformed since 1982. The management of the public service and the responsibility for driving public service reform has always exclusively resided with the Governor and his assistant, the Deputy Governor.
>
> …
>
> … It cannot be for Ministers to initiate the necessary public service reform but for the Governor and his Deputy who are constitutionally responsible."[86]

11.58 The consequence of these failures, they say, is that the elected Government is unable to achieve its legislative programme, with public officers predominantly focused on processes rather than the development of policy. The Ministers note that, with the exception of reserved matters, the Constitution provides for executive functions – policy formulation and implementation – to be in the hands of the elected Government. However, it is said, "no serious work has been done to equip the [BVI] with a modern public service capable of effectively supporting the expanded democratic architecture and self-government for which the Constitution made provision". The result has been a void in policy development, planning and coordination, "which there is no doubt a strong temptation on the part of the Governor's Office and the FCDO to fill by means which appear to be coercive"[87]. The elected Ministers say that this is a failure of successive Governors: and "[Ministers] have long been pressing to remedy the chronic state of institutional neglect and decay in which the public service finds itself"[88].

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[85] Elected Ministers' Response to Governor Position Statement paragraph 31.
[86] Elected Ministers' Response to Governor Position Statement paragraphs 20 and 31.
[87] Elected Ministers Position Statement paragraphs 47-49, the quotation coming from paragraph 49.
[88] Elected Ministers' Response to Governor Position Statement paragraph 22. The elected Ministers suggest in their Position Statement that this is entirely the fault of successive Governors. The Supplementary Note on the Elected Ministers Position Statement (which was submitted by the Attorney General) does not go so far: it says that "successive Governors, and the UK Government, which promised support for the public service it does not appear to have delivered, cannot be exempt from criticism" (paragraph 26).

11.59 In advancing these points, the elected Ministers place significant weight on a draft report prepared by Public Administration International ("the PAI Report")[89]. The report is undated, but appears to have been produced in or around June 2019[90]. It was commissioned by the Governor through the Deputy Governor's Office to assist with the development of the PSTP[91], the costs being borne by the FCDO[92].

11.60 The PAI Report identifies an elected Government's setting of clear policy objectives linked to a National Plan as a "central pillar" in establishing and maintaining good governance because, without it, there is no transparency and citizens cannot hold government accountable. This identifies the limits of a public officer's job: whilst a public officer might assist with the formulation of a National Plan based upon a policy agenda, the policy agenda is of course a matter for the executive (in the case of the BVI, the Cabinet). The Public Service cannot set the policy agenda, only assist in formulating and implementing it[93]. That then allows the Public Service to give policy "feet" by developing strategic plans. Such planning must be aligned to the budget process. Without such alignment, resources may be spent on activities that may not deliver on the policy objective. Further, it says, there needs to be a mechanism of "Monitoring and Evaluation" to support delivery of results and provide accountability and transparency[94]..

11.61 The authors note that there have been previous efforts to establish a policy coordination mechanism. At one point, there was a Development Unit in the Premier's Office bringing together policy, planning, economic planning and statistics. Although it is unclear why the elected Government decided upon this course, this Unit was however dissolved, with its functions dispersed to units in other Ministries, including the Macro-Fiscal Unit in the MoF[95]. They cite the National Integrated Development Strategy 2000 as another example of an effort to achieve policy coordination, and information received from senior public officers of efforts at "policy development process initiatives and training" which did not bear fruit[96].

11.62 The PAI Report identified a number of "challenges" for the BVI[97]. First, it noted the absence of a unified "whole-of-Government" approach to policy development and planning, which meant that the elected Government's legislative agenda was used as a substitute for a policy agenda. The second, and a result of the first challenge, was that there was a lack of clarity between various policy and planning documents (because policy was found in various disparate documents, such as the Budget and the Speech from the Throne). Third, the relationship between policy, planning and budget was not well developed. Fourth, there was a need to strengthen the policy capabilities across Ministries. Fifth, the system for executing policy needed strengthening. Finally, there needed to be a formal mechanism to ensure that monitoring and evaluation was done consistently across the Public Service.

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[89] Report of Public Administration International, Strategic Policy, Planning and Performance in BVI – Organisational Design Report. Public Administration International are management consultants who have been instructed by a number of government organisations in respect of governance and Public Service.

[90] PAI Report at page 12.

[91] Felicia Linch, one of the authors of the PAI Report, was the lead adviser in the external consultancy team brought in to assist in the development of the PSTP (Deputy Governor's Report 2019: 1 Year in Office dated March 2019 pages 6-7).

[92] T50 19 October 2021 pages 187-189; and Elected Ministers Position Statement paragraph 132.

[93] This is an issue to which the Attorney General referred in her evidence at T16 22 June 2021 pages 19-21. The Attorney appears to have been complaining primarily at the elected Government's lack of a comprehensive policy agenda, although she also refers to policy formulation.

[94] PAI Report Introduction pages 2-3.

[95] Both the establishment and disestablishment of this unit appear to have been at the instigation of the elected Government.

[96] PAI Report Context and Challenges page 6.

[97] PAI Report Context and Challenges pages 6-10.

11.63 While the PAI Report presented a number of options, the authors recommended the establishment of a Strategic Policy and Planning Unit within the Premier's Office to support the development of a National Plan and a policy agenda. Alongside that, it proposed a Monitoring and Evaluation Unit within the Cabinet Secretariat[98]. Further, the report recommended the adoption of a formal policy process integrated with other processes such as planning, budgeting and project management[99], and capacity building initiatives across government to develop skills in policy development, planning and monitoring and evaluation[100].

11.64 The PAI Report's broad advice and recommendations appear to me to be constructive and helpful in respect of the formulation of the PSTP. Governor Rankin considered the paper's proposal of a policy planning unit in the Premier's Office to be a helpful step. He said, that, while not every public officer had to be trained in policy planning and development, it would be useful to increase the number of people within the Premier's Office and other Ministries with such skills[101].

11.65 While recognising that there are challenges in the BVI Public Service, and reform is necessary, Governor Rankin submitted that there are two particular requirements needed to drive "effectiveness and capacity" in the Public Service, namely (i) the financial support required to enable capacity building, which is a matter for the elected Government, and (ii) clear ministerial policy guidance upon which policy formulation by public officers is dependent[102].

11.66 The elected Ministers' response was as follows.

(i) The Ministers denied that there have been failures by any elected Government, present or past, to ensure proper financial support to Governors to enable a Public Service reform programme to be implemented. They say that no request to provide financial support for a Public Service reform programme has ever been denied; and no proposal for any such programme was forthcoming until late 2017, in the aftermath of the 2017 hurricanes – and then only in embryonic form (a reference to the PSTP)[103].

(ii) They point out that the PAI Report does not "once mention a lack of 'clear ministerial policy guidance' as a problem"[104].

(iii) The elected Ministers also blame the Governors for the long-standing problem of rates of pay within the Attorney General's Chambers, despite regular requests by the Attorney to the Department of Human Resources (within the Governor's Group) to permit higher rates of pay, which have been refused (it is said) because that would prompt a general re-evaluation of pay for all public officers[105]. Similarly (and as discussed above), it is said that Ministers are not responsible for the problems of recruitment within the RVIPF and other law enforcement agencies: they are unaware of a refusal of any request by the CoP for further resources. If there were any such difficulties, then it would have been open to the Governor to have used his powers under section 103 of the Constitution to direct the expenditure needed[106].

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98 PAI Report Introduction page 4.
99 PAI Report General Supporting Recommendations page 20. The report notes that the authors have prepared another report relevant to this recommendation. It has not been disclosed to the COI.
100 PAI Report General Supporting Recommendations page 21.
101 T55 24 November 2021 pages 90-91.
102 Governor's Response to Elected Ministers Position Statement page 3; and Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.6.
103 Elected Ministers' Response to Governor Position Statement paragraphs 21-27.
104 Elected Ministers' Response to Governor Position Statement paragraphs 34.
105 Elected Ministers' Response to Governor Position Statement paragraphs 42-44.
106 Elected Ministers' Response to Governor Position Statement paragraphs 45-49.

(iv) It is said that there are also consequential lacunae, e.g. the Ministers say that the lack of reforms to cross-departmental practice is a failure of successive Governors, so that, (i) there is no written guidance with regard to appointments to statutory boards and (ii) the core function of recording reasons for decisions has not even been contemplated, let alone proposed and implemented[107].

(v) The elected Ministers say that, in addition to being unable to develop and implement policies, the consequences of the longstanding neglect of the Public Service include (a) the common practice of requesting ad hoc waivers of procurement processes for major projects, and (b) the failure to have any financial audits, which was the result of shortages of staff in the Auditor General's Office, and the failure of the Accountant General to prepare financial statements (without which such annual audits cannot proceed) since 2016[108].

11.67 However, the submissions of the elected Ministers do not paint the full picture; and, in terms of supporting the proposition that a main reason why governance is so poor in the BVI is that the Public Service is severely deficient as the result of decades of neglect by Governors and the FCDO, they are anything but compelling. In coming to that firm view, I have taken into account, especially, the following.

11.68 First, as a general point, the UK Government has long-recognised that, in respect of BOTs, one factor that is important to good governance is a Public Service that is fit for purpose, and notably fit for the purpose of supporting the development and implementation of the policies in devolved areas. In the 2012 White Paper, it was said (under the heading "Making Government Work Better")[109]:

> "> The [UK] Government has responsibilities towards the people of the Territories and of the UK to ensure the good governance of the Territories. The Government acknowledges the sensitivity of this area of work but believes that those living in the Territories have a right to expect the same high standards of governance as in the UK, including in the areas of human rights, rule of law and integrity in public life.
>
> > The Government expects high quality public financial management and financial services regulation as important contributors to building resilient economies and providing for the wellbeing of Territory communities.
>
> > The UK is determined to tackle corruption in all its forms. The UK is committed to working closely with the Territories on these issues. To this end the UK is launching a long-term programme of support for the public services in the Territories."

And, later, in the chapter with that same heading (and the subheading "Policy Making")[110]:

> "Public services have a vital role in providing objective and impartial advice to Ministers and managing the policy making process including organising public consultation and assessing the potential impact of particular policy options. The UK Government is supporting the development of policy making capacity in some Territories."

[107] Elected Ministers' Response to Governor Position Statement paragraphs 37 and 38.
[108] Elected Ministers Position Statement paragraphs 43-45; and Elected Ministers' Response to Governor Position Statement paragraphs 89.
[109] The Overseas Territories: Security, Success and Sustainability page 9: see paragraph 1.34 above.
[110] The Overseas Territories: Security, Success and Sustainability Chapter 4 page 57.

It was of course the UK Government that sponsored the PAI Report to assist the BVI Government to develop their Public Service through the PSTP.

11.69 Second, whilst of course I am sure that the BVI Public Service – like the Public Service of very many countries – would benefit from both additional resources and reform to ensure that it is fit for purpose in the modern world, the evidence before me did not suggest that it was as deficient as the elected Ministers suggest. I heard from many senior public officials, most of whom were experienced and dedicated, and none of whom suggested they were unable to provide advice on policy development and implementation, as and when requested. I will come to the evidence of the Acting Financial Secretary Mr Frett shortly; but, for all the difficulties of his evidence in relation to this topic, it was certainly not his position that the Public Service was incapable of formulating and implementing policy. He said there was a need to develop further expertise and capacity "so we don't have to rely on consultancies"[111]; but he spoke of his pride of working on policy matters, and of the role of public officers in drafting policy on the instructions of Cabinet or a Minister. That evidence was reflected in the evidence of other senior public officers.

11.70 Third, I do not accept the argument of the elected Ministers that neither the elected Government nor the House of Assembly can initiate changes to the Public Service, e.g. as set out in the General Orders. They can. But the system in place to govern the day-to-day activities of the Public Service is not, as the submissions of the elected Ministers may have suggested, limited to the General Orders. Aside from the constitutional arrangements to which I will return, that system encompasses not only the work of the Commissions (notably, the PSC) but the powers delegated under the Devolution Regulations, which give a degree of autonomy to senior public officers who, pursuant to section 56 of the Constitution, work under the direction and control of a Minister. Their contention that they were powerless to alter the arrangements for the Public Service does not sit comfortably with the existence of the Service Commission Regulations or the Devolution Regulations, nor with the repeated intent of a previous government to revitalise the terms and conditions of the Public Service through a Public Service Management Bill and a Public Service Code. Indeed, the current administration similarly gave a commitment to:

> "… introduce the Public Service Management Bill to replace the General Orders, 1982, to provide a legal framework for the overall management, organisational structure, administration and proper establishment of the Public Service of the Virgin Islands"[112].

11.71 Fourth, whilst accepting that the PSTP is a very major programme of reform, I cannot accept the premise that there has been no effort – especially, no effort on the part of the Governor and Deputy Governor – to modernise the Public Service, including in relation to policy planning.

11.72 As I have described, Governor Rankin pointed to various initiatives, dating back over 20 years, which he identified (listed above), of which the PSTP was an evolutionary continuum. Governor Rankin did not suggest that all of these initiatives were aimed at policy development: but they were all aimed at improving the performance of the Public Service[113].

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[111] T55 24 November 2021 pages 171-173.

[112] Speech from the Throne: Building BVI Stronger, Smarter, Greener Better Through Legislation, delivered by His Excellency the Governor Augustus Jaspert, First Sitting of the Second Session of the Fourth House of Assembly, 14 November 2019.

[113] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.5; and T50 19 October 2021 pages 187-194 and T55 24 November 2021 pages 48-55.

11.73 I have already referred in this chapter to an affidavit from Acting Financial Secretary Jeremiah Frett on the Public Service[114]. There, Mr Frett addressed the initiatives identified by Governor Rankin. With the particular exception of the PSTP, Mr Frett said of the earlier initiatives that "it was not apparent to him that [the initiative] had an impact on policy development capacity within the Public Service" or "[the initiative] did not assist with providing for an enhanced capacity within the Public Service". There were aspects of the initiatives upon which, Mr Frett said, he could not comment[115].

11.74 Mr Frett also gave oral evidence on this topic[116]. This was not the first time that he had given oral evidence to the COI; and, as Acting Financial Secretary, his evidence has been of particular importance. It has often been helpful. However, there were some aspects of his evidence on this occasion that were troubling.

11.75 Mr Frett appeared uneasy in giving this evidence at all. He had wrongly assumed that I had required the affidavit he had prepared, whereas I had not. The evidence was "voluntary", in the sense that the Attorney General applied to me for permission to lodge it. Mr Frett made plain that he thought it unfortunate that he should have been asked to provide such evidence, and he had not been given the option of refusing to do so[117]. Asked why he had said in his affidavit that it was not "apparent" to him that an initiative had not had an impact on policy development, Mr Frett said it was a term he had discussed with "his legal team"[118]. That was all very unsatisfactory.

11.76 Taking it in the round, the best I can make of Mr Frett's evidence is that it reflects the recollection of one public officer who had, as he said, only been able to do limited research[119]. However, as I have described above, it was certainly not his position that the Public Service, as it now is, is incapable of formulating and implementing policy; nor that it was not in the hands of the elected Government to take steps to increase the capacity of the Public Service to advise on the formulation and implementation of policy.

11.77 What is not clear, from either the PAI Report or the submissions of the elected Ministers, is why these earlier efforts were not pursued with greater vigour or, where this was the case, why they were simply abandoned. The evidence, such as it is, suggests that the Governor from time-to-time and the Deputy Governor have encouraged and pressed for reform; but the elected Government has lacked the political will to address and implement reform with the prioritisation of effort and resources that that requires.

11.78 Fifth, the PAI Report, looked at as a whole, does not support the elected Ministers' submissions. It does not support a conclusion that there have not been previous efforts to improve the ability of the Public Service to give effect to the policy objectives of the elected Government of the day; or that any deficiency in the capacity of the Public Service in this regard could not be addressed by the elected Government.

11.79 But, more importantly, under the Constitution, policy is the preserve of Cabinet; and the PAI Report stresses the importance of the Public Service being given clear policies to develop and then implement. While the elected Ministers are right to say that the PAI Report did not refer to a lack of "clear ministerial policy guidance" as a problem, it did make clear[120]:

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114 Jeremiah Frett Thirteenth Affidavit dated 12 November 2021.
115 Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraphs 2.1-2.27.
116 T55 24 November 2021 pages 148-178.
117 T55 24 November 2021 pages 148-150.
118 T55 24 November 2021 pages 153-154.
119 T55 24 November 2021 page 159.
120 PAI Report Introduction page 2.

> "Political parties outline general and specific commitments during election campaigns. Once elected a Government should clearly articulate and implement these by re-casting them as policy objectives that then form their policy agenda."

If that premise is accepted, then the "whole-of-Government" approach to policy it envisages would fail if the Government of the day were not able, or chose not, to formulate its policy agenda and rather left it to the Public Service to identify policy priorities based on disparate sources (as the PAI Report suggests has occurred in the BVI).

11.80 Further – rightly and importantly – the PAI Report links policy, planning and budgeting. Policy is exclusively a function of Cabinet; and, consequently, a decision to develop the policy planning and implementing capacity is itself a matter for Cabinet (not the Governor), because it is a policy decision. Further, the budget for the Public Service is set by the elected Government subject to approval by the House of Assembly and section 103. Similarly, funds to pay public officials and to pay for their facilities, equipment and training is determined by the elected Government subject to the same caveats. I have already explained that I consider that it is right for a Governor to adopt a cautious approach over the use of section 103.

11.81 Under present arrangements, and as I have explained, the Governor's Group/Deputy Governor's Office must apply to the elected Government for funding. An example given by Governor Rankin of the perennial difficulty in obtaining funding concerns the Archive and Records Unit within the Deputy Governor's Office, set up in 2004, but repeatedly denied funding requests over the period 2011-18 for both a building to house the unit and computerised records management system improvements, on the basis that funds were not available[121]. While the UK Government stands by to provide assistance, the proposal in the PSTP to improve the records management function of the Public Service would require considerable funding by the BVI Government[122].

11.82 These two questions – who is responsible for policy in this area, and who holds the purse strings – are critical to determining the extent to which it can properly be said that the Governor has responsibility for Public Service reform.

11.83 Sixth, whilst before the COI the elected Ministers made formal submissions based upon the premise that the Governor was essentially responsible for the whole of the Public Service (and, consequently, any failings in it), elsewhere they have made clear that they understand the true position under the Constitution. As the Premier said to Governor Jaspert[123]:

> "The [Constitution] is clear that the powers of the Governor, some of which are assigned to the Deputy Governor, is limited only to the appointment of Public officers in connection with the Public Service Commission and the terms and conditions of their engagement. Delivery of administrative services to the public is vested with the Ministries, with the Ministers in the lead.
>
> While human resource functions of the Governor's Group do form part of the Public Service transformation agenda, the vast majority of this exercise pertains to the reform of the practices, processes and procedures for enhancing the administrative functions within the various Ministries to improve the effectiveness of delivery of services by the Ministries to their clients the public in accordance with the national vision. Ministers report to the Premier. The national vision is the remit of the elected Government, which is determined and executed by the Premier and his Ministers. This structure emanates from the [Constitution]

[121] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.16.
[122] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.17.
[123] Letter Premier to Governor Jaspert dated 16 October 2020, quoted in the Elected Ministers Position Statement paragraph 133.

> and hence, any programme for the execution of the Government's agenda and related administration thereof lies clearly with the Premier as Head of the elected Government.
>
> …
>
> … [T]his requires the tasks within the PSTP to be led and coordinated by the respective branches that are responsible for them; which is for the Governor's Group to manage the aspects of the programme pertaining to terms and conditions of employment of Public Officers consistent with its Constitutional remit, and the Premier's Office leading and coordinating the Ministry projects aimed at achieving improved functionality, strategic structure and operational effectiveness and efficiency where the Premier is the leader of Government Business and ultimately responsible to the [House of Assembly]."

11.84 This letter was written in the context of the Premier's view that his Office should be the lead Ministry in implementing the PSTP. Prior to the 2019 election, the Deputy Governor had led on this programme. According to both former Governor Jaspert and Governor Rankin, the position adopted by the Premier hampered delivery of the PSTP, as it seems to have done. It led to the Deputy Governor expressing concern as to who was responsible for leading the Public Service. Governor Rankin said that, to prevent further delay, the matter was resolved by adopting a partnership approach whereby the Deputy Governor and the Permanent Secretary in the Premier's Office would lead the work on the PSTP[124]. That allowed the programme to proceed.

11.85 The recent Cabinet decision to approve the appointment of Ministerial Political Advisers reinforces the point. The intention is for these advisers, amongst other things, to strengthen the human resource capacity and policy capabilities of the relevant Ministers/Ministries so as to "drive the Government's work and agenda"[125]. The creation of these positions shows that the elected Government not only has the necessary powers, but is in practice perfectly capable of taking steps to address any deficiencies (or "neglect") it sees in the Public Service. This initiative had the full support of the Governor. It – or another initiative with a similar aim – could have been taken by the elected Government at any time[126].

11.86 Before I leave this topic, there are two further matters to which I should refer, both related to the financing of the Public Service.

11.87 First, there is the question of training.

11.88 Governor Rankin, while maintaining that primary responsibility for budgetary provision for the Public Service lies with elected Government, particularly in those areas devolved to them, said that since 2018 the UK had invested about $2.14 million in training for the Public Service[127]. In support of a submission that there has been chronic underfunding of the Public Service by successive BVI elected Governments, Governor Rankin pointed to the decline in the total budget available for training for the Public Service. He described the budget as "inadequate",

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[124] T51 20 October 2021 pages 128-132 (Augustus Jaspert); and Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 4.7-4.8.

[125] Cabinet Memorandum: Ministerial Policy Advisers dated 18 June 2021 paragraphs 6-8; and Expedited Extract of Cabinet Decision on that Memorandum dated 22 July 2021.

[126] The effect of this Cabinet decision is to formalise a practice that it seems was already in place, albeit the adviser would be described as a consultant: T44 5 October 2021 pages 81-83 (Elvia Smith-Maduro), and pages 154-155 (Jeremiah Frett). Indeed, there is evidence that consultants, often with a Public Service background, have been engaged as "special advisors". For example, Wendell Gaskin, a former IAD Director and Deputy Financial Secretary was engaged as a "Special Advisor to the Premier & Minister of Finance on COVID-19 Financial Matters" (see paragraph 5.151 and footnote 256 above).

[127] T55 24 November 2021 page 56.

and said that more financial investment from the BVI Government is required if the needs of the public are to be met[128]. Governor Rankin produced a table which showed that in 2016, $138,000 was allocated to the Department of Human Resources[129] for this but, by 2021, this had fallen to $25,000 (for a cohort of 3,000 public officers). The budget for scholarships had declined from $460,500 to $48,800 over the same period[130]. He said that the total allocated budget for teacher training in 2021 was $12,300. On the basis of there being 450 public teachers, this meant an investment that year of just over $27 per teacher for training. Similarly, the 2022 budget for the MNRLI allowed just $978 for training for policy planning and administrative services[131].

11.89 The elected Ministers did not agree with the Governor's characterisation of the training budget. Mr Frett said: "I should point out that training and development as a tool for greater efficiency and productivity in the Public Service lies directly under the Deputy Governor's Office portfolio through the Department of Human Resources"[132]. When asked whether a budget of $25,000 was therefore sufficient, Mr Frett said that not all financial resources were allocated to the Department of Human Resources. Funding had been "decentralised a long time ago". Each Ministry and Department was allocated funding in its annual budget for foreign and domestic training. However, Mr Frett praised the efforts that the Department of Human Resources had made in training officers and offered the opinion that, in deciding how to spend its budget, a Ministry or Department should "coordinate" with the Department of Human Resources to maximise resources and ensure that the needs of public officers were met[133].

11.90 Mr Frett produced a table which showed that the amount actually spent by Departments and Ministries between 2018 and 2021 on foreign and domestic training was always less than the budget allocation. Except for 2019, the actual spend on training had decreased each year since 2017. As of 12 November 2021, the amount spent in 2021 was $59,313 as against a budget allocation of $479,384.47[134]. Governor Rankin accepted that the figure provided for training across the Public Service was higher than the $25,000 that goes through the Department of Human Resources, but questioned how much of the $479,000 identified by Mr Frett was allocated to domestic training as opposed to foreign scholarships. The Governor maintained his argument that there was a need for better investment in training.

11.91 The second (and related) issue concerns public officials' pay. Governor Rankin explained that, for certain positions, pay levels in the Public Service are simply unable to compete with those in the private sector[135]; and Mr Frett noted that the "constant cry that public officers are underpaid is becoming widespread"[136]. He said that pay levels – and indeed, government finances more generally – have been affected by a series of seismic events including the 2008 world economic crises, the 2017 hurricanes, and the ongoing COVID-19 pandemic[137].

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[128] T50 19 October 2021 pages 197-198.
[129] This Department falls within the Governor's Group, and has overall responsibility for training the Public Service (see Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraph 3.3; and see also T55 24 November 2021 pages 55 and 180-181).
[130] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.19; and T50 19 October 2021 pages 197-198. See also Office of Governor 2021 Revised Budget Submission.
[131] T55 24 November 2021 pages 55-56.
[132] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraphs 3.3.
[133] T55 24 November 2021 pages 180-181; and Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraphs 3.4.
[134] Jeremiah Frett Thirteenth Affidavit dated 12 November 2021 paragraphs 3.6-3.7. I did not find Mr Frett's proposition that, in addition to annual budget allocations, regard must also be had to contributions to regional and international organisations, as well the contribution to the H L Stoutt Community College, to be particularly compelling.
[135] Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.11. See also Governor Position Statement paragraph 115.
[136] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(g).
[137] Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(3).

11.92 I have set out earlier in this chapter the (largely temporary) cost-saving measures in relation to the expenditure on the pay of the Public Service that the Government has taken from time-to-time. As I have indicated, those measures were not the product of the FCDO and/or a Governor seeking to coerce an elected Government into taking a step it would otherwise avoid. Rather, they, like the decisions as to making funds available for recruitment or to pay competitive salaries, are matters that fall squarely within the constitutional scope of the elected Government.

11.93 As noted above, Mr Frett's view was that freezing employee compensation has led to a "brain drain" in several critical Government departments[138], and it is the view of the elected Ministers that pay structures and the rate of pay are a significant cause of problems in recruiting to the Public Service[139]. This view is shared by the Governor[140]; and it is certainly the case that recruitment has been a perennial problem. In particular, there is a large number of vacancies in the RVIPF[141], the DPP's Office, the Attorney General's Chambers[142], the Courts[143], the Prison Service[144] and HM Customs[145].

11.94 It is fair to say that some steps are now being taken to attempt to address these issues. An accelerated review of the compensation of legal and court staff is currently underway, and a broader review of the pay structure for the Public Service is due to commence shortly[146]. Payment of the annual performance increments for the years 2016/2017 and 2017/18 has also been authorised[147]. In addition, Cabinet has approved a job evaluation and classification exercise, which will lead to the revision of Public Service pay structures[148]. It is worth noting that there have been no lay-offs or pay cuts in the Public Service since the pandemic[149].

11.95 Whilst the terms and conditions of public officers are constitutionally a matter for the Governor, the pay of public officers is another one of those areas that requires collaboration between the elected Ministers and the Governor[150], for the reasons given by Governor Rankin:

> "The budget for the public service is set by the Government of the day subject to approval by the House of Assembly. Accordingly, the funds available to pay public servants and pay for their facilities, equipment and training is determined by the Government subject to the extraordinary power of the Governor under section 103 of the Constitution to order withdrawal of money from the consolidated fund to discharge his responsibilities under Section 60[151]".

11.96 Finally, there are two further matters which the elected Ministers submitted had suffered as the result of failings of policy making and implementation capacity within the Public Service, both of which are referred to above[152].

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138 Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(g).
139 Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 5.18; T50 19 October 2021 page 183; T51 20 October 2021 page 117; Elected Ministers' Response to Governor Position Statement paragraphs 29 and 48.
140 Governor Position Statement paragraph 115.
141 Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.13. See also paragraph 12.30.
142 Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.12.
143 Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.12.
144 See paragraph 12.39 below.
145 See paragraph 12.44 below.
146 T50 19 October 2021 page 232; Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.11.
147 Elected Ministers' Response to Governor Position Statement paragraph 25.
148 Elected Ministers' Response to Governor Position Statement paragraph 29. Record of Cabinet's decision issued on 14 January 2021,
149 Jeremiah Frett Tenth Affidavit dated 24 September 2021 paragraph 2.3(h)(iii).
150 Disaster management would be another example where collaboration is necessary (see paragraph 13.40ff below).
151 Governor Response to COI Warning Letter dated 14 October 2021 paragraph 4.3.
152 See paragraphs 11.66(iv) and (v) above.

11.97 First, there are matters such as the absence of cross-government written guidance on appointments to statutory boards. These cannot, in my view, sensibly be said to be the consequence of poor policy planning and capacity. That suggestion ignores the role which a Minister has to play under the legislation governing such boards, that the process adopted was one which the elected Ministers sought to justify if not defend, and that Ministries had experience of recruiting employed personnel using a more formal process[153].

11.98 Second, the elected Ministers say that, in addition to being unable to develop and implement policies, the consequences of the longstanding neglect of the Public Service include (i) the common practice of requesting ad hoc waivers of procurement processes for major projects, and (ii) the failure to have any financial audits which was the result of shortages of staff in the Auditor General's Office and the failure of the Accountant General to prepare financial statements (without which such annual audits cannot proceed) since 2016[154].

11.99 I consider this to be no more than a red herring. As I have described, at least 60% of major projects which are subject to mandatory open tendering have the tender process waived by Cabinet. Strong reasons have to be given for waiver. On the evidence, those reasons never include the fact that an open tender process is impractical because of an inability of the Public Service to put the project out for tender. The absence of financial audits is the result of the failure of the Accountant General's Office to prepare financial statements without which the Auditor General cannot do her statutory job. The Auditor General, short staffed as she is, has never suggested that those staff shortages have led to delay in producing statutory annual reports.

Integrity in Public Life

Integrity in Public Life Act 2021

11.100 Integrity in Public Life legislation in the BVI has been a long and winding road. Attempts were made to introduce legislation in the 1990s. A draft Integrity in Public Life Bill was presented for consideration by the Legislative Council on 17 May 2001. None of these initiatives got home.

11.101 In November 2019, Governor Jaspert introduced an Integrity in Public Life policy to Cabinet, the history of which is set out below[155]. In circumstances there described, the Attorney General's Chambers received instructions to prepare a draft Integrity in Public Life Bill, which received its first reading on 22 April 2021 and its second and third readings on 22 December 2021 when the Integrity in Public Life Act 2021 was passed[156]. The Governor assented to the Act on 11 February 2022. The Act has yet to come into force and will only do so when certain administrative arrangements are in place[157]. No date has yet been given for its coming into force.

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[153] See paragraph 7.15 above.
[154] Elected Ministers Position Statement paragraphs 43-45; and Elected Ministers' Response to Governor Position Statement paragraphs 89.
[155] See paragraphs 13.114-13.123 below.
[156] Attorney General's Response to Enumerated Questions in Mr King's Letter of 19 May 2021 in respect of the Legislative Programme on Governance dated 3 June 2021 updated 10 February 2022 ("Attorney General's Memorandum on Governance Measures") paragraphs 15-24.
[157] The COI was told that following a new procedure introduced by the Attorney General's Chambers, a memorandum will be forwarded to the instructing Ministry indicating the need for the Act to be brought into force and requesting a date on which arrangements are to be put in place to bring the Act into force (Attorney General's Memorandum on Governance Measures paragraph 24).

11.102 To reflect the fact that the Act is essentially just a framework statute, by section 44 of the Act, the relevant Minister (i.e. the Premier) may make regulations to give effect to the Act. As I understand it, no regulations have yet been drafted.

11.103 If and when it comes into force, section 4 of the Act will establish an Integrity Commission, whose independence is guaranteed in the same formula as other constitutional pillars in the BVI. It will be constituted of five members, one nominated by each of the Governor, the Premier, the Leader of the Opposition and the BVI Christian Council, and the chair being a retired judge or an attorney of 15 years' standing. All members must be belongers[158].

11.104 The functions of the Commission are set out in section 5(1), as follows:

> "The Commission shall
>
> (a) receive and investigate complaints regarding any breaches or non-compliance with the provisions of this Act;
>
> (b) without prejudice to the provisions of any other enactment, conduct an investigation into corruption under this Act referred to it by any person;
>
> (c) make recommendations and to advise public bodies of any changes in practices and procedures which, in the opinion of the Commission, will reduce the likelihood or the occurrence of acts of corruption;
>
> (d) conduct educational programmes and training relating to the role of the Commission in promoting ethical conduct;
>
> (e) perform such other functions or exercise such powers as may be conferred on it under this Act or any other enactment."

11.105 "Persons in public life" is defined in Schedule 1 as Members of the House of Assembly, members of the board or governing body of a public body and/or officers and all public officers[159]. "Corruption" is defined by reference to various types of conduct[160]. A person who commits corruption as defined commits an offence with a maximum sentence of $30,000 or five years' imprisonment[161].

11.106 The Act also introduces a Code of Conduct, which each person in public life is required to sign and keep[162]. In addition, it sets out particular statutory requirements in respect of such conduct, as follows:

> "23(1) A person in public life shall ensure that he or she performs his or her functions and administers the public resources for which he or she is responsible in an effective and efficient manner and shall
>
> (a) be fair and impartial in exercising his or her public duty;
>
> (b) afford no undue preferential treatment to any group or individual; and
>
> (c) arrange his or her private interests, whether pecuniary or otherwise, in such a manner as to maintain public confidence and trust in his or her integrity.

[158] Section 4(7)(g).
[159] Section 2.
[160] Section 29(1).
[161] Section 29(2).
[162] The Code of Conduct is set out in Schedule 3 to the Act.

(2) A person in public life shall not

(a) use his or her office for the improper advancement of his or her own or his or her family's personal or financial interests or the interest of any person;

(b) accept any position or have any commercial or other interest that is in conflict with his or her office, function and duty or the execution of his or her duties, or that may be perceived as conflict of interest with his or her office, function and duty or the execution of his or her duties;

(c) use public property or services for activities not related to his or her official work; and

(d) directly or indirectly use his or her office for private gain.

24. A person in public life shall not use information that is gained in the execution of his or her office and which is not available to the general public to further or seek to further his or her private interests.

25. A person in public life shall not use his or her office to seek to influence a decision made by another person or public body to further his or her own private interests.

26(1) A person in public life shall not accept a gift, fee or personal benefit that is connected directly or indirectly with the performance of the duties of his or her office, whether as a reward for any official act done by him or her, or as an inducement for any official act to be done by him or her or otherwise…".

11.107 It does not appear to set out any penalties for breach of these provisions or of the Code of Conduct. Instead, in circumstances in which there is an alleged breach, the Integrity Commission can investigate it under Part III of the Act. Where the Commission is satisfied on the basis of an inquiry that any provisions have been breached, it shall take such actions as it deems fit, but somewhat surprisingly the Act does not define what these actions are[163]. Where the Commission is satisfied that an offence has been committed, it is required to refer the matter to the DPP[164].

11.108 Part VI of the Act concerns funding of the Integrity Commission. It simply and shortly provides that:

> "The funds of the Commission shall consist of funds as may, from time to time, be appropriated by the House of Assembly and other moneys as may be lawfully received by or made available to the Commission for the purposes of this Act"[165].

11.109 There is no doubt that, on its face, the Integrity in Public Life Act is a step forward. However, I remain extremely concerned about its likely effectiveness. There are several strands of concern.

11.110 First, the Act appears to be unduly and unnecessarily restrictive in its terms. For example, section 29 provides that a person in public life commits corruption if he or she seeks or accepts personal or private benefit for himself or herself or a member of his or her family or person associated with him or her. Under the interpretation section, the definition of "family" only extends to the spouse of a public official and the dependent child of a public

[163] Section 19(1).
[164] Section 19(1)(b)(i). It is also required to forward a report of its findings to the Governor, the Premier and Cabinet (section 19(1)(b)(ii)).
[165] Section 30.

official, whether minor or not, who is being maintained by the public official[166]. On the face of it, this definition excludes partners, siblings, cousins, uncles, aunts, parents and non-dependent children[167]. There is no obvious need or justification for this restrictive definition. Similarly, the Act provides for a limitation for prosecution of offences under the Act[168] so that no prosecution may be instituted after seven years from the date when the person in public life is alleged to have committed the offence. Again, there is no obvious justification for this limitation, particularly given the notorious difficulty in investigating and prosecuting such matters.

11.111 Second, and more importantly, despite its long gestation period, the Act does not appear to have been thoroughly thought through. In making submissions on the Bill (as it then was), Sir Geoffrey Cox QC for the Attorney General and the elected Ministers, whilst not accepting that the Bill was clearly inadequate, said that "as it currently stands, it clearly needs significant more work". An example he used to demonstrate this was paragraph 3 of the General Principles of the Code of Conduct (which Sir Geoffrey called the "Schedule of Principles") which provided that:

> "A person in public life should act in a politically neutral manner when carrying out the lawful policies, decisions, or citations of a public body."

As I have indicated, "person in public life" includes Members of the House of Assembly. As Sir Geoffrey put it of this statutory provision:

> "It would be the first time, in my understanding, that a Member of the House of Assembly had to act politically impartial."

However, the work that Sir Geoffrey said needed to be done, has apparently not been done: the essence of that provision, for example, remains unchanged.

11.112 Similarly, the way in which the Act interrelates with the current criminal law is unclear. Conduct amounting to corruption is pursuable under both the Act and the Criminal Code. However, it is unclear as to which should be applied and how that decision should be made. This is significant as the penalty under the Act for an offence of corruption (as defined under section 29) is a fine not exceeding $30,000 or imprisonment for a term not exceeding five years, whereas under the Criminal Code equivalent conduct may attract higher penalties depending on the offence: for example, abuse of office in section 84 of the Criminal Code attracts a penalty of up to seven years. Nor is it clear how this Code of Conduct will relate to the distinct Public Service Management Code ("the PSM Code"), which is due to replace the General Orders[169].

11.113 This approach to the Act suggests that it has been progressed without the care and attention that one would expect if the political agenda included a real intention to get to grips with the challenges the BVI faces in terms of integrity in public life[170].

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[166] Section 2.

[167] Notably in this context, under the Criminal Code reference is made to "relative", which is far broader and expressly includes a spouse, child, brother or sister, parent, grandparent or grandchild (see section 79(1)) as inserted into the Criminal Code by the Criminal Code (Amendment) Act 2006.

[168] Section 34, which provides that no prosecution for an offence other than one committed under section 21 (obstructing an investigation) may be instituted after seven years from the date when the person in public life is alleged to have committed the offence.

[169] See paragraphs 11.139ff below.

[170] Sir Geoffrey Cox's submissions are at T15 21 June 2021 pages 261-263, with the quotations coming from pages 262 and 263. See also T17 23 June 2021 pages 253-254 (the Deputy Governor).

11.114 Third, and in my view most importantly, for this Act to have any chance of being effective, the Integrity Commission requires both infrastructure to support its work, including a secretariat and a team of appropriately skilled and experienced investigators, and proper and sustained funding. There are currently no regulations as to how the Commission will in practice operate. The experience of other jurisdictions which have introduced a similar institution is that they are very resource-heavy (i.e. expensive) to run. Whilst I have no doubt that funding of a properly organised and effective Integrity in Public Life scheme would be money well spent, in my view Part VI of the Act does not go anywhere near far enough to ensure an adequate level of funding and support for the work of the Integrity Commission here. Neither is it clear from where investigators will be drawn, and how they will be remunerated. As I have described, offices such as the DPP and Attorney General have struggled to maintain both numbers and quality of staff on the basis of the current rates of remuneration.

11.115 Therefore, whilst I welcome the Integrity in Public Life Act, it is little more than an enabling framework Act without evidence that could give me, or the people of the BVI, confidence that it will be effective and efficient in dealing with issues of corruption and wider issues of Integrity in Public Life.

The Draft Ministerial Code of Conduct

11.116 A draft Ministerial Code was drafted and presented to Cabinet on 26 September 2018[171]. It is not clear who drafted that document: the Attorney General's Chambers did not, but apparently did some work on comparative codes.

11.117 In April 2020, a Working Group was established by the Cabinet to make recommendations in respect of drafting a Ministerial Code, as a policy document (as opposed to legislation). The Attorney General's Chambers again apparently had no hand in the drafting. Cabinet approval of a final draft was given on 15 April 2021, and it was placed before the House of Assembly. However, to date there has been no debate in the House in relation to the draft Code – the next step – and it is not finalised or in force[172].

11.118 According to the introduction to the draft Code, it provides a guide for Ministers on how they should act and arrange their affairs in respect of a number of matters, including their constituency and party interests and their private interests, in order to uphold the standards within the Code. It sets out a number of well-established principles (such as joint Cabinet responsibility, and as to a Minister's integrity in his or her conduct).

11.119 In terms of enforcement, under the draft Code, that lies in the hands of the Premier. The introduction provides that:

> "The Premier is responsible for holding Ministers to account for the effective execution of the Code. The Premier has discretion in respect of the initial handling of possible breaches of the Code. Where a breach of standards has been alleged, the Premier decides whether or not a minister should resign… She/he is the judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards".

Indeed, the Premier may "decline to entertain a complaint" which appears to him/her to be "minor, frivolous or vexatious" or to relate to a matter that occurred more than 12 months prior to the date of the complaint. In order to determine a complaint, the Premier is permitted

[171] Attorney General's Memorandum on Governance Measures paragraphs 85-86.
[172] Attorney General's Memorandum on Governance Measures paragraphs 86-94.

to commission an investigation "in any manner he deems appropriate". It is for the Premier to decide whether or not a breach of the Code has taken place, and to determine the appropriate sanction.

11.120 Whilst there are worthy and proper principles of conduct set out within the draft Ministerial Code, in my view the implementation is fundamentally flawed. There is an obvious flaw in making the Premier the arbiter of the Ministerial Code, given that he or she will inevitably lack independence and impartiality – and, certainly, the appearance of independence and impartiality – when deciding whether to investigate an alleged breach by Ministers of he or she own Government and political party. The conflict of interest between the Premier's role in enforcing the Ministerial Code and his political position as Premier and leader of he or she party is obvious, and would critically undermine the effectiveness of the Code. On any view, it is crucial that any decision to investigate an alleged breach of the Code by any Minister (including the Premier), any investigation undertaken and any determination of an alleged breach must be conducted by an independent arbiter.

The Whistleblower Act

11.121 As I have indicated, there is a strong current of unwillingness to assist the RVIPF or others engaged in the enforcement of the criminal law and standards in public life, based to a significant extent on the fear of reprisals.

11.122 The Whistleblower Act was passed in the House of Assembly on 17 June 2021, and was assented to by the Governor on 5 August 2021. The Act has yet to be brought into force[173].

11.123 The Act is intended to protect a person who makes a disclosure of "impropriety", which includes a criminal offence that has been or is about to be committed or is likely to be committed, non-compliance with a law or likelihood of breaking a law which imposes an obligation on that person, and that there has been or is or is likely to be waste or misappropriation of public resources in a public institution[174]. Any such disclosure of impropriety will be protected, notwithstanding any other law to the contrary, if it is made in good faith, the whistleblower has reasonable cause to believe that the information disclosed is substantially true and the disclosure is made to a specified person, including an employer and a wide group of public and religious officials[175]. The specified person to whom any disclosure is made is required to keep the disclosure confidential, on pain of criminal sanctions (namely: a fine of up to $500,000 or a term of imprisonment not exceeding five years)[176].

11.124 In so far as the procedure for the investigation is concerned, either the specified person in receipt of the disclosure, depending on their investigative capabilities, or the Attorney General will undertake such an investigation. The outcome of such an investigation (if not carried out by the Attorney General) is to be submitted to the Attorney General who will take action, such as ask for further investigations by the same or different person/institution[177].

[173] Attorney General's Memorandum on Governance Measures paragraphs 25-34. On 28 September 2021, the Attorney General's Chambers issued a memorandum to the MoF suggesting 12 October 2021 as the commencement date. However, as at 10 February 2022, no commencement date had been fixed (paragraph 34).
[174] Section 3.
[175] Under section 5, "specified persons" includes an employer, the Governor, the Premier, the Attorney General, the CoP, the Auditor General, a member of the House of Assembly, the Complaints Commissioner, a Cabinet Minister or Junior Minister or the head of a recognised religious body.
[176] Section 8.
[177] Sections 10-13.

11.125 The Act expressly protects the whistleblower from victimisation, such as dismissal, harassment and intimidation. Where such conduct has occurred, a complaint can be made to the Complaints Commissioner. A whistleblower who makes a disclosure and reasonably believes that his/her life or his/her property or the life or property of a member of his/her family[178] is likely to be endangered shall be provided with adequate protection in accordance with the provisions of the Justice Protection Act[179]. The whistleblower is not liable to civil or criminal proceedings in respect of the disclosure made unless he/she knew it was false and it was made with malicious intent[180]. The Act also establishes a Reward Fund to provide monetary rewards to whistleblowers[181].

11.126 The Act, if and when it comes into force, at face value appears to be another step in the right direction. However, again, based on all evidence before me, I have real concerns about the extent to which it will be effectively implemented.

11.127 The CoP spoke of a "total deficit in trust and confidence as regards, the RVIPF professionalism, integrity, ability to act on information offered instead of divulging amongst colleagues and friends"[182]. This deficit appears to extend to other law enforcement agencies and the justice system[183]. Indeed, the CoP identified a lack of trust and joint working across law enforcement agencies as there is, in his view, some reluctance to share intelligence for fear of it being divulged[184] (a view shared by the DPP[185]), and significant issues in relation to vetting[186]. In the context of the COI, as I have indicated, people told me that they were reluctant to come forward to give me evidence because of fear of reprisals against them and their family[187]. In that context, it is difficult to see how the Act, without more, could operate effectively.

11.128 Furthermore, again, proper resources would be required to give the Act teeth. That is vital. I note the concerns raised by those involved in law enforcement and justice (discussed further in Chapter 12) as to existing levels of support and infrastructure – a matter relevant to any future investigation of disclosed impropriety and indeed to the protection of whistleblowers[188]. There is no evidence that sufficient resources will be made available to make this an efficient and effective scheme. Without confidence in the scheme, those in a position to whistleblow will simply not be prepared to come forward.

11.129 In my view, whilst again I welcome the move to have provision on the statute book to enable those with information of corruption and other wrongdoing in public office to come forward, unless other circumstances change in the Territory, I do not consider that, even if and when it is brought into effect, the Whistleblower Act 2021 will be sufficient to embolden people with evidence of such wrongdoing to come forward.

[178] By section 19(3), "family" is defined as spouse, father, mother, child, grandchild, brother and sister.
[179] Sections 14 and 19.
[180] Section 20.
[181] Part V: Whistleblower Reward Fund.
[182] CoP Position Statement paragraph 5.
[183] CoP Position Statement paragraph 6.
[184] T17 23 June 2021 page 56.
[185] T17 23 June 2021 page 105.
[186] T17 23 June 2021 page 32.
[187] See paragraphs 3.11 and 3.15 above
[188] DPP Position Statement paragraph 4(a). The DPP described her office as being "grossly understaffed and under-resourced".

Concerns

11.130 The core submission of the elected Ministers that the present state of the Public Service, and in particular limitations that exist as to policy planning and capacity, are attributable to failings of successive Governors is not one which, on all the available evidence, I find at all compelling. Indeed, it falls far short of being made good.

11.131 I set out my reasons above. Whilst section 60 gives the Governor responsibility for terms and conditions of public officials, the argument ignores the limitations on section 60 and the constitutional responsibilities placed on Cabinet and elected Ministers in respect of the administration of their Ministries and departments. Cabinet is responsible for policy, including the policy in relation to policy making and implementing capacity. A Minister is responsible for the administration of his or her Ministry. A Minister who signs and presents a policy paper to Cabinet must be taken as endorsing, not only the substantive policy put forward, but also its rationale and the manner in which it is proposed that that policy will be implemented. Similarly, Cabinet, if it approves a paper which sets out how a policy will be implemented, can only be taken as endorsing that approach.

11.132 Whilst in respect of some aspects of the administration of Ministries (e.g. the increase in capacity to formulate policy by the appointment of Ministerial Political Advisers sitting outside the Public Service), Ministers and/or Cabinet are able to make and implement decisions, sections 56 and 60 of the Constitution (and the fact that the elected Government holds the purse strings) mean that wider measures for the reform and transformation of the Public Service inevitably require collaboration between the elected Ministers and the Governor which, as in other areas where there are overlapping responsibilities, gives rise to the question as to who should lead the effort to reform the Public Service.

11.133 As I have said, the PSTP was and is an ambitious response to the changing circumstances facing the BVI after 2017. The need to reinvigorate the Public Service may become even more acute as the BVI begins its recovery from the COVID-19 pandemic.

11.134 In his Response to a COI Warning Letter dated 14 October 2021, Governor Rankin said:

> "… a paper on Public Service Transformation Initiative Funding Requirements in the joint names of the Governor and the Premier is in final preparation for tabling in Cabinet, proposing projects in four key areas namely, Good Governance (including establishment of a Strategic Policy and Planning Unit), Digital Transformation/e-government, Customer Service Improvement and Public Administration/Human Resources Management.
>
> UK Government funds can be accessed to support elements of the Transformation Programme, particularly those related to good governance. An Memorandum of Understanding (MOU) was already signed between the Government of the United Kingdom and the Office of the Deputy Governor on 16 September 2021 for Capacity Building initiatives in the sum of $147,554 to support work in a variety of areas including training in Information Technology, Human Resources, Land and Property Evaluation, Electoral Processes and Software development support for the Office of the DPP and the Public Estates Programme"[189].

11.135 That progress is being made is of course welcome. I am, however, concerned about two things: the pace of that progress, and the need to ensure that the Public Service is independent of the executive.

[189] Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 4.9-4.10.

11.136 Whilst the evidence suggests that the elected Government has, over time, been slow to play its part in enabling the Public Service to perform its functions optimally, the Governors and the Deputy Governors have attempted to drive reform forward. It is they who are responsible for ensuring the impartiality of the Public Service. Whilst the elected Government must play its full part in any reform programme, in my view, unless the Governor is entirely sure that a partnership whereby the PSTP is led by both the Deputy Governor and (e.g.) the Permanent Secretary Premier's Office (as is now the case) is more likely to result in better implementation of the PSTP, the lead should be taken by the Deputy Governor on behalf of the Governor. The implementation should be driven forward energetically, and without delay.

11.137 In his position statement, Governor Rankin suggested that the confidence of public officers "appears to have been eroded by perceived attempts to exert undue political influence on their work or to create uncertainty over lines of authority"[190]. This was a suggestion which the elected Ministers rejected in robust terms. They responded that if there had been such "undue political influence" then it may arise from ministerial frustration over a Public Service incapable of implementing political commitments within a timescale that reflected political realities. The elected Ministers argue that, if such a problem exists then it made it imperative that the General Orders be replaced with a more modern mechanism[191].

11.138 Whether there has been "undue political influence" is not a matter I need to resolve. There is certainly some evidence of such influence. The possibility only emphasises the need to safeguard the independence of the Public Service, without which public officers would not be able to give proper advice. There is a need therefore to deliver on the oft-repeated intention of the elected Government to reform the administration, management and terms and conditions of the Public Service.

11.139 The evidence of the Deputy Governor was that the General Orders are to be replaced by the Public Service Management Code ("the PSM Code"), the drafting of which has been informed by the Nolan Principles (also known as the Seven Principles of Public Life)[192].

11.140 According to a February 2022 update on the current legislative programme insofar as it applies to governance, the Attorney General informed the COI that the Department for Human Resources had initiated a review of employment practices and procedures in the Public Service between 2010 and 2017, the result of which was a briefing report on a Public Service Management Bill[193]. The Deputy Governor explained that, following consultation, it was decided to revise the Bill to fit the format of a code. Once the PSM Code has been implemented and its impact reviewed, then it is proposed to "transition that code into the Public Service Management Bill"[194]. The Deputy Governor confirmed that the PSM Code will explicitly recognise the independence and impartiality of public officers[195].

11.141 The present position is that Attorney General's Chambers returned a draft of the PSM Code to the Department of Human Resources on 22 October 2021 for review and consideration[196]. I assume that the iteration of the draft PSM Code provided to the COI is therefore current as of that date. Now renamed the Public Service Management Orders of the Virgin Islands, I note that this draft has a Chapter headed "Duties, Responsibilities and Powers of the Deputy Governor", under which the Deputy Governor would be responsible to the Governor for the management of the Public Service. It makes reference to "an apolitical service" which

190 Governor Position Statement paragraph 64.
191 Elected Ministers' Response to Governor Position Statement paragraphs 35-36.
192 Deputy Governor Position Statement pages 6, 17 and 23. See paragraph 11.48 and footnote 72 above.
193 Attorney General's Memorandum on Governance Measures paragraph 97.
194 T17 23 June 2021 pages 235-236.
195 T17 23 June 2021 page 237.
196 Attorney General's Memorandum on Governance Measures paragraph 97.

delivers in "a professional and non-partisan way". It defines the role of the Public Service as being to provide and administer public services with "integrity, honesty and impartiality", and to assist the formulation of policy by providing "frank, honest, comprehensive, accurate and timely advice". The need for political impartiality is also dealt with elsewhere in the draft. Scheduled to the draft PSM Code is a "Code of Conduct and Ethics", which repeats the principle of impartiality. There is a separate "Code of Discipline" which provides for misconduct to be reported to the PSC, the Teaching Service Commission or the Judicial and Legal Services Commission, as appropriate. These bodies could then initiate investigations and disciplinary proceedings[197].

11.142 The steps that have been taken to produce the draft PSM Code are to be applauded. It has plainly taken much work conducted over several years, across more than one administration. The draft provided to me appears to be in the form of a much-amended version of a statute or statutory instrument. It is still, only too obviously, a draft in respect of which there is much more work to be done. A point that may become important is the interplay between any code of conduct established under the PSM Code and that to which public officers, as persons in public life, would be bound under the recently enacted Integrity in Public Life Act 2021[198].

11.143 In the circumstances, I consider that priority be given to finalising and promulgating the PSM Code, with a view to then enacting the Public Service Management Bill.

11.144 Training must be seen as a critical element of the PSTP. I do not need to resolve any potential dispute between Governor Rankin and Mr Frett on the size of training budgets. Even on the latter's evidence, I am left with a concern not only as to the adequacy of the training budget, but how it is deployed. I note that the PAI Report records that the Training Division had been closed with the result that there was no centralised focus on capacity building, but that the Department of Human Resources would be undertaking a service-wide needs analysis of training[199]. While I see the benefit in individual Ministries retaining a budget, it seems to me that there is real value in the Department of Human Resources undertaking a coordinating role focused on assessing the needs of different Ministries but within the framework of delivering the PSTP. That, too, should give rise to savings where training can be undertaken on a cross-Ministry basis, e.g. in respect of policy formulation and implementation.

Recommendations

11.145 I deal with overarching recommendations below[200]. However, with regard to the Public Service, I make the following specific recommendations.

Recommendation B35

I recommend that the Public Service Transformation Programme is led by the Deputy Governor, unless the Governor is satisfied that a joint lead by the Deputy Governor and the Permanent Secretary Premier's Office (or the Permanent Secretary of another Ministry) is more likely to result in a quicker or otherwise better finalisation and implementation of the programme. The implementation should be driven forward energetically, and without delay.

[197] Draft Public Service Management Code (Bundle accompanying Attorney General's Memorandum on Governance Measures at pages 185, 193, 197, 282 and 292).
[198] See paragraphs 11.110-11.115 above.
[199] PAI Report Context and Challenges page 9.
[200] See Chapter 14.

Recommendation B36

I recommend that the Public Service Management Code is finalised and put into place as soon as practical, with a view to it being incorporated into a Public Service Management Act at some early stage.

Recommendation B37

I recommend that the Department of Human Resources coordinates the expenditure on the training of public officers.

APPENDIX A

CHAPTER 12:

LAW ENFORCEMENT AND JUSTICE

APPENDIX A

LAW ENFORCEMENT AND JUSTICE

This chapter looks at the law enforcement and justice systems. What are the strengths of the systems? Is there evidence of corruption or other serious dishonesty? What can be done to make them function better?

Introduction

12.1 The BVI presents a significant challenge in terms of policing and law enforcement because of its topography, comprising as it does of numerous small islands. The challenge is compounded by the fact it is situated between the world's largest cocaine producers in South America and the world's largest cocaine consumer in the US.

12.2 Through the UK and/or by its own commitment, the BVI is bound by international treaties on tackling organised crime, drug trafficking, corruption and terrorism, and participates in international and regional standard setting bodies, such as the Organisation for Economic Development ("the OECD"), the OECD Global Forum, the International Organisation of Securities Commissions, the Financial Action Task Force and the Caribbean Financial Action Task Force. The BVI has signed 28 tax information exchange agreements; as a result of an extension by the UK, it participates in the Convention on Mutual Administrative Assistance in Tax Matters (designed to promote international cooperation in respect of national tax laws); it was an early signatory to the Common Reporting Standards for the Automatic Exchange of Tax Information; it is a signatory to the Multilateral Competent Authority on Automatic Exchange of Financial Account Information (which specifies the details of information that will be exchanged and when); and it provides information to the US tax authorities through the International Tax Authority[1].

12.3 Domestically, the BVI Financial Services Commission ("the FSC") has oversight of the financial services industry, and regulates corporate service providers, banks and insurance companies. Under the Beneficial Ownership Secure Search System Act 2017[2] (passed following an Exchange of Notes between the UK Government and the BVI Government dated 8 April 2016, annexed to the Act as Schedule 1), the FSC has access to a secure beneficial ownership search system ("BOSSs"), which facilitates access to databases of prescribed information which registered agents licenced to conduct company, bank or trust management business in the BVI are required to keep. The information is disclosable to identified law enforcement agencies, including the BVI Financial Investigations Agency ("the FIA")[3].

12.4 However, these steps have struggled in the face of organised crime. Since November 2020, the RVIPF has recovered over 3.6 tons of cocaine, with an estimated street value higher than the annual BVI GDP. It is thought that huge quantities of drugs pass through the BVI undetected. There is also substantial evidence that, despite efforts such as those described briefly above, BVI companies are regularly used in the laundering of colossal amounts of illicit funds. The House of Commons Foreign Affairs Committee recorded the following evidence taken in 2018[4]:

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[1] Attorney General Position Statement paragraph 10.
[2] No 17 of 2017 as amended.
[3] Attorney General Position Statement paragraph 9.
[4] Foreign Affairs Committee Report: Global Britain and the British Overseas Territories: Resetting the Relationship paragraphs 27-28 (https://publications.parliament.uk/pa/cm201719/cmselect/cmfaff/2174/217402.htm). The evidence was given to the Committee in the context of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"): see paragraphs 13.63-13.68 below.

> "27. … [Transparency International and Global Witness] point to evidence uncovered in the UK of: a company registered in BVI providing financial services to North Korea's main arms dealer; the use of front companies in offshore locations including BVI to register North Korean ships; and the use of a BVI-registered company by the man once in charge of Muammar Gaddafi's long-range missiles programme to buy properties in the UK.
>
> 28. This link between [B]OT-registered companies and money tied to autocratic regimes echoes the evidence we received during our inquiry into Russian corruption in the UK. In that inquiry journalist Juliette Garside, who investigated the Panama papers and Paradise papers for the Guardian, told us that, 'in Russia, one of the names for a shell company one of the words people use is BVI'…".
>
> Over half of the shell companies identified in the Panama papers appear to have been registered in the BVI.

12.5 Turning to the relevant institutions, there are four law enforcement agencies in the BVI, namely:

(vii) the RVIPF (which reports to the Governor);

(viii) HM Customs (which reports to the Minister of Finance);

(ix) the Immigration Department (which is under the Minister for Natural Resources, Labour and Immigration); and

(x) the FIA[5].

12.6 Several limbs of government are responsible for the administration of criminal justice, notably:

(i) the Office of the DPP;

(ii) the Eastern Caribbean Supreme Court; and

(iii) Magistrates' Court[6].

Royal Virgin Islands Police Force

Introduction

12.7 The main evidence before the COI concerning the police was from the Commissioner of Police Mark Collins QPM ("the CoP") who produced written evidence[7] and gave oral evidence[8].

12.8 As already described[9], the CoP commands the RVIPF on all aspects of operational deployment and investigations and is responsible for setting its strategic direction. He is also a member of the NSC[10] which advises the Governor, who chairs the NSC on matters relating to internal security[11].

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[5] DPP Position Statement paragraph 1A; and see paragraph 1.91-1.94 above.
[6] DPP Position Statement paragraph 1B.
[7] CoP Position Statement, CoP Report on Law Enforcement and Security in BVI: Recommendations for Improvement from the COI dated 8 December 2021 ("CoP Recommendations Report") and Letter CoP to the COI dated 3 January 2022 captioned "Police Act, the Suggested/Anticipated Amendments and Additions". Mr Collins was appointed CoP from 15 April 2021, being sworn in on 19 April 2021.
[8] T17 23 June 2021 pages 1-59.
[9] Paragraph 1.95. The role of the CoP is set out in section 57(4) of the Constitution quoted in that paragraph.
[10] For further details of the NSC, see paragraph 6.432 above.
[11] CoP Position Statement paragraph 3.

12.9 As reflected in section 57(4)(b) of the Constitution, internal security including the police falls within the Governor's special (reserved) responsibilities; and so the RVIPF falls under the authority of the Governor (and to an extent, through him by delegation to the Deputy Governor)[12]. However, the CoP described lines of reporting and accountability in practice as blurred, overly bureaucratic and often duplicative and/or overlapping[13]. He was of the view that this was unnecessary and time-consuming[14]. For example, if there is a vacancy in the RVIPF which needs to be filled, he is required to make a request through the DGO and then make a request to the MoF for approval for funding[15]. In respect of operational matters, the CoP reports to the Governor's Office but also separately to the DGO.

12.10 The processes and systems in place to monitor the effectiveness of the RVIPF include daily management meetings which review incidents over the previous 24 hours to ensure appropriate action and resources are deployed. The RVIPF also holds a monthly meeting which monitors the performance of the force. The CoP meets the Governor weekly to provide him with updates in relation to policing matters; and prepares quarterly and annual reports for the NSC based on the RVIPF Strategic Plan which provides an overview of each department and district and sets out achievements, challenges and key information on crime statistics and trends[16].

12.11 There is also a Criminal Justice Advisory Group ("the CJAG"), chaired by the Governor, which brings together the range of agencies involved in the justice system, including the DPP, the CoP, the Senior Magistrate, the Registrar of the High Court, the DGO and the Permanent Secretary for the MHSD. The CJAG's purpose is "to enhance and promote the safety and wellbeing of the British Virgin Islands through effective and efficient coordination of the criminal justice services", and it is designed to take a holistic approach[17].

12.12 In addition, there are quarterly meetings of the Police Service Commission, established under section 96 of the Constitution and comprising five members appointed by the Governor – three of those on the advice of the Premier, the Leader of the Opposition and Police Welfare Association, respectively – which seeks to give a voice to the community in respect of policing matters. The CoP attends the Commission to give updates on the performance of the RVIPF, and address any matters of concern to the community brought to his attention via this body. However, the role of the Commission goes beyond a community-based agenda, e.g. it is responsible for making all police appointments and all promotions of the rank of Chief Inspector and above, without police representation on the promotions panel[18]. The CoP considers that that is neither necessary nor consistent with making the best appointments to these important posts. The Commission also makes the final decision on the cessation of probationary constables which, the CoP considers, is an unnecessary burden on the Human Resources Department and the RVIPF[19].

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[12] Section 60(1)(c) of the Constitution (see paragraph 1.52 above); and T17 23 June 2021 pages 9-10 (CoP). HM Customs sits under the MoF and the Immigration Department sits under the MNRLI. Her Majesty's Prison sits under the Governor and the MHSD. See also Governor Position Statement paragraph 98.

[13] T17 23 June 2021 pages 16-17.

[14] T17 23 June 2021 page 17.

[15] Funding for both the Police and the Courts, including funding to fill vacant positions, is a matter for the Minister of Finance, subject to the extraordinary power of the Governor under section 103 of the Constitution to order payments out of the Consolidated Fund (Governor Position Statement paragraph 102).

[16] Governor Position Statement paragraph 107.

[17] For example, the Governor gave evidence to the COI that the most recent CJAG meeting focused on ways to address domestic violence and the current court case backlog (Governor Position Statement paragraph 108).

[18] Albeit the power to do so vests in the Governor under section 97 of the Constitution, the Governor in practice exercises that power generally in accordance with the advice of the Police Service Commission (Governor Position Statement paragraph 100).

[19] CoP Position Statement paragraph 3; and T17 23 June 2021 page 22.

12.13 Given the nature of the Territory, sea border security is a high priority, and has particularly been so during the COVID-19 pandemic. Joint working with other law enforcement agencies is thus particularly important. During the pandemic, this has been primarily through the Joint Task Force ("the JTF") which consists of officers from the RVIPF, HM Customs and the Immigration Department[20]. The CoP said he considers that liaison at the top level of the JTF has been very good, and the Commissioner of HM Customs ("the HMC Commissioner") Wade Smith, the CIO Ian Penn and he meet the Governor weekly. However, based on the weekly reports he has commissioned from the JTF and the Police Marine Unit (which provides data as to general activity on the water, e.g. interactions with vessels on the water, routes taken and training activities), he questioned the operational effectiveness and value for money of the JTF[21].

12.14 The CoP has also recently commissioned a wider review of the RVIPF which will be carried out by a Chief Inspector[22].

Corruption

12.15 RVIPF statistics for 2020 report an increase in detection rates and a decrease in recorded crimes, and recorded seizures of illicit drugs. However, BVI remains a major route for illegal drugs transhipment, which is highly damaging to the reputation of the Territory: and a number of recent drug seizures point towards the involvement of some law enforcement officers in the illicit drugs trade and corrupt practices[23]. For example, in November 2020, in a single operation, the RVIPF seized 2.353 tons of cocaine from the home of a serving police officer who is currently under arrest[24].

12.16 At the time the CoP gave his evidence, the RVIPF had nine officers suspended for various offences, including not only possession with intent to supply, but also possession of an unlicensed firearm, making obscene publications, handling stolen goods and indecent assault. These matters were still before the court[25]. The CoP said there are more cases to come[26].

12.17 The DPP confirmed that there are two trials before the High Court concerning offences of dishonesty where the accused are law enforcement and other public officers; two matters before the Magistrate's Court concerning law enforcement officers; and a further six investigations in progress concerning public servants and law enforcement officers[27].

12.18 In addition, there are a substantial number of outstanding investigations with the RVIPF Professional Standards Department. However, that department comprises only one Inspector and a Police Sergeant; and, in the CoP's view, the department's current resources are insufficient to fulfil its function. He observed that there is no independent authority to investigate misconduct within the police, such as the Independent Office for Police Conduct in the UK[28].

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[20] T17 23 June 2021 page 13. For more detail about the JTF, see paragraphs 6.440-6.443 above.
[21] T17 23 June 2021 page 12.
[22] T17 23 June 2021 page 14.
[23] Governor Position Statement paragraphs 113 and 114.
[24] "BVI Makes 'Largest Drug Bust in BVI History' Worth $250 Million; Drugs Found at Policeman's House": The Virgin Islands Consortium 11 November 2020 (https://viconsortium.com/vi-crime/virgin-islands-bvi-makes-largest-drug-bust-in-bvi-history-worth-250-million-drugs-found-at-policemans-house-).
[25] T17 23 June 2021 page 31. The CoP expressed particular concern about the delay in respect of these cases, with some dating back to 2014.
[26] T17 23 June 2021 page 31.
[27] DPP Position Statement paragraph 10. The DPP referred to these as "approximate" numbers. Understandably, to preserve the integrity of the investigations and the objects of interests' right to a fair trial, the DPP considered the details of these matters should remain confidential.
[28] CoP Position Statement paragraph 6.

12.19 A Code of Conduct and Code of Ethics has been introduced within the last two years. The CoP said he would like to go further, as some other BOTs have done. For example, Bermuda has recently implemented Police Performance and Conduct Orders based on UK regulations. These are designed to ensure prompt and effective action in response to clear cases of gross misconduct. In relation to conduct which repeatedly falls below the threshold of gross misconduct but still amounts to misconduct, performance regulations have been found to be successful in the UK in supporting and improving officer performance to an acceptable standard[29].

12.20 The CoP said he considers that, whilst he has "a lot of very good officers out there working, you know, over and above every day, doing some fantastic work. I've also got some other officers that I don't think pay attention to any Code of Ethics, any Code of Conduct at all, and those are the people that I need to root out of the organization"[30]. The CoP considers that the RVIPF could benefit from a Professional Standards Unit, as in other BOTs[31].

12.21 The CoP said that, amongst the BVI public, there was a "total deficit in trust and confidence as regards, the RVIPF professionalism, integrity, ability to act on information offered instead of divulging amongst colleagues and friends" [32]. This deficit appears to extend to other law enforcement agencies and to the broader justice system[33]. It is coupled with what the CoP described as a culture of fear of retribution and nepotism so far as the police are concerned[34].

12.22 This presents a significant challenge to the RVIPF's ability to detect and investigate crime, as members of the public are not willing to come forward with information or intelligence[35]. The CoP referred to the recent tragic murder of Catherine Pickering, a 67-year-old woman who was fatally shot at her home during a robbery[36]. Although the circumstances of the murder were such that it is very likely that someone would have had direct relevant evidence, no one was willing to come forward and give the police information[37]. As a consequence, the CoP launched a hotline to allow any member of the public to contact him directly to provide information on any investigation, historical or current, or to report a concern about any serving police officer[38].

12.23 The CoP also identified a lack of trust and joint working across law enforcement agencies. In his view, there is some reluctance to share intelligence for fear of it being divulged[39]; but, also, the ability to share information across agencies and departments is impeded by the fact that computer systems are not linked. He also noted outdated working practices include the use of paper files, with many agencies still only accepting paper files and reports[40]. The CoP observed that there is an inherent, deep resistance to change[41].

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[29] CoP's Recommendations Report page 2.
[30] T17 23 June 2021 page 34.
[31] CoP Recommendations Report page 2.
[32] CoP Position Statement paragraph 5.
[33] CoP Position Statement paragraph 6.
[34] CoP Position Statement paragraph 6.
[35] T17 23 June 2021 page 38. This was reflected to an extent in the public's reluctance to come forward to assist the COI for fear of the consequences if they did (see paragraphs 3.11 and 3.15 above).
[36] https://bvinews.com/catherine-pickering-was-found-in-great-agony/, https://bvi.org/two-males-charged-in-connection-with-catherine-pickering-murder
[37] T17 23 June 2021 pages 38-39.
[38] CoP Position Statement paragraph 5.
[39] T17 23 June 2021 page 56.
[40] CoP Position Statement paragraph 7; the exception being the FIA.
[41] CoP Position Statement paragraph 7.

Staffing Levels, Recruitment and Vetting

12.24 The firm view of the CoP is that the current system of recruiting for the RVIPF does not adequately vet potential candidates[42], and leaves the service vulnerable to corruption[43]. At present, there are no social media or financial checks made of potential candidates and only limited checks made in relation to previous employment and criminal records. The CoP considers there is a need to recruit a vetting officer to conduct more comprehensive vetting of potential candidates[44]. In addition, vetting should be accompanied by clear policies for gifts and hospitality, drug and alcohol misuse, secondary employment, business interests and appropriate associations[45], the ultimate objective being to ensure an ethical and professional workforce.

12.25 The CoP expressed particular concern about RVIPF officers being permitted to have second jobs (mainly as security officers or operating a security business), which he believes are not compatible with working as a police officer[46]. He said he intends to address this concern by introducing a business register as part of a professional standards review[47].

12.26 The CoP has also recommended that an Anti-Corruption Intelligence Unit should be set up proactively to monitor the RVIPF, as well as deal with the most sensitive corruption matters external to the police[48].

12.27 The RVIPF has an operating budget of around $19 million, annually. The outgoing CoP Michael Matthews noted in 2020 that the RVIPF's regular allocated budget falls far below the reasonable cost required to maintain the competencies and highly skilled requirements and demands in investigating crime and bringing offenders to justice[49]. The current CoP confirmed that there is a continuing shortage of equipment and human resources, and described a "complete lack of training within the RVIPF and other agencies" which required funding which was not forthcoming[50]. In light of the increase in financial crime in the BVI, the CoP considers that an increase in both resources and training in this area of policing is particularly required[51].

12.28 As well as being under resourced, police staff had not had any pay increase since 2018, and there were staff who were promoted over 12 months ago who had still not received an increase in pay. The CoP is of the view that there needs to be appropriate remuneration for overtime and recall to duty in the Terms of Service. He considers that the current conditions result in many officers turning to second jobs and low-level corruption in order to make a decent standard of living[52]. He suggested that the RVIPF should have a fixed post profile to set the number and position of officers to meet the operational and business policing demand, and be funded to that amount with the RVIPF having control over that funding allocation to enable it to determine how best to meet the needs of the organisation and to avoid delays in filling posts[53].

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[42] T17 23 June 2021 page 32.
[43] CoP Recommendations Report page 2.
[44] CoP Position Statement paragraph 6.
[45] As, the CoP observed, has been introduced in Bermuda.
[46] T17 23 June 2021 page 32.
[47] CoP Position Statement paragraph 8.
[48] CoP Recommendations Report page 1.
[49] Governor Position Statement paragraph 115.
[50] CoP Position Statement paragraph 7; and T17 23 June 2021 page 20.
[51] CoP Position Statement paragraph 8.
[52] CoP Recommendations Report page 1.
[53] CoP Recommendations Report page 1.

12.29 Further, and perhaps related to the terms and conditions referred to above, the CoP expressed substantial concern about the persistent number of vacancies in the RVIPF. Of a total staff complement, including officers and civilian support staff, of 350 there were (at the time the CoP gave his evidence) 67 vacancies[54]. He described the resulting "tremendous pressure on the organisation in all departments":

> "We have had 8 murders since last September and a number of high-profile drugs, robbery and burglary offences. It is my view that there is not a policing department in the UK with the capacity of the RVIPF that would be able to operate effectively and efficiently with the current available resources, combined with the ongoing deficit of a fifth of the work force remaining vacant"[55].

The CoP said that in the UK, if he were investigating seven or eight murders, he would expect to have a resource of around 100 detectives: in the BVI, albeit very dedicated people, he said he has a major investigation team of only one Inspector and a team of eight or nine[56]. He reiterated his frustration in relation to the delay and bureaucracy involved in filling vacancies and dealing with resourcing[57].

Concerns

12.30 There is little doubt that, whilst the majority of the RVIPF are reliable, honest and dedicated officers, there is a significant minority who are not. The CoP and the Governor each accept that there is a vein of endemic corruption running through the force[58]. There is no doubt that there is conduct within the RVIPF that falls into paragraph 1 of my Terms of Reference. The evidence suggests that there appear to be a number of contributing factors, touching upon fundamental aspects of the system, including issues with structure, professional standards, vetting, and funding and staffing levels. Understandably, the result is that (as the CoP put it) there is a "total deficit in trust and confidence as regards, the RVIPF professionalism, integrity, ability to act on information offered".

12.31 The conditions in which this conduct occurred persist; although the CoP fully recognises these issues, and is determined to address them. In that, he has the full support from the Governor. I accept, and welcome, that commitment. However, the CoP considers the current environment in the BVI makes such a task extremely challenging. I agree.

12.32 Given that the BVI is such a small territory, in my view law enforcement needs to be – and can be – considered holistically. It is essential that those in charge of law enforcement in the BVI in the future are given the tools to tackle the substantial problems with the system as it currently stands, the causes of which are multifactorial. An essential early step is to identify the current issues, and then work on addressing them.

12.33 From his evidence, I know that the CoP is already working along these lines: he is seeking to establish a review of various aspects of policing in the BVI. As I understand it, in addition to making appropriate investigations into corruption within the RVIPF with a view to removing corrupt officers from the force and in appropriate cases prosecuting them, he is seeking to

[54] T17 23 June 2021 page 18.
[55] CoP Position Statement paragraph 6.
[56] T17 23 June 2021 page 42.
[57] The Governor also expressed concern about resourcing for the RVIPF, both in terms of recruitment and training (Governor Position Statement paragraph 115).
[58] T17 23 June 2021 page 34; and Governor Position Statement paragraph 114.

introduce objective and monitored vetting and standards for police officers. I am confident that these steps will be progressed, and with urgency. In the circumstances, I do not make any specific recommendations in respect of these matters.

12.34 Whilst a review of parts of the system is currently in progress, in my view, it is essential that there is a root-and-branch review, as part of an overall review of law enforcement that seeks to identify and then address both the problems and their causes. I consider the possible form of such a review below[59].

Prison Service

12.35 There is only one prison in the BVI, namely HMP Balsam Ghut which is located in East End, Tortola. It was built in 1997 to replace a Victorian prison in High Street, Road Town which was operated by the RVIPF.

12.36 The prison operates under the Prison Ordinance 1956[60] and the Prison Rules 1999[61] made under section 27 of that Ordinance. The Ordinance makes clear – by giving all relevant powers to, and imposing all relevant obligations on, the Governor – that the prison falls under the authority of the Governor[62].

12.37 The Superintendent of HMP Balsam Ghut is Guy-Michel Hill who was appointed on 2 July 2021.

12.38 In the face of a number of concerns about the prison – deepened by the killing of a prisoner (Nickail Chambers) on 30 May 2021, which has subsequently led to five other prisoners being charged with murder – a comprehensive independent review of security arrangements at the prison was directed by the NSC, the remit of which includes identifying corrupt and otherwise illegal conduct by prison staff. That review is ongoing. As I understand it, it will also consider the extent to which facilities at the prison are safe for both prison officers and prisoners, and compliant with the normative human rights of prisoners.

12.39 Finally, information was received by the COI in relation to the prison which I should record – as it is consistent with other areas of the law enforcement system – concerning staff resources. The complement of officers is 74, comprised of 66 Prison Officers and eight Principal Prison Officers (Senior Managers). Numbers fluctuate (and vacancy numbers have in the recent past been higher); but, in December 2021, compared with budgeted figures, there were vacancies for one Deputy Superintendent, three Prison Officers and one Principal Prison Officer. The Superintendent has raised this with the Ministry of Health and Social Development: there have been delays in recruiting due to money not being readily available, and he has been told that in the meantime there is no money available for overtime. The difficulties are compounded by the fact that, of the six Principal Officers in post, two have been suspended for 30 months while being investigated for misconduct, and a further Principal Officer has recently been suspended pending investigation[63].

[59] See paragraph 12.130-12.132.
[60] Cap 166.
[61] BVI SI 1999 No 25.
[62] Unsurprisingly, as the prison was under the control of the RVIPF until 1997 and, under section 60 of the Constitution, authority over the police falls to the Governor. There does not appear to have been any change in the statutory scheme since the move of the prison to HMP Balsam Ghut. However, the prison is currently overseen by the Minister for Health and Social Development. I do not know (and the COI did not investigate) why the Minister is in practice in charge of HMP Balsam Ghut rather than the Governor, as prescribed in the Ordinance.
[63] Email Superintendent of HMP Balsam Ghut to COI dated 21 December 2021.

12.40 It is clear that there are significant issues arising in the Prison Service as to the conduct of prison officers, which fall within paragraph 1 of my Terms of Reference. However, in in the circumstances, given the COI's load in other areas and to avoid compromising the current independent review, whilst acknowledging those concerns, I have not generally pursued enquiries into them. The current review will report in due course. Again, on the basis that these matters are in hand – and I have confidence in the independent review which is being undertaken – it is unnecessary for me to make any specific recommendations in respect of them.

12.41 However, in my view, the future of the Prison Service should be considered as part of the wider review of law enforcement agencies that I propose. I deal with the possible scope of that review below[64].

Her Majesty's Customs[65]

HM Customs in Operation

12.42 Section 4(1) of the Customs Management and Duties Act 2010[66] provides for the appointment of a Commissioner for Customs ("the HMC Commissioner") and other customs officers as necessary for the administration of the Act. "Customs" is defined as "the department of Government responsible for the collection and security of the revenues of customs and control of all imports and exports to and from the Territory"[67], namely the Customs Department within the MoF (known as "HM Customs").

12.43 The HMC Commissioner is responsible for the administration and implementation of the Customs Act, subject to any policy direction of the Minister of Finance[68]. He or she is responsible for (i) the management, supervision and control of Customs; (ii) the collection and accounting of Customs revenue; (iii) the care of public and other property under Customs control and (iv) any other enactments relating to Customs matters[69]. The HMC Commissioner Wade Smith said that, in practice, his primary responsibilities are in respect of border security and ensuring HM Customs meets its annual revenue collection goals[70]. He described the purpose of HM Customs as "maximising the collection of revenue, protecting our Territorial borders and facilitating legitimate trade efficiently, effectively and economically in order to safeguard the well-being and security of the entire British Virgin Islands"[71]. He noted that, in relation to security issues, HM Customs liaises closely with the other law enforcement agencies in the BVI as well as international counterparts to prevent transnational crime and monitor cross-border movement of vessels, goods and people[72]. During the COVID-19 pandemic, HM Customs has been working with the RVIPF and the Immigration Department as part of the JTF established to secure the BVI's borders as well as safeguard internal security[73].

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[64] See paragraphs 12.130-12.132.
[65] The main evidence in relation to the HM Customs was given by the HMC Commissioner Wade Smith who both produced a Position Statement and gave oral evidence on various topics (T4 11 May 2021 pages 106-194, T17 23 June 2021 pages 148-180, T23 7 July 2021 pages 106-194 (with Assistant Customs Commissioner Ms Tashima Martin) and T38 22 September 2021 pages 4-144). His oral evidence in relation to process can mainly be found in T23 7 July 2021 and T38 22 September 2021.
[66] No 6 of 2010.
[67] Section 2.
[68] Section 4(2) read with section 2, which defines "Minister" as the Minister of Finance.
[69] Section 5(1). Under section 5(2), the responsibility of the HMC Commissioner under subsection (1) may be exercised by officers.
[70] HMC Commissioner Position Statement paragraph 3.2.
[71] HMC Commissioner Position Statement paragraph 1.3.
[72] HMC Commissioner Position Statement paragraph 3.2.
[73] T4 11 May 2021 pages 16-17. See also paragraphs 6.440-6.443 above.

12.44 The budget for HM Customs in 2021 was approximately $5.26 million, which provided for approximately 82 Customs Officers and a further 15-20 administrative staff[74]. There were, at the time the HMC Commissioner gave his evidence, approximately 18 vacancies which (in the HMC Commissioner's view) were due to a combination of factors, including employees' relocation after the 2017 hurricanes, retirement and disciplinary leave. He has asked for an increase to the staff complement of an additional 10-15 officers annually over the next three years due to growing demands in relation to the increase in imports, and the opening of further stations as well as the implementation of the Caribbean Distribution Centre[75]. HM Customs continues to be challenged in achieving its strategic objectives and in relation to succession planning due to vacancies within the Department[76].

12.45 In terms of vetting, a police record must be produced by an applicant prior to joining HM Customs; but, thereafter, there is no substantial further vetting of any kind[77].

12.46 Training is given to new Customs Officers, conducted online as well as in person by specialist trainers from the Caribbean Customs Law Enforcement Council; and training is also delivered by the Caribbean Regional Technical Assistance Centre ("CARTAC"). HM Customs also has its own in-house trainers certified by CARTAC[78].

12.47 HM Customs consists of 12 units, covering nine ports and 10 stations[79]. Two units are of particular note.

12.48 The Enforcement Unit is responsible for enforcing customs provisions, and liaising with domestic, regional and international counterparts. It gives guidance to other units, notably the operational units; and liaises with the DPP, the RVIPF, the FIA, the Immigration Department, the Attorney General, the Airports Authority, the Ports Authority, the Shipping Registry, Conservation and Fisheries, and private stakeholders such as charter companies, shipping companies and courier services. It also deals with both internal and external investigations. Depending on the nature of the conduct being investigated, the matter may be investigated by the Enforcement Unit alone or with the assistance of the RVIPF, Airports Authority, the Ports Authority and/or private stakeholders (who may have relevant information), before the file is passed to the DPP for consideration and a charging decision[80].

12.49 The Assurance Unit encompasses both the Internal Audit Unit ("the Customs IAU") (a discrete unit within HM Customs, distinct from the central IAD) and the Customs Automated Process Systems ("CAPS") Unit.

12.50 As its name suggests, the Customs IAU monitors the effectiveness of HM Customs. Where allegations of corruption, fraud or irregularities are made, the IAU is able to conduct a review and, if necessary, assemble a post-audit team to investigate[81]. When the HMC Commissioner first receives a complaint, he decides whether the matter should go to the Customs IAU (which presents its findings to the Enforcement Unit) or whether it should be referred straight to the Enforcement Unit[82]. If evidence of corruption, misconduct, fraud or irregularities or other

[74] T17 23 June 2021 page 152.
[75] T17 23 June 2021 pages 153-154.
[76] HMC Commissioner Position Statement paragraph 6.1.
[77] T17 23 June 2021 page 176. Nor it seems is any guidance given to those officers who take on a senior position within HM Customs as to declaring an interest which might affect their ability to take on the role (T7 20 May 2021 pages 84-86, per Deputy HMC Commissioner Gregory Romney and Acting HMC Deputy Commissioner 2018-2020 Leslie Lettsome).
[78] T17 23 June 2021 pages 166-167.
[79] HMC Commissioner Position Statement paragraph 1.5.
[80] T17 23 June 2021 pages 155-156.
[81] HMC Commissioner Position Statement paragraph 2.1.
[82] T17 23 June 2021 pages 163 and 169.

serious dishonesty is uncovered, the matter should be referred to the Financial Secretary[83] and then on to the Human Resources Department; and, depending on the nature of the evidence discovered, then to the RVIPF, the FIA, the DPP and/or the Attorney General to act on as appropriate in the circumstances[84]. In recent years, although very few, there have been referrals to the Financial Secretary arising from investigated allegations of corruption, fraud or irregularities by Customs Officers; and, although not recently, in the past there have been instances where officers have been removed from HM Customs and disciplined or imprisoned[85].

12.51 The role of the CAPS Unit is to ensure compliance with relevant Customs provisions and the effectiveness of revenue collection by improving financial management and establishing/ maintaining sound accounting procedures and reporting structures[86]. It is involved in the automation of Customs Declarations, including all imports, exports and bonded goods processes, with a view to simplifying those processes and freeing up Customs Officers from doing clerical work to more operational work, such as inspection of goods. The unit is staffed by IT professionals who monitor and develop the system, provide network support and maintain the IT equipment in collaboration with the Department of Information Technology[87].

12.52 Processes and systems (such as Regional Clearance Systems, and Overseas Territory Regional Central Intelligence Systems) have been put in place, with a view to discouraging and detecting instances of corruption or other dishonesty in HM Customs. Training has been instigated. Vitally, in the view of the HMC Commissioner, Customs Officers are rotated across ports of entry and units[88]; but there are also whistleblowing procedures in place (for both other officers and the public) and investigative revenue and compliance audits of all stations and teams.

12.53 Customs Officers have a statutory obligation to declare conflicts of interest[89]. In practice, on applying, Customs Officers are required to disclose interests by way of a "private interests form" which is considered within HM Customs. If there are any concerns as regards conflict, these will be noted and the form sent to the Human Resources Department for approval[90]. There are no subsequent checks. A Code of Conduct for Customs Officers is being developed, and is due shortly to be sent to the Attorney General's Office prior to its finalisation and circulation to Customs Officers[91].

12.54 The HMC Commissioner accepted that there are a number of internal challenges to detecting and investigating alleged corruption or other dishonesty within HM Customs, including the fact that the department has limited investigative and human resources, which means that it

[83] HMC Commissioner Position Statement paragraph 3.3 states that "any allegation of misconduct, abuse of office, corruption or other serious dishonesty made against a Customs Officer, it will be my responsibility in accordance with the General Orders 3.6 and 3.7, Service Commissions Act, 2011, Service Commission Regulations 2014 and devolution regulations, 2008, to forward to the Department of Human Resources through the parent Ministry (Finance) headed by the Financial Secretary for further action".
[84] HMC Commissioner Position Statement paragraph 2.1.
[85] However, the HMC Commissioner said that, at the time he gave evidence, HM Customs investigations were proceeding against three Customs Officers (T17 23 June 2021 page 164).
[86] HMC Commissioner Position Statement paragraph 1.5.9.
[87] HMC Commissioner Position Statement paragraph 1.5.9(b); and T17 23 June 2021 page 160.
[88] The HMC Commissioner described the rotation of customs officers as "mission-critical", as it helped to prevent importers building relationships with Customs Officers. He said he had seen cases where, following a rotation, there has been a resulting surge in revenue (T17 23 June 2021 page 172).
[89] Under section 8 of the Customs Act, a Customs Officer who fails to disclose to the HMC Commissioner that he or she (a) owns, either in whole or in part, any vessel or aircraft engaged in trade; (b) acts on behalf of the owner of any vessel or aircraft engaged in trade; (c) imports or is concerned in the importation of any merchandise for sale, or (d) acts on behalf of an importer or an importer's agent in the preparation of an entry or any other document required under this Act in respect of the importation of goods; commits an offence and is liable on summary conviction to a fine not exceeding $10,000.
[90] T17 23 June 2021 pages 174-175.
[91] T17 23 June 2021 page 174.

has to rely on other agencies (such as the RVIPF, the FIA or the Attorney General Chambers), "who may not view Customs matters as priorities because those agencies have their own challenges/cases and/or may not be familiar with the Customs Act, system and other Laws"[92].

12.55 More broadly, the HMC Commissioner identified a number of weaknesses affecting HM Customs as he saw them, some mirroring concerns expressed in relation to other parts of the law enforcement system, including weaknesses in IT structure, budgetary restrictions which limit and delay the function of HM Customs, the absence of a locally-based training organisation with particular focus on Customs, and policies imposed by the MoF and the Human Resources Department[93] which restrict law enforcement[94]. By way of example of the latter, the policy on leave mandates that all government employees must take annual leave at a certain time. However, peak seasons for Customs in terms of revenue collection and enforcement are Easter, summer and Christmastime. This mandated leave policy results in a loss of enforcement capability during these periods.

12.56 In contrast to evidence given by the CoP, the HMC Commissioner did not consider that people were reluctant to provide information to HM Customs for fear of it being leaked and their identities revealed: in his experience, he said, members of the public shared information with HM Customs on a regular basis[95]. Nor did the HMC Commissioner have concerns about sharing information across law enforcement agencies: whilst HM Customs was in the habit of sharing information, he thought that that was not reciprocated by other law enforcement agencies.

12.57 Over recent years, whilst not involved in any comprehensive review, the Auditor General and the IAD have conducted several audits into specific aspects of the work of HM Customs. I shall focus on two, namely the reports on the Import Duty Partial Payment Plan, and CAPS and the Courier Trading Declaration Process

Import Duty Partial Payment Plan

12.58 The Customs Management and Duties Act 2010 requires duty to be paid on imports in accordance with a tariff. Generally, duty must be paid before the goods are released to the importer. However, where importers had had difficulty paying prior to the release of the goods, a piecemeal and unofficial practice was introduced whereby goods would be released on the basis of an agreement to pay instalments over a period of time, with provisions for the recovery of the goods in case of default.

12.59 The legal basis for allowing the release of goods without full payment of duty in these circumstances does not appear to have been considered at the time the scheme was set up and maintained. The Attorney General submitted to the COI[96] that there was however a legal basis for the scheme, namely sections 51 and/or 103 of the 2010 Act. Section 51 allows the HMC Commissioner to authorise the removal of goods without payment of duty. Section 103 allows him or her to "require a person to give security by bond or otherwise in the form and manner the Commissioner may direct, for the observance of any condition or restriction in connection with an assigned matter". The Attorney General submitted that the term "security by bond *or otherwise*" means that other forms of security of a similar nature to a bond; and, furthermore, the phrase "for the observance of any condition or restriction in connection with an assigned matter" should be read so as to refer to the conditions or restrictions that may

[92] HMC Commissioner Position Statement paragraph 6.1.
[93] This is part of the Deputy Governor's Office (T17 23 June page 162).
[94] HMC Commissioner Position Statement paragraph 7.2.
[95] T17 23 June 2021 pages 170-171.
[96] Attorney General's Submissions on the Legal Basis for the Partial Payment Programme dated 15 September 2021; and Attorney General's Further Submissions on the Legal Basis for the Partial Payment Programme dated 5 November 2021.

be imposed by the HMC Commissioner for the purposes of enforcing the bond obligation or security[97]. Whilst these provisions are not obviously applicable in these circumstances (e.g. in some cases it seems that there was in fact no effective security given, so section 103 would not apply in any event), it is unnecessary for me to determine whether the practice ever had a legal basis. It is unfortunate that it was introduced without consideration of whether it was lawful.

12.60 Leaving aside legality, in terms of governance, the Auditor General examined the scheme in 2015, by when the arrears due to the BVI Government under the plan were nearly $0.5 million[98]. The Auditor General found that some importers only paid the initial down payment to release the goods, and then refused to make any further payment, whilst other instalment payments were commenced but not completed. Enforcement steps were minimal: no legal action had been taken to recover any of the debts[99].

12.61 The IAD investigated and reported on the scheme in 2020[100]. It found that there were no policies or procedures in place to guide the administration of the system; there was insufficient due diligence or checks conducted when decisions about such requests were made; and there was an absence of appropriate controls in approving requests for duties to be paid via partial payment[101]. In addition, there was a lack of adequate monitoring and enforcement of partial payment agreements, which in some instances were not committed to writing or, where they did exist, were poorly drafted and executed[102].

12.62 In evidence to the COI, the IAD Director described decisions on partial payments being made on an arbitrary and "ad hoc case-by-case basis"[103]. To illustrate the absence of checks and balances in the system, she gave the example of an employee who had left the Government's employment in 2017, who had defaulted on significant outstanding balances for both vehicle and personal loans, and who was then approved for a partial payment in 2019, of which only the down payment was made[104].

12.63 In its 2020 report, the IAD concluded that the partial payment programme lacked appropriate and effective controls to ensure that revenues were being collected and remitted in a timely manner; and that there was no strict management structure or systems in place to ensure compliance of importers (some of whom were Customs Officers or other BVI Government employees). As a result, some customs duties had been in arrears for 14 years without action being taken to collect this debt[105]. The report concluded:

> "… the programme, as currently structured and managed, serves more of a social interest and detracts from the revenue collection mandate of the department. As a result, significant government revenue is at risk of being loss"[106].

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[97] Paragraphs 12 and 13 of the Attorney General's Submissions on the Legal Basis for the Partial Payment Programme dated 15 September 2021. See also evidence of the Commissioner for Customs T38 22 September 2021, pages 17-26.
[98] The Auditor General's Report, Office of the Auditor General Examination of HM Customs – Import Duty Partial Payment Plan dated 18 April 2015. At the date of the examination, the aggregate arrears (over 90 days past due date) were $486,125.
[99] Summarised in the Executive Summary to the Auditor General's Report page 3.
[100] The IAD Final Report, Her Majesty's Customs Partial Payment Programme and Courier Clearance Operations dated December 2020. In this section of the Report, I will refer to this report as "the IAD 2020 Report". The report comprised two parts: the part on the Import Duty Partial Payment Plan is dated 7 October 2019. At 1 June 2019, the aggregate arrears were recorded as $490.145.60 (page 2).
[101] IAD 2020 Report Facts and Findings paragraph 3; and T22 6 July 2021 page 128.
[102] IAD 2020 Report Facts and Findings paragraph 9; and T22 6 July 2021 page 131.
[103] T22 6 July 2021 page 129.
[104] T22 6 July 2021 page 129.
[105] IAD 2020 Report Facts and Findings paragraph 11; and T22 6 July 2021 pages 132-133. Most of this debt is no longer recoverable – the Attorney General had opined that over $265,000 was statute barred, and in some cases the individual in question had died.
[106] IAD 2020 Report Conclusion; and T22 6 July 2021 page 137.

12.64 Given the matters above, as well as the high default rate found by the investigation, and the "lack of discernible business or economic value", the IAD's primary recommendation was that the partial payment programme be discontinued[107]. In evidence to the COI, the IAD Director explained that this recommendation was made on the basis that the programme was dysfunctional: it was not working, the process was not being monitored and funds were not being collected[108].

12.65 In its Management Response, the HMC Commissioner accepted most of the criticisms made by the IAD; and, in particular, agreed that the scheme should be discontinued[109].

12.66 Any application not to pay the full duty, but rather to pay under this programme, is sent to and determined by the Financial Secretary (although the determination is sent out in the name of the HMC Commissioner). There are no published (or even known) criteria by which he does so[110]. There is no proper process, and no transparency. The HMC Commissioner (rightly) accepted that, as a consequence of this poor governance, the scheme posed a higher risk[111].

12.67 On 7 August 2020, the Financial Secretary sent the HMC Commissioner a memorandum headed: "General Moratorium on Partial Payments". Despite its heading, this did not impose a moratorium but, as a result of information disclosed through the IAD investigation, the Financial Secretary directed that further granting of partial payments, without specific instruction from his Office, should cease with immediate effect. He said:

> "Customs should only refer to my office, any person(s) requesting partial payment who they deem as a worthy risk. With respect to Civil Servants, they should only receive partial payment once they agree to a direct deduction from salary."

12.68 Therefore, despite the recommendation of the IAD Director that it should be discontinued (formally accepted by the HMC Commissioner), the plan continues in operation. Given that the Financial Secretary in any event had to approve partial payments in any particular case, the extent to which the new arrangements improved governance (or risk) is not entirely clear. In addition, the memorandum said that HM Customs should initiate efforts to collect as much of the outstanding revenues as possible using existing records[112]. The extent to which money will be irrecoverable is, again, not yet clear.

CAPS and Courier Trading Declaration Processing

12.69 An import trader declaration is a statement made by importers or their licensed customs broker agent to enable imported goods to be released from customs controls. A declaration provides information about the goods including details of the importer, how the goods are being transported, the tariff classification and customs value. In the past, significant amounts of imports have been made through courier services; and, as a result, HM Customs implemented a processing procedure involving trader declarations to facilitate these imports.

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[107] IAD 2020 Report Recommendations paragraph 1. Other recommendations were made on the basis that HM Customs chose not to cancel the programme.
[108] T22 6 July 2021 page 137.
[109] Management Response to IAD 2020 Report dated 14 December 2020.
[110] T38 22 September 2021 pages 34 and 42.
[111] T38 22 September 2021 pages 110ff.
[112] Memorandum Financial Secretary to HMC Commissioner dated 31 August 2020 (Appendix M of the HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021); see also T38 22 September 2021 page 29.

12.70 In 2016, HM Customs introduced CAPS, which allowed for the completion and submission of all trader declarations electronically to HM Customs for processing. The purpose of CAPS was to collect accurate data and expedite the customs process. All couriers are required to use CAPS to submit their declaration.

12.71 In 2020, the IAD investigated and reported on the CAPS scheme in the context of courier transaction[113], and found a number of significant deficiencies and internal control weaknesses in the process. These deficiencies[114] included:

(i) standing deposits limits on courier accounts without the support of any agreement or bonding mechanism;

(ii) the failure to monitor these accounts;

(iii) items improperly classified on declarations, and as a consequence incorrect tariff rates being applied;

(iv) proper multi-record declarations not being made;

(v) significant differences between duties reflected in CAPS compared with the duties actually collected via the JD Edwards Receipting System[115];

(vi) no evidence that a reconciliation process was being carried out to ensure that all deposit declarations are cleared;[116] and

(vii) low level compliance (with 15-day requirement) to clear the deposit declaration[117].

12.72 In her evidence to the COI, the IAD Director confirmed that the audit found that the CAPS programme was not being used as intended and, in particular, information was not being updated or recorded accurately, with the consequence that the system was not reliable[118] and that there was a risk that government revenue was not being collected[119].

12.73 The IAD Report concluded that HM Customs did not have an adequate system of internal controls in place for the administration of its operations in relation to courier clearance procedures, and that there are no clear, established guidelines for either Customs Officers or courier operators. In particular, the report concluded that HM Customs:

> "… have allowed courier operators to dictate the manner in which HM Customs processes are carried out and have become de facto customs officers servicing their business interests. We found the entire process to be starved of adequate resources, particularly at the Beef Island station where the bulk of courier imports are processed, to effectively execute the clearance and monitoring function for this area. Overall, the facilitation of courier operations within HM Customs requires significant reform in order to be a value added service to the Government. Finally, based on the significant number of issues highlighted in this

[113] This formed the first part of the IAD 2020 Report.
[114] Set out with recommendation in paragraphs 1-8 of the CAPS section of the IAD 2020 Report.
[115] The audit found that approximately 90% of the trade declarations in CAPS were not updated with the payment receipt numbers showing that the trade declaration was in fact cleared. See also T23 7 July 2021 page 7.
[116] The absence of such a reconciliation process presents a significant risk that not all Government revenues are being collected and accounted for.
[117] The IAD Director took the view that the low level of compliance was a consequence of the way the system was being used by HM Customs (T23 7 July 2021 pages 11).
[118] T23 7 July 2021 pages 12 and 13.
[119] T22 6 July 2021 page 15; and T23 7 July 2021 pages 6-8.

report and their possible pervasiveness within the operations of Her Majesty's Customs, we find that other areas of the Department must be evaluated on an ongoing basis"[120].

12.74 Specifically in relation to courier services, the IAD found deficiencies, including:

(i) some couriers were allowed to operate under the standing deposit scheme;

(ii) the absence of established and documented guidelines for the processing of declarations;

(iii) the acceptance and approval by customs officers, without verification, of deposit declarations;

(iv) the absence of adequate monitoring of standing deposit accounts;

(v) the use of deposit declarations to circumvent the requirement for proper classification of imports;

(vi) the significant understatement of freight charges on deposit declarations;

(vii) the reduced efforts to prevent and intercept restricted and prohibited goods as a result of the burden in processing courier imports;

(viii) the inadequate review of declarations for couriers; inadequate systems in place to manage paperwork;

(ix) the general lack of understanding of the requirements for processing courier entries in CAPS, and/or the unwillingness by customs officers to adapt to changes in service delivery;

(x) the poor use of and under use of CAPS; and

(xi) enforcement action is seldom taken against couriers for noncompliance. Both in the report and in the IAD's evidence to the COI, it was said that the lack of enforcement action could encourage intentional breaching of protocols by couriers or at least complacency in respect of fulfilling their obligations. The IAD Director considered this was a significant problem[121].

12.75 In relation to the absence of established and documented guidelines for the processing of declarations, the IAD 2020 Report identified two significant risks.

12.76 First, there was the risk of inappropriate relationships being fostered between importers and Customs Officers, whereby officers could offer preferential treatment to importers in the processing of their declaration which may include the offer of gifts and/or payments. In her evidence to the COI, the IAD Director said that the audit had not identified any specific evidence of inappropriate relationships; but she was of the view that the environment was ripe for this type of conduct[122].

12.77 Second, the report noted that there was evidence that a number of Customs Officers appear to provide brokerage services, whether legitimately or illegitimately, to supplement their income. In her evidence to the COI, the IAD Director confirmed that the audit did establish that there were officers providing brokerage services in HM Customs and that there was evidence to suggest that whilst these officers had approved trade licences, they had not informed HM Customs of their activity, creating a conflict of interest[123]. This posed a

[120] IAD 2020 Report Conclusion.
[121] T22 6 July 2021 page 163.
[122] T22 6 July 2021 page 147.
[123] T22 6 July 2021 page 149.

significant conflict of interest, in that officers may be reviewing and releasing or influencing the processing of declarations, in respect of which they are directly involved. The report observes that:

> "Absent of appropriate controls to monitor, manage and minimize this conflict, the current process is ripe for fraud"[124].

12.78 In his evidence to the COI, the HMC Commissioner Wade Smith responded to these reports[125]. Broadly, whilst he accepted that governance could be improved, he denied that there was anything fundamentally wrong with the workings of HM Customs. His evidence in relation to particular issues was as follows.

(i) He said that HM Customs had always maintained comprehensive and accurate records of all duties which are payable on imported goods, even where deferment of payment had been granted[126].

(ii) Whilst he accepted that import duties were not always fully collected, he did not agree that this presented a significant risk to the public purse, as the figure owed was merely $450,000 in the context of $500 million dollars collected in duty over the past 21 years[127].

(iii) HM Customs had been consistently taking strides to ensure that the outstanding duties are, or can be, recovered[128].

(iv) He drew the COI's attention to the Trusted Trader Programme which allows the release of imported goods on bond to "trusted traders", meaning reputable importers in the BVI with a high compliance record[129]. He said that this programme was not specifically for couriers but all traders, and he accepted that there were no existing written policies or criteria in place (although he said these were being worked on and existed in draft form)[130]. He was unaware of any duties going entirely unpaid under the programme[131].

(v) He accepted that, in relation to CAPS, there were challenges experienced in the administration of the system which was adversely affected by the 2007 hurricanes until the accounts were brought up-to-date in 2021. HM Customs had to resort to manual processes, which posed challenges, and he accepted that there were instances where bonds were exceeded[132].

(vi) He did not accept that the partial payment programme risked inappropriate relationships developing between Customs Officers and traders. He was of the view that disciplinary proceedings and criminal sanction were deterrents against this happening and also drew attention to the fact that internal audits were carried out, Customs Officers were rotated, staff were supervised and internal investigations could be carried out by HM Customs Enforcement Unit. He considered that "generalisations" ran the risk of tainting innocent officers and the organisation as a whole[133].

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[124] IAD 2020 Report Recommendation 1.
[125] HMC Commissioner Position Statement, HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021, T22 6 July 2021 and T38 22 September 2021.
[126] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 1.3a.
[127] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 1.b; and T38 22 September 2021 page 64.
[128] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 1.3c.
[129] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.1b. According to the HMC Commissioner, this was also known as the Authorized Economic Operators Programme (T38 22 September 2021 pages 96-98).
[130] T38 22 September 2021 ages 98-99.
[131] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.1j.
[132] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.1i. and T38 22 September 2021 pages 101-102 and 107.
[133] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.2f; and T38 22 September 2021 pages 111, 127 and 132-133.

(vii) In respect of the allegation that a number of Customs Officers were providing brokerage services, whether legitimately or illegitimately, to supplement income thereby causing a conflict of interest, he observed that there was no hard evidence of this and no actual or potential breaches had been identified. He was of the view that HM Customs had built-in mechanisms which safeguard against any one individual from having significant influence over the process[134]. HM Customs had faced challenges in the immediate aftermath of the hurricanes, but he said that this has long since been rectified[135].

Concerns[136]

12.79 A number of individuals have expressed serious concerns about the operation of HM Customs. However, these concerns were either in the form of assertions without any overt evidential foundation, or were expressed on a confidential basis which prevented any criticisms being aired. The COI had neither the time nor the forensic resources to conduct an in-depth investigation of the practices within HM Customs. Consequently, I am not in a position to say whether or not there is conduct within HM Customs that falls into paragraph 1 of my Terms of Reference.

12.80 However, although the HMC Commissioner Wade Smith was less willing to accept the wrongdoing in the ranks of Customs Officers to the extent that the CoP accepts it in the ranks of the RVIPF – and did not accept that there was anything fundamentally wrong with the working of HM Customs – I consider it is equally worrying. I do not share Mr Wade Smith's sunny view of the current position. Many of the factors bearing upon fundamental aspects of the system, which have contributed to the level of corruption in the police force, are similarly present in HM Customs, e.g. vetting standards are no better and possibly even lower, professional standards are not subject to any substantive regime, there is no Code of Conduct, there is very limited process for reporting and disclosing interests which might conflict with the role of a law enforcement officer, and there appears to be insufficient funding and staffing levels. The auditors' reports to which I have referred suggest that there are significant deficits in the standards of governance within HM Customs. That means, at the very least, that one cannot have confidence in the proposition that all is well within it. Furthermore, unlike the RVIPF, it is the function of HM Customs to collect government money. Without proper governance, one cannot have confidence that the collection and onward delivery of such funds is not abused. Currently, any investigation of suspected wrongdoing is likely to be internal.

12.81 In all of the circumstances, there does not appear to be any reason why the level of dishonesty and other wrongdoing in HM Customs would be any less than that in the RVIPF.

12.82 I therefore firmly consider that the root-and-branch review of the law enforcement agencies to which I have referred should cover HM Customs, as well at the RVIPF and other law enforcement agencies. Furthermore, steps that are currently being taken within the RVIPF with regard to corruption should, in my view, be extended to HM Customs. I deal with appropriate recommendations below[137].

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[134] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.3b and 3.3c.
[135] HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021 paragraph 3.3d.
[136] The concerns and potential criticisms in relation to HM Customs arising from the evidence before the COI were put to HMC Commissioner Wade Smith in COI Warning Letter No 1 dated 6 September 2021, to which he responded in writing (HMC Commissioner Response to COI Warning Letter No 1 dated 13 September 2021) and orally (T38 22 September 2021 pages 4-144). The warning letter identified the evidence giving rise to the concerns and potential criticisms. The criticisms of the HMC Commissioner in respect of HM Customs in this Report are restricted to those in respect of which he had a full opportunity to respond, as described.
[137] See paragraphs 12.130-12.132 below.

Immigration[138]

Introduction

12.83 Immigration status and processes are governed by the Immigration and Passport Act 1977 as amended ("the 1977 Act")[139], and the Immigration and Passport Regulations 2014 ("the Immigration Regulations")[140].

12.84 Section 11 of the 1977 Act establishes an Immigration Department (which sits within the MNRLI), consisting of a Chief Immigration Officer ("the CIO"), a Deputy Chief Immigration Officer and other Immigration Officers, as appointed by the Governor. Section 13 establishes a Board of Immigration ("the Immigration Board") which has no executive or administrative functions, but is able to give advice on immigration matters, including general policy and individual cases, either on request (of the CIO or Minister) or of its own motion[141]. The CIO is under no obligation to follow the advice, and is entitled to rely upon his or her own discretion. There are regular meetings with the Immigration Board at which the CIO is expected to give a presentation on pertinent matters[142].

12.85 The current CIO is Ian Penn. Under the 1977 Act, he is responsible for the administration and discipline of the Immigration Department[143]. In practice, his duties are to maintain the security of the BVI's borders to ensure that undesirable persons or persons whose presence in the BVI is not conducive to the public good are denied leave to enter or remain; ensure the smooth and efficient running of the Immigration Department (including training); and provide advice and guidance to the Government on the review of national immigration policy and legislation[144]. He confirmed that, during the COVID-19 pandemic, he has been a member of the Joint Task Force to secure the BVI's borders[145]. In terms of performance indicators, he said annual reports are produced which draw together the relevant information; and he felt that the JTF was currently operating very well[146].

12.86 The Immigration Department's 2021 budget was $2,899,000[147]. There are currently 57 Immigration Officers and six administrative support staff[148]. The CIO explained that the reason for being understaffed is down to budgetary constraints[149]. Limited staffing is one of the main

[138] The main evidence in relation to the immigration system (including the process for making residency and belongership applications) was given by the CIO Ian Penn, who both produced a Position Statement and gave oral evidence on various topics (T5 13 May 2021 pages 104-156, T17 23 June 2021 pages 124-136, T41 28 September 2021 pages 3-145 (with Acting Permanent Secretary MNRLI Joseph Abbott Smith) and T49 15 October 2021 pages 3-42). His oral evidence in relation to process can mainly be found in T23 7 July 2021 and T41 15 October 2021. The process for residence and belongership applications is also considered, in detail, in Chapter 10 of the Report: Residence and Belongership Status.

[139] The Immigration and Passport Ordinance 1977 (No 9 of 1977) as amended by the Immigration and Passport (Amendment) Act 1990 (No 11 of 1990), the Immigration and Passport (Amendment) Act 2000 (No 12 of 2000), the Immigration and Passport (Amendment) Act 2003 (No No8 of 2003) and the Immigration and Passport (Amendment) Act 2006 (No 11 of 2006). A consolidated version was prepared in 2013 taking in amendments to that date; but, unless otherwise appears, none of the later amendments are relevant to the issues raised in this Report.

[140] BVI SI 2014 No 1.

[141] Section 14 of the 1977 Act; and T17 23 June 2021 page 127 (CIO). No one sitting on the Immigration Board is required to have any specialist expertise in immigration matters (T17 23 June 2021 page 127 (CIO)).

[142] T17 23 June 2021 page 128 (CIO).

[143] Section 12 of the 1977 Act; and T5 13 May 2021 pages 110-111 (CIO).

[144] CIO Position Statement paragraph 3.

[145] T5 13 May 2021 page 113.

[146] T17 23 June 2021 page 145.

[147] T17 23 June 2021 page 137.

[148] T17 23 June 2021 page 135.

[149] T17 23 June 2021 page 135.

weaknesses in the system[150]. He considers that the level of pay is a factor that may act as an inhibitor for recruiting staff, but not significantly as regards retention of staff[151]. However, he confirmed that some staff do have second jobs; although he ensures that individuals complete annual private interest forms which are submitted to the MNRLI for checking to capture any changes. He said that it is a matter for the Human Resources Department to determine whether an employee is permitted to hold a second job[152].

12.87 In relation to the vetting of staff, the position appears to be the same as in HM Customs: applicants for jobs submit a police report which is checked but, thereafter, no further checks are carried out[153].

12.88 Immigration processes are considered elsewhere in this report[154]. A new Border Management and eVisa System is being introduced, which will permit tracking of individuals travelling to and from the BVI; allow for better data management; and provide advance passenger information for those travelling to the BVI. This is expected to be fully operational by the first quarter of 2022[155].

12.89 In terms of oversights and checks, the Immigration Board plays a role in monitoring the Department. Further, it is open to Members of the House of Assembly at any time to question any policy, process and procedure that is being undertaken by the Immigration Department; and, every year, the CIO is required to attend the House of Assembly Standing Committee (which comprises all House of Assembly Members) to speak to his budget submission, which provides an opportunity to the Members to raise issues about (e.g.) operational matters[156].

12.90 The CIO considered that structure of the Immigration Department assists in the identification of dishonesty. He said:

> "The structure of the Department is set so that all officers report to a supervisor who then reports up the chain to a Unit Head/manager, thereafter following the chain upward to the Deputy Chief Immigration Officer and then the Chief Immigration Officer. These layers allow for checks and balances to take place at each level, thus resulting in the detection and investigation of any suspected wrongdoing"[157].

The layers of the chain of command means that, even if a supervisor were to be of the view that there is nothing to investigate, this would be checked by the Unit Head[158].

12.91 The CIO said that suspected corruption or other forms of dishonesty within the Immigration Department would be the subject of an internal investigation which, in line with General Orders for the Public Service, would be reported to the Ministry through the Human Resources Department for consideration by the PSC[159]. In the last three years, the CIO

[150] T17 23 June 2021 pages 134-135. He considered technological limitations to be the other main weakness.
[151] T17 23 June 2021 page 138.
[152] T17 23 June 2021 page 139.
[153] T5 13 May 2021 pages 149-150; and T17 23 June 2021 page 140.
[154] See Chapter 10: Residence and Belongership Status.
[155] CIO Position Statement paragraph 6.
[156] T17 23 June 2021 pages 125-126.
[157] CIO Position Statement paragraph 5.
[158] T17 23 June 2021 pages 133-134.
[159] T17 23 June 2021 page 130.

recollected probably two such investigations, which ultimately found no incriminating evidence and no further action was taken[160]. He explained that, if he took the view that an external investigation was required, he would ask the CoP for assistance[161].

Concerns

12.92 Again, although the CIO Ian Penn considered that the internal chain of command within the Immigration Department made dishonesty less likely and (like the HMC Commissioner in respect of HM Customs) was less willing to accept wrongdoing in his own ranks than the CoP had been, I consider it is still a concern. As with HM Customs, many of the factors bearing upon fundamental aspects of the system, which have contributed to the level of corruption in the police force, are similarly present in the Immigration Department, e.g. issues concerning (e.g.) vetting, professional standards, disclosure of interests, lack of a Code of Conduct, any investigation into wrongdoing likely to be internal, and staffing levels appear similar to those found in HM Customs; although the subject matter of immigration perhaps makes the environment less conducive to dishonesty than in HM Customs. However, again, there does not appear to be any compelling reason why the level of dishonesty and other wrongdoing in the Immigration Department should be any less than that in the RVIPF.

12.93 I therefore consider that the root-and-branch review of the law enforcement agencies to which I have referred should also cover the Immigration Department. I make an appropriate recommendation below[162].

Financial Services Commission and Financial Investigation Agency

12.94 The FSC is an autonomous regulatory body, established by the Financial Services Commission Act 2001, as the regulatory authority responsible for the regulation, supervision and inspection of all financial services in and from within the BVI. As well as being responsible for registering companies, limited partnerships and intellectual property, it consequently regulates all financial services including insurance, banking, fiduciary services, trustee business, company management, investment business and insolvency services. Its role includes monitoring and policing regulated activity and reducing financial crime[163]. The FSC is a statutory board which comes under the portfolio of the Ministry of Finance. As part of its role, it will collect fees on behalf of the BVI Government, a percentage of which is retained to resource the FSC[164].

12.95 The FSC was responsible for promoting and drafting the Proceeds of Criminal Activity (Amendment) Act 2021[165], which increased the powers for the investigation of financial crime, made the FSC the reporting agency for money-laundering and terrorist-related activity, and established the National Anti-Money Laundering and Terrorist Financing Coordinating Council (chaired by the Premier, and including the Governor and Deputy Governor) to coordinate policy and activity in those areas, including compliance with international standards.

[160] T17 23 June 2021 page 131.
[161] T17 23 June 2021 page 132.
[162] See paragraphs 12.130-12.132 and 12.137 below.
[163] Robin Gaul Position Statement paragraphs 5, 13, and 20A (7).
[164] Chapter 7, Table 10; and Robin Gaul Position Statement paragraph 13.
[165] No 25 of 2021.

12.96 The COI received a detailed position statement from Robin Gaul, the Chairman of the FSC. In light of its content, there was no need to call for oral evidence on the activities of the FSC.

12.97 The Financial Investigation Agency ("the FIA") was established by the Financial Investigation Agency Act 2003, to investigate financial offences or the proceeds of finance offences, and to deal with requests from foreign jurisdictions concerning such offences[166]. It has a Board chaired by the Deputy Governor, with the Attorney General, the Financial Secretary, the CoP, HMC Commissioner, the Managing Director of the FSC and the Director of the Agency as its other members. In a position statement provided to the COI, the Director of the FIA, Errol George, identified the need to improve cooperation between domestic law enforcement agencies and inadequate funding as two challenges. As to the latter, he said that most law enforcement agencies in the BVI are underfunded.

12.98 I did not consider it necessary to call for any oral evidence in relation to the FIA.

The Laws of the BVI

12.99 There is a common view that the laws of the BVI need both review and publication. As the Attorney General said[167], the laws should be clear and accessible.

12.100 The last comprehensive revision of the laws was in 1990, and since then there have been a myriad of new measures in the form of statutes, statutory instruments, Orders in Council and other instruments. As the COI has discovered during the course of its work, many are not readily available. To add to the confusion, unofficial consolidations of statutes can be found online.

12.101 To that end, on 21 April 2021, Cabinet approved the launch of the Accessibility of Law Project with the aim of (i) creating a process for the immediate revision and publication of amended legislation as amendments are made, and (ii) establishing an open, user-friendly, searchable online platform with access to all laws of the BVI.

12.102 In the meantime:

(i) The Attorney General's Chambers, in collaboration with the FSC and the Regional Law Revision Centre in Anguilla, have produced an interim revision of the BVI financial services legislation to 1 January 2020.

(ii) A review of the Police Act 1986[168] began in 2018, and a new Police Bill is currently out for consultation after its first reading in the House of Assembly. I deal with this below[169].

12.103 Whilst I understand the potential enormity of the project, building on the Accessibility of Law Project, I consider steps should be taken to revise, consolidate and publish in accessible form the laws of the BVI. Those steps should include the identification of areas of law which should be prioritised for revision.

[166] Errol George Position Statement pages 4-5; and see paragraph 1.98(iii) above.
[167] Attorney General Position Statement paragraph 27.
[168] Police Act 1986 (Cap 165) (No 12 of 1986) as amended by the Police (Amendment) Act 2001 (No 11 of 2011), the Police (Amendment) Act 2013 (No 1 of 2013) and the Police (Amendment) Act 2018 (No 14 of 2018).
[169] See paragraphs 12.120-12.123 below.

The Justice System

Introduction

12.104 The BVI falls within the jurisdiction of the East Caribbean Supreme Court, the Chief Justice of which is appointed by HM The Queen and the other judges by the Judicial and Legal Services Commission[170], all after open competition. The Governor appoints magistrates, on the advice of the Commission[171].

12.105 In such a small jurisdiction, local pressure on judges is, to an extent, inevitable – and it appears more severe in the BVI than it should properly be, with a lack of understanding outside the judiciary of the role of the judges within the Constitution – but, generally, there does not appear to be any particular concern about the independence of the judiciary. Judicial independence is in practice assisted by the fact that several senior judges do not reside in the BVI.

The Criminal Justice System

12.106 The main evidence before the COI concerning the criminal justice system was from the Director of Public Prosecutions Mrs Tiffany R Scatliffe Esprit LLM ("the DPP"), who both produced written evidence[172] and gave oral evidence[173].

12.107 Within the BVI the following bodies are responsible for the administration of criminal justice:

(i) the DPP[174];

(ii) the Magistrates' Court, which hears first appearances, bail hearings, committal proceedings and summary matters; and

(iii) the Eastern Caribbean Supreme Court, where High Court and Court of Appeal matters are heard.

12.108 The DPP said that, in her view, her office needed to be restructured[175], preferably as part of a wider restructuring, with all law enforcement agencies (including her own office), the prison and the courts being brought under one umbrella, akin to a Ministry of Justice, which directly falls under the Governor given his responsibility under the Constitution for internal security. She considered that this would more likely lead to sufficient funding and access to appropriate expertise being provided, and (she considered) would likely prevent actual or apparent political influence being exerted. It would also assist in relation to the provision of training and achieving a more consistent level of training across different agencies (e.g. the RVIPF and Customs Officers)[176]. This restructuring would also prevent issues in relation to information

[170] The Judicial and Legal Services Commission is established under section 94 of the Constitution, and is comprised of the Chief Justice, another judge nominated by the Chief Justice, the Chairman of the Public Service Commission and two other members (one of whom must be a legal practitioner) nominated by the Premier and Leader of the Opposition, respectively.
[171] Section 95 of the Constitution.
[172] DPP Position Statement.
[173] T17 23 June 2021 pages 60-123.
[174] The role and powers of the DPP are dealt with above (see paragraphs 1.91-1.94).
[175] T17 23 June 2021 page 70.
[176] T17 23 June 2021 page 107.

sharing across law enforcement agencies and bodies, about which the DPP shared the CoP's concerns[177]. In her view, it was a problem resulting from an inadequate appreciation of the importance of confidentiality[178].

12.109 The DPP acknowledged strengths within the criminal justice system – such as the cooperation between her office and the courts, the system in place between the DPP and law enforcement agencies to ensure advice is received during the investigative phase, and the enshrinement of due process and the right to a fair trial in the Constitution – but she had several serious concerns about the system.

12.110 The allocated budget for the DPP in 2021 was approximately $1.569 million[179].

12.111 In terms of legal staffing, the DPP said that there was no proper appreciation and respect for the work of the Office of the DPP in government, and that her office was not properly funded[180]. She described her office as being "grossly understaffed and under-resourced"[181]. She said that, to permit all offences to be prosecuted, there ideally needed to be 25 lawyers within her office[182]. In fact, in addition to the DPP herself, her office has one Principal Crown Counsel, four senior Crown Counsel, one senior Financial Crown Counsel, six Crown Counsel and one paralegal. There were, at the time she gave her evidence, four open positions for Senior Crown Counsel[183]. Positions remaining vacant for some time was not unusual. She observed that salary rates for Crown Prosecutors were "poor", and were not competitive with Crown Counsel rates in other jurisdictions (or, of course, rates in the private sector in the BVI). This is problematic in relation to recruitment[184].

12.112 Similarly, the DPP said that the Magistrate's Court and the Eastern Caribbean Supreme Court are "grossly understaffed and under-resourced", and there are insufficient court room facilities"[185]; and that there had not been sufficient resources and attention given to assist either the DPP or the courts to eliminate the backlog of cases caused by the 2017 hurricanes and the COVID-19 pandemic[186]. She described her efforts to clear the backlog, which included considering plea bargaining in appropriate cases and reviewing cases for discontinuance which are more than three years old to see whether they were still viable, e.g. whether the victim still supports the prosecution, witnesses are still available or whether the accused is still within the jurisdiction[187]. She suggested that it would help with the backlog to fill all vacant posts in the High Court Registry, the Magistrates' Court, and her office – and then to provide an additional court room at the Magistrates' Court and, eventually (and subject to the approval of the Chief Justice), a second criminal court at the High Court[188].

12.113 In addition, the DPP said:

[177] T17 23 June 2021 page 105.
[178] In the DPP's view, where a breach of confidentiality put a potential witness, fellow officer or operation in jeopardy, the officer in breach should be penalised: without such a sanction, she considers that the issue will not go away (T17 23 June 2021 page 104).
[179] T17 23 June 2021 page 80.
[180] T17 23 June 2021 page 80.
[181] DPP Position Statement paragraph 4(a).
[182] T17 23 June 2021 page 66.
[183] T17 23 June 2021 page 71.
[184] T17 23 June 2021 pages 74-75.
[185] DPP Position Statement paragraph 4(a) and (d). The Chief Justice was invited to give evidence as to how the Supreme Court is faring, but declined to do so. I assume that she had no particular concerns to raise.
[186] DPP Position Statement paragraph 4(b).
[187] T17 23 June 2021 page 100.
[188] DPP Position Statement paragraph 5(d).

(i) there is an urgent need for training, not only of the staff in her office but for all law enforcement agencies, specifically in relation to confiscation, forfeiture, seizure of assets, covert evidence and updating of knowledge[189]; and

(ii) security is unacceptable, both for her staff ("Prosecution is an extremely dangerous job, and I do not think people realise that"[190]), and for judges and magistrates[191].

12.114 The criminal justice system therefore suffers from similar functional problems as many other areas of government, e.g. structural problems, inadequate funding and staff, and inadequate training funding and facilities. If law enforcement is to be effective in the BVI, these issues need to be addressed.

12.115 Given the need to consider the system holistically, in my view there should be a review of the law enforcement agencies, including not only what might be termed the "front-line agencies" (i.e. the RVIPF, HM Customs and the Immigration Department), but also the DPP's Office and, possibly, the courts. I deal with the possible form of this review below.

Criminal Law and Procedure

12.116 There is a generally held view that the criminal law and criminal procedure in the BVI are substantially outdated, and in need of review.

12.117 The DPP described the current Criminal Code[192] and other criminal legislation as outdated and requiring review and change to ensure that they are in line with current developments. By way of example, she referred to the way in which it deals with sexual offences: the definition of "rape" is limited to vaginal rape, with the result that anal rape has to be charged as the offence of buggery under the Offence Against the Person Act 1861[193]. In relation to the Criminal Justice Alternative Sentencing Act 2005 (which, in appropriate cases, introduced and encouraged sentences other than prison), the DPP considered this has not been properly funded, and that there was insufficient machinery to give effect to the Act. For example, she understood that there was only one parole officer in the SDD[194]. The DPP said that her office was frequently not consulted about new criminal legislation or it "finds out, like with the rest of the members of the public, we're not told, and we're the ones that have to go out there and defend this legislation"[195].

12.118 She agreed that it was often difficult to access criminal legislation; and welcomed the suggestion made by the Attorney General to the COI to have a consolidation of the laws of the BVI in order to make them more accessible and to do so electronically in order that members of the public may be able to access them[196].

12.119 Turning to procedure, unexplained wealth orders (i.e. freezing and other orders made on the basis of the object of the order ("the respondent") has wealth that is unexplained and there are reasonable grounds for suspecting that that person is involved in (usually, serious) crime) are not available in the BVI. However, in 2019, the Governor requested the Attorney General to draft appropriate legislation, and the Proceeds of Criminal Conduct (Amendment) (No 2) Bill resulted. This would make provision for unexplained wealth orders by inserting new sections

[189] T17 23 June 2021 page 89.
[190] T17 23 June 2021 pages 75-76.
[191] DPP Position Statement paragraph 4(a).
[192] Criminal Code 1997 of The Virgin Islands.
[193] T17 23 June 2021 page 96.
[194] T17 23 June 2021 page 98. The CoP expressed similar concerns (CoP Recommendations page 3).
[195] T17 23 June 2021 page 93.
[196] T17 23 June 2021 page 94.

38A-38J of the Proceeds of Criminal Conduct Act 1997. Section 38A sets out the proposed circumstances in which such an order might be made, namely (i) that the respondent holds property of at least $100,000 in value, (ii) the court is satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's wealth would have been insufficient to explain obtaining such property, and (iii) the court is satisfied that the respondent (or someone involved with the respondent) is or has been involved in serious crime or the commission of any financial or money laundering crime. The Bill is currently being updated by the Attorney General's Chambers after comments upon it had been received from stakeholders, before it goes to Cabinet for approval[197].

12.120 Further, a review of the Police Act 1986[198] began in 2018, and as at 31 January 2022 a new Police Bill was out for consultation after its first reading in the House of Assembly.

12.121 The CoP said the rules with regard to police investigations are outdated; and he welcomes the review. For example, first, the RVIPF is currently only able to detain a suspect in custody for a maximum of 24 hours, which the CoP considered untenable as, in some cases (particularly, more serious and/or complex cases), it did not allow officers adequate time to carry out basic investigations. He gave by way of example a recent murder, following which seven people were arrested: it was impossible to process these individuals within 24 hours and, as a consequence, suspects had to be released back into the community[199]. The Bill seeks to increase the length of time to 48 hours[200].

12.122 Second, DNA evidence is only currently available for intelligence purposes: a person arrested for an offence is not required to provide a DNA sample on arrest, nor do they need even to provide fingerprints. The CoP said that there are a number of people suspected of having committed very serious offences who cannot be charged due to the current legislation in relation to such evidence. The Bill seeks to allow the police to take at least some intimate samples without consent, and to hold photographs and samples for a specified time[201].

12.123 The Bill would also enable an adverse inference to be drawn from silence in certain circumstances[202].

12.124 The DPP considered that the criminal procedure rules also require review. There are no criminal procedure rules for the High Court[203], e.g. there is no provision to read agreed statements, make admissions as to facts not in issue, or requirement for an accused to file the defence statement. The Magistrate's Court currently follows the Magistrate's Code of Procedure[204] which has been amended periodically but which, in her view, also requires a "proper review and revamp"[205]. The DPP considers that the Criminal Procedure Rules, drafted by the Bench and Bar Committee in 2018-2019 and received by Morley J, should be adopted with immediate effect, as they will promote effective case management and ensure matters are progressed efficiently. They should also give guidance on the scheduling of matters and the obligations for Counsel (both Crown and Defence) in a criminal trial.

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[197] Attorney General's Response to Enumerated Questions in Mr King's Letter of 19 May 2021 in respect of the Legislative Programme on Governance dated 3 June 2021 updated 10 February 2022 ("Attorney General's Memorandum on Governance Measures") paragraphs 45-55.

[198] Police Act 1986 (Cap 165) (No 12 of 1986) as amended by the Police (Amendment) Act 2001 (No 11 of 2011), the Police (Amendment) Act 2013 (No 1 of 2013) and the Police (Amendment) Act 2018 (No 14 of 2018).

[199] CoP Position Statement paragraph 8.

[200] Clause 75 of the Police Bill.

[201] Clauses 31 and 28(3).

[202] Clause 187. This clause would retain the right to silence but allow an inference to be drawn from silence in the same circumstances as those set out in section 34 of the UK Criminal Justice and Police Order Act 1994.

[203] There is the Criminal Procedure Act, Cap 18, which the DPP considered to be "extremely antiquated" (T17 23 June 2021 page 91).

[204] Cap 44.

[205] DPP Position Statement paragraph 4(g).

12.125 In respect of particular aspects of criminal procedure:

(i) The DPP said that the absence of provisions to allow for witness anonymity severely undermined the criminal process. Although there is justice protection legislation which facilitates a witness protection programme, without witness anonymity it is not workable. This is particularly the case in a small community, in which it is not difficult to find out the identity of witnesses. She said that people know this and are scared to come forward, which is hampering progress in investigating serious offences such as murder. There is a need, she said, to introduce measures to allow for witness anonymity to protect those who are fearful of coming forwards to support a prosecution. The DGO submitted drafting instructions to the Attorney General's Chambers on witness anonymity in 2020, but nothing has been heard since[206].

(ii) As regards sexual offences, especially involving child victims, the DPP said that, even with special measures, there is a reluctance to give evidence in front of a jury: "The thought of going before a jury is either very humiliating or it's very scary for them, and they would rather not proceed"[207]. She noted that in 2020, a draft Bill for a provision allowing witnesses to give evidence remotely was circulated and comments provided by her office, but there has since been no progress that she is aware of[208].

(iii) The DPP said that media reporting of criminal investigations/trials was also capable of undermining the process: she said that there is a need to introduce legislation in relation to media reporting of criminal matters which properly balances freedom of expression with the protection of the accused's right to a fair trial, as well as the right to privacy of witnesses and victims of sexual offences[209].

12.126 A significant problem identified, both by the DPP and the CoP[210], concerned the administration and selection of the jury array and jury trials.

12.127 The DPP said that, in her opinion, the current legislation (the Jury Act 1914[211]) required revision[212]. The jurisdiction of the BVI is small, and finding jurors who do not know and are unrelated to witnesses and the accused is challenging[213]. Under the Jury Act, only persons who are Belongers, who have lived in the Territory for at least 10 years, are between the ages of 21 and 60, have no previous convictions and are not currently members of the House of Assembly are eligible to be jurors. These eligibility requirements have the effect of significantly restricting the size of the jury pool. The DPP considers that the eligibility criteria should be revised, e.g. as to allow those aged 18 and above and those who have been resident for five years (as opposed to 10 years) to be jurors. She also said that information should be gathered and cross-referenced across government agencies to ensure that there is a complete and accurate list of those eligible for jury service.

206 T17 23 June 2021 page 101.
207 T17 23 June 2021 page 111.
208 DPP Position Statement paragraph 5(e).
209 T17 23 June 2021 pages 116-117.
210 T17 23 June 2021 page 57 (CoP).
211 Cap 136.
212 In the Speech from the Throne delivered by His Excellency the Governor Augustus Jaspert on 5 November 2020, it was said that the Jury Act would be reviewed, to reconsider the powers of a judge in relation to jury trials and explore whether some trials could be heard by judge alone, as well as enhance the process for the selection of jurors.
213 T17 23 June 2021 page 109.

12.128 Further, she considers that there should be a legislative change to give the court a discretion to allow judge-only criminal trials in cases of murder, gang crime and sexual offences[214]. She said that, in her experience, jurors were reluctant to serve when these sorts of offence come to trial. Under the current jury system there is no way to sequester a jury; and the DPP gave evidence of past (albeit unproven) allegations of jurors being approached[215].

12.129 The CoP shared these concerns about the jury system and the size of the jury pool, as under the relevant legislation only belongers are eligible. He said: "This creates a big issue when all parties are known to each other, and historically justice will not be bestowed on a fellow belonger, instilling a feeling of omnipotence for the few"[216]. He too considers that the eligibility criteria for jurors should be widened, and consideration should be given to judge-only trials[217].

Concerns

12.130 The BVI is a small jurisdiction; but, due to a variety of factors (including the geographical), it has a history of more than its fair share of crime, including serious organised crime, with which its law enforcement and justice systems were and are not designed to cope. As well as not having the capability to deter, investigate and prosecute offences as they should, significant parts of the system (notably the frontline) lack good standards of governance, which has itself resulted in corruption permeating the public officials (such as police officers) involved. Although the COI's necessarily limited enquiries have been unable to assess the level of corruption involved, I can say on what I have seen that it is significant.

12.131 As I have said above, I consider the problems and challenges faced by the law enforcement and justice systems need to be looked at holistically; and the jurisdiction is small enough for that to be, not only realistic, but (in my view) optimal. I consider that there should be a review of the law enforcement system, established by and reporting to the Governor, to include not only the front-line agencies (such as the RVIPF, the FIA, HM Customs and the Immigration Department (insofar as the last two mentioned are involved in the law enforcement system), but also the Prison Service and the DPP's Office. Consideration should be given as to whether it should also cover the whole or parts of the Attorney General's Chambers and/or the courts. This review might be a strand of the Constitutional Review I have proposed.

12.132 The scope of the review will need careful consideration. It will need to cover various strands, which might be dealt with separately and/or sequentially; but they should in my view include:

(i) Structure

There should be a review of the structure of the law enforcement and at least parts of the justice system, with a view to ensuring coherence and improving inter-agency cooperation in the future. It seems to me that the law enforcement system should probably be held under one umbrella and, under the current constitutional arrangements, that should be under the Governor. I also see the force in having one front-line agency named as the lead law enforcement agency and, under the current arrangements, that should be under the CoP. The review will also need to consider the vexed but important question of where responsibility for border control lies. However, these are structural matters which the review will need to consider, and upon which it will need to make recommendations.

[214] T17 23 June 2021 pages 112-115.
[215] T17 23 June 2021 page 110.
[216] CoP Position Statement paragraph 7.
[217] CoP Recommendation Report page 4.

(ii) Resources and Funding

There needs to be a review of required resources for the law enforcement and justice systems, including a review of head count, with a view to arriving at a fixed (and properly funded) head count in each agency; and the funding of the resources as identified.

(iii) Conduct and Standards

The review should cover how conduct and standards are monitored and maintained. It seems to me that there is much to be said for the establishment of a single Professional Conduct and Standards Unit, impartial and with at least some degree of independence from the agencies themselves. That unit could both produce and maintain a Code of Conduct and Ethics that would apply to personnel across the agencies, and importantly be in a form suitable for effective enforcement; but also ensure that applicants to the law enforcement agencies are properly vetted both before appointment and during the course of service. The unit could provide guidelines and training in respect of (e.g.) second jobs (i.e. whether they are allowed and, if so, which jobs can be taken and the terms on which they can be taken) and the requirement to declare conflicts of interest.

(iv) Terms and Conditions

There should be a review of the terms and conditions of those in the service of law enforcement agencies, including pay. Remuneration should be set at a level which takes into account (e.g.) the guidance in respect of second jobs.

12.133 In the meantime, for the reasons I have given, I cannot exclude the possibility that corruption may exist among officers in HM Customs and the Immigration Department. The environment in each – but particularly the former – is conducive to such. I propose making two recommendations.

12.134 First, in my view, independent vetting of all current HM Customs and Immigration Officers at all levels needs to be undertaken on an urgent basis. Such vetting should include confirming whether there has been a failure to disclose information such as a second job or a conflict of interest which, if it had been disclosed, would compromise the individual's ability to fulfil his or her role and whether the officer has made proper financial declarations. On the assumption that the ongoing reviews in the RVIPF and HM Prison Service will undertake or recommend vetting, those bodies need not be included in this exercise. If that is not the case, then the RVIPF and HM Prison Service should also be subject to the same process. As well as providing reassurance to the BVI public, the outcome of this process will inform the wider review I have recommended.

12.135 Second, the CoP is already, as I understand it, conducting appropriate investigations into corruption within the RVIPF with a view to identifying and removing any officers who are corrupt and (if appropriate) prosecuting them. In my view, given the risk of such corruption also within HM Customs, I consider that those investigations should extend to HM Customs. It is vital that the public have confidence in the integrity of HM Customs, and such an investigation will assist in engendering that confidence. The investigations should be made by officers appointed to the task by the CoP, and should be independent of HM Customs. Such investigations should only extend to the Immigration Department if the CoP considers such an extension appropriate. I do not make a positive recommendation that there should be such an investigation into that department.

12.136 Additionally, in my view:

(i) There should be statutory provisions, either through the current Police Bill or some other early statute, to ensure that the RVIPF and (as necessary) other enforcement agencies have the facilities and powers to prevent, monitor and detect crime, and prepare matters for prosecution, including by way of access to and use of modern scientific techniques and intelligence material.

(ii) I am persuaded by the submissions I received that the current provisions for juries are not in the interests of justice, and that they should be reviewed in two ways. First, consideration should be given to increasing the size of the jury pool by (e.g.) changing the criteria to enable and require those who are long-term residents to sit on juries. Second, consideration should be given to granting the court wider powers to hear judge-only criminal trials.

(iii) Steps should be taken in respect of the laws of the BVI for their revision, consolidation and publication in readily accessible form. I well-understand the enormity of this task, but it is essential that the laws to which citizens and corporations in the BVI are subject are easily understood and readily accessible. They are currently neither. Initially, there should be an exercise to identify the areas of the law that should be prioritised for revision and/or consolidation and/or publication, so that a programme of work can be prepared.

Recommendations

12.137 I deal with overarching recommendations below[218]. However, with regard to the law enforcement and justice systems, I make the following specific recommendations.

Recommendation B38

I recommend that there is a review of the law enforcement and justice systems, to include not only the front-line agencies (such as the Royal Virgin Islands Police Force, the Financial Investigation Agency, HM Customs and the Immigration Department, insofar as the last two mentioned are involved in the law enforcement system), but also the Prison Service and the Office of the Director of Public Prosecutions. Consideration should be given as to whether it should also cover the whole or parts of the Attorney General's Chambers and/or the courts. I recommend that this review forms an element of the Constitutional Review I have proposed. The scope of the review will need careful consideration but it should in my view include a review of (i) structure (including whether the front-line law enforcement agencies should have a lead agency and what should that be, and under which arm(s) of government should law enforcement lie; and, particularly, where responsibility for border control should lie), (ii) resources and funding, (iii) conduct and standards, and (iv) terms and conditions. The review need not be a single project – strands will need to be identified and prioritised – and it can draw on the work of reviews currently in progress in relation to the Royal Virgin Islands Police Force and the Prison Service.

[218] See Chapter 14.

Recommendation B39

I recommend that all serving HM Customs and Immigration Department Officers at all levels of seniority be subject to full vetting by an independent agency. Without limiting the ambit of that exercise, it should involve determining if there has been a failure to disclose (i) relevant information before or when first appointed and which may have led to the officer being deemed unsuitable; and (ii) relevant information thereafter including the existence of a second job or a conflict of interest which could reasonably be seen to compromise the individual officer's ability to fulfil his or her role now and in the future. In the event that a similar exercise is not being undertaken in relation to the Royal Virgin Islands Police Force and the Prison Service, then their officers should be included in this process.

Recommendation B40

I recommend that officers appointed by the Commissioner of Police investigate possible corruption within HM Customs.

Recommendation B41

I recommend that consideration is given to ensuring that the Royal Virgin Islands Police Force and (as necessary) other enforcement agencies have the facilities and powers to prevent, monitor and detect crime, and prepare matters for prosecution, including by way of access to and use of modern scientific techniques and intelligence material. This can be done through a panel comprising representatives of (e.g.) the Attorney General, the Director of Public Prosecutions, the Police Commissioner, HM Customs Commissioner and the Immigration Department, with external expertise being brought in as and when required. The panel should prepare a report, setting out recommendations as to what is required, to be presented to the Governor.

Recommendation B42

I recommend that Criminal Procedure Rules are revised, to give the criminal courts modern case management powers.

Recommendation B43

I recommend that consideration is given to revising the Jury Act in two respects. First, consideration should be given to increasing the size of the pool of jurors by (e.g.) changing the criteria to enable those who are long-term residents to sit on juries. Second, consideration should be urgently given to granting the court wider powers to hear judge-only criminal trials.

Recommendation B44

I recommend that consideration is given to building upon the current initiatives for revising, consolidating and publishing in readily accessible form the laws of the BVI, including early consideration for prioritising elements of this project and producing a work programme for it.

APPENDIX A

CHAPTER 13:

GOVERNANCE AND SERIOUS DISHONESTY IN PUBLIC OFFICE

APPENDIX A

GOVERNANCE AND SERIOUS DISHONESTY IN PUBLIC OFFICE

In earlier chapters, I have looked at several important areas of government, and considered the extent to which there is good or poor governance, and whether there is information that there may be dishonesty in relation to public officials in respect of government decision-making in those areas.

In this chapter, I draw the strings together. I consider the reasons the elected Ministers put forward for governance being poor in the BVI. I then look at the picture painted by the evidence as a whole. What is the extent of any poor governance? Why, in some areas, is governance so very poor? On the evidence before me, what is the extent of any dishonesty there may be?

In respect of the particular areas of government into which I have enquired, I have already made some specific recommendations. Consideration of these matters here lays the foundation for my overarching recommendations, which I consider in the next chapter.

Introduction

13.1 This COI was called for the public welfare; and, throughout, I have conducted the Inquiry in the public interest, i.e. in the interests of *all* the people of the BVI.

13.2 There is no doubt that good governance is in the public interest. As a general proposition, "good" decision making and implementation by the state – processes that are, amongst other things, open, transparent, inclusive and in accordance with the rule of law – not only reduce the risk of poor and/or dishonest decisions, but also enable citizens properly to participate and hold those who govern them to account. However, in the BVI, in addition to good governance being inherently in the public interest, it is vital for a very specific reason.

13.3 As I have emphasised, the Preamble to the current Constitution sets out the aspirations of the people of the BVI in respect of both developing a modern democracy and of self-determination, a right firmly established in international law. It affirms that the government of the BVI is to be based on "adherence to well-established democratic principles and institutions"; and that "the people of the Virgin Islands have generally expressed their desire to become a self-governing people and to exercise the highest degree of control over the affairs of their country at this stage of its development". During the course of the COI, the evidence has been clear: far from those aspirations having changed or being diminished, for many who live in the BVI, this desire for self-government on a modern democratic model burns bright. It is right that it should.

13.4 For those aspirations to be met, a stable political system and stable economy are essential. However, as I have indicated[1], in a modern democracy, such stability is heavily reliant on good governance. Good governance is consequently essential if the rights and aspirations of the people of the BVI to self-determination are to be progressed and made good. "Good

[1] See paragraph 2.30 above.

governance" in this context is, of course, a relative concept. A counsel of perfection is not required; but particularly poor governance is likely at least to impede progress towards these aspirations and thereby substantially delay them, if not defeat them altogether.

Current Position

13.5 With limited exceptions[2], the evidence received by the COI shows that governance within the areas of BVI Government under the control of the elected public officials is, at best, very poor, with principles such as openness and transparency not simply absent but positively shunned; and proper procedures, checks and balances being absent, or patently inadequate for their purpose, or ignored or by-passed.

13.6 The evidence in this regard is overwhelming, and extends to almost all areas of government, including registration of interests[3], distribution of public funds by way of grants[4], procurement and implementation of contracts[5], statutory boards[6], disposals of Crown Land[7], and residence and belonger status[8]. These are mere examples: the evidence suggests that this attitude to the principles of governance pervades almost the whole of the BVI Government under the control of the elected Ministers, and has done so for some years and across different administrations. Although some witnesses expressed a greater degree of concern than others – I have in mind in particular the evidence I obtained from those who hold statutory posts specifically designed to monitor the functions of the executive, such as the Auditor General, the IAD Director and the Registrar of Interests, who expressed very great concern – by the end of the evidence, few suggested that governance is adequate, or better than very poor. While some witnesses resolutely sought to focus on changes being made or considered (which I address below), that in itself is an admission that all is not well.

13.7 In their evidence and submissions, the elected Ministers dealt with the governance position in the BVI at great length, being measured in thousands of pages[9]. It cannot be said that they did not have full opportunity to respond to the evidence and concerns in relation to poor governance; or that they did not fully take such opportunity. The IRU frequently said, in responding to the COI, their resources were limited, as they no doubt were; but they were nevertheless formidable, and employed in this response.

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[2] Such as Government acquisition of leases where, as I have described, the evidence shows that there has been real and sustained progress at establishing and maintaining good governance practices: see Chapter 9 above.
[3] See Chapter 4 above.
[4] See Chapter 5 above.
[5] See Chapter 6 above.
[6] See Chapter 7 above.
[7] See Chapter 8 above.
[8] See Chapter 10 above.
[9] The main documents were the Elected Ministers Position Statement dated 1 June 2021 (33 pages plus 669 pages of appendices); a bundle of documents, largely correspondence, referred to in the Position Statement but only disclosed following a letter from the COI (284 pages); the Supplementary Note on the Elected Ministers Position Statement dated 19 June 2021 (7 pages plus 582 pages of appendices); and the Elected Ministers Response to Governor Position Statement dated 16 August 2021 (17 pages plus 966 pages of appendices). These were supplemented by a number of other documents that were lodged, e.g. Summary of Submissions on behalf of the Attorney General and Elected Ministers dated 22 November 2021, which dealt with issues of both governance and dishonesty in public office (20 pages plus 673 pages of appendices including authorities), and the Attorney General's own Position Statement on governance (13 pages) and her subsequent Submissions on Governance dated 11 November 2021 (12 pages); together with documents the elected Ministers lodged on specific aspects of governance (e.g. the Elected Ministers' Response to the reports of the Auditor General and IAD on COVID-19 grants sent to the COI on 7 September 2021 (34 pages and 859 pages of appendices); and documents purporting to be evidence, but in fact including substantial submissions (e.g. Jeremiah Frett Thirteenth Affidavit dated 12 November 2021, which dealt with the issue of Public Service development/reform (17 pages with 93 pages of exhibits)).

13.8 I have taken all that they have said into account. Unfortunately, I did not find their response on this issue to be very helpful: their documents generally lacked structure, were diffuse and confused rhetoric for principled and evidence-based submissions.

13.9 On analysis, two particular broad strands of response appear.

13.10 First, the elected Ministers said that, looking backwards, any past failings were not their fault. They said that past and current failings in governance were and are the result of (a) past (NDP) administrations, which the current elected Ministers appear to accept oversaw very poor governance which (at least, the current Premier said) underlay a corrupt regime, (which, serious as it was, may be described as a minor theme); and (b) the persistent failure of successive Governors, the FCDO and the wider UK Government to support the elected BVI Government generally, but notably in reforming the Public Service (for which it is said the Governor is constitutionally responsible); and, worse, they have failed to respect and have positively undermined the elected Government in a variety of ways, thus acting contrary to both the principles of the Constitution and the normative rights set out in international law, such as article 73 of the UN Charter (put forward as the major theme).

13.11 Second, looking forward, it is said that the current VIP administration, which was elected on a manifesto of reforming governance, is taking active steps to cure the deficiencies in governance – and I (and, more importantly, the BVI public) can have confidence that these measures will be effective in improving governance to an appropriate standard – indeed, it is said, to a high standard.

Past Failings

Introduction

13.12 Whilst the focus of the elected Ministers' evidence and submissions was on the failings of successive Governors and the UK Government, evidence from both before and after the 2019 election shows that those in the current elected Government (and, notably, the Premier) accept that governance under the previous NDP regime (especially in respect of projects such as the School Wall Project, BVI Airways and the Cruise Ship Port Development) was extremely poor. The Premier made no bones about it: he considered that this resulted in a corrupt regime[10]. Indeed, they considered the governance was so poor, and its consequences so grave, that it warranted a Commission of Inquiry and, as we shall see, they vigorously criticised the then Governor (Governor Jaspert) for not calling a COI in respect of these matters earlier.

13.13 As I have described in this Report above, the governance in respect of many of the matters from the NDP regime into which I have enquired, including those referred to above, was shockingly poor, there being a flagrant and deliberate disregard for the principles of good

[10] T6 18 May 2021 pages 215-221, where the Premier confirmed press reports of what he had previously said to the same effect. The Premier accepted that he had accused the previous administration of financial misappropriation. Speaking of BVI Airways, the Premier said: "I just saw it as corruption.... I saw the whole system as corrupt". Explaining this, the Premier said that in his view, "'corrupt' means more than dishonesty". He referred repeatedly to the requests he had made, while in opposition, for a COI – all of which had been refused. On 30 August 2021, the COI wrote to the Attorney General referring her to the Premier's evidence and a statement made on her behalf that her role in the COI was "to seek out any wrongdoing and bring it to [the Commissioner's] attention" (T5 13 May 2021 pages 50-52). The COI's letter invited the Attorney General to set out, in accordance with the COI's Protocol on Potential Criticisms, each criticism of any previous administration and/or individual members thereof, which the Premier (or any other participant represented by the Attorney General) sought to make. No criticism was provided in reply. The Premier was more forthright in correspondence with Governor Jaspert. Thus, at a meeting on 24 May 2019, the Premier suggested that criminal deception had occurred in the BVI Airways Project (Draft Notes of Meeting between Governor Jaspert and the Premier dated 24 May 2019). Later, in a letter dated 10 January 2020, wherein he referred to among others, the School Wall Project, the Premier suggested individuals had grossly inflated their costs (Letter Premier to Governor Jaspert dated 10 January 2020).

governance. That gave rise to a higher risk – a greatly heightened risk – of corruption or other form of serious dishonesty involving public officials. Indeed, two of the projects (the School Wall and BVI Airways) are currently the subject of criminal investigations in which the persons of interest include public officials. Without prejudging the outcome of those investigations which must run their course, I have firmly in mind (as the elected Ministers urged I should) that this was the state of governance when the current VIP administration came into office in 2019.

13.14 However, the main focus of the elected Ministers' criticism was not on the previous administration. Rather, they say that successive Governors (but particularly Governor Jaspert) and the UK Government have compounded the historic failings, and have positively undermined good governance and good government in the BVI over time, and particularly since they took office in 2019. With the possible exceptions of (i) Governor Jaspert's actions in seeking to encourage compliance with the Register of Interests Act 2006[11] and his refusal to allow the Premier to preside over Cabinet in the personal absence of the Governor[12], and (ii) SAMLA (the lawfulness of which is currently being challenged by two individuals in the Eastern Caribbean Supreme Court, with the Attorney General also a party)[13], the elected Ministers do not say that the Governor and/or the UK Government have unlawfully breached the Constitution; and they made only limited formal criticisms of Governors when given the opportunity to do so[14]. However, they say that the Governors and the UK Government have failed to respect the elected BVI Government, and thus failed to respect both (i) the principles of international law, including the right of self-determination as reflected in article 73 of the UN Charter, and (ii) the constitutional "settlement", i.e. the "modern partnership" based on mutual respect and the principle of self-determination as reflected in the Constitution[15,16]. These allegations, suggestions and themes are very broad and, in places, somewhat indiscriminate and inchoate: but they are potentially serious, and I must deal with them.

13.15 The ways in which the elected Ministers say this lack of respect is evidenced are set out across the various documents they have lodged with the COI from time-to-time, but particularly in their Position Statement. Their criticisms are wide-ranging, but the topics at which most of their evidence and submissions have been aimed are as follows:

(v) presiding at Cabinet;

(vi) the Governor's interference with the role of the Registrar of Interests;

(vii) tuna quotas;

(viii) the Blue Belt Programme;

(ix) disaster management;

(x) fiscal management, notably (a) the PEFM, (b) the post-2017 hurricanes loan guarantee, (c) SAMLA and (d) medicinal cannabis;

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[11] See paragraphs 13.26-13.29 below.
[12] See paragraphs 13.18-13.25 below.
[13] See paragraphs 13.63-13.68 below.
[14] The Attorney General (through Mr Haeri of Withers) confirmed that the Table of Criticisms that she lodged with the COI exhaustively set out all of the criticisms made by the elected Government (T29 6 September 2021 page 118). The concerns and potential criticisms in respect of governance arising out of the evidence before the COI were put to Governor Rankin and former Governor Jaspert in COI Warning Letters dated 30 September 2021 and 4 October 2021, respectively. The letters identified the evidence giving rise to the concerns and potential criticisms. Each responded fully in writing on 14 October 2021, and gave oral evidence on T50 19 October 2021 (Governor Rankin) and T51 20 October 2021 and T52 21 October 2021 (former Governor Jaspert).
[15] See paragraph 1.36 above.
[16] These themes flow through the submissions made on behalf of the elected Ministers, but perhaps are most focused in the Supplementary Note to the Elected Ministers Position Statement, which comprised submissions by the Attorney General on their behalf.

(xi) Public Service reform;

(xii) a Governor's relations with public officers; and

(xiii) the calling of the COI without consultation.

13.16 I will deal with these in turn. As we shall see, in the main, they involve either a dispute over the correct construction of the Constitution as to who has responsibility for a particular area; or, where the Constitution is silent (e.g. as to the coordination of effort where the Constitution places the responsibility for some areas that require to be coordinated in the hands of the Governor, and others in the hands of the elected Government), a dispute as to who should in practice have that responsibility.

13.17 Wherever there are devolved powers, such issues as these are of course not uncommon, particularly where (as is so often the case) devolution of powers is not simply a one-off event, but a process towards a new status quo between the devolver and the recipient of the powers. The issues can become more pointed where the recipient of the powers has a different new status quo in mind from the devolver which may consider that enough powers have been devolved and may not wish to give any further powers away. The elected Ministers suggest that the UK Government is colonialist and jealous of its powers over the BVI; and, contrary to its obligations under international law, the UK Government hampers the elected Government and does not wish to dispose of any further powers to that Government. That is something to which I will return[17].

(i) Presiding at Cabinet

13.18 Section 49 of the Constitution provides:

> "(1) The Governor shall, so far as practicable, attend and preside at meetings of the Cabinet.
>
> (2) In the absence of the Governor there shall preside at any meeting of the Cabinet the Premier, or in his or her absence, the Deputy Premier."

13.19 The current Attorney General has given an opinion to the effect that, where the person of the Governor is absent from a Cabinet meeting, then section 49(2) requires the Premier to preside ("there *shall* preside… the Premier")[18].

13.20 However, when the previous Governor (Governor Jaspert) was not personally present at Cabinet, he did not allow the Premier to chair[19]. Instead, he purported to assign that function to the Deputy Governor. A request by the Premier to the UK Minister for Overseas Territories (Baroness Sugg) to intervene did not result in any change of position[20]. It is said that the elected Government "believes there to be no respectable argument for that position as a matter of law"; and this is an example of the UK Government and the former Governor not only showing the elected Government disrespect, but failing to adhere to the rule of law[21].

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[17] See paragraphs 13.129-13.130 below.

[18] Memorandum Attorney General Hon Dawn Smith to the Premier dated 13 January 2021.

[19] Governor Jaspert appears to have been following historical precedent: before him, it seems that the Deputy Governor (or another person assigned by the Governor) chaired Cabinet in the Governor's absence. Governor Jaspert referred to that precedent, and said that he had taken advice from the then Attorney General who advised that this was constitutionally correct (T51 20 October 2021 pages 75-76). The issue has not in practice arisen since Governor Rankin's appointment, as the Governor has chaired all Cabinet meetings either in person or remotely.

[20] Letter Premier to Baroness Sugg dated 30 September 2020.

[21] Elected Ministers Position Statement paragraphs 31-33.

13.21 However, neither Governor Jaspert nor current Governor Rankin agrees[22]. Section 2(3) of the Constitution provides that any reference to the holder of any office shall be construed as including a reference to any person who is for the time being performing the functions of that office. Governor Rankin relies on two provisions for the proposition that the Deputy Governor is able to carry out the function of presiding at Cabinet if the Governor himself is not there. First, section 37(1) provides:

> "During any period when the office of Governor is vacant or the Governor is absent from the Virgin Islands or is for any other reason unable to perform the functions of his or her office—
>
> (a) the Deputy Governor; or
>
> (b) if the office of Deputy Governor is vacant, or the Deputy Governor is absent from the Virgin Islands or is for any other reason unable to perform the functions of the office of Governor, such person as Her Majesty may designate by instructions given through a Secretary of State…
>
> shall, during Her Majesty's pleasure, act in the office of Governor and shall perform the functions of that office accordingly."

Therefore, the Governor submits, "the Governor" in section 49(1) includes any person exercising the functions of Governor under this provision. It seems to me that that construction may be supported, at least to an extent, by section 37(5), which expressly provides that, in that section, "'the Governor' means the person holding the office of Governor…"; which perhaps suggests that, where the Constitution means to restrict the term "the Governor" to the individual holding the office, it says so[23]. The second, alternative provision upon which the Governor relies is section 38(2), which provides that:

> "The Governor, acting in his or her discretion, may, by writing under his or her hand, authorise the Deputy Governor to exercise for and on behalf of the Governor any or all of the functions of the office of Governor…".

13.22 The former Attorney General (Hon Baba Aziz), when specifically asked by the Deputy Governor to advise in 2018, advised that section 37 gave the Deputy Governor the authority to chair Cabinet in the absence of the Governor in person[24].

13.23 It is not for me to determine who, under the Constitution, should preside over a Cabinet meeting if the person of the Governor is not there. It seems to me that each argument on the construction of the Constitution set out above has some force, a view reflected by the fact that, recently, one Attorney General has advised one way and another Attorney has advised the other way. For the elected Ministers to say that they "believe" that there is "no respectable argument" against their contention that the Premier should preside in the absence of the person of the Governor is not only unhelpful, it is not a view expressed by

[22] Governor Rankin's submissions are found in his Response to Elected Ministers' Position Statement, including the annexes; and Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 2.1-2.7 (Response to Criticism 2). Whilst I received no formal submissions from the UK Government, given the correspondence the Premier had with Baroness Sugg, I assume that it takes the same position as the Governors.

[23] In response to the Governor, the elected Ministers repeated their submissions to the effect that, in their view, there is no plausible argument that the Governor can act in this way to deprive the Premier of his right (as they see it) to chair Cabinet in the absence of the Governor; and, they submit, it breaches the Governor's obligation to encourage and promote the capacity of the BVI for self-government (Elected Ministers' Response to Governor Position Statement paragraphs 78-84).

[24] Memorandum Attorney General Hon Baba Aziz to Deputy Governor dated 24 April 2018.

the current Attorney General (whose advice is favourable to their contention, but not so extreme), and it is disrespectful to the former Attorney General whose advice was indeed contrary to their view.

13.24 It simply cannot properly be said that the stance taken by the Governor (and, before him, by Governor Jaspert), supported by the advice of Attorney General Hon Baba Aziz, smacks of a failure to heed the rule of law, or to show proper respect for the Constitution or the laws of the BVI. A genuine difference in the interpretation of the Constitution does not warrant such hyperbole. In the circumstance in which governance is a general concern, I understand why, when he is himself unable to attend, the Governor might wish to have the Deputy Governor attend Cabinet to offer guidance and advice, and, where appropriate, to urge the exercise of caution. Further, this is a dispute for which there is a mechanism of resolution, namely a reference by the Attorney General to the Eastern Caribbean Court of Appeal to consider the true construction of the Constitution[25]. The Cabinet does not appear even to have considered asking the Attorney to make such a reference. Certainly, no application has been made[26]. In any event, Governor Rankin said that he would "not preclude" asking the Premier to preside over Cabinet in certain limited circumstances (where, e.g., the Governor was unable to attend Cabinet even remotely, due to health issues)[27].

13.25 Whilst I accept that there is a genuine dispute as to the meaning of the Constitution – resolvable by the elected Ministers, as and when they wish – on the evidence before me, with regard to this issue, there is no merit in the suggestion that the Governor and/or the UK Government has shown any disrespect for the Constitution, or the partnership between the Governor and the UK Government on the one hand, and the elected Government on the other, which is so crucial to that Constitution; or for the rule of law.

(ii) Interference with the Role of the Registrar of Interests

13.26 Under section 13 of the Register of Interests Act 2006[28], the Registrar of Interests is prohibited from disclosing information relating to any declaration or matter in the Register, or that he or she has acquired in the course of or in relation to his or her duties. Where the Registrar breaches that provision, it is a criminal offence.

13.27 In the light of persistent refusals of Members of the House of Assembly to comply with their obligation to make declarations, the Registrar has from time-to-time sought the assistance of the Governor at the time, in the hope that he could encourage compliance. There is evidence that Governor Jaspert asked the Registrar for details of defaulters, so that he might assist. Of course, he did not ask for (nor did the Registrar supply him with) any details of any Member's interests, only whether a particular Member was in default of his or her obligations under the Constitution and the 2006 Act.

13.28 The Attorney General on behalf of the elected Ministers submitted that the Governor showed disrespect for the laws of the BVI by encouraging the Registrar to breach section 13. The Attorney has reserved her position as to whether to take steps to prosecute the Registrar for breach of section 13.

[25] See paragraph 1.90 above.
[26] I deal below with my recommendations for such disputes in the future (paragraphs 13.129-13.130 and Recommendation A2).
[27] T50 19 October 2021 pages 150-152 and 155. The evidence was that Governor Rankin had in fact presided over all Cabinet meetings to date, and so the issue had not arisen in practice since his installation as Governor.
[28] No 5 of 2006. Section 13 is quoted at paragraph 4.16 above.

13.29 I deal with this issue above[29]. In short, I consider the Attorney's view of the law to be wrong; but, more importantly for present purposes, there is simply no question of Governor Jaspert having been disrespectful to the laws of the BVI by encouraging Members of the House of Assembly, some of whom were persistent in their refusals, to comply with their constitutional and statutory obligations in respect of declarations of interest. The attack on the Registrar for attempting to fulfil her constitutional role as a pillar of governance was, in my view, particularly inappropriate; but the contrived attack on Governor Jaspert similarly had no proper basis whatsoever.

(iii) Tuna Quotas

13.30 Another example of recent alleged disrespectful behaviour of the UK Government, which the elected Ministers regard as particularly egregious, concerns tuna quotas[30].

13.31 In 1995, the UK acceded to the International Convention for the Conservation of Atlantic Tunas ("ICCAT")[31]. In 1998, the European Union acceded to the Convention, and the UK became part of the EU's delegation, with four BOTs (including the BVI) forming a separate delegation with a separate catch limit for albacore tuna of 200 tonnes, which they could allocate amongst themselves.

13.32 Following the UK's withdrawal from the EU, the UK deposited a further Instrument of Adherence to ICCAT in respect of both the UK and the relevant BOTs, effective from 20 October 2020. Under this, a single allocation of 434.04 tonnes of albacore tuna was granted. From this, the UK Department for Environment, Food and Rural Affairs ("DEFRA") proposed to allocate 10 tonnes to the BVI. No agreement over allocation between the UK Government and the BVI Government was reached. On 28 June 2021, the Governor wrote to the Premier to say that, unless he heard from him by 30 June, then he would inform DEFRA that the proposed allocation of 10 tonnes is acceptable. DEFRA wrote to the BVI Government on 12 July 2021 formally allocating 10 tonnes.

13.33 The elected Ministers say that a reduction of up to 200 tonnes down to 10 tonnes allocation for the BVI is not in the interests of the BVI; and, fisheries being a devolved matter, this shows disrespect to their devolved functions[32].

13.34 However, leaving aside entirely the international element in the issue, Governor Rankin said that the BVI had recorded zero tonnes of lawful catch of albacore tuna in recent years[33]; and it was for that reason that an allocation of 10 tonnes was considered by DEFRA to be more than adequate to meet any likely need. He left open the possibility that the allocation might be adjusted in future years if demand for catch in the BVI were to rise[34].

13.35 Again, on the evidence, the allegation of the elected Ministers that the way in which the Governor and/or the UK Government have acted in relation to tuna quotas – an allegation that they chose by way of an example of what they considered to be particularly disrespectful conduct – has no possible foundation.

[29] See paragraphs 4.68-4.78.
[30] Elected Ministers' Response to Governor Position Statement paragraphs 65-73.
[31] Enacted in Rio de Janeiro on 14 May 1966, coming into force on 21 March 1969.
[32] Elected Ministers' Response to Governor Position Statement paragraphs 63-74.
[33] There was no evidence to the contrary. The elected Ministers did not seek to controvert this evidence.
[34] T50 19 October 2021 pages 180-182.

(iv) Blue Belt Programme

13.36 The Blue Belt Programme is a voluntary scheme launched by the UK in 2016, which allows the BOTs to seek support for marine protection and sustainable management of marine environment.

13.37 The BVI has not joined this programme. That is, of course, its right. However, on 3 April 2021, the FCDO issued a press statement suggesting that it had, and Governor Rankin also put a tweet on social media to that effect[35]. The elected Ministers criticised the UK Government and the Governor for issuing, and not then retracting, these statements.

13.38 Governor Rankin accepted this criticism, and explained that the FCDO press statement was a regrettable but accidental oversight. It should not have happened; but it was not deliberate, and there was no intention to diminish the importance of the BVI Government's views on this issue: they had not, and do not wish, to join the programme. The Governor said that he had made his regrets clear to the Premier[36].

13.39 I accept that explanation. The statement by the UK Government, in an area of responsibility clearly devolved to the elected BVI Government, was unfortunate and wrong; but it was a mistake. I accept that the UK Government might have apologised for that mistake more promptly and with better grace; but the suggestion that an erroneous statement that the BVI had joined a scheme designed to support the marine environment when it had not, made in the circumstances I have briefly outlined, in some way fundamentally undermined, or showed profound disrespect for, the democratic structures of the BVI is, to say the very least, a gross exaggeration.

(v) Disaster Management

13.40 The Constitution does not specifically refer to "disaster management", perhaps because any disaster will inevitably require a response from a number of organs of government. Section 27 of the Constitution, however, gives the Governor power to declare a public emergency in a number of specified circumstances, one of which is in respect of a natural disaster.

13.41 The management of disasters (such as the aftermath of the 2017 hurricanes), and preparedness for them, clearly requires an approach in which several arms (and possibly the whole) of the BVI Government collaborates. The Disaster Management Act 2003 unambiguously vests authority for the Department of Disaster Management ("the DDM") (and thus the coordination of any disaster management and preparedness) in the Governor[37]. It is the Governor's obligation to prepare a Disaster Plan and make preparations for disasters using funds allocated for the purpose; and to appoint and supervise the Director of the DDM and, through him or her, the department itself.

13.42 However, in 2020, without consulting the Governor, the elected Ministers proposed to transfer the DDM budget from the Governor's Office to the Premier's Office, on the basis that the placement of the DDM in the Governor's Group was "inadvertent" and "is inconsistent with the provisions of [the Constitution]". It was also considered that, in practice, the placement within the Governor's Group led to "the inefficient coordination with the rest

[35] Elected Ministers' Response to Governor Position Statement paragraphs 63-64. It is uncontroversial that these statements were made, and they were inaccurate.
[36] T50 19 October 2021 pages 178-179.
[37] This was the opinion of the Attorney General set out in a memorandum to the Premier: Interpretation from the Courts (Department for Disaster Management) dated 21 December 2020, with which I agree. It, now, seems uncontentious. In this section of the Report, references to "the Attorney General's Opinion" are to this memorandum. The position taken by the elected Ministers was supported by a legal opinion obtained from Freedom Law Chambers dated 17 November 2020, which was provided to the Attorney General.

of the Government in terms of policy, planning and preparedness"[38]. They considered that, depending on the nature of the disaster, various Ministries would be involved and, in any event, the Premier/Minister of Finance would lead the BVI recovery from any such disaster[39]. A Disaster Management Bill was drafted and brought forward, with the purpose of transferring the function of disaster preparedness and management to the Premier.

13.43 The Governor (Governor Jaspert) objected to this transfer; and the Appropriation (2021) Act 2020 was assented to only on the basis of an express reservation in respect of this allocation[40]. After the Disaster Management Bill had passed through the House of Assembly, Governor Rankin (now in office) has refused to assent to it.

13.44 The elected Ministers consider that this represents a failure by the UK Government "to allow the elected Government to assume responsibility for important spheres of government activity even where these matters are not constitutionally reserved to the Governor and where they would more logically lie with the elected Government…"; and they put it forward as a prime example of such conduct[41].

13.45 However, Governor Jaspert and, now, Governor Rankin consider that, under the current constitutional arrangements, the allocation of responsibility is correct[42]. Governor Rankin explained that his concern with the new legislation, as drafted, was that it involved a complete transfer of responsibility for disaster management from the Governor to a Minister in circumstances where key elements of that responsibility were constitutionally for the Governor. They both stressed that disaster management (whether it be the consequences of a hurricane or otherwise) will necessarily require a collaborative effort on the part of the Governor's Office and the elected Government; but, it is said, it clearly involves issues of both internal and external security, both of which are specifically reserved to the Governor under section 60 of the Constitution. Governor Rankin pointed to the external support that was required to help ensure the safety and security of the Territory following the 2017 hurricanes; the recent visit of the British Army to undertake disaster planning work; and the fact that the UK Government has Royal Navy ships in the Caribbean for speedy deployment as and when required[43].

13.46 It has consequently been the view of the Governors that key disaster management responsibilities (including the function of coordinating disaster planning/preparedness and management) should remain with the Governor's Group so that the Governor can continue to fulfil his section 60 responsibilities.

13.47 However, as Governor Rankin fully accepts, this does not of course rule out either:

(i) the assignment of a particular disaster to the elected Ministers by agreement: for example, the response to COVID-19 has been led by the Minister of Health and Social Development and not by the Governor under the 2003 Act (although Governor Jaspert initially considered that the response should be led by the DDM under him)[44]; and

[38] Letter Premier to Attorney General dated 13 November 2020, quoted in Attorney General's Opinion paragraph 4.
[39] Elected Ministers Position Statement paragraph 35.
[40] Assent was given by the Deputy Governor, as Acting Governor on 22 December 2020. Governor Rankin described the basis on which assent was given as a "without prejudice statement' as to where responsibility for disaster management should lie (T50 19 October 2021 pages 123-125).
[41] Supplementary Note on the Elected Ministers Position Statement paragraph 8.
[42] Letter Governor Jaspert to Premier dated 4 December 2020; letter Governor Rankin to Premier dated 23 April 2021; and Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 1.1-1.12 (Response to Criticism 1).
[43] Governor Response to COI Warning Letter dated 14 October 2021 paragraphs 1.7-1.8.
[44] Elected Ministers' Response to Governor Position Statement paragraph 61.

(ii) the possibility of a future realignment of responsibilities in this area. Governor Rankin suggests that this is a matter which can and should be looked at in the presaged Constitutional Review.

13.48 The Governor's suggestion that the issue be considered as part of the long-proposed Constitutional Review did not receive a positive response from the Premier, who responded that he was inclined to seek the guidance of the House of Assembly. Governor Rankin said he did not rule out further discussion, considered the approach to disaster management to require partnership, but said that he did not consider that moving "policy direction" to a Minister wholesale would, at this stage, further disaster management for the BVI[45].

13.49 In my view, it is again simply wrong to portray this as an example of the Governor and/or the UK Government improperly failing to allow the elected Government to assume responsibility for important areas of government activity which are devolved. In relation to disaster preparedness and management, each elected Minister remains responsible for those areas of activity which fall within his or her portfolio. It is an example of circumstances in which the Governor and the elected Government each have their own responsibilities and, under the current constitutional arrangements, in practice the coordination of effort must be allocated to one or the other. There is a dispute between the elected Ministers and the Governor as to who should coordinate the work of government in relation to preparedness and the consequences of disasters, including hurricanes (which, regrettably, will inevitably strike the BVI from time-to-time).

13.50 This is a dispute over coordination of government effort where both Governor and elected Ministers have responsibilities, not the construction of the Constitution. Consequently, as the Attorney General has advised[46], it is not a matter capable of being resolved by a reference to the Eastern Caribbean Court of Appeal. It requires a political resolution. The Governor has suggested that the resolution of such disputes should be considered by a Constitutional Review[47]. I agree; and will make a recommendation, not simply as to this dispute but generally as to disputes of this nature, accordingly.

(v) Fiscal Management

(a) PEFM

13.51 The elected Ministers say that the conditions in respect of fiscal restraint attached by the PEFM, such as the requirement to hold 25% of its recurrent expenditure in unallocated liquid funds, "encroach not only on their financial freedom of manoeuvre but also upon their legitimate aspiration to govern and make important political and economic choices for themselves"[48]. Although the BVI Government agreed to the PEFM in 2012 (and this administration agreed to amendments to the borrowing criteria in 2020), the current elected Ministers suggest that it did not have a real choice in the matter, because of the "unequal bargaining power" between the BVI Government and the UK Government[49]. The suggestion is that, in the "imposition" of the PEFM (as the elected Ministers see it to be), the UK

[45] T50 20 October 2021 pages 125-135.
[46] Attorney General's Opinion dated 21 December 2020 paragraphs 16-17.
[47] See paragraphs 13.47(ii) above.
[48] Elected Ministers' Response to Governor Position Statement paragraph 52.
[49] Elected Ministers' Response to Governor Position Statement paragraph 53. The complaint in respect of the PEFM was particularly made in the context of the post-2017 hurricanes loan guarantee which, if and when taken up and loans obtained, would (at least temporarily) take the BVI outside the parameters set by the PEFM (see paragraphs 13.55-13.62 below); but was also made as a self-standing point.

Government is treating as paramount its "clear policy imperative" of "seeking to mitigate the risk of the UK's contingent liability", thus abusing its position and particularly failing to respect the devolved powers of the elected Government in respect of finance.

13.52 As I have described[50], the purpose of the PEFM was to stabilise the BVI economy, a stable economy being vital to the management of the contingent liability the UK Government has for the debts of the BVI, the encouragement of legitimate investment in the BVI (by evidencing responsible government, particularly in fiscal matters) and the aspirations of the people of the BVI to self-government.

13.53 The elected Ministers' criticism is loud; but its basis is unclear. Insofar as they seek to make a constitutional point that the UK Government would be wrong to seek to impose any restraints on the fiscal policies of the elected Government because financial matters are a devolved area, such a proposition is obviously hopeless. As the holder of contingent liabilities in respect of BVI Government debt, the UK Government is clearly entitled to see some restraints on BVI fiscal policy, by agreement if possible (as with the PEFM) or by imposition if necessary[51]. Further, as the sovereign authority with obligations towards the people of the BVI, the UK Government has an obligation to ensure that the BVI economy is at least sufficiently stable to allow progress to be made by the BVI towards self-determination.

13.54 However, the elected Ministers' reference to "unequal bargaining power" appears to suggest that their main complaint is not that fiscal restraints within the PEFM are unacceptable as a matter of principle, but rather that restraints that are currently in place are not "fair" or proper because they go beyond those that are necessary to enable the UK Government reasonably to manage its contingent liability and meet its obligation under international law. And, so, the elected Government wish to alter the agreement. However, this is essentially a political (and, to an extent, commercial) issue, that can only be dealt with by negotiation with the UK Government. The UK Government considers that the PEFM provide for no more fiscal restraint than is compatible with ordinary prudential government. I have not heard submissions or received evidence as to whether that is so or not. There is no evidence before me that the fiscal restraints in the PEFM are greater than those reasonably required by ordinary commercial prudence. The bare assertion of the elected Government is, of course, not evidence. However, it is noteworthy that there does not seem to be any evidence that the BVI Government did not appreciate the benefits to the BVI of agreeing to the PEFM in 2012; and the BVI Government has been able to use the fact that it is bound by these restraints when evidence of fiscal responsibility has been required. The borrowing criteria were indeed varied by agreement in 2020. What I do not see is any evidence to support the proposition that continuation of the current PEFM terms are such as to be disrespectful of the elected Government's devolved financial and fiscal powers, or of any other aspect of that Government.

[50] Paragraph 1.170 above.

[51] Government accounting requirements in the UK would not allow a contingent liability to be held without such comfort. Indeed, as a contingent liability of the UK, the UK Government was required to lay before the UK Parliament details of how the contingent liability was covered and the steps that had been taken, in so far as governance was concerned, to ensure risks were properly managed.

(b) Loan Guarantee

13.55 Following the 2017 hurricanes, the cornerstone of BVI recovery and future development was in the form of a Recovery and Development Plan ("the RDP"). In addition to other aid[52], the UK Government offered to guarantee commercial loans made to the BVI Government of up to £300 million (approximately $400 million) to assist with the implementation of this Plan, such a guarantee making loans for the BVI Government both easier to obtain and cheaper to service.

13.56 Given the amount of the guarantee – the equivalent to the annual revenue of the BVI pre-2017, and a third of its GDP – the UK Government wished to ensure, not only that the UK obtained value for money for this contingent risk (e.g. that there were rigorous governance mechanisms in place in respect of contracting for and delivering recovery projects), but that this additional borrowing was sustainable by the BVI. Good governance was to be achieved by, amongst other things, (i) a commitment of the BVI Government to a public administration reform plan, (ii) a renewed commitment of the BVI Government to manage its public finances in a fiscally sustainable and effective manner as set out in the PEFM, and (iii) requiring projects to be contracted and implemented through an arm's length investment and development agency (the Recovery and Development Agency, "the RDA"), with its governance arrangements to be agreed by the UK Government after consultation with the Premier/Minister of Finance. The UK Government also required (i) UK Government approval for the BVI Medium Term Financial Plan ("the MTFP"), (ii) a Public Expenditure and Financial Accountability assessment[53] and (iii) a Contingent Liability Approval Framework (i.e. a Debt Sustainability Analysis) to ensure that the BVI fiscal position was sufficiently robust, the BVI Government could repay the loans and that there was proper oversight of both financial accountability and project delivery. Oversight in respect of project delivery was to be the responsibility of the RDA. The Debt Sustainability Analysis was required not least because it is a statutory requirement for UK Government accounting. As part of setting up the new contingent liability, the UK Treasury required appropriate risk monitoring mechanisms to be put in place, e.g. through the Director Overseas Territories Directorate reporting to the FCDO, and a technical adviser working with the MoF to monitor the loans and reporting to the Governor. There was a contingent legal requirement on UK Government, once these processes were in place, formally to notify the UK Parliament[54]. These principles and conditions were set out in a document agreed and signed by the BVI elected Government, entitled the High Level Framework for UK Support to BVI Hurricane Recovery ("the High Level Framework").

13.57 The RDA was duly established by the Recovery and Development Agency Act 2018[55], which (i) set up the Virgin Islands Trust Fund into which all funds concerned with recovery would be placed, to be used for the purposes of implementing the RDP, and (ii) required the RDP to be produced by the Premier (as responsible Minister), approved by Cabinet and laid before the House of Assembly. A Plan was duly produced. If the loan guarantee were taken up, it was expected that the borrowings which it supported to finance the Plan would result in the PEFM criteria being exceeded; and that there would be a side agreement with the UK Government with proposed steps to recover full compliance with the relevant criteria over time. In the event, the loan guarantee offer has not been taken up by the BVI Government.

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[52] Paragraph 1.175 above.

[53] The Public Expenditure and Financial Accountability programme provides a framework for assessing and reporting on the strengths and weaknesses of public financial management using quantitative indicators to measure performance (www.pefa.org).

[54] These principles and requirements were helpfully set out in a letter from the FCDO Director Overseas Territories Ben Merrick to the Premier Dr the Hon Orlando Smith dated 21 August 2018.

[55] No 1 of 2018.

13.58 The elected Ministers say that the conditions attached to the proposed loan guarantee, again, "encroach not only on their financial freedom of manoeuvre but also upon their legitimate aspiration to govern and make important political and economic choices for themselves"; and that, because of the unequal bargaining power as between the BVI Government and the UK Government, the choice for the latter is not a real one, especially as the FCDO has informed the BVI Government that, if it rejects the loan guarantee, the UK Government will not look favourably under the PEFM on any alternative borrowing[56]. Whilst saying that they understand the UK Government's requirement to protect the UK taxpayer in respect of a new contingent liability, the elected Ministers assert that the conditions attached to the offer (which they say the UK Government has stated in the past are non-negotiable) are incompatible with the BVI Government's declared policy objective of developing greater autonomy and democratic self-government and with its views of the proper scopes of its rights and powers under the constitutional settlement of 2007. The elected Ministers also maintain that they came under heavy pressure from Governor Jaspert to agree to the conditions and accept the loan guarantee[57]. They now wish to review the parameters in which the RDA operates so that (i) the RDA is not the sole implementer of the RDP, (ii) the BVI Government determines which projects should be assigned to the RDA, (iii) Trust Fund monies can be accessed by the BVI Government and (iv) the RDA's responsibilities are subject to BVI Government direction[58].

13.59 As indicated above, as part of these negotiations, the elected Ministers have also pressed for the removal or a suspension of the PEFM, the guidelines of which loans of the magnitude covered by the loan guarantee would breach. However, whilst flexible in allowing the BVI Government to go out of compliance with the ratios in respect of such borrowing for a period, the UK Government was and is insistent that interim targets and mechanisms for financial management are agreed which set a realistic pathway to compliance return[59].

13.60 As I understand it, the elected Ministers continue to seek to renegotiate the basis of the proposed loan guarantee with the UK Government, with a view to having the conditions adjusted[60]. The guarantee remains on offer. As the Premier accepts, it is a matter for the BVI Government whether it chooses to accept it or not on whatever terms can be agreed[61].

13.61 In my view, there is no question here of the UK Government (or the Governor) arguably being disrespectful of the elected Government and/or their devolved powers: indeed, the approach of the UK Government to assistance has shown full respect for the fact that government finance is a devolved area, and it is up to the elected Government as to how to finance recovery from the 2017 hurricanes. It is uncontroversial that a loan guarantee by the UK Government would enable the BVI Government to obtain finance on the international market and at rates substantially less than would otherwise be the case. Whether the BVI Government wishes to obtain such finance (and, if so, whether it wishes to do so with the benefit of a loan guarantee from the UK Government) is a matter entirely for the BVI Government. The full costs of the RDP have been estimated at something over $500 million; and, if financed mainly by loans, the elected Ministers have expressed concern about servicing such loans (even at a rate reflecting a UK Government guarantee). I understand such caution. But, as with the PEFM,

[56] Elected Ministers' Response to Governor Position Statement paragraphs 52-53.
[57] Elected Ministers Position Statement paragraphs 16-24. Governor Jaspert said that he did not recall placing any undue pressure on the Premier, and he made it clear that it was a matter entirely for the elected Government as to whether to accept the offer of the loan guarantee; but he accepted that he forcefully and "intensely" put forward his view that the recovery was too slow, that the offer was a good one made in good faith, and that it would benefit the people of the BVI (T51 20 October 2021 pages 63-65).
[58] Paper prepared by the Disaster Recovery Coordinating Committee (Premier's Office): Advancing Recovery: Recommendations for a Timely, Efficient and Effective BVI-led Recovery dated 1 May 2019.
[59] Letter Minister of State for the Overseas Territories Lord Ahmad to the Premier 22 September 2019.
[60] T52 21 October 2021 pages 279-280.
[61] T52 21 October 2021 pages 276-280.

if the UK Government is to guarantee up to $400 million of loans, then of course it is entitled to proper comfort that the risks of such contingent liability will be managed properly, with appropriate governance processes in place.

13.62 Again, the elected Ministers' complaint is not that the UK Government are not entitled to have such comfort, but rather that the terms of the loan guarantee, although agreed by the previous administration, are not acceptable to them. It therefore wishes to renegotiate (and is, in fact, renegotiating) the terms. As with the PEFM, the elected Ministers do not consider that the terms offered are "fair", i.e. not in the interests of the BVI. However, again, this involves political (and, to some extent, commercial) judgment, and is an issue that can only be dealt with by negotiation with the UK Government. Whilst the UK Government has various obligations to the BVI, it is not bound to incur contingent liabilities involving risks that it does not consider commercially acceptable. There is no evidence of substance that the UK Government considers that the loan guarantee terms offered involve conditions over and above those compatible with ordinary prudence. There is also no substantial evidence that the UK Government has "threatened" the BVI Government that, if it does not accept the loan guarantee, then the UK Government would not look favourably on loan offers obtained without such guarantee; although it would be understandable if the UK Government were cautious in respect of very substantial loans by the BVI Government, at possibly a substantially higher rate than that obtainable with the guarantee, and without the governance measures which the loan guarantee would require.

(c) The Sanctions and Anti-Money Laundering Act 2018 ("SAMLA")[62]

13.63 SAMLA is a UK statute, which makes provision for an independent (post-Brexit) sanctions and anti-money laundering regime for both the UK and the BOTs.

13.64 It requires the Secretary of State to assist the BOTs to establish publicly accessible beneficial ownership registers, and allowed him or her to impose them by Order in Council if any BOT did not commit to do so by 31 December 2020[63]. This measure was strongly opposed by a number of BOTs with a particular interest in financial services[64]. The BVI Government opposed it on the basis that it had an FATF-compliant due diligence system (i.e. a system that met global standards), and to have a publicly accessible beneficial register at this stage would lead to its financial services sector becoming less competitive[65]. The BVI Government considered the measure unconstitutional, because it interfered with its financial services, a devolved area. The BVI is not the only BOT to criticise SAMLA as being unconstitutional[66]. The constitutionality of these provisions is being challenged in the Eastern Caribbean Supreme Court in a BVI claim by two individuals against the FCDO, to which the Attorney General is a party[67].

[62] See paragraph 1.149(ii) above. This UK statute was passed in furtherance of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EC (the EU Fifth Anti-Money Laundering Directive).
[63] Section 51.
[64] Notably, Bermuda and the Cayman Islands, as well as the BVI (Foreign Affairs Committee Report paragraph 29).
[65] Approximately 33% of the BVI GDP, and 60% of its government revenues, derive from the financial service sector (see Foreign Affairs Committee Report paragraph 30; and paragraphs 1.146-1.147 above).
[66] Foreign Affairs Committee Report paragraph 3.
[67] Supplementary Note on the Elected Ministers' Position Statement paragraph 1.

13.65 However, in the meantime, on 14 December 2020, the UK Government published a draft Order in Council, setting out the UK Government's expectations for publicly accessible registers in all BOTs. Later, in the light of statements on the adoption of such registers made by all BOTS, including the BVI, the UK Government decided it was unnecessary to make the Order. The UK Government is currently working with the BOTs to support their implementation of publicly accessible registers by the end of 2023.

13.66 The elected Ministers regard the introduction of publicly accessible beneficial ownership registers as solely concerned with financial services, a wholly devolved area, which the elected Ministers are understandably anxious to protect. However, the true position is somewhat more complex; because, in the light of evidence of the use to which companies whose beneficial ownership is not public are put:

> "[The UK] Parliament has judged public registers of beneficial ownership to be a matter of national security. Those who seek to undermine our security and that of our allies must not be able to use the [B]OTs to launder their funds. We cannot wait until public registers are a global norm and we cannot let considerations of competitiveness prevent us from taking action now. The lowest common denominator is not enough. While law enforcement agencies in the UK appear to have made relatively little use of their powers to request company information from the [B]OTs, it is vital that this information can be accessed by the public, both in the UK and in countries where public money has been stolen by kleptocrats whose actions harm the UK and its allies…"[68].

Recent events have perhaps underscored the point made here. It should be said that the BVI Government does not accept that public registers are the solution for detecting and deterring financial crime[69].

13.67 However, in addition to this aspect, in the longer term, it is at least arguable that the adoption of financial services standards that are higher than the minimum now globally required shows a commitment to a responsible approach to this sector that will not only discourage the use of BVI companies for nefarious purposes, such as money laundering, but also encourage legitimate business in this area.

13.68 As I have indicated, unlike the UK Parliament, the BVI Government does not accept that publicly accessible beneficial registers are necessary for the proper policing, detection and deterrence of financial crime, including money laundering. It is not for me to say who is right – I do not have the expertise, or the evidence, to make such a call, a call which is both high level and requires the careful consideration of a multitude of factors, including national security. However, in considering this issue, the elected Ministers (like their predecessors) appear to have failed even to acknowledge that there are interests in play over and above the short-term financial interests of the BVI. They adopt the approach that any interest of the BVI as they perceive it to be in a devolved area must inevitably trump any other interests of the BVI and/or the UK in reserved areas such as foreign policy. Under the current constitutional arrangements, that is not right. The UK Government can (indeed, must) take into account not only the best interests of the people of the BVI as they see them (including the longer-term advantages of encouraging legitimate business), but also national security.

[68] Foreign Affairs Committee Report paragraph 33.
[69] Foreign Affairs Committee Report paragraph 30, recording the evidence of the BVI representative in the UK, Dr Elise Donovan.

(d) Medicinal Cannabis

13.69 Cannabis is classified as a Schedule I drug under the UN Single Convention on Narcotic Drugs 1961, which means that, although it is considered to be an addictive drug with a serious risk of abuse, medical use is permitted. It is licensed for medical use in a number of countries (and a number of states within the US), with indications generally to relieve the symptoms of nausea, spasticity and chronic pain.

13.70 The Cannabis Licensing Bill 2020 is designed to facilitate a medicinal cannabis industry in the BVI. However, the Governor has not assented to it, on the basis that, because the UK Government has obligations as a party to the UN Single Convention and consequent international regulations (and wishing to ensure that the BVI meets the same standards), technical discussions need to take place between the UK Government and the BVI Government so that necessary assurances can be given to the International Narcotics Control Board about safeguards against the diversion of cannabis into the illicit market[70].

13.71 I appreciate that the elected Ministers are anxious to proceed with a medicinal cannabis industry in the BVI, which they see as an alternative source of BVI Government revenue to that provided by tourism and corporate services, which are both currently under severe pressure. This is why I have included this under the fiscal management heading. However, as I understand it, the Governor/UK Government has not refused to assent to the Act: they have simply required time to ensure that the provisions of the measure do not adversely impact on their international obligations. On the evidence I have seen, that cannot be construed as an unreasonable stance; and certainly cannot be construed as a stance that is disrespectful of the BVI elected Government or House of Assembly or other institutions.

(e) Fiscal Management: Conclusion

13.72 Finance is a subject matter devolved to the BVI Government. I deal elsewhere in this Report with governance issues as to how the BVI Government conducts its financial business. I need not repeat them here. This part of the Report concerns the suggestion that the Governor and/or the FCDO do not treat the BVI Government with sufficient respect in relation to its handling of fiscal affairs.

13.73 There is scant – and, certainly, no persuasive – evidence that either the Governor or the UK Government interferes, or seeks to interfere, or has any wish to interfere with the fiscal and financial matters that are devolved. However, that does not mean that they have no legitimate interest in such matters. Not only does the UK Government have a contingent liability for the debts of the BVI Government, it has an interest that is not only legitimate but a crucial component of its obligations towards the people of the BVI. Whilst under international law, in its relationship with the BVI, the UK Government has to treat the interests of the BVI people as special, it (the UK Government) is not required to act without proper consideration of (i) others within the realm, to whom it also has obligations including obligations in respect of national security, (ii) the commercial aspects of the financial assistance that it gives to the BVI, including assistance in the form of a loan guarantee, and (iii) very importantly, its obligations to the people of the BVI, including its obligations to ensure a stable and sustainable economy that is vital to the welfare of the BVI people and their future aspirations.

[70] Letter Director Overseas Territories FCDO Ben Merrick to the Premier dated 24 June 2021.

(vi) Public Service Reform

13.74 A key way in which the elected Ministers say that the lack of respect towards the democratically elected BVI Government manifests itself is the manner in which successive Governors (and the UK Government) have failed to fulfil their constitutional obligations and neglected the Public Service. In particular, it is said they have failed to ensure the Public Service is properly funded, and they have failed to reform it. As a consequence, they say, the Public Service is in a parlous state, lacking in the necessary institutional capacity, which undermines the ability of elected Ministers properly to develop, plan and then implement policies – which thwarts the elected Government's policy objectives. This is also a main strand of the elected Ministers' submission as to why governance is so dismal in the BVI.

13.75 I have considered the material and submissions put forward by the elected Ministers in relation to this matter in detail in Chapter 11 of this Report. I need not repeat at any length what is said there. Suffice to say that I do not find the submissions compelling. They ignore not only the constraint imposed on the acts of the Governor by section 60 of the Constitution, but also section 56 which mandates a Minister to direct and control the particular Ministry allocated to him or her. The approach adopted by the elected Ministers in their submissions is wholly artificial.

13.76 As I have set out in Chapter 11, I fully accept that effective governance requires a Public Service which is capable of advising on policy, implementing policy, and monitoring and evaluating the efficacy of any policy. Whilst I do not accept that the capability of the Public Service is as limited as the elected Ministers submit, it is common ground – and clearly the case – that there is a need to improve the Service, including in relation to policy coordination. Training needs to be reconsidered, and steps taken to preserve the independence of the Public Service.

13.77 In respect of the suggestion that the Governor has failed to ensure proper funding for the Public Service, funding is effectively a matter for the elected Government (subject to approval by the House of Assembly). The Governor's Group/Deputy Governor's Office has to apply for funding, as would any other Ministry and department. The allocation of public funding to the Service is a matter for the elected Government, which gives it the priority it considers appropriate. The funding decisions that have been made to constrain expenditure on the Public Service have not been the result of external pressure from the Governor or the FCDO or, indeed, anyone else. Although a Governor has powers to direct payments for the Public Service out of the Consolidated Fund, it is right that they treat such a power as one of last resort, to be used cautiously.

13.78 With regard to the reform of the Public Service, while the Governor has an interest in reform (because of his or her responsibility for the terms and conditions of public officers), the resources and support required for a reform programme is dependent upon a policy decision of the elected Government. The elected Governments from time-to-time have been less than enthusiastic about such reform; but, following the 2017 hurricanes, the previous administration supported a major reform programme (the PSTP) – and, indeed, a commitment to reform of the public administration was a condition of a loan agreement offered to the BVI by the UK Government to assist with recovery[71]. Although the PSTP is proceeding, it is doing so slowly – and I am not convinced that there is the political will in the current elected Government to establish and implement the full programme with reasonable speed. Furthermore, I have concerns about the maintenance of the independence of the Public Service, which is essential to its proper functioning in a modern democracy.

[71] See paragraphs 11.53 and 13.56 above.

13.79 However, at present, the PSTP is being progressed which, if properly implemented, could result in systemic changes within the Public Service. The work that has gone into that programme reduces the need for recommendations. However, as will be seen from Chapter 11, I have made recommendations intended to ensure that the PSTP is taken forward and at reasonable speed.

13.80 What is clear is that the approach of the Governors to the challenges faced by the Public Service does not arguably exhibit any lack of respect towards that Service or to the elected Government which it serves.

(viii) Relationship with Public Officers

13.81 In a letter dated 6 May 2020 and headed "Overreaching by UK Government Officials", the Premier complained to Baroness Sugg of the "many transgressions" of Governor Jaspert in acting beyond his responsibilities under section 60 of the Constitution.

13.82 As an example, the Premier contended that Governor Jaspert had acted improperly by not informing either the Minister for Health and Social Development or the Cabinet that he was inviting some members of the Health Emergency Operations Centre ("the HEOC") to an introductory call with FCDO officials tasked with contingency planning in relation to the COVID-19 response in the BOTs. The Premier wrote that the Cabinet had established the five-member HEOC to provide data to inform the decisions of "all institutions of Government" in responding to the pandemic. According to the Premier, the HEOC was "guided" by the Public Health Ordinance 1977[72], which gave the Minster holding the relevant portfolio responsibility for the promotion and preservation of health. Thus, by law, any meeting to discuss COVID-19 fell to the Minister for Health and Social Development.

13.83 The true complaint was wider. There was, the Premier wrote, "a continual concern of overreach into the Public Service … by the FCO through the Governor and the Governor through his office". Such overreach, the Premier said, occurred notwithstanding that Ministers had been legally assigned responsibility for the administration of their Ministries and departments and that ministerial government had long existed in the BVI.

13.84 The effect of Governor Jaspert and his office making direct contact with public officers without the approval or sometimes knowledge of Ministers, was (the Premier wrote) to leave public officers feeling conflicted and expressing concerns to him. Referring to experienced public officers having expressed discomfort, the Premier implied that the actions of Governor Jaspert were contrary to how "the mutual relationship" had previously operated. In the Premier's view, the then Governor's actions were "heavy-handed", and no less than "constitutional misconduct" and "an abuse of authority"[73].

13.85 Subsequently, in a letter dated 19 May 2020 in which the Premier gave his views on the subject of UK military personnel being called upon to assist in the BVI in an advisory capacity during the pandemic, the Premier also accused Governor Jaspert of making misleading and inaccurate statements and of repeatedly forgetting the limits of his office as Governor and engaging in "constitutional overreach"[74].

[72] Cap 194.
[73] Elected Ministers Position Statement paragraphs 39; and Annex 9 in bundles of documents accompanying Elected Ministers' Position Statement.
[74] Letter Premier to Governor Jaspert dated 19 May 2020.

13.86 Use of the Government Information Service ("the GIS") by the Governor's Office was another facet of how the latter might interact with public officers. In a letter dated 17 December 2020, the Premier informed Governor Jaspert that, as Minister for Information, he had given instructions that the GIS should no longer issue communiqués or provide "public relations coverage" for the Governor, the Governor's Office or the FCDO. That had been a courtesy extended in the aftermath of the 2017 hurricanes. The Premier considered that, save for issues of joint interest, the Governor's Office should take separate responsibility for communication of its plans and those of the UK Government to the BVI public. Any such communication should however (he said) be sent to the Premier's Office before publication[75]. The material disclosed on behalf of the elected Ministers did not include Governor Jaspert's reply to this letter, but did include a letter from the Premier dated 24 December 2020 responding to that reply (which appears to have been sent on 18 December)[76].

13.87 In his letter of 24 December 2020, the Premier maintained that his directive that the GIS should no longer be available to the Governor's Office would stand. He took the opportunity to explain to Governor Jaspert the distinction between their respective positions and said that, since 1967, the purpose of the GIS had been to communicate (elected) Government policy, not the policy of the Governor or the FCDO.

13.88 Notwithstanding the prominence afforded the letter of 6 May 2020 in the Elected Ministers Position Statement, and the Premier's language in that letter and the three letters I have set out above, the Attorney General did not formulate any allegation of constitutional overreach as a criticism of Governor Jaspert in this regard. Nonetheless, Counsel to the COI put the issues arising from this correspondence to him at some length[77].

13.89 Governor Jaspert rejected the assertions set out in the Premier's letters of May 2020 as unfounded. He said that other correspondence[78] existed which clarified the Premier's misrepresentations. Governor Jaspert rejected any suggestion of constitutional overreach. He said it was wrong to characterise the Governor as an "FCDO institution"; rather, under the Constitution, the Governor was part of the Government of the BVI. Accordingly, it would be inappropriate to prevent him using the GIS. Governor Jaspert said the Governor's Office might act as "post-box" for FCDO communications which were "UK-solely communications" albeit the GIS might be used if "there was a collaborative approach to that message".

13.90 As to contact with public officers, Governor Jaspert did not accept that, under the Constitution, he was limited to communicating only through the Premier and his Office. He pointed to his own constitutional responsibilities under section 60, including for the terms and conditions of public officers; and, more widely, to ensure good governance. He accepted that there may have been situations where, for reasons of expediency, he had to communicate directly with public officers, giving as an example the need to take urgent action in the aftermath of the 2017 hurricanes which had struck the BVI two weeks after he had taken up his post. However, Governor Jaspert said that he had, in general and consistent with the aim of a modern partnership, sought to keep Cabinet and Ministers informed. He also said that, for the proper functioning of government, it was to be expected that public officers working to him as Governor would need to consult directly with officers in other Ministries and Departments to make "practical arrangements". He gave as examples of such consultation the restoration of electricity following the 2017 hurricanes, which was done with UK Government support; and, in more normal times, the compilation of information concerning land disposals.

[75] Letter Premier to Governor Jaspert dated 17 December 2020.
[76] Letter Premier to Governor Jaspert dated 24 December 2020.
[77] T51 20 October 2020 pages 76-81.
[78] Having left office, Governor Jaspert no longer had access to records generated during his tenure as Governor, including letters he had written. He was dependent therefore on the documents disclosed to him by the COI (T51 20 October 2021 pages 41-42).

13.91 Governor Rankin took a similar view to his predecessor. In his position statement, Governor Rankin said that to limit the interaction between the Governor's Office and Ministries risked eroding the confidence of the Public Service. He disclosed two Cabinet memoranda, both dated 7 January 2021, to the COI. The first was intended to update the Cabinet on the use of the GIS by the Governor's Office[79]. The paper describes the GIS as "an internal organ of the Premier's Office". It repeats much of the detail found in the two letters from the Premier to Governor Jaspert to which I have referred above, including that it was established policy dating back to 1967 that the GIS was intended to communicate Government policy; and that approval for GIS to issue communications from the Governor's Office would now be given by the Premier's Office on a "case-by-case basis" but then only "where there is a partnership between the Territorial Government and the Governor's Office on specific projects or initiatives."

13.92 The purpose of the second Cabinet paper[80] was stated to be to "update Cabinet on how the Governor's Office should interact with Ministries and Department [sic] of the Government of the Virgin Islands". It continued:

> "The modus operandi was that the Governor's Office liaised only through the Chief Minister's Office, (now Premier's Office), but never directly with Ministries, and certainly not without the prior knowledge of the Ministers, who have been assigned responsibilities for the conduct of Government business including responsibility for the administration of various Departments of Government, in accordance with Section 56 of the Virgin Islands Constitution Order, 2007. This has also been the experience of other public officers who worked with former Chief Ministers."

Accordingly, from 1 January 2021, the Governor's Office would be "required to liaise directly through the Premier's Office".

13.93 The paper makes no specific reference to section 56(7) of the Constitution, which permits a Governor at any time to request from a Minister "any official papers or seek any official information or advice available to that Minister with respect to a matter for which that Minister is responsible". Nor does it refer to section 60 which reserves certain responsibilities to the Governor. Section 60(8) allows the Governor, following consultation with the Premier, to give directions to a person or authority (save for the House of Assembly) exercising a function which involves or affects those responsibilities devolved to the Governor under section 60.

13.94 Governor Rankin considered that a proposal that his Office must only engage through the Premier's Office would be contrary to section 56(7) and "cut across" section 60(8) of the Constitution. He said that, contrary to the Cabinet paper, he had been informed by public officers that it was usual for the Governor to engage with individual Ministries. Governor Rankin pointed out that Ministers would often contact him directly without going through the Premier's Office. While stating that on significant issues a Governor and Premier should seek to work in consultation, Governor Rankin said that there were good reasons for those working in his Office to be able to engage directly with public officers elsewhere in the Public Service. He gave the provision of COVID-19 supplies, including vaccines as an example. There, while the Premier and Minister of Health and Social Development were aware of the overall plan, the

[79] Cabinet Memorandum No 18 of 2021: Government Information Services in Relation to Governor's Office dated 7 January 2021, in particular paragraphs 3,5 and 9 (Annex D to Governor Response to COI Warning Letter dated 14 October 2021).
[80] Cabinet Memorandum No 19 of 2021: Governor's Office interaction with Ministries through Premier's Office dated 7 January 2021 (Annex C to Governor Response to COI Warning letter dated 14 October 2021).

logistical arrangements required liaison between the Governor's Office, BVI health officials and Public Health England. According to Governor Rankin, to have had to go through the Premier's Office on every occasion would have been impractical[81].

13.95 Responding to Governor Rankin's position statement, the elected Ministers said that they fully accept the power available to the Governor under section 56(7). As to section 60(8), they pointed to the requirement for consultation with the Premier, something Governor Rankin also noted in both his written and oral evidence. The elected Ministers, however, said that there have been repeated instances where public officers are contacted directly without the knowledge of the relevant Minister[82].

13.96 As to the use of the GIS, Governor Rankin was firm in his view that, as the Governor was part of the Government of the BVI and the GIS's function was to disseminate information relating to the work of Government, then his office could not properly be prevented from using that service. Governor Rankin said that he had been informed that the GIS had always previously issued information on behalf of the Governor's Office[83].

13.97 The correspondence disclosed by the elected Ministers in support of their arguments on governance shows that the current Premier has been assiduous in reminding recipients of his correspondence that the Constitution provides the framework by which all elements of government are to operate[84]. Under the Constitution, the Governorship is a part of the BVI Government. The elected Ministers made the point that a Governor is not democratically accountable[85]. Governor Rankin did not accept that he was unaccountable to those who would be most affected by the decisions he made as Governor: he said he was accountable under BVI law[86]. Be that as it may, I do not understand the position of the elected Ministers to be that the Governorship is not part of the system of Government in the BVI. It plainly is. Characterising the role simply as a mouthpiece of the FCDO is no more than political rhetoric.

13.98 Governor Rankin explained that the two measures detailed in the Cabinet papers of January 2021 had yet to be implemented and that he was in, he hoped, constructive dialogue with the Premier[87]. Both measures were heralded in correspondence with former Governor Jaspert considered above. Both raise wider questions of governance.

13.99 In my view, to restrict access to the GIS would be to push against the constitutional traces, and good governance. It creates a perception – a misperception – that the Governor is not part of the system of Government in the BVI. It shuts down a means by which the BVI public can be informed as to the work of the Governor's Office, so diminishing the accountability and transparency which the elected Ministers say is needed to increase public trust[88]. It would also place public officers in a difficult and wholly avoidable position.

[81] T50 19 October 2021 pages 156-168; Governor Position Statement paragraph 65; and Governor Response to COI Warning letter dated 30 September 2021 paragraphs 3.1-3.6.
[82] Elected Ministers' Response to Governor Position Statement paragraphs 58 and 59.
[83] T50 19 October 2021 pages 168-170; and Written Response of Governor Rankin to COI Warning letter dated 30 September 2021 at paragraphs 3.1-3.6.
[84] The Premier accepted the proposition that both elected public officials and the Governor had to be guided by the Constitution (T52 21 October 2021 pages 195-196).
[85] See for example, Elected Ministers Response to Governor's Position Statement paragraph 9.
[86] T50 19 October 2021 pages 75-77.
[87] T50 19 October 2021 page 170.
[88] Supplementary Note on the Elected Ministers Position Statement paragraph 12.

13.100 On the wider issue, the requirement that the Governor's Office is required to engage only with the Premier's Office cannot be reconciled with the wording of section 56(7) of the Constitution, a provision which the elected Ministers say they fully accept. In my view, had Cabinet pressed on with this measure, the Attorney General could not reasonably have done anything else but warn them that they would be in breach of the Constitution.

13.101 That returns us to the question of constitutional overreach, an allegation directed at Governor Jaspert. It is a serious allegation. Separating assertion from evidence, I do not consider that, on the evidence the elected Ministers chose to put forward, there is any substance to the allegation. Indeed, this may explain why the Attorney General did not put it forward as a criticism of the Governor.

13.102 In any event, there are good reasons why the Governor should be able to engage with public officers and ought to do so. Without such engagement, he cannot fulfil his constitutional responsibilities for their terms and conditions or to ensure good governance, and cannot act (when action is required) to secure the independence of the Public Service.

13.103 The elected Ministers say that such direct contact puts public officers in a difficult position. However, no public officer who appeared before me spoke of such conflict, nor did the Attorney General seek to explore the matter with the Deputy Governor. More importantly perhaps, to fetter a Governor in the way the Premier proposes would undermine the efficient and effective functioning of government. To return to the HEOC as an example, one of its members was the Director for Disaster Management, whose Department sits within the Governor's Group. On the Premier's logic, were the Director to have had a meeting with the Governor in which COVID-19 came up inadvertently, then either that aspect of the conversation could be taken no further or the Minister for Health and Social Development would need to be informed.

13.104 In her supplemental submission on governance[89], the Attorney General ascribed the disagreement as to the extent to which Ministers should be informed or consulted about the Governor's interaction with public officers to failings in communication. She posited that any confusion in the minds of public officers as to whom they should answer on a matter may be due to "outdated codes" which are being redrafted. I take the reference to the outdated codes here to mean the General Orders. I have discussed these, and the work being done to replace them in Chapter 11. I need only say here that I trust that the Constitutional Review I have proposed will address this issue; and, in the meantime, any update to the General Orders will indeed settle any confusion as to lines of responsibility insofar as they are not clear in the current Constitution.

(ix) The Establishment of the COI

13.105 The elected Ministers make the fair point that government operates more effectively in an atmosphere of consultation and mutual understanding, even when the issue is not one where the Constitution compels consultation. That is a proposition with which the Governors agreed. The elected Ministers say, however, that such an atmosphere has not pertained. In their experience, decisions have been taken by the Governors (but, particularly, by Governor Jaspert) which bear upon the interests of the BVI, and on matters for which the elected Government has responsibility, without consultation or "even effective notice". As the example of such decision-making, the elected Ministers give the establishment of this COI[90].

[89] Attorney General's Submissions on Governance dated 11 November 2021 paragraph 13.
[90] Supplementary Note on the Elected Ministers Position Statement paragraph 9.

13.106 It is an odd example to choose. I do not take the elected Ministers to be suggesting that Governor Jaspert acted with an improper motive and so abused his position because there was no proper basis for establishing any Commission of Inquiry. That was not advanced as a formal criticism, and I have received evidence on projects undertaken during the previous NDP administration where the current elected Ministers (or, at least, the current Premier) have previously called for such Inquiry.

13.107 The COI Act does not require a Governor to consult before establishing a Commission of Inquiry. The point made seems to be that, in a genuine modern partnership, there would be consultation with the elected Government of the day before such a step is taken[91]. Such consultation, I presume it is said, would only be meaningful if it encompassed potential terms of reference, and possibly even the choice of commissioner. However, given this COI's Terms of Reference and the fact that it was established for the public welfare, I can see how consultation limited just to elected officials might easily have undermined public confidence in the independence of this inquiry. On the evidence, I consider that a decision not to consult the elected Ministers was in itself neither unreasonable nor indicative of Governor Jasper behaving in a manner inimical to a modern partnership forged on consultation and mutual understanding. It is not for me to comment further on his reasons for establishing the COI. It is sufficient to note that I have made my findings and conclusions on the evidence obtained during its course, which are set out in the Report.

13.108 It may be said that, when taken with other matters raised by the elected Ministers, how Governor Jaspert established the COI only reinforces a more general argument that he showed disrespect, if not overt hostility, towards the current administration from the moment they took office. A vivid example of this is the elected Ministers' criticism of the former Governor for making wide-ranging remarks at a Cabinet meeting on 8 January 2020, which they took as not only imputing their integrity but that of all Virgin Islanders[92], despite his not having taken any meaningful action in relation to allegations of misconduct in respect of the previous administration as regards BVI Airways[93], the School Wall Project[94] and the Cruise Ship Port Development Project[95]. The Premier made this criticism at length in a letter dated 10 January 2020, repeating it in another of 13 January 2020[96]. The elected Ministers quote at some length from the latter in their position statement, seemingly because they say it showed how "regrettably, disputes, became heated"[97].

13.109 Governor Jaspert's written reply to the first of these letters was not available when he gave evidence to the COI[98]. In it, he wrote that the Premier had misrepresented Cabinet's discussions and described the tone of the letter to him as hostile. He explained that there were ongoing investigations into BVI Airways and the School Wall Project, and invited the Premier to submit any evidence he had to the relevant authorities. In answer, the Premier

[91] I note that the yet to be established Integrity Commission is not required to consult with the Governor and/or Cabinet before exercising the power afforded to it by section 14 of the Integrity in Public Life Act 2021 to hold an inquiry into, for example, an alleged act of corruption by a person in public life.
[92] Elected Ministers Position Statement paragraphs 36-37.
[93] See paragraphs 6.260-6.327 above.
[94] See paragraphs 6.178-6.259 above.
[95] See paragraphs 7.31-7.66 above.
[96] Letter Premier to Governor Jaspert dated 10 January 2020, and letter Premier to Governor Jaspert dated 13 January 2020, each captioned "Unfounded allegations of corruption". According to the letter of 10 January, the comments attributed to Governor Jaspert were said at a Cabinet meeting held on 9 January 2020. This letter was said to be superseded by the letter of 13 January, which contained the same wording save that the comments attributed to Governor Jaspert were now alleged to have been said at a Cabinet meeting held on 8 January 2020. Both letters were copied to the UK Prime Minister, the Secretary of State, the UK Minister of State for Overseas Territories Lord Ahmad, the Director of Overseas Territories FCDO Ben Merrick, and all BVI elected Ministers.
[97] Elected Ministers Position Statement paragraphs 36.
[98] Letter Governor Jaspert to Premier dated 13 January 2020. This letter was copied to all BVI elected Ministers, the Attorney General, the Deputy Governor and the Director of Overseas Territories FCDO Ben Merrick.

maintained his accusations against Governor Jaspert[99], as he also did when writing to the UK Minister of State for Overseas Territories Lord Ahmad[100]. In a letter to the Premier dated 21 February 2020, referencing a later letter from the Premier to Lord Ahmad, Governor Jaspert again asserted that the Premier was continuing to misconstrue what he had said at Cabinet, pointing out that any conversation would be in the agreed minutes. He continued that the Premier's assertions were without foundation and his tone "deeply disrespectful"[101].

13.110 Questioned about this matter by Counsel to the COI[102], Governor Jaspert described the Premier's statements as misguided. He said the way that the Premier had behaved on more than one occasion was not "befitting of a professional or courteous manner from an elected leader of government". Governor Jaspert said that he was surprised that practices of which the Premier had complained to him when Leader of the Opposition, such as the use of tender waivers, had continued when he had assumed office. Governor Jaspert said the letters, to which Counsel to the COI had taken him, showed how his efforts to promote good governance standards had met with a negative reaction from the Cabinet.

13.111 Governor Jaspert did not accept that this correspondence evidenced a complete breakdown of his relationship with the Premier. He said that, whatever the motives of others, he had always endeavoured to be professional and had been committed to working in partnership with the elected Government of the day, consistent with the oath he took as Governor. He rejected the suggestion that his approach had changed with a new administration assuming office in 2019.

13.112 To my mind, read as a whole, this correspondence is more than heated. Anyone reading that part of the Premier's letter of 13 January 2020 reproduced in the elected Minister's Position Statement would see it as levelling serious allegations of, at the very least, unprofessionalism at Governor Jaspert. Yet, once again, the Attorney General (acting in the COI for the Premier and the other elected Ministers) did not advance any criticism before me. The Premier had and took an opportunity to address the point, and his evidence is on the record.

13.113 I do not have to make a finding as to what happened at Cabinet on 8 January 2020, but I make these observations. I was only provided with the Minutes of the Cabinet meeting of 8 January 2020 after Governor Jaspert had given evidence, and then only on asking[103]. When reviewed, they support Governor Jaspert's position[104]. I have had cause during this COI to express dismay over the disclosure of Government documents. Indeed, the Attorney General identified poor record keeping as an issue[105]. It is surprising that those instructed on behalf of the elected Ministers did not think it necessary to disclose the Minutes earlier, given the obvious implication of what was said in their position statement. Poor recording keeping cannot explain this. I assume the answer is that the only point the elected Ministers are seeking to make is that disputes can become heated. But, on the correspondence taken as a whole, the heat appears to have come from only one direction. I am sure that, on quiet reflection, the Premier may consider that the tone he adopted (e.g.) in his letters of 10 and 13 January 2020 could have been better considered.

[99] Letter Premier to Governor Jaspert captioned "Re Your Offensive Statements in Cabinet" dated 14 January 2020. This letter was signed by the other ministerial members of Cabinet, and copied again to the UK Prime Minister, the Secretary of State, the UK Minister of State for Overseas Territories Lord Ahmad, the Director of Overseas Territories FCDO Ben Merrick, and all BVI elected Ministers.
[100] Letter Premier to UK Minister of State for Overseas Territories Lord Ahmad dated 4 February 2020.
[101] Letter Governor Jaspert to Premier dated 21 February 2020 (Annex A to Governor's Response to Elected Ministers).
[102] T52 21 October 2021 pages 20-34.
[103] T52 21 October 2021 pages 28-29 and 38. The Minutes were provided to the COI on 26 October 2021. I am grateful to the Cabinet Secretary for the promptness with which she dealt with their production.
[104] Cabinet Meeting Minutes No 1 of 2020.
[105] Attorney General's Submissions on Governance dated 11 November 2021 paragraph 26.

13.114 Another example of where Governor Jaspert was said to have shown disrespect to the elected Government was in respect of the progress of the Integrity in Public Life Bill. Such legislation, if properly enacted and implemented, could have positive benefits for the BVI. On 7 November 2019, Governor Jaspert presented Cabinet Memorandum No 378/2019: Integrity in Public Life Policy, to Cabinet. Cabinet decided that the Deputy Governor's Office would instruct the Attorney General's Office to draft a new Integrity in Public Life Bill to its order[106]. By this time, the Premier's Office had informed the Deputy Governor's Office that it would be "leading the charge" on the implementation of an Integrity Commission, and requested that all input from the Deputy Governor's Office be submitted to the Premier's Office[107].

13.115 On 28 November 2019, the Attorney General's Chambers was instructed to begin work on an Integrity in Public Life Bill[108]. Work progressed thereafter[109].

13.116 On 3 December 2020, Governor Jaspert held a "Catch-up with the Media". His opening remarks mentioned several matters which touched on good governance, including a concern over victimisation and intimidation in the Territory, a concern which had been brought to him by senior members of the Public Service. Governor Jaspert continued:

> "The Deputy Governor and I will shortly be bringing forward the Integrity in Public Life Act which will bolster the ability of our institutions to ensure accountability."

According to the elected Ministers, by not making reference to the fact that Cabinet had approved the Integrity in Public Life policy on 7 November 2019 and/or to their public support for such a policy (for example, by reference to it being included in the Speech from the Throne given on 5 November 2020), Governor Jaspert's statement created the impression that the elected Ministers were neither concerned with nor interested in progressing the Integrity in Public Life Bill and that he (Governor Jaspert) and the Deputy Governor were imposing this legislation because of concerns over good governance[110].

13.117 In response, the Premier presented a detailed Memorandum to Cabinet on 18 December 2020, which introduced a new and distinct Integrity in Public Life Bill[111]. The paper makes no reference to Cabinet's decision of 7 November 2019, nor to the work that had followed it (which, by this time, had progressed as far as a draft Bill, on which relevant stakeholders such as the DPP, the Registrar of Interests and the Premier's Office had been consulted, being ready)[112].

13.118 Cabinet decided to rescind its decision of 7 November 2019 that the Deputy Governor should have lead responsibility for taking this legislation forward. Rather, the Deputy Governor and Premier's Office were to collaborate, with the latter taking the lead on the basis that the "scope is wider than public officers". Cabinet further decided that the Premier's Office instruct the Attorney General to vet and finalise the bill, and that all stakeholders were to be consulted[113].

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[106] Minutes of Cabinet Meeting No 30 of 2019.
[107] Memorandum Permanent Secretary Premier's Office to Permanent Secretary Deputy Governor's Office dated 2 May 2019 (Annex 13 to Elected Ministers Position Statement).
[108] See chronology set out in Cabinet Memorandum No 173/2021: Bill Entitled Integrity in Public Life 2021 (Annex 18 to Elected Ministers' Position Statement).
[109] See chronology set out in Cabinet Memorandum 173/2021: Bill Entitled Integrity in Public Life 2021 page 10 (Annex 18 to Elected Ministers' Position Statement).
[110] Elected Ministers Position Statement paragraphs 91-92.
[111] Cabinet Memorandum No 505/2020: Bill entitled Integrity in Public Life Act, 2020 dated 13 December 2020 (Annex 47 to Elected Ministers Position Statement).
[112] See chronology set out in Cabinet Memorandum No 505/2020: Bill entitled Integrity in Public Life 2021 page 10 (Annex 18 to Elected Ministers Position Statement). See also Annex 44 to Elected Ministers Position Statement.
[113] Expedited Extract of Cabinet Decision on Cabinet Memorandum No 505/2020 (Annex 48 to Elected Ministers Position Statement).

13.119 On 18 December 2020, Governor Jaspert wrote to the Deputy Governor and the Attorney General instructing them to continue to work on the original Integrity in Public Life Bill as, in his view, the new version introduced by the Premier was inconsistent with the Governor's functions under section 60[114]. On 22 December 2020, the Premier issued a press statement which said that, on the initiative of his Office, a draft Integrity in Public Life Bill had come before Cabinet on 18 December 2020[115]. The statement added:

> "May I say that it is important to note the role that the Premier's Office and your elected BVI Government is playing in driving the process for our Territory to have this legislation."

13.120 Governor Jaspert said that his talking about the Integrity in Public Life Bill with the media was not disrespectful, but consistent with established practice, namely that the Minister responsible for a policy would speak about it publicly. Here, this legislation was being taken forward by the Governor's Group and so it was appropriate for him to speak of it[116]. His recollection was that he had not been consulted on the Bill introduced to Cabinet by the Premier on 18 December 2020[117], and was surprised by this step[118].

13.121 Contrary to the elected Ministers' apparent view, I do not see that Governor Jaspert's decision to mention the Integrity in Public Bill in a statement to the press can sensibly be described as disrespectful. His statement was not inaccurate: it said nothing about the role (or lack of role) of the elected Ministers. The Speech from the Throne, which referred to the elected Government wanting to introduce such legislation, was publicly available. If the elected Ministers believed this was not enough to convince the BVI public in the aftermath of Governor Jaspert's statement, then their immediate remedy lay in issuing a press statement reiterating their own commitment to such legislation. That, in a way, is what the Premier did.

13.122 Harder to explain or even understand was the decision of the Premier to put before Cabinet a new version of the Integrity in Public Life Bill. Dr O'Neal Morton told me that the COVID-19 pandemic had left the Premier's Office hard-pressed[119]. Drafting a new paper for Cabinet would have meant diverting resources within the Premier's Office and the Attorney General's Chambers. More importantly still, the step carried a number of risks. First, there was the substantial risk of undoing the work that had been done over the course of the previous year. Second, public officers were left in a difficult position. The Attorney General put the point in an email: "The Integrity in Public Life Bill is now internally controversial…. We need to resolve the current conundrum where the Premier brought a version of the Bill after DGO had been working with Chambers to produce a draft". Third, it inevitably delayed the introduction of legislation which the elected Ministers said they were so anxious to see in place.

13.123 In the event, the Integrity in Public Life Bill was progressed as a joint initiative of the DGO and the Premier's Office. However, from the perspective of good governance, issues such as the Cabinet meeting on 8 January 2020 and responsibility for the Integrity in Public Life Bill prompt wider questions about how issues are resolved when the functions of the elected, devolved Government and reserved functions overlap, to which the current Constitution cannot respond robustly.

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[114] Letter Governor Jaspert to Deputy Governor and Attorney General: Integrity in Public Life Bill dated 18 December 2020 (Annex 49 to Elected Ministers Position Statement).
[115] Statement by Premier Fahie on the Integrity in Public Life Act 2020 dated 22 December 2020 (http://www.bvi.gov.vg/media-centre/statement-premier-fahie-integrity-public-life-act-2020).
[116] T51 20 October 2021 pages 18-25.
[117] T51 20 October 2021 pages 25-29.
[118] T51 20 October 2021 page 33.
[119] T45 8 October 2021 pages 36-37.

Conclusion

13.124 The elected Ministers portrayed the Governors (particularly Governor Jaspert) and the UK Government as failing to respect the BVI's elected Government and institutions to such an extent that the authority of the elected Government and those institutions was undermined. Thus, they say, disrespect is also paid to both (i) the principles of international law governing the relationship between a non-self-governing territory such as the BVI and its "administering authority", including the right of self-determination as reflected in article 73 of the UN Charter; and (ii) the constitutional "settlement", i.e. the "modern partnership" based on mutual respect and the principle of self-determination as reflected in the Constitution.

13.125 As will readily be seen from the above, the evidence simply does not support that proposition. There have been differences between the BVI and the UK Government and/or the Governor from time-to-time (notably Governor Jaspert), including differences over the construction of the Constitution and over who should lead in respect of work streams that involve both devolved and reserved matters. Such difficulties are not uncommon in other jurisdictions where there are devolved powers. But simply because someone else disagrees with your view, it cannot be assumed, without more, that that is a show of disrespect. Here, there is no evidence to support the proposition that the UK Government and/or Governors have shown disrespect to the BVI elected Government, or BVI democratic institutions, or to the people of the BVI. Indeed, some of the matters raised by the elected Ministers as examples of such disrespect appear contrived, e.g. aspects of the fiscal management and Public Service reform that have been raised, tuna quotas and Registrar of Interests. It is unhelpful, and undermining of the vital relationship of partnership between them, for unsubstantiated suggestions to be made – often, publicly and immoderately – by the elected Government that the UK Government is disdainful or disrespectful of the relationship.

13.126 Of particular importance in the context of this COI, in my view, is that there is no evidence here that the UK Government is not entirely committed to, and focused upon, its obligations under the Constitution and international law (including article 73 of the UN Charter) to assist the people of the BVI towards self-government. The attempt by the elected Ministers to suggest otherwise – indeed, to suggest that the UK Government positively undermines the rights of the people of the BVI, which are the reverse side of those obligations – simply does not get off the ground.

13.127 As indicated above[120], in recent years, the UK Government has repeatedly and unequivocally emphasised its commitment to the right of self-determination for the peoples of its BOTs, including the development of self-government and appropriate free political institutions; the promotion of the political, economic, social and educational advancement of those peoples, whilst protecting them from abuses; and allowing the peoples of the BOTs the autonomy necessary for them to continue to flourish. Where the pursuit of further self-government (which might include independence) is the expressed wish of the people, this includes a commitment to help the Territory to achieve it. In the meantime, the UK Government is committed to granting each BOT the greatest possible autonomy consistent with that BOT's own aspirations and circumstances and the UK Government's obligation under article 73 to protect the people of its BOTs from abuses.

[120] Paragraphs 1.33-1.35.

13.128 Although media, and even some political figures in the BVI, have suggested that the UK Government retains a colonialist mind-set – and wishes to maintain control over the BVI contrary to the wishes of its people[121] – I have seen no evidence of the UK Government being other than fully and unequivocally committed to these obligations[122]. It is important that that commitment, and the wider commitment of the UK Government to the people of the BVI, continue to be emphasised, monitored and met. The people of the BVI are entitled to keep the UK Government up to the mark in that respect. It is also vitally important that conditions in the BVI allow the aspirations of the people who live there to be achieved, and that the UK Government ensures that such aspirations are not thwarted.

13.129 I have referred to disputes between the elected Government on the one hand, and the UK Government and/or Governor on the other, as to the proper scope of devolved powers. There is a resolution procedure where the dispute is over the construction of the Constitution, namely by a reference to the Eastern Caribbean Court of Appeal. But many differences are not simply about interpretation of the Constitution: several referred to above, for example, concern who should lead in circumstances in which devolved and reserved matters are involved.

13.130 Such disputes are bound to arise wherever there are devolved powers, and particularly where devolution is an ongoing process. There should be a process whereby such disputes can be resolved, by way of adjudication or through some form of mediation. That is a matter to which the Constitutional Review which I propose should give particular consideration, and I will make a recommendation accordingly. That mechanism, once in place, would be able to resolve (e.g.) where the lead in disaster management and other controversial areas should lie.

Recent Measures

13.131 Although they did not accept that it was as parlous as I have found it to be, at least by the end of the evidence the elected Ministers accepted that governance in the BVI was below an acceptable level. However, they submitted that they were tackling the deficiencies by progressing a number of measures that will (they say) result in improvements in decision making and implementation, such that governance would be improved to a level that is acceptable – and much better than merely acceptable.

13.132 I have considered these measures above. They comprise in particular (i) a suite of measures concerned with conduct in public life (i.e. the Integrity in Public Life Act[123], the Whistleblowers Act 2021[124], the Register of Interests Bill 2021[125] and the draft Ministerial Code of Conduct[126]), (ii) measures related to government procurement of goods and services (i.e. the Public Procurement Act 2021[127] and the Contractor General Act 2021[128]), (iii) the Public Service Management Code[129] and (iv) anti-money corruption and laundering legislation (i.e. the Proceeds of Criminal Conduct (Amendment) (No 2) Bill[130]).

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[121] See, for example, the comments of the Deputy Premier at a meeting of the Fourth Committee (Special Political & Decolonizations) at the 76th UN General Assembly (https://bvi.gov.vg/media-centre/bvi-says-uk-should-not-pursue-colonial-path-un). See also Letter Premier to Lord Ahmad dated 4 February 2020.
[122] See paragraphs 1.30-1.38 and 13.12-13.123.
[123] See paragraphs 11.100-11.115, and 13.114-123.
[124] See paragraphs 11.121-11.129 above.
[125] See paragraphs 4.106-4.122 above
[126] See paragraphs 11.116-11.120 above.
[127] See paragraphs 6.571-6.580 above.
[128] See paragraphs 6.581-6.586 above.
[129] See paragraphs 11.139-11.143 above.
[130] See paragraph 12.119 above.

13.133 However, the evidence leads me to be extremely sceptical about such claims. I have set out my concerns with the particular measures above. Here, I simply make some overarching observations.

13.134 First, as I have described, the elected Ministers have not identified the reasons for the state of poor governance: they have only offered the deficiencies within the Public Service which, I have found, were and are not a substantial cause. It could therefore only be coincidence if their efforts were to address the real reasons for the poor state of governance.

13.135 Second, whilst claiming to be champions of good governance, the current elected Government has continued in practice to ignore the principles of good governance, even as these measures were making such progress that they have.

13.136 Even when they have trumpeted good governance and purported to herald a change in the approach to governance to respect the principles of openness and transparency, there is a history of elected Governments in the BVI prevaricating over steps to make governance better; and, in the meantime, ignoring the principles including existing measures adopting those principles. The current administration has proved no different. Having criticised its predecessor, and promised a change in approach, it has persistently ignored the principles of good governance in the examples I have given. In particular, it uses effectively unfettered powers to make decisions in relation to (e.g.) procurement of contracts (ignoring or by-passing the open tender regime for major projects in the majority of cases, and employing contractors of its choice), statutory boards (where it has revoked all appointments even where it has known revocation to be unlawful, with a view to having individuals who are in favour of its policy programme on the boards), disposals of Crown Land, and the grant of residency and belonger status. What it does is in distinct contrast with what it says. The practice does not appear substantively to have changed even as the result of the evidence given to the COI, which very clearly showed governance procedures across government that were at best very poor. None of that is a good foundation for the proposition that the people of the BVI, or I, can have confidence in the elected Government's commitment to the principles of good governance.

13.137 Third, the timing of the progress is not, in my view, coincidental. There has been a raft of better governance measures in the air for some years. Successive elected Governments have been very slow to progress them. Whilst the current VIP Government was elected on the ticket of being a party of good governance, and some steps were taken during 2019 and 2020, virtually all progress that has been made has been during the period of the COI when the Government has known that governance has been a key issue. In my view, the measures have been, to a large extent, reactive to the work of the COI. I am pleased that some progress has been made whatever the driver, but again this does not engender confidence for the future when the COI will have been concluded.

13.138 Fourth, the paper measures that have been passed, whilst being very welcome, do not suggest that the elected Government is enthusiastic in pressing forward with them in practice.

13.139 As I have described, in respect of most of these measures, a significant driving force has been successive Governors. Some (e.g. the Proceeds of Criminal Conduct (Amendment) (No 2) Bill) appear to be the result of the initiative of the Governor alone. Many of the measures have not yet been implemented. The drafts that exist (in respect of, e.g., the Register of Interests Bill 2021 and the Ministerial Code) clearly have much work to be done on them before they are in a state to be potentially effective. Some (such as the Integrity in Public Life Act 2021) are no more than enabling statutes which do not yet have any supporting architecture.

13.140 Fifth, successive elected Governments (including, particularly, the current Government) have failed to support the BVI institutions that are designed to maintain good governance. Again as I have described, the work of the Auditor General, the IAD Director and the Registrar of Interests have been treated with contempt: their reports, including their conclusions as to bad governance (and the risk of impropriety to which that gives rise) and recommendations have been consistently and almost completely ignored. In the context of this COI, the elected Ministers through the Attorney General have made serious criticisms of the Auditor General (including charges that she lacks integrity and is politically motivated) in circumstances in which she has simply been seeking to do her job, monitoring the executive and pointing out deficiencies in the way in which they go about government. They have, at least, allowed their Ministries to obstruct the work of the statutory auditors. They have treated the Registrar of Interests' efforts with disdain, to the extent that she now has the shadow of criminal proceedings hanging over her for seeking to encourage compliance with constitutional obligations. That conduct is not, in my view, the conduct of a government intent on supporting the principles of good governance. That conduct by the elected Government has, if anything, worsened during the current administration. There is no evidence that their attitude towards these important pillars of good governance has changed. There is no evidence that they will not hold any new institutions in similar contempt.

13.141 I pause here to note that, as I have described, if not moribund, the role of Complaints Commissioner is not thriving, with a severe decline in numbers of complainants[131]. In my view, this reflects a lack of regard for the post by other elements of the BVI Government, with a resulting loss of public confidence in the position. As with the statutory public auditors, the recommendations of the Complaints Commissioners usually fall on deaf ears. Pending a broader review of the pillars of governance in proposed Constitutional Review, in my view the Complaints Commissioner should be required to report annually to the Governor, Deputy Governor and the House of Assembly/SFC, setting out the extent to which there has been a response to her criticisms and recommendations. That would give the House/SFC an opportunity to scrutinise the report and raise questions about it as part of the budget process. I have made a recommendation accordingly.

13.142 One element of the failure of elected Governments to support the constitutional pillars of governance is that they have failed to provide sufficient resources to those institutions in the past, and have not provided any comfort that in the future those institutions (and new ones, such as the Integrity Commission) will be ensured of proper resources and sufficient funding to make them efficient and effective. No thought appears to have been given to resourcing these initiatives properly. This in itself would be sufficient to undermine the whole edifice of governance.

13.143 Thus, in all of the circumstances, the rhetoric of the Premier and other elected Ministers, compared with the evidence, generally rings hollow. In my very firm view, the people of the BVI can have no confidence that, as things currently stand, these recent measures will be pursued and implemented effectively. In my view, it is highly unlikely that they will.

[131] See paragraph 1.128 above.

Governance: Summary

13.144 The position in relation to governance is, thus, as follows.

(i) Within the areas of government under the control of elected public officials, governance is almost uniformly very poor with proper procedures, checks and balances being absent, patently inadequate for purpose, by-passed or ignored.

(ii) The Premier and the elected Ministers submitted that this failure in governance was and is, at least in large part, a consequence of deficiencies in the Public Service, which (it is said) is under-qualified, under-trained, under-resourced and outdated as the result of neglect by successive Governors. However, on the evidence, for the reasons set out above[132], I am entirely unpersuaded by that submission. On the evidence, the proposition that the gross failures of governance I have identified are due in any large part to failings in the Public Service and/or a failure on the part of Governors to encourage and support change within the Service is simply not made out. The elected Ministers do not offer any other substantial explanation for the parlous state of governance.

(iii) Governance has been in such a state for some years and across different administrations. Governance was in a chronically poor state in the previous NDP administrations, as illustrated by the School Wall and BVI Airways Projects and its approach to such matters as the registration of interests and assistance grants[133]. The evidence shows that governance has, if anything, worsened under the current VIP administration, as illustrated by the contracts with Mr Skelton Cline and in respect of radar barges, and in its approach to the COVID-19 Assistance Programmes, residency and belonger status, and statutory boards, as well as its continuing approach to registration of interests and assistance grants.

(iv) Insofar as there are deficiencies in governance, the elected Ministers said that they are tackling them by progressing a number of measures, notably in relation to procurement of contracts, integrity in public life and reform of the Public Service that will result in improvements in governance, including in policy and decision making and implementation, to at least an acceptable (if not, as they say, a much higher) level. However, the evidence (including the evidence as to their approach to governance in practice since coming to power) leads me to be extremely sceptical about such claims. For the reasons set out above[134], I do not accept that the steps they are taking will be effective in addressing the deficiencies.

13.145 What are the real reasons for the dire state of governance?

13.146 As I have described, the elected Ministers have not put forward any overarching reason that is compelling. In the course of the evidence, I was confronted by specific courses of conduct by elected officials in a wide variety of fields of government which, equally, have not been explained to anything like a satisfactory degree. By way of example:

- How has it come to pass that, notwithstanding concerns for the public purse being raised explicitly many years ago, Members of the House of Assembly now enjoy a substantial allocation of public money to dispense in a manner which is for practical purposes unconstrained and unmonitored?

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[132] See Chapter 11, and paragraphs 13.74-13.80 above.
[133] Whilst registration of interests and House of Assembly Assistance Grants are matters concerning all Members of the House of Assembly, as I have explained, the elected Ministers are a majority in the House; and, in recent years, the House has been dominated by the party in government which has had a very substantial majority of seats.
[134] See paragraphs 13.131-13.143 above.

- Why is there a disconnect between the elected Members of the House of Assembly and those who vote for them, such that the former have given scant regard to their constitutional obligations as regards declarations of interests?
- Why has there been such little regard for the constitutional primacy afforded to Cabinet, and even the House of Assembly?
- Why have contracts on major projects been distributed in a manner which, to the knowledge of the elected public official driving them, results in added cost with no identifiable public benefit?
- Why has the need to maintain the autonomy of statutory boards been undermined?
- Given the deep emotional connection to the land felt by the people of the BVI, how can it be that disposals of Crown Land have been made without the application of proper criteria reflecting that importance? Why, on occasion, have disposals of Crown Land for commercial purposes been at a substantial undervalue?
- How is the value afforded to residency and belongership supported by the circumvention of the system which governs how they are granted?
- More generally, why in so many areas of government do elected public officials prefer a system in which decisions are made using powers involving the exercise of unrestrained and unmonitored discretion, rather than a system that is open, transparent and guided by clearly expressed and published criteria?

The list goes on. In respect of none of these has any sensible or at all persuasive explanation been put forward.

13.147 It is of course possible that poor governance is the result of recklessness or even just lack of care – but, again, in my view the evidence does not support such a conclusion here. As I have described, the failings in governance have been pointed out, unambiguously and with force, by the Auditor General and the IAD over many years. Those auditors have also indicated, with equal clarity and force, that such lack of governance is fertile ground for, not only poor decision making and implementation, but dishonesty by public officials and/or those who may benefit from such decisions. The failure to apply good governance principles gives rise to an enhanced risk of dishonest and unlawful use of public funds and assets. They have pointed out that, in particular circumstances, there is the appearance that a course of action has been taken in abuse of position and/or for the benefit of a particular constituency. The frequent and broad use of unfettered discretion in respect of decision-making has been particularly criticised. All of that has been made patently clear to elected officials, time-and-time again, year-on-year.

13.148 In my view, the response of the elected Government has been, and is, noteworthy and informative. They have consistently, and across administrations, turned their backs on the observations and recommendations made. Good governance is shunned by elected officials as an unwelcome stranger. They have repeatedly and doggedly eschewed the pleas of the auditors to adopt principles of good governance, such as openness and transparency, in favour of continuing with systems that they have been informed, in no uncertain terms, give rise to the risk of not just unwise but dishonest and unlawful expenditure of public money. Where what they want to do is contrary to their own policy, they ignore that policy. Where what they want to do is contrary to the law, they ignore the law. This conduct does not involve misunderstandings, or legitimate differences of opinion, or for that matter a lack of capacity to formulate and implement policy. The evidence is overwhelmingly to the effect that the elected Government will exercise its powers to make decisions and spend public money as it wishes, without the application of the principles of good governance, including proper,

published criteria and the giving of proper reasons. The failings in governance have not only been allowed by successive informed BVI elected Governments, but there is evidence that they have been positively and repeatedly endorsed and even encouraged.

13.149 In my view, the evidence points firmly in one direction: that the elected Government in successive administrations (including the current administration) has deliberately sought to avoid good governance; and, where processes are in place, undermined good governance by by-passing or ignoring them as and when they wish, which is regrettably often. In my view, the evidence only properly permits that conclusion.

13.150 The conditions which have allowed this state of affairs to exist and be maintained are still extant. And, for the reasons I have already given, the measures which the elected Government is now progressing do not instil any confidence that the conditions will change in the short, or even medium, term. Unless action is taken, then it is my firm conclusion on the evidence that the elected Government will likely continue to ignore the principles of good governance, and an environment conducive to dishonesty in public office will continue indefinitely.

Serious Dishonesty in Public Office

13.151 The elected Ministers submit that "there is no proper factual basis in respect of statutory boards, COVID-19 grants, belongership, Crown Lands and contracts (VINPP, [Claude Skelton Cline] and EZ Shipping) of a kind which the Commissioner could adjudge to be reasonable and which would satisfy the objective observer, for concluding that any person may have engaged in criminal conduct"[135].

13.152 However, I cannot accept that submission. It is made on the basis that the failure of governance is the result of deficiencies in the Public Service, and notably deficiencies in the capacity within the Service for policy formulation and monitoring. The submission states:

> "It is submitted that the fundamental problem common to an examination of each of [these] topics… is the lack of effective policy formulation and monitoring in the Public Service and an appreciation of its vital role in modern government and good governance (see principles identified by the Attorney General [T16 22 June 2021 page 20 lines 8-23 and page 21 line 22 to page 23 line 9])."

13.153 This theme was picked up in the Attorney General's own submissions on governance, where she says:

> "20. In my view, a number of areas upon which the [COI] has focused such as Statutory Boards, Belongership, Crown Lands and Contracts are all areas in which there has been a failure in policy-making. However, I have not yet seen evidence of dishonesty, venality or ill-intent in these areas and I believe that such problems as have been identified in the evidence could have been avoided through carefully thought-out and implemented policies.
>
> 21. The deficit in the policy-making function also leads to a position where the Ministers often seem to be left to make decisions on their own without the benefit of expert advice and suitable policy-making input. While the direction on policy comes from Ministers (or in some cases the Governor), a robust and well-developed policy-making function is needed within the public service to assist them in that respect.

[135] Elected Ministers' Closing Submissions paragraph 3.

22. A further consequence of this deficiency is that parties get frustrated with the perceived lack of policy solutions to problems and instead of fixing or improving structures, there is a temptation to get rid of or go around them. This impetus comes not just from the Elected Government, also from the public service, and the Governor"[136].

She thus considers that priority and investment into policy making is required– and, frankly, is all that is required – to remedy the current parlous state of governance.

13.154 However:

(i) The passages from the Attorney General's evidence from Day 16 of the COI hearings appear to relate primarily to the failure of the elected Government to have a policy agenda, rather than a failure to have policies formulated and/or implemented which, on the face of it, is a different thing[137].

(ii) The Attorney General says that she has not seen evidence of dishonesty, venality or ill-intent in these areas, including contracts into which I have enquired which include the School Wall Project and BVI Airways. She does not say where she has looked. However, a criminal investigation is already underway in respect of the School Wall Project and BVI Airways in which public officials are persons of interest. I have set out in this Report findings relating to information that has been provided to me that serious dishonesty in relation to public officials may have taken place.

(iii) In the second submission, the Attorney General expresses an opinion, namely that: "In my view, a number of areas upon which the [COI] has focused – such as Statutory Boards, Belongership, Crown Lands and Contracts – are all areas in which there has been a failure in policy-making". However, that is clearly not right as a general proposition. For example, the policy in relation to procurement for major projects is clear: it requires an open tender process unless there are extraordinary circumstances warranting a waiver. The policy for the appointment and removal of members of the CCTF Board is clear: it is set out in the CCTF Act. In making decisions, the elected Government decided to ignore the clear policy in each case. Furthermore, the submission ignores other matters into which the COI enquired, such as registration of interests, where again the clearly expressed policy (expressed there not just in statute, but in the Constitution) was consistently ignored over many years.

(iv) In any event, on the evidence, I have rejected the contention that the problem with governance in these areas results from any lack of capacity or capability within the Public Service in respect of the formulation and implementation of policy. I need not repeat my reasons for doing so. There appears to be no foundation to the submission that there is no proper factual basis for concluding that any person may have engaged in criminal conduct.

13.155 For the reasons set out above[138], it was never intended that the COI itself would be involved in following money or conducting in depth investigations into particular projects or particular public officials. Those are tasks for the appropriate BVI authorities. However, it is an abuse of public office and a form of dishonesty that, in any particular circumstances, is highly likely to be serious for a public official, when exercising a statutory power or duty, knowingly to take into account a private interest or any interest other than a legitimate strand of the

[136] Attorney General's Submissions on Governance dated 11 November 2021 paragraphs 20-22, quotation from paragraph 20.
[137] This evidence of the Attorney General is considered in this context above (paragraph 11.60 and footnote 88).
[138] See paragraphs 3.14-3.16.

public interest[139]. Where, on the evidence, I am satisfied that that is a real possibility, then such conduct falls within paragraph 1 of my Terms of Reference, i.e. there is information that serious dishonesty in relation to officials may have taken place.

13.156 Elected public officials have ignored the clearest warnings from their own statutory auditors that the lack of governance principles in their decision making gives rise to the risk of dishonesty by either public officials themselves and/or those who benefit from their decisions, in favour of continuing with practices that have no rational explanation in terms of the public interest. The elected public officials have been unable to provide any compelling explanation for this pattern of conduct. The conduct has been more or less across the board, and from administration to administration. It is continuing, has worsened and, I have found, is likely to continue indefinitely as things stand.

13.157 In respect of a number of areas of government, with regard to particular projects, schemes or programmes, I have found conduct to fall within paragraph 1 of my Terms of Reference. I have found such conduct to have occurred not just in respect of one project or even one area of government, but in respect of a considerable number of projects, schemes and programmes across, the wide spectrum of government. Whilst I accept that some of the matters into which I have enquired appear to have extreme elements (e.g. the extent, but not the nature, of the contract splitting in respect of the School Wall Project), those matters were chosen as being illustrative examples; and no one suggested that they were outlying, but rather they were typical of government practice. That appears to coincide with the evidence.

13.158 There is, therefore, a general picture painted of deliberately maintained poor governance, in circumstances in which the relevant elected officials are well aware both that the governance is poor and of the consequent greatly increased risk of dishonesty. There is, therefore, not only information that serious dishonesty in relation to public officials may have taken place in relation to specific decisions they have taken, as I have found; but, I conclude, more generally, that there is information that widespread serious dishonesty in relation to public officials may have taken place across government and across administrations. Given the broad spread of both the decisions and the areas of government implicated, the risk is of course compounded.

13.159 I stress that, although there is clear evidence that the current administration has overseen a decline in governance standards, my conclusions in relation to the state of governance and the reasons therefor are not restricted to this administration. They apply equally to the NDP Government that was in power until 2019.

13.160 On the evidence, I firmly conclude that there is not only information that serious dishonesty in relation to officials may have taken place, but it is highly likely to have taken place across a broad range of government. It is unnecessary for me here to name individual officials whose conduct falls within that category: although my conclusions in relation to particular areas of government are based on criticisms of individuals (mainly particular public officials), to whom the concerns and criticisms were put and who had full opportunity to respond. It will be apparent that the public officials who may be involved are almost predominantly elected. Whilst it is unnecessary for me to make any finding in relation to corruption in the form of direct personal bribery, in all the circumstances as I have described them (including the overwhelming picture of the principles of good governance being ignored and worse), it would be frankly surprising if there were no such corruption. Further investigations by the appropriate authorities, which I have recommended, will identify who and when.

[139] See paragraphs 2.11-2.23 and 3.17 above.

13.161 In my view, as things stand, that position is unlikely to change in the foreseeable future. Whilst of course I do not say that all elected officials are dishonest, I do conclude that there is information that a substantial proportion of elected officials, not restricted to this administration, may be involved.

Recommendation

13.162 I deal with overarching recommendations below[140]. However, with regard to governance, I make the following specific discrete recommendation.

Recommendation B45

I recommend that the Complaints Commissioner be required to report annually to the Governor, Deputy Governor and the House of Assembly/Standing Finance Committee of the House of Assembly, setting out the extent to which there has been a response to her criticisms and recommendations. That would give the House/Committee an opportunity to scrutinise the report and raise questions about it as part of the budget process.

[140] See Chapter 14.

APPENDIX A

CHAPTER 14:
OVERARCHING RECOMMENDATIONS

APPENDIX A

OVERARCHING RECOMMENDATIONS

Introduction

14.1 On analysis of the evidence, many of the conclusions set out above were not difficult to draw. The state of governance in the BVI is appallingly bad. In all the circumstances, including the absence of any acceptable explanation for that state and the way in which elected public officials continue to shun the basic principles of good governance knowing that that gives rise to an environment in which dishonesty in and around government can flourish, the evidence would drive anyone who is impartial and independent to the view that the conduct falls within paragraph 1 of my Terms of Reference. The conditions which allowed this state of affairs have not changed and, as things currently stand, are likely to remain unchanged for the foreseeable future.

14.2 During the course of this COI, participants have often sought to show that a particular part of the evidence does not show poor governance and/or dishonesty in public office. Although they have usually been unsuccessful, and I hope any errors in this Report are few, I should say that the information before me paints a picture that would not be undermined by any attack of part of it. The evidence is enormous. Looked at as a whole, it is in my view overwhelming. It irrefutably paints the picture I have described.

14.3 However, I have found some aspects of the recommendations, which my Terms of Reference require me to consider, to be more difficult. In my view, the overarching recommendations I make should not simply reflect what I consider to be optimal, but what I consider essential in the public interest, i.e. in the interest of the people of the BVI.

14.4 After the most careful consideration, I make four primary recommendations. I consider each essential. Three look forward. One looks back.

Temporary Partial Suspension of the Constitution

14.5 First, and with a particularly heavy heart, I have concluded that, unless the most urgent and drastic steps are taken, the current unhappy situation – with elected officials deliberately ignoring the tenets of good governance giving rise to an environment in which the risks of dishonesty in relation to public decision making and funding continue unabated, and the consequences of allowing such an environment to flourish – will go on indefinitely. That is wholly unacceptable. It is not simply that the people of the BVI deserve better – which they do – but the UK Government owes them an obligation not only to protect them from such abuses, but to assist them to achieve their aspirations for self-government as a modern democratic state. I have concluded, with some considerable regret but ultimately very firmly, that for the current situation to continue would adversely affect those aspirations by delaying (or even entirely preventing) progress towards such self-government as a modern democratic state.

14.6 As will be clear, the problem lies with the role played in government by elected officials. I have most anxiously considered action short of temporarily denying elected officials that role by a partial suspension of the Constitution. However, although of course I do not say that all elected officials are dishonest, the information of conduct falling within paragraph 1 of my Terms of Reference spans different administrations and different parties. As things currently

stand, I could have no confidence in a future elected government re-establishing adequate governance or bringing to an end the conditions which favour dishonesty involving public office holders. As I have indicated, my findings in relation to governance etc apply equally to the previous NDP administration; and the Constitution as it is currently framed lacks the robustness to prevent such conduct in the future.

14.7 Therefore, whilst I appreciate that the Governor and the UK Government will consider this only as a last resort, as do I, I have concluded that the only way – and I stress, the *only* way – in which the relevant issues can be addressed is for there to be a temporary suspension of those parts of the Constitution by which areas of government are assigned to elected representatives. It is only with the most anxious consideration that I have been driven to the conclusion that such a suspension is not only warranted but essential, if the abuses which I have identified – which are abuses against the people of the BVI – are to be tackled and brought to an end. If the abuses were allowed to continue, then, in my view, they would put at severe risk steps towards self-determination as a modern democracy to which the people of the BVI are entitled and wish to take. Let there be no doubt – I have not recommended suspension of part of the Constitution to frustrate the hopes and wishes of the people of the BVI, but rather to give them an opportunity to fulfil those aspirations. They deserve no less.

14.8 As I have indicated, whilst the length of the suspension will depend upon a wide variety of factors (including, possibly, the time that the review of the Constitution I propose may take), the suspension should be for as short a time as needed to allow for the re-establishment of elected government, subject to the principles of good governance. I recommend that, initially, the suspension should be for two years, but subject to extension or early termination as circumstances dictate.

14.9 Such suspension would include both the cessation for the time being of ministerial government, and the dissolution of the House of Assembly. During the period of the suspension, I recommend direct rule by the Governor with the assistance of some form of Advisory Council to advise him on the formulation of policy and the exercise of his functions. The Advisory Council should reflect civic society, and take full advantage of the pool of experience, expertise and wisdom within the BVI.

14.10 A suspension of that part of the Constitution will, of course, impose a greater burden on the Governor and his Office. It would require substantial strengthening of the Governor's Office in terms of both numbers and seniority of staff, as well as administrative support and facilities. However, whilst I did see public officers under pressure, I did not find any information that senior public officers are or may be systemically dishonest. Far from it: I saw generally talented, able and committed people, in whose hands I consider the Public Service would be safe and could be effective. In my view, they would be able to bear the additional burden that my proposal would involve. Even if, in some areas, expertise and advice is required from outside, in supporting any temporary arrangement as I have proposed, I would recommend and urge the Governor primarily to draw upon this invaluable pool.

Recommendation A1

I recommend partial suspension of the Constitution, by the dissolution of the House of Assembly, the cessation of ministerial government and necessary consequential suspension of provisions of the Constitution, for an initial period of two years. During that period, I recommend direct rule by the Governor with such assistance as he considers appropriate, e.g. an Advisory Council to advise him on the formulation of policy and exercise of his functions. That Council should reflect BVI civic society. In the period of the temporary constitutional arrangement, I also recommend and urge the Governor to draw upon the pool of Public Service talent in the BVI to advise and aid him. In that period, the Governor should have all necessary executive powers, including the power to make any public appointments.

I recommend that there should be a return to ministerial government and an elected House of Assembly as soon as practicable; and the Governor should regularly, and at least every six months, take advice from any Advisory Council and/or from whom otherwise he considers appropriate as to the earliest practicable date on which such government can resume. The Governor shall publish a report on that issue at least once every six months.

Constitutional Review

14.11 Second, and again looking to the future, I have concluded that a Constitutional Review is also essential. The last such Review was held in 2006, and led to the 2007 Constitution. The COI has demonstrated that that Constitution cannot take the weight it has to bear. Indeed, although there may have been significant differences in the reasons for this, no one suggested that the Constitution is working. In my view, a Review is required to ensure, so far as possible within any constitutional framework, that mechanisms are put in place so that abuses which I have identified cannot continue or be repeated; but also that the needs and wishes of the people of the BVI (including their aspirations for self-government) are met. To meet those requirements, the Review must be focused, open, inclusive and expedited.

14.12 Such a Review has, of course been in the wind for some time. Nearly two years ago, the Premier announced that a Constitutional Review Commission was to be established, to report within six months. However, appointments were not made until 31 December 2021, the detailed terms of reference have not been published, and the time for the Commission to report has been extended to an initial two years, i.e. by January 2024. It is not for me to set out the detail of how the Review should be conducted, but it is essential that the members of the Review team are drawn from a sufficiently wide constituency, and that its terms of reference are sufficiently robust and forward-looking to ensure the abuses I have identified are mended and cannot recur, and the aspirations of the people of the BVI can be met – and met within a timeframe that is as short as reasonably practicable.

14.13 As to terms of reference, these must be broad, but in my view, amongst other things, the Commission should consider the following:

(vi) how the executive ministerial government can be held to account in the House of Assembly (e.g. by some different structure, number and/or configuration of seats) and/or in other ways, and how the "elected dictatorship" of the Premier (i.e. current constitutional position of the Premier, which gives him or her largely unrestricted powers in practice) might be mitigated[1];

(vii) whether the current constitutional pillars of governance are sufficient, and in any event how those independent institutions can be effective;

(viii) the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers respectively, when they arise, are to be resolved;

(ix) a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required[2];

(x) whether there should be a regime in relation to election expenses in the form of (e.g.) a requirement on election candidates to submit a breakdown of expenses including donations above a specific sum and/or a cap on such expenses[3];

(xi) whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission[4]; and

(xii) whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties[5].

14.14 It should also consider how best the law enforcement agencies can sit within the constitutional framework. Either as a strand of the Constitutional Review, or as a separate review running in parallel, I recommend that there be a review of the law enforcement agencies and justice agencies, with a view to ensuring that the law enforcement and justice systems are coherent and fit for purpose within the context of the BVI today[6].

14.15 Particularly because it may be challenging to re-establish ministerial government and the House of Assembly without changes to the Constitution, the Constitutional Review I propose should begin its work urgently, and conclude its work promptly. Whilst I know that such reviews often take longer, I propose that the Constitutional Review commences as soon as possible and concludes its business within a year, with the Governor having the ability to extend that time by no longer than six months. In that way, it is hoped that the Review will not impede or delay the return to elected government.

Recommendation A2

I recommend that there be an early and speedy review of the Constitution, with the purpose of ensuring that abuses of the type I have identified do not recur, and establishing a Constitution that will enable the people of the BVI to meet their aspirations, including those in respect of self-government within the context of modern democracy. That will require a Constitution that is sufficiently robust to ensure adherence to the principles of good governance within government, but also enables the progressive development of the BVI's own political institutions.

[1] This was a term used by Hon Julian Fraser: see paragraphs 1.70-1.78 above. He described the powers of the Premier under the Constitution as it works in practice as being effectively unrestricted.
[2] See paragraphs 13.129-13.130 above.
[3] See paragraph 1.47 above.
[4] See paragraphs 7.151 above.
[5] See paragraphs 1.48 and 1.76-1.78 above.
[6] See paragraphs 12.130-12.132 above.

The Constitutional Review I propose must be broad. Without restricting its ambit in any way, in my view it will need to address the following issues (amongst others):

(i) how the executive ministerial government can be held to account in the House of Assembly (e.g. by some different structure, number and/or configuration of seats) and/or in other ways;

(ii) whether the current constitutional pillars of governance are sufficient, and in any event how those independent institutions can be effective;

(iii) the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers respectively, when they arise, are to be resolved;

(iv) a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required;

(v) whether there should be a regime in relation to election expenses in the form of (e.g.) a requirement on election candidates to submit a breakdown of expenses including donations above a specific sum and/or a cap on such expenses;

(vi) whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission; and

(vi) whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties.

The Constitutional Review I propose should begin its work promptly, and conclude its work within a year or, if the Governor is persuaded to extend that time, in 18 months. As a return to elected government will be difficult without constitutional reform, I regard the time for this Review to be concluded to be of the essence.

The Constitutional Review I propose should be established by the Governor. I am aware that a Constitutional Review Commission has been recently set up by the elected Government. Its membership has recently been announced but, so far as I am aware, its terms of reference have not yet been determined. It has an initial period of two years to report. Whilst that Commission may be a basis for proceeding with the Constitutional Review I propose, whether its membership, terms of reference and timetable remain appropriate are matters that now need reconsideration.

Curtailment of Open-Ended Discretion

14.16 In considering governance within government, I have identified a significant number of areas where an elected public official (usually a Minister) exercises an open-ended decision-making power. Sometimes that power is granted to that person, sometimes it is simply abrogated. The existence and use of such powers is contrary to good governance, and perhaps more than anything else I have seen gives rise to a risk of not only poor decision making, but also dishonesty.

14.17 In my view, there is an urgent need to review all such discretionary powers, and remove them or, where they are deemed necessary, ensure that they are exercised in accordance with clearly expressed and published criteria. I have made some specific recommendations about powers in the particular areas I have looked into. Drawing specific recommendations together, I therefore recommend a general review to curtail such powers.

Recommendation A3

I recommend that there be a review of discretionary powers held by elected public officials (including Cabinet), with a view to removing the powers where they are unnecessary; or, where they are considered necessary, to ensuring that they are exercised in accordance with clearly expressed and published guidelines. This review could be conducted by a senior BVI lawyer, or retired BVI/East Caribbean judge.

Audits and Investigations

14.18 The final recommendation is burdensome, but relatively straightforward: it flows logically and inevitably from my findings in relation to the matters into which I have enquired, as set out above. It is again, in my view, essential. Whilst I regard the future as more important than the past, I have concluded that a proper, independent and impartial audit should be undertaken in relation to government decision making and expenditure, mainly (but not exclusively) in the areas of government into which I have looked.

14.19 This is vital because, not only do those who live in the BVI have the right to know, but also further steps (such as criminal prosecutions and the recovery of public moneys wrongly expended) will be crucially informed by such investigations. Where such steps should, in my view, be considered by the relevant BVI authorities (notably the CoP and DPP) now, without the need for any further audit, I have said so above. Where such investigations are recommended, a report of the Auditor General (or the independent person or body she appoints to conduct it), then the CoP and, in her turn, the DPP will consider whether such steps are in the public interest.

14.20 My enquiries have shown that almost every aspect of government in the BVI has very poor governance; but, in recent years, the efforts of the Auditor General and IAD Director to investigate and report have to a large extent been thwarted; and, where they have reported, their observations in respect of the possible consequences of such poor governance and their recommendations have, in almost all cases, been ignored. That means that the areas which I identified as being in need of investigation and audited are legion. I am very well aware of the potential burden that this proposal may put upon the Auditor General and, in due course, the CoP and DPP.

14.21 I therefore recommend that the Auditor General, together with other independent persons or bodies instructed by her to assist, as soon as possible initiate a short review of all areas of government (including, but not restricted to those identified in this Report) and prepares a timetable for the audit of appropriate areas and reports to the Governor accordingly. The Governor should ensure that sufficient resources are available to her to undertake the audits as they arise under that timetable. However, the initial review will of course require the prioritisation, and possibly even the selection, of matters for audit. The Auditor General will be in the best position to make decisions as to such priorities and selections; but she may, for example, wish to prioritise areas which, in her view, may be more likely to give rise in due course to further steps (e.g. in relation to criminal investigation and/or steps to recover public money). The Auditor General should report to the Governor with the results of that review as soon as possible, and in any event within, say, two months.

14.22 The audit reports, once complete, should be published on the Auditor General's website unless the Governor directs that they cannot be published (e.g. on grounds of national security).

14.23 Those reports should indicate where the Auditor General considers further investigations into possible wrong-doing should take place, and such reports should be sent to the CoP as well as the Governor. The CoP will then consider whether a criminal investigation is in the public interest. That proposal does not, of course, prevent the CoP instigating an investigation into the circumstances of a matter involving public officials earlier, if he considers that is in the public interest. Any charging decision will be made by the DPP in the usual way, on the usual dual test (i.e. evidential and public interest).

14.24 As I have indicated, the COI did not have the facilities to conduct any financial investigations into either individual projects or individual people. In the light of my findings, I recommend that one or more independent units are established to conduct such investigations and take steps to ensure that any appropriate steps are taken to secure money, land or other assets pending the outcome of criminal or civil recovery/confiscation proceedings. I recommend that the unit(s) is/are responsible for any civil recovery proceedings. It will be a matter for the Governor, but it seems to me that at least the Investigation Unit might sit under the CoP; but its independence, impartiality and integrity will be crucial, and steps should be taken to ensure that the people of the BVI can and will have proper confidence in it. Again, the Governor will need to ensure that the unit(s), together with the DPP's Office, are adequately resourced. As the audits which I have proposed proceed, the unit(s) will also need to work with the Auditor General's team. However, as with the audits, the CoP and/or the DPP will have to make decisions in the public interest as to priorities and selection of matters for investigation and criminal/recovery proceedings.

14.25 I consequently make the following recommendation.

Recommendation A4

I recommend that the Auditor General, together with other independent persons or bodies instructed by her to assist, as soon as possible initiate a review of all areas of government (including but not restricted to those identified in this Report) and prepare a timetable for the audit of appropriate areas and report to the Governor accordingly. The Governor should ensure that sufficient resources are available to her to undertake the audits as they arise under that timetable. The review will require the prioritisation, and possibly even the selection, of matters for audit. The Auditor General will be in the best position to make decisions as to such priorities and selections; but she may, for example, wish to prioritise areas which, in her view, may be more likely to give rise in due course to further steps (e.g. in relation to criminal investigation and/or steps to recover public money). The Auditor General should report to the Governor with the results of that review as soon as possible, and in any event within, say, two months.

I recommend that the Auditor General (assisted by other independent individuals as the Governor thinks fit) thereafter proceeds to perform the audits in accordance with that timetable, as agreed with the Governor. The Governor should ensure that sufficient resources are available to the Auditor General to enable her to perform these audits expeditiously. Once complete, the reports should as soon as practicable be published on the Auditor General's website, unless the Governor directs that publication should not be made (e.g. in the public interest).

I recommend that the Governor establishes one or more independent unit(s) to conduct investigations into projects and/or individuals as identified by the unit(s), taking into account the information in this Report, the audits that have been and will be conducted by the Auditor General and Internal Audit Department and, of course, information and intelligence that the unit(s) themselves gather. The unit(s) should also be responsible for taking steps to secure money, land or other assets pending criminal and/or civil confiscation and/or recovery proceedings, if appropriate. They should also be responsible for civil recovery. The Governor should ensure that sufficient resources are available to the unit(s) to enable them to perform their functions; and to the DPP's Office (and any other enforcement office) in relation to subsequent steps taken in respect of criminal proceedings and steps to recover public money.

Other Recommendations

14.26 In addition, I make 45 recommendations in respect of particular areas of government, including specific projects, which are set out at the end of the respective chapters of this Report. It is unnecessary to repeat them here: they can be found listed in full in the Summary of Recommendations at the beginning of this Report. These are all by way of particular requirements, as I see them, within the framework of the primary recommendations to which I have referred.

Final Observation

14.27 I recognise only too well that the recommendations I have made are extensive, and will require huge effort. That is inevitable, as they reflect the work that I consider needs to be done. However, I appreciate that, even if the Governor is minded to accept them in whole or in part, they will require prioritisation and planning, so that the business of government can proceed in parallel. But I consider that they will be worth the effort and sacrifices that they will demand.

14.28 Despite their challenges, I commend my recommendations to the Governor, and I encourage him to adopt them in full.

APPENDIX A

ACKNOWLEDGEMENTS

During the course of the Inquiry, I have been assisted by a core team working mainly in the BVI comprising Bilal Rawat (Counsel to the COI), Steven Chandler (Secretary to the COI), Juienna Tasaddiq (Assistant Secretary to the COI), Andrew King (Senior Solicitor to the COI) and Rhea Harrikissoon (Solicitor to the COI), together with support both in the Territory and in the United Kingdom. That support included assistance with the management and analysis of the documents received, notably from Alexandra Tampakopoulos of Counsel, Andrew Kneebone, Sophie Holmes, Sumeyye Salcan and Frances Edwards. I could not have asked for more dedicated and able assistance. Throughout, although they have at all times been careful not to encroach at all on the substance of the Inquiry, I have been given invaluable logistical support by both the Governor's Office and the Foreign, Commonwealth and Development Office. Finally, it would be remiss of me not to mention the support we have received from the RVIPF Commissioners of Police, Michael Mathews and from April 2021 Mark Collins, who were responsible for our security arrangements which were both expert and discreet.

The hearings were held in the BVI International Arbitration Centre, where the COI office was also situated. The Centre's Chief Executive Officer, Francois Lassalle, and his team, notably Janette Brin, Shantel Gray and Kennicia Duncan were invariably kind and receptive to our requests for assistance, which was always ably forthcoming. My decision, taken to ensure the openness and transparency of the Inquiry, not only to record and transcribe all hearings but to livestream them, was made possible through the often extraordinary efforts of Dame Peters of Timeless Films and Media, and David Kasdan assisted by Randy Salzman of Worldwide Reporting, who accommodated the lengthy and intensive hearings that were necessary to see the COI progress in the manner that it did. My thanks go to all of them for their expertise, their dedication and their commitment.

Elsewhere in this Report, I have thanked all of those who came forward to assist the COI by producing documents of information relevant to my Terms of Reference. Without apology, I do so again here. For many who voluntarily came forward, it required a good deal of fortitude. For the public officials upon whom the burden of most of my formal requests fell, I know that it added substantially to their workload, particularly acute during the COVID-19 pandemic; and I am particularly grateful to them for their efforts. I also thank all of the witnesses, including both elected and non-elected public officials. With some (but few) exceptions, they assisted the COI as best they could, with good grace and patience.

Without the COI team assisted by these public servants and committed technical expertise – and, vitally, the support of the people of the Virgin Islands for which I shall be always grateful – my task would have been impossible and certainly would not yet be complete.

APPENDIX A

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BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

REPORT OF THE COMMISSIONER
THE RT HON SIR GARY HICKINBOTTOM

VOLUME 2: APPENDICES

Presented to His Excellency John James Rankin CMG
The Governor of the Virgin Islands
4 April 2022

Published on the Authority of the Governor of the Virgin Islands

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APPENDIX A

APPENDIX 1

NOTE ON STYLE

I hope that the style I have used in this Report will be generally acceptable. Some notes of explanation may assist.

1. Paragraph numbers are a combination of the chapter number and internal paragraph number, with each chapter starting with internal paragraph number 1 (e.g. paragraph 6.1 is the first paragraph in Chapter 6). The footnotes in each chapter start at footnote 1.

2. I have tried to use terms and abbreviations consistently throughout the Report, and attach a table of abbreviations as Appendix 2. Generally, after I have adopted an abbreviation for the first time, I have used it without referring again to the full name of what is abbreviated – except where it might be useful to remind the reader of the full name (because, e.g., the abbreviation has not been used for some time).

3. Place names in the BVI are more fluid than elsewhere (e.g. Sea Cow Bay, Sea Cow's Bay, Sea Cows Bay and Sea Cows' Bay all seem to be in usage), and I have chosen one of these in each case (Sea Cow Bay, in the example) and used it consistently throughout.

4. Similarly, whether a hyphen is used between two personal names is not consistent and appears to be largely a matter of choice. In each case, I have chosen what appears to be the individual's preferred usage, and consistently used that.

5. In respect of honorific titles, I have generally used "Hon" on each occasion I refer to a current Member of the House of Assembly, and generally when I am referring to past Members during their period as Members. Otherwise, I have generally used honorific titles and post-nominal initials only the first time an individual appears in the Report (e.g. "His Excellency Governor John James Rankin CMG", and thereafter "Governor Rankin"). Similarly with additional initials of a personal name: I have used those the first time I have referred to a person, but generally not thereafter.

6. Whilst the length of the name of some institutions etc has led me to adopt a regrettable number of abbreviations, where (e.g.) a particular Ministry features heavily in a section of the Report, I have simply used the term "the Ministry" to describe it in that section, except where that would be misleading or unclear. I have added a footnote of explanation when I have done this.

7. Where I have quoted from documents, I have quoted verbatim without (e.g.) correcting spelling or grammar, or indeed marking up any such errors in the text.

APPENDIX A

APPENDIX 2

ABBREVIATIONS

I set out below abbreviations I have used throughout the Report. In addition, as Table 10 in Chapter 3 of the Report, there is a table of Position Statements etc which, for convenience, I have also attached an abbreviation: I have not repeated those here.

I have also not included local abbreviations which I have used within a section or chapter (e.g. where I have referred to a particular Auditor's Report that is relevant to that section or chapter as just "the Auditor's Report"). Where I have used such abbreviations, I have made their use clear in the particular section or chapter.

Finally, where I have referred to a transcript of a hearing, I have done so in the following form, "TX Y page Z", where "X" is the day of the hearing, "Y" is the date of that hearing and "Z" is the page number, e.g. "T45 8 October 2021 page 189" is a reference to page 189 of the transcript for Hearing Day 45 on 8 October 2021.

1967 Constitution	Virgin Islands (Constitution) Order 1967 as amended
1976 Constitution	Virgin Islands (Constitution) Order 1976 as amended
1996 Marine Estate Policy	Policy for Management and Administration of the Marine Estate (May 1996)
2007 Constitution	Virgin Islands Constitution Order 2007 as amended
2017 hurricanes	Hurricane Irma 6 September 2017, Hurricane Maria 20 September 2017 and the associated flooding
2018 Land Policy	Virgin Islands Land and Marine Estate Policy
A R Potter	A R Potter & Associates
Accommodation Guidelines	Guidelines for the Procurement of Office and Housing Accommodation, Tenancy Agreements and Lease Management
Airports Authority	British Virgin Islands Airports Authority
All Island	All Island Security Services Limited
AMF	Accommodation Management Framework (September 2018)
Border Security Plan	Comprehensive Border Security Plan prepared by the Joint Task Force
BOSSs	Beneficial Ownership Secure Search system
BOT	British Overseas Territory

BVI	British Virgin Islands
BVI IAC	BVI International Arbitration Centre
CAPS	Customs Automated Processing System
CARICOM	Caribbean Community
Castleton	Castleton Holdings Limited
CARTAC	Caribbean Regional Technical Assistance Centre
CCTF Act	Climate Change Trust Fund Act 2015
CCTF Board	Board of Trustees of the British Virgin Islands Climate Change Trust Fund
CDB	Caribbean Development Bank
CIO	Chief Immigration Officer
Colchester	Colchester Aviation Limited
CJAG	Criminal Justice Advisory Group
COI	Commission of Inquiry
Constitution	Virgin Islands Constitution Order 2007 as amended by the Virgin Islands Constitution (Amendment) Order 2015
Conyers	Conyers, Dill and Pearman, Solicitors and Advocates
CoP	Commissioner of Police
CRCS	Contractor Registration and Certification System
CTB	Central Tenders Board
CTU	Caribbean Telecommunications Union
CV	Curriculum vitae
Customs IAU	Her Majesty's Customs Internal Audit Unit

dba	"doing business as", and, hence, a non-incorporated trading entity
DDM	Department of Disaster Management
DEFRA	(UK) Department for Environment, Food and Rural Affairs
Delta Petroleum	Delta Petroleum (BVI) Limited
Department of Trade	Department of Trade and Investment Promotion and Consumer Affairs
Devolution Regulations	Appointment to Public Office (Devolution of Human Resources Functions) Regulations 2008
DGO	Deputy Governor's Office
DMS	Document Management System
DPP	Director of Public Prosecutions
EAC	Economic Advisory Council
Egypt Construction	Egypt Construction Company Limited
Emergency Procurement Policy	Procurement in Emergency, Disaster, Pandemic and Catastrophic Situation (Cabinet Memorandum No 227/2020)
ESHS	Elmore Stoutt High School
EU	European Union
EZ Shipping	EZ Shipping Limited
Falko	Falko Regional Aircraft Limited
FCDO	(UK) Foreign, Commonwealth and Development Office (and its predecessor, the Foreign and Commonwealth Office)
FIA	Financial Investigation Agency
Foreign Affairs Committee Report	House of Commons Foreign Affairs Committee: Fifteenth Report of Session 2017-19: Global Britain and the British Overseas Territories: Resetting the Relationship (HC 1464)
FPO	Finance and Planning Officer
FSC	Financial Services Commission

GIS	Government Information Service
GOAC	Government Office Accommodation Committee
HEOC	Health Emergency Operations Centre
High Level Framework	High Level Framework for UK Support to BVI Hurricane Recovery
HM Customs	Her Majesty's Customs: Customs Department of the Ministry of Finance
HMC Commissioner	Commissioner of Customs
IAAC	Internal Audit Advisory Committee established by section 6 of the Internal Audit Act 2003
IAD	Internal Audit Department (formerly the Internal Audit Unit)
IAD Director	Director of the Internal Audit Department (formerly the Internal Audit Unit)
IALA	International Association of Marine Aids to Navigation and Lighthouse Authorities
ICCAT	International Convention for the Conservation of Atlantic Tunas
ICT	Information and Communications Technology
IFRS	International Financial Reporting Standards
Immigration Department	Department of Immigration
IPSAS	International Public Sector Accounting Standards
IRD	Inland Revenue Department
IRIC	Immediate Relief Implementation Committee
IRP	Immediate Relief Package
JTF	Joint Task Force
MEC	Ministry of Education, Culture, Youth Affairs, Fisheries and Agriculture (and its predecessors, such as the Ministry of Education and Culture)
MHSD	Ministry of Health and Social Development (and its predecessors, such as the Ministry of Health and Social Services)

MNRLI	Ministry of Natural Resources, Labour and Immigration (and its predecessors, such as the Ministry of Natural Resources and Labour)
MoF	Ministry of Finance
MOU	Memorandum of Understanding
MSME	Micro, Small and Medium Enterprises
MTFP	Medium Term Fiscal Plan
MTWU	Ministry of Transportation, Works and Utilities (and its predecessor, the Ministry of Communications and Works)
NatDP	National Development Plan
Nature's Way	Nature's Way Limited
NDP	National Democratic Party
NPDP	National Physical Development Plan
NSC	National Security Council
OECS	Organisation of Eastern Caribbean States
PAC	Public Accounts Committee of the House of Assembly
PAI Report	Public Administration International Report
Parcel 251	Parcel 251 of Block 2837E, Road Town Registration Section
Parcel 310	Parcel 310 of Block 2938B, Road Town Registration Section
PEFM	Protocols for Effective Financial Management
PFMA	Public Finance Management Act 2004 as amended
PFMR	Public Finance Management Regulations 2005 as amended
PMU	The Ministry of Finance Project Unit (or Project Management Unit)

Ports Authority	British Virgin Islands Ports Authority
PSC	Public Service Commission
PSM Code	Public Service Management Code
PSSC	Public Schools Security Committee
PSTP	Public Service Transformation Programme
Public official	Public official as defined in section 79(1) of the Criminal Code
PWD	Public Works Department
Quantum	Quantum Management, Construction and Project Management
RDA	Recovery and Development Agency
RDP	Recovery and Development Plan
Register of Interests Committee	Committee established under section 5(1) of the Register of Interests Act 2006
RVIPF	Royal Virgin Islands Police Force
SAMLA	Sanctions and Anti-Money Laundering Act 2018
Samuel Security	Samuel Security and Investigations
School Wall Project	Elmore Stoutt High School Perimeter Wall Project
SDD	Social Development Department
SFC	Standing Finance Committee of the House of Assembly
Sixel	Sixel Consultancy Group Limited
SME	Small and Medium Enterprises
SSAC	SS Accounting and Consulting Services Limited
SSB	Social Security Board

Systems Engineering	Systems Engineering Limited
Task Force	Coronavirus Economic and Fiscal Stability Task Force
TCPD	Town and Country Planning Department
Top Priority	Top Priority Security Services Limited
Tourist Board	BVI Tourist Board
TPP	Tortola Pier Park
TP Partners	Tortola Port Partners
TRC	Telecommunications Regulatory Commission
TSAG	Territorial Security Action Group
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN Charter	Charter of the United Nations 1945
US	United States of America
Vangard	Vangard Security Services and Supplies Limited
VINO	Virgin Islands News Online
VINPP	Virgin Islands Neighbourhood Partnership Project
VIP	Virgin Islands Party
WCDA	Wickham's Cay Development Authority

APPENDIX A

APPENDIX 3

INSTRUMENTS OF APPOINTMENT

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COMMISSIONS OF INQUIRY ACT

(CAP. 237)

AUGUSTUS JAMES ULYSSES JASPERT
Governor

INSTRUMENT OF APPOINTMENT

TO: THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM
Greetings

WHEREAS it is provided by section 2 of the Commissions of Inquiry Act Chapter 237 of the Revised Laws of the Virgin Islands that it shall be lawful for the Governor, whenever he shall deem it advisable, to issue a Commission appointing one or more Commissioners to inquire into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.

AND WHEREAS in the opinion of the Governor it would be for the public welfare to hold an inquiry as set out in the following Terms of Reference:

1. to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years;

2. if there is such information, to consider the conditions which allowed that corruption, abuse of office or other serious dishonesty to take place and whether they may still exist;

3. if appropriate, to make independent recommendations with a view to improving the standards of governance, to give the people of the Virgin Islands confidence that government is working in a fair, transparent and proper manner;

4. If appropriate, to make independent recommendations with a view to improving the operation of the agencies of law enforcement and justice;

5. should the Commissioner at any time consider that a change to these terms of reference would be beneficial to public welfare in achieving the objectives of the Inquiry, to inform the then Governor of the Virgin Islands at the first opportunity; and

6. to prepare and submit a written report to the then Governor of the Virgin Islands within six (6) months from the commencement of the Inquiry, making all such recommendations as seem fit provided that the Governor may extend the period for submission of the report to a period no longer than 9 months from the date of the Inquiry

AND WHEREAS it is expedient that for the above mentioned purposes a Commission should be issued under the provisions of the Commissions of Inquiry Act (Cap. 237).

NOW KNOW YE THAT I, AUGUSTUS JAMES ULYSSES JASPERT Governor of the Virgin Islands, reposing full confidence in your zeal, discretion and ability, do appoint you the said RIGHT HONOURABLE SIR GARY HICKINBOTTOM to be Commissioner under the said Act to make a full, faithful, and impartial inquiry into the matters specified in this Commission and to conduct such inquiry in accordance with the directions herein given.

AND I DIRECT THAT YOU the said RIGHT HONOURABLE SIR GARY HICKINBOTTOM shall function as a one-man Commission.

AND I FURTHER DIRECT THAT the said inquiry shall be made on such days and such places as you shall deem proper and necessary and that you shall report in writing, the result of such inquiry, and make recommendations in the premises as may seem fit to you, with all convenient

speed and furnish to me a full statement of the proceedings of such Commission, and of the reasons leading to the conclusion arrived at or reported.

AND I FURTHER DIRECT THAT the meetings of the Commission may be held in private whenever you the said RIGHT HONOURABLE SIR GARY HICKINBOTTOM considers it appropriate to do so and THAT, to the extent permitted by law, and so far as it is consistent with the public welfare in achieving the objectives of the Inquiry, you may allow for information to be given to the Inquiry in confidence.

AND I acting as aforesaid do appoint Stephen Clive Chandler to be Secretary to the Commission, to attend the sittings of the Commission, to record proceedings, to keep the papers, to summon and minute the testimony of witnesses and generally to perform such duties connected with the inquiry as may be prescribed.

AND I CHARGE AND COMMAND all officers and all other Her Majesty's loving subjects in the Virgin Islands that in their several places and according to their several powers and abilities they be aiding and assisting you in execution of this your Commission.

GIVEN under my hand and the public seal of the Virgin Islands at the Governor's Office in the town of Road Town in the island of Tortola in the Virgin Islands this 19th day of January, two thousand and twenty one in the sixty eighth Year of the Reign of Her Majesty Queen Elizabeth the Second.

GOD SAVE THE QUEEN

COMMISSIONS OF INQUIRY ACT

(CAP. 237)

JOHN RANKIN CMG
Governor

AMENDED INSTRUMENT OF APPOINTMENT

TO: THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM

Greetings

WHEREAS by section 2 of the Commissions of Inquiry Act Chapter 237 of the Revised Laws of the Virgin Islands (hereinafter referred to as "the Act"), you, the RIGHT HONOURABLE SIR GARY HICKINBOTTOM, were appointed by an Instrument of Appointment on the 19th day of January, 2021 by the then Governor, HIS EXCELLENCY AUGUSTUS JAMES ULYSSES JASPERT to function as the Commissioner under the said Act to make a full, faithful and impartial inquiry into matters specified in the Commission and to conduct such inquiry in accordance with directions given.

WHEREAS section 2 of the Act provides that "It shall be lawful for the Governor whenever he shall deem it advisable ....Each such Commission shall specify the subject of the inquiry, and may, in the discretion of the Governor, if there is more than one Commissioner, direct which Commissioner shall be Chairman, and direct where and when such Inquiry shall be made and the report thereof rendered...".

WHEREAS paragraph 6 of the second recital of the said Instrument of Appointment provides as a term of reference, for the preparation and submission of a written report to the Governor of the Virgin Islands within six (6) months from the commencement of the Inquiry, making all such recommendations as seem fit provided that the Governor may extend the period for submission of the report to a period no longer than nine (9) months from the date of the Inquiry.

WHEREAS the Governor in accordance with section 2 of the Act now directs that the said report be rendered within twelve (12) months from the commencement of the Inquiry.

NOW THEREFORE, paragraph 6 of the second recital of the said Instrument of Appointment is hereby amended to read as follows;

> "6. to prepare and submit a written report to the then Governor of the Virgin Islands within twelve (12) months from the commencement of the Inquiry making all such recommendations as seem fit."

GIVEN under my hand and the Public Seal of the Virgin Islands at the Governor's Office in the town of Road Town in the island of Tortola in the Virgin Islands this 14th day of July, two thousand and twenty one in the seventieth year of the reign of Her Majesty Queen Elizabeth the Second.

GOD SAVE THE QUEEN!

COMMISSIONS OF INQUIRY ACT

(CAP. 237)

JOHN RANKIN CMG
Governor

AMENDED INSTRUMENT OF APPOINTMENT

TO: THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM

Greetings

WHEREAS by section 2 of the Commissions of Inquiry Act Chapter 237 of the Revised Laws of the Virgin Islands (hereinafter referred to as "the Act"), you, the RIGHT HONOURABLE SIR GARY HICKINBOTTOM, were appointed by an Instrument of Appointment on the 19th day of January, 2021 by the then Governor, HIS EXCELLENCY AUGUSTUS JAMES ULYSSES JASPERT to function as the Commissioner under the said Act to make a full, faithful and impartial inquiry into matters specified in the Commission and to conduct such inquiry in accordance with directions given.

WHEREAS section 2 of the Act provides that "It shall be lawful for the Governor whenever he shall deem it advisable ….Each such Commission shall specify the subject of the inquiry, and may, in the discretion of the Governor, if there is more than one Commissioner, direct which Commissioner shall be Chairman, and direct where and when such Inquiry shall be made and the report thereof rendered…".

WHEREAS paragraph 6 of the second recital of the said Instrument of Appointment provides as a term of reference, for the preparation and submission of a written report to the Governor of the Virgin Islands within six (6) months from the commencement of the Inquiry, making all such recommendations as seem fit provided that the Governor may extend the period for submission of the report to a period no longer than nine (9) months from the date of the Inquiry.

WHEREAS the Governor on the 14th day of July, 2021, in accordance with section 2 of the Act, directed that paragraph (6) of the second recital of the said Instrument of Appointment

be amended so that the said report be rendered within twelve (12) months from the commencement of the Inquiry.

AND WHEREAS the Governor, in accordance with sections 2 and 3 of the Act, now directs that paragraph (6) of the second recital of the said Instrument of Appointment be further amended so that the said report be rendered within fifteen (15) months from the commencement of the Inquiry.

NOW THEREFORE, paragraph 6 of the second recital of the said Instrument of Appointment is hereby amended to read as follows:

> "6. to prepare and submit a written report to the then Governor of the Virgin Islands within fifteen (15) months from the commencement of the Inquiry making all such recommendations as seem fit."

GIVEN under my hand and the Public Seal of the Virgin Islands at the Governor's Office in the town of Road Town in the island of Tortola in the Virgin Islands this 10th day of January, two thousand and twenty two in the seventieth year of the reign of Her Majesty Queen Elizabeth the Second.

GOD SAVE THE QUEEN!

APPENDIX 4

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BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

COMMISSION OF INQUIRY RULES ("COI RULES")

General

1. These rules may be cited as the "Commission of Inquiry Rules" or "the COI Rules" and are made pursuant to section 9 of the Commissions of Inquiry Act 1880 (cap 237).

2. The Commissioner may at any time amend, vary or dispense with the need for compliance with these Rules if he considers such necessary for the fair and effective conduct and management of the COI.

3. The Commissioner may issue such protocols, directions and Orders as he considers necessary for the effective conduct and management of the COI.

4. Participants, witnesses and their Counsel are deemed to undertake to adhere to these Rules.

5. The Commissioner may deal with a breach of these Rules or any act which undermines the effective conduct and management of the COI as he sees fit. That may include revoking or restricting the ability of participants or Counsel to take part in the COI.

Interpretation

6. In these Rules –

   (a) "the Act" means the Commissions of Inquiry Act 1880 (cap 237);

(b) "COI" means the Commission of Inquiry appointed under section 2 of the Act and pursuant to an instrument of appointment dated 19 January 2021 to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years, and if so, what conditions allowed this to happen and whether they may still exist; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice;

(c) "the Commissioner" means Sir Gary Hickinbottom appointed as sole Commissioner under section 2 of the Act;

(d) "COI Counsel" means counsel appointed by the Attorney General of the British Virgin Islands in accordance with section 13 of the Act, including any co-counsel so appointed;

(e) "COI Secretary" means the secretary appointed by the Governor in accordance with section 6 of the Act;

(f) "COI Solicitor" means a solicitor appointed by the Commissioner to assist in his COI;

(g) "COI Team" means those persons authorised or appointed to assist the Commissioner in the COI;

(h) "Counsel" means a barrister or solicitor with rights of audience in the British Virgin Islands authorised by the Commissioner to appear before him on behalf of a participant or witness or any other person authorised by the Commissioner to appear before him;

(i) "designated email address" means the published email address of the COI Secretary (steven.chandler@bvi.public-inquiry.uk);

(j) "document" means anything in which information of any description is recorded or stored; and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

(k) "the Governor" means the Governor of the British Virgin Islands as appointed under section 35 of The Virgin Islands Constitution Order 2007 (as amended);

(l) "notified email address" means in the case of a person, the email address notified to the COI, in writing, as the address to be used for email communication.

(m) "notified postal address" means in the case of any person other than the Commissioner, the postal address notified to the COI, in writing, as the address to be used for postal communication.

(n) "participant" means a person designated as such under Rule 13 of these Rules.

(o) "person" includes an individual, body corporate or unincorporate, a government department, a state agency or any other entity;

(p) "private" means a COI hearing at which neither the media nor the public are permitted to be present;

(q) "Record of Inquiry" means all documents given to or created by the COI;

(r) "Request" means a written communication from the COI to a person

seeking voluntary disclosure to it of documents and or information;

(s) "relevant" means anything which touches upon or concerns the subject matter of the COI or that may directly or indirectly lead to other information that touches upon or concerns the subject matter of the COI;

(t) "Terms of Reference" means the Terms of Reference for the COI as set out in the Instrument of Appointment dated 19 January 2021;

(u) "witness" is a person from whom the Commissioner intends to take written and/or oral evidence.

7. A requirement under these Rules that a document is given or sent to any person by the COI is deemed effective by the document being –

(a) delivered in person;

(b) left at the person's notified postal address;

(c) sent to the person's notified postal address by first class post; or

(d) sent by email to the person's notified email address.

Applications

8. Save as set out elsewhere in these Rules or unless the Commissioner directs otherwise, any application to the COI should be made in writing, addressed to the Commissioner and sent to the COI Secretary at the designated email address.

upon 7 days' notice.

10. The Commissioner may require that the application be supported by affidavit evidence.

11. The Commissioner will determine the application on the basis of the written application alone unless he considers an oral hearing necessary for the fair and just determination of the application.

Hearings

12. (1) The COI will hold its sittings at any location and at such times as specified by the Commissioner.

(2) The Commissioner may, whether on application or not, make such directions as he considers necessary for the efficient management and conduct of any hearing of the COI including but not limited to:

(a) that a hearing may take place in person or by means of audio or video link;

(b) that the following may attend a hearing remotely either by audio or video link;

(i) the Commissioner himself
(ii) COI Counsel
(iii) a witness
(iv) a participant
(v) Counsel representing a participant or witness.

(c) that the whole or part of any evidence or submission presented at a hearing should not be published;

(d) that the name or any other particulars likely to lead to the identification of a witness or any person participating in the COI (with the exception of Counsel) should not be published.

(3) All hearings shall be deemed to take place in the British Virgin Islands irrespective of where the hearing in fact takes place and whether the Commissioner and/or others attend remotely.

(4) At the Commissioner's direction, a hearing of the COI may be held wholly or partly in private.

Participants

13. (1) COI Counsel is permitted to participate in the entirety of the COI.

(2) Where upon application the Commissioner is satisfied that the conduct of a person forms part of the subject matter of the COI or that a person is implicated or concerned with the subject matter of the COI then that person shall be entitled to participate in the COI through Counsel.

(3) Where upon application the Commissioner is satisfied that it is desirable that a person should participate in the COI, then that person shall be entitled to participate in the COI through Counsel.

(4) In determining participant status for the purposes of these Rules, the Commissioner shall have regard to all the circumstances, including:

in an important aspect of the COI;

(b) whether the person played, or may have played, a direct and substantial role in an important aspect of the COI;

(c) whether the person may be the subject of criticism; and

(d) whether the person's participation in the COI may otherwise assist the Commissioner in fulfilling his Terms of Reference.

(5) An application to be a participant must be made in the manner and form prescribed in the relevant protocol.

(6) Where participants have joint or similar interests, they are encouraged to be represented by a single Counsel.

(7) The Commissioner will determine the nature and extent to which a participant and/or Counsel representing that participant can take part in the COI. Such determination may include but is not limited to the extent to which any participant needs to be provided with documents in order to participate in the COI.

(8) The Commissioner may in his discretion modify or revoke the ability of a participant to take part in the COI.

(9) A person ceases to be a participant on:

(a) being notified in writing by the Commissioner; or

(b) at the end of the COI.

Evidence

14. The Commissioner may:

    (1) receive any evidence that he considers may assist in fulfilling the COI's Terms of Reference, whether or not the evidence would be admissible in a court of law;

    (2) take evidence on oath or affirmation;

    (3) permit a witness to give evidence by any means, including in writing or by electronic means and require the witness to verify the evidence by oath or affirmation.

15. Upon the Request of the Commissioner, a person, whether granted participant status or not, shall produce true copies of all documents in their possession or control having any relevance to the subject matter of the request and an inventory listing the said documents and signed by the person producing them. Upon the Request of the Commissioner, such persons shall also provide originals of relevant documents in their possession or control for inspection.

16. The Commissioner may require the production of documents pursuant to a summons issued under the Act.

17. All documents received by the COI will be treated as confidential, unless and until the Commissioner directs otherwise. This does not prevent the Commissioner from producing a document or a part a document or a gist of the same to a potential witness as part of the Commissioner's investigation nor does it limit the Commissioner from disclosing documents, parts of documents or a gist of the same to a participant as necessary. Nothing in this paragraph will compromise the confidentiality of any documents or information given to the

COI on the basis of an express understanding or agreement of confidence.

18. (1) Participants, witnesses and their counsel or any other persons are deemed to undertake that any information and documents received by them from the COI will be kept confidentially and used solely for the purpose of this COI or, subject to permission from the Commissioner, any directly related proceedings. No other use is permitted.

(2) That undertaking extends to the receipt of documents which may be the subject of an application that the document or parts of it be redacted.

Oral Evidence

19. The Commissioner may issue a summons requiring a person to give evidence to the COI.

20. The Commissioner may require that a witness provide a witness statement or affidavit in advance of giving oral evidence at a hearing of the Inquiry.

21. A witness may be called more than once to give evidence to the COI.

22. A witness will be required to give evidence on oath or affirmation.

23. Any member of the COI Team may administer the oath or affirmation.

24. A participant, in accordance with the rules herein concerning the making of applications (Rules 8-11), may apply to the COI for a direction that a witness be called or summonsed.

25. The Commissioner will determine which participants are entitled to be present when a witness gives evidence.

26. The Commissioner may permit a witness to have Counsel present when giving evidence to the Inquiry.

27. (1) Subject to paragraphs (2) to (3), where a witness is giving oral evidence at a COI hearing only COI Counsel and the Commissioner may ask questions of that witness. Where Counsel for a participant or a witness considers that there are further questions to ask of that witness, they should, prior to any application under paragraphs (2) or (3), submit those questions to COI Counsel who will ask them if he considers it necessary to do so.

(2) Counsel for a participant must apply to the Commissioner for permission to ask questions of a witness giving oral evidence, including of the participant they represent.

(3) Counsel representing a witness who is not a participant, must apply to the Commissioner for permission to question that witness. Such questioning, if permitted, will follow on from questioning put by COI Counsel and Counsel for any participant.

(4) Any application under paragraphs (2) and (3) must be made as soon as practicable and must identify:

(a) the issues in respect of which a witness is to be questioned; and

(b) whether those issues are new, and if not, why questions should be permitted.

(5) The Commissioner may impose a time limit on questioning by Counsel or participants and will disallow questioning which he considers is not relevant to the subject matter of the COI.

the COI complete copies of any documents upon which they propose to rely or to refer to during the questioning of that witness. Questions will not be permitted if such documents are not provided in sufficient time for both the COI and, if necessary, the witness to give the document proper consideration.

(7) The Commissioner and, with the permission of the Commissioner, COI Counsel may ask questions of any witness at any stage in the COI hearing.

Opening and Closing statements

28. (1) Subject only to paragraph (2), only COI Counsel may make an opening and/or closing statement to the COI at any COI hearing.

(2) Counsel for a participant may with the permission of the Commissioner make a closing statement to the COI at the conclusion of the COI proceedings.

(3) The Commissioner may impose time restrictions on the length of any statements referred to in paragraphs (1) and (2).

(4) The Commissioner may give directions relating to the provision of written submissions or position statements by COI Counsel, participants or any other person.

Witness summons

29. (1) The Commissioner may issue a summons for the production of evidence or the answering of questions at a COI hearing.

(2) Documents or responses received pursuant to a witness summons shall form part of the Record of Inquiry.

(3) An application by a person that:

(a) he/she is unable to comply with the witness summons; or

(b) it is unreasonable in in all the circumstances to require him to do so

shall be submitted in writing to the Commissioner within 48 hours of service of a summons and will be determined by the Commissioner who may revoke or vary the summons as appropriate.

(4) In deciding whether to revoke or vary a summons on the ground mentioned in paragraph (3) the Commissioner will have regard to all the circumstances including the public interest in the information in question being obtained by the COI, having regard to the likely importance of that information to the ability of the Commissioner to fulfil the Terms of Reference.

The Rt Hon Sir Gary Hickinbottom
Commissioner
13 April 2021
Amended 1 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol for Representation under Section 12 of the Commissions of Inquiry Act

1. This Protocol is made under section 9 of the Commissions of Inquiry Act 1880 (Cap 237) ("the Act").

2. By section 12 of the Act:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

3. If any person considers that, under this provision, he or she is entitled to representation, or considers that it is desirable that he or she is represented and wishes to be represented, then that person shall apply in writing to the Commissioner through the Secretary to the Commission of Inquiry ("the COI") at steven.chandler@bvi.public-inquiry.uk for a direction confirming the representation. In the absence of such a direction, representation will not be allowed.

4. Any application should be no more than 5 pages in length and should include details of (i) the person applying with their postal address, telephone number and email address, (ii) whether it is submitted that that person is implicated or concerned with the matter under inquiry (so that person is entitled to representation), and if so why; or whether that person is not so implicated or concerned but considers representation is desirable, and if so why, (iii) the counsel that that person wishes to represent him or her, with an postal address, an email address and a telephone number for that counsel, (iv) confirmation

that that counsel is willing and able to represent that person and has no conflict of interest in doing so, (v) confirmation that the applicant gives that counsel authority to accept service of all documents relating to the COI.

5. The Commissioner will determine the application on the basis of the written application alone unless he considers an oral hearing necessary.

6. Without prejudice to the power of the Commissioner to make an order for payment of expenses to witnesses under section 15 of the Act, any person with representation under section 12 of the Act shall bear his or her own costs of such representation.

7. Any person who succeeds in an application under section 12 and his or her legal representatives may be required to sign a confidentiality undertaking prior to receipt of any documentary material from the COI.

The Rt Hon Sir Gary Hickinbottom
Commissioner
13 April 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol for expenses claimed under Section 15 of the Commissions of Inquiry Act

1. This Protocol is made under section 9 of the Commissions of Inquiry Act 1880 (Cap 237) ("the Act").

2. By section 15 of the Act:

> "All persons summoned to attend and give evidence, or to produce books, plans or documents, or any other matter, at any sitting of any such commission, shall be bound to obey the summons served upon them as fully, in all respects, as witnesses are bound to obey subpoenas issued from the High Court, and shall be entitled to the like expenses as if they had been summoned to attend the High Court on a criminal trial, if the same shall be allowed by the commissioners, but the commissioners may disallow the whole or any part of such expenses in any case, if they think fit. Orders for the payment of such witnesses shall be made, as nearly as may be, as orders are made for the payment of witnesses at the High Court, and shall be paid at such time and in such manner as the Governor may direct."

3. Any person who has, under this provision, received a summons to attend and give evidence, or to produce books, plans or documents, or any other matter, at any sitting of the Commission of Inquiry ("COI") can make a claim for expenses to the Commissioner if so advised. Such a claim cannot include a claim for any fees and expenses incurred by the person in respect of legal representation or advice.

4. The application can be made through the Secretary to the COI at steven.chandler@bvi.public-inquiry.uk

5. Any application should be no more than 5 pages in length and should include details of (i) the person applying with their postal address, telephone number

and email address, (ii) the legal basis on which expenses are claimed; and (iii) the amount in expenses claimed and why such is justified.

6. The Commissioner will determine the application on the basis of the written application alone unless he considers an oral hearing necessary.

The Rt Hon Sir Gary Hickinbottom
Commissioner
13 April 2021

Protocol concerning the provision of written witness evidence

Introduction

1. A "witness" is a person from whom the Commissioner intends to receive written and/or oral evidence. The Commissioner will decide from whom he wants to hear oral or written evidence whether or not that person has been given participant status.

2. Anyone who believes they may have evidence relevant to the Commissioner's Terms of Reference is welcome to approach the Secretary to the Commission of Inquiry ("the COI"). The means by which this can be done are set out on the COI's website. If the Commissioner decides that such evidence may be likely to assist his investigation then the COI Team will decide what steps, if any, need to be taken. It may not be necessary or appropriate to take evidence from every person who approaches the COI.

3. Unless otherwise directed by the Commissioner, written evidence will be in the form of an affidavit.

4. For the avoidance of doubt, members of the public, witnesses and participants should not submit affidavit evidence on any matter without prior discussion with the COI. If such evidence is submitted unsolicited, that does not mean that the Commissioner will necessarily consider it to be relevant: as with all evidence, he will determine whether, and the extent to which it is relevant.

5. The purpose of this protocol is to ensure that:

   (a) participants, witnesses and legal representatives understand the process by which the COI will seek written evidence from a witness; and

6. This protocol is not intended to cover every eventuality that may arise in relation to written evidence. Where it is necessary for the efficient progress of the COI, the Commissioner may direct that written evidence is provided in a form other than that provided by this protocol.

The provision of written evidence

7. Where the Commissioner wishes to obtain written evidence from a person, then the COI Team will send that person a written request. If the person has legal representation, the request will be sent or copied to the relevant legal representative. The request for an affidavit may be included in a letter dealing with other matters such as the provision of disclosure.

8. The request will set out those matters to be covered in the affidavit. There may be cases where the request is directed to more than one witness and contains a description of the matters each witness needs to be addressed. Where appropriate, the COI Team may ask a witness to make more than one affidavit to cover different topics. It may issue further or supplementary requests following receipt of an affidavit.

9. The request for an affidavit will set a date for compliance. This may vary depending on the nature and extent of the evidence requested. The Commissioner will consider applications for an extension of time to provide an affidavit. Such requests must be submitted by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk) as soon as possible and in any event before the expiry of the time allowed. Any queries about the content of this protocol, the form of an affidavit or the content of a request should also be similarly raised.

10. Where a witness is legally represented the affidavit should be provided:

(a) in final signed form;

(b) following the format set out at paragraphs 13-22 below; and

(c) be limited to addressing the matters set out in the request. Where a witness or his or her legal representative considers that the affidavit should address other matters, then they must speak to the COI Team before the affidavit is signed and before the expiry of any date by which it was to be submitted.

11. Where a witness is not legally represented then the COI Team may:

(a) invite the witness to a meeting for the purpose of discussing the request for an affidavit; and/or

(b) ask the witness to provide an unsigned affidavit in draft so as to decide whether:
(i) it requires clarification or amplification,
(ii) it conforms with paragraphs 13-22 below; or
(iii) it can be sworn and submitted to the COI.

12. The COI may ask a legally represented witness to follow the procedure set out in paragraph 11, in which case a legal representative may attend any meeting between the COI Team and the witness.

Format and Structure of the Affidavit

13. Any affidavit submitted to the COI must be typed on single-sided ANSI A Letter size paper (8.5ins width x 11ins height) and adopt the following format:

(a) Arial font with point size 12.

(b) Line spacing of 1.5 with each page numbered sequentially in the bottom right-hand corner of each page.

(c) Paragraphs numbered sequentially (i.e. 1, 2 ,3, 4 etc).

(d) Have all numbers, including dates, expressed in figures.

(e) Give the reference to any document or documents mentioned in bold text defined by square brackets, in the body of the affidavit.

(f) At the top right hand corner of the first page (and on the backsheet) there should be clearly written:

(i) The initial and surname of the person making the affidavit ("the deponent").
(ii) The number of the affidavit in relation to the named deponent.
(iii) The identifying initials and number of each exhibit referred to.
(iv) The date on which the affidavit was sworn.

14. The affidavit must, if practicable, be in the deponent's own words, should be expressed in the first person and should:

(a) commence 'I (full name) of (address) make oath and say as follows: ……'

(b) if giving evidence in his professional, business or other occupational capacity, give the address at which the deponent works in (a) above, the position he or she holds and the name of the organisation on whose behalf the affidavit is being made. Personal addresses should not be given.

15. Where appropriate a brief biography should be included setting out the deponent's experience and qualifications to make the statement.

16. The affidavit must indicate which of the statements in it are made from the deponent's own knowledge and which matters of information or belief and, if so, the source for any matters of information and belief. That is particularly important where the maker of the affidavit has been asked to address questions on behalf of an organisation.

17. Factual events should be set out chronologically. If the affidavit is dealing with a number of different matters, then these should be clearly identified by using sub-headings. Where possible, paragraphs should be confined to one subject.

18. The affidavit must:

    (a) be signed by the deponent;

    (b) be sworn or affirmed by the deponent; and

    (c) contain the full name, address and qualifications of the person before whom it is sworn or affirmed.

19. The statement authenticating the affidavit ("the jurat") must follow immediately from the text and not be on a separate page.

Documents accompanying the Affidavit

20. Any document to be used in conjunction with an affidavit must be exhibited to it. If there is more than one such document or the document is more than 10 pages in length, then these (or it) must be included in a separate bundle which is arranged chronologically or in some other convenient order. The bundle must be indexed and paginated in the bottom right hand corner.

21. Exhibits should be referenced in the body of the affidavit using the following system "**[XY/*]"** where XY are the initials of the deponent and '*' the number of the exhibit. Exhibits should be numbered sequentially. The same sequence should be used when preparing a bundle of exhibits.

22. Copies of original documents may be exhibited but these must be clearly legible. The originals must be retained for inspection by the COI if necessary.

23. Each exhibit or bundle of exhibits must be:

    (a) produced to and verified by the deponent;

(b) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and

(c) be marked in accordance with paragraph 13(f) above and with the exhibit number as referred to in the affidavit.

Submission to the COI

24. The signed and authenticated affidavit, together with any accompanying exhibit or bundle of exhibits should be submitted in electronic PDF format by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk). The affidavit should be separate from any exhibit or bundle of exhibits. Where the affidavit and exhibits are too large to send in one email, the deponent or his or her legal representative should contact the COI in advance.

25. The email submitting the affidavit and any accompanying exhibit or bundle of exhibits should confirm where the signed and authenticated originals are being held and that these will be retained for inspection,

26. Where the affidavit or any exhibit contains information which the deponent or the organisation on whose behalf the affidavit has been made contends should be redacted, then two further copies of the document to be redacted (be it the affidavit and or an exhibit) should be provided in electronic PDF format. These further copies should be in the following forms:

(a) one where the redaction sought is shaded but still visible; and

(b) the other where the same material is marked out so that it is no longer visible.

27. At the same time, and unless otherwise directed by the Commissioner, a copy of the affidavit in its final form before it was signed and authenticated should be provided in electronic Word format.

28. At the same time, and unless otherwise agreed with the COI, the deponent or the relevant legal representative should deliver five hard copies of the affidavit together with any accompanying exhibit or bundle of exhibits to the COI at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town, Tortola.

29. Where further to paragraph 26 above, redaction of the affidavit or any accompanying exhibit or bundle of exhibits will be sought, then additional hard copies of the document which it is said should be redacted must also be provided. Five of these copies must be marked in accordance with paragraph 26(a); five must be marked in accordance with paragraph 26(b).

The Rt Hon Sir Gary Hickinbottom
Commissioner
1 June 2021

APPENDIX A

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol for the Conduct of Hearings

1. This protocol is intended to assist participants, witnesses, legal representatives, and any others attending a hearing of the Commission of Inquiry ("COI") with key information as to how hearings will be conducted.

Place of Sitting

2. Unless otherwise directed by the Commissioner, the COI will hold its hearings at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town, Tortola ("the IAC").

3. For reasons of health and security, all those attending will be required to check-in via the receptionist iPad at the IAC Reception desk.

4. Any questions about the facilities available at the IAC or concerning a specific requirement, should be directed to the Secretary to the COI (steven.chandler@bvi.public-inquiry.uk) and the Assistant Secretary to the COI (juienna.tasaddiq@bvi.public-inquiry.uk) in advance. This is particularly important if any specific assistance is needed in order to participate in the hearing, for example if an individual has restricted vision or is hard of hearing. Those with mobility issues should be assured that these should not affect access to the Ritter Building nor to the hearing room on its 3rd floor.

Times of Sitting

5. The usual sitting times of the COI will be from 10.00am to 4.30pm Monday to Thursday. The Commissioner may direct that sittings are held at other times and/or on other days so as to ensure the continued progress of the COI. There will be breaks during the sitting day including for lunch.

6. Please aim to arrive not less than 20 minutes before the hearing is due to commence.

Form of Address

7. The Commissioner, Sir Gary Hickinbottom, should be addressed as "Commissioner" or "Sir". Advocates and others attending a hearing are not expected to stand either when the Commissioner enters the hearing room or leaves it.

Attendance of witnesses and legal representatives at a hearing

8. Given COVID-19, steps have been taken to ensure that witnesses and their representatives are able to attend the hearings safely, including by keeping to a minimum the number of people in the IAC and in the hearing room at any one time. The IAC, including the hearing room, is cleaned thoroughly at the end of each sitting day.

9. With this in mind, witnesses are expected to attend the hearing alone, other than if accompanied by their legal representative(s) (as permitted in advance by the Commissioner).

10. All witnesses and legal representatives are expected to attend in person at any hearing at which they are required. Legal representation should be proportionate and should be limited to ensure compliance with COVID-19 safeguards. Legal representatives must therefore confirm their wish to attend in person by email to the Secretary to the COI (steven.chandler@bvi.public-inquiry.uk) and Assistant Secretary to the COI (juienna.tasaddiq@bvi.public-inquiry.uk) at least 24 hours before the relevant hearing. Remote attendance by video link may be possible upon application by email to the Secretary to the COI (steven.chandler@bvi.public-inquiry.uk) and Assistant Secretary to the COI (juienna.tasaddiq@bvi.public-inquiry.uk).

11. All visitors to the IAC are required to wear a mask or face covering in all common areas of the IAC and to sanitise their hands on arrival at the IAC Reception on the 3rd Floor. Once visitors are settled in the waiting room/area, and are at least two metres from any other persons/group, they may if they wish remove their masks or face covering but should resume wearing the mask or face covering at any time when moving around the common areas on the 3rd floor.

12. Restrictions mean that it will not be possible to provide separate consultation rooms for witnesses and their legal representatives.

13. Witnesses and any accompanying representative(s) will be told when they can enter the hearing room and will be directed as to where they should sit. Once seated in the hearing room, the witness and their legal representative(s) can remove their mask or face covering.

14. Social distancing should be maintained in the hearing room, and across the IAC, at all times.

15. Evidence will be given under oath or affirmation. If you wish to take the oath using a holy book other than the New Testament or Old Testament, please let the Secretary to the COI (steven.chandler@bvi.public-inquiry.uk) and Assistant Secretary to the COI (juienna.tasaddiq@bvi.public-inquiry.uk) know well in advance of the hearing. If you give evidence remotely, and wish to give it under oath, you will need to provide your own holy book. In either event, if you make an oath, you take the book in your right hand and read the oath from the card that will be provided to you. If you make an affirmation, you simply read the affirmation from the card that will be provided to you. You may take an oath or an affirmation whilst standing or seated.

16. There will be no restrictions on bringing mobile telephones into the hearing room but they must be either turned off or switched to silent. Calls must be made and taken outside the hearing room.

17. It is strictly prohibited to take any type of recording, film or photographs in the hearing room.

Remote attendees

18. Those joining a hearing remotely are required to confirm they are alone and cannot be overheard. Unless permitted by the Commissioner, they should keep their camera on during the proceedings save during a break. They should keep their microphone muted unless called upon by the Commissioner or Counsel to the COI, or if they wish to raise a matter for the Commissioner's attention such as that outlined in paragraph 22 below.

19. Remote attendees are reminded that it is not permitted to make any type of recording of the hearing. They will be asked to confirm that all mobile telephones are turned off and that all recording devices have either been removed or turned off.

Transcription

20. A transcript of the proceedings will be prepared in real time using a stenographer based outside the hearing room. Where necessary, for example if a question or answer is not clear or there is a dip in audio quality, the speaker may be asked to repeat what they last said. This is important so as to maintain the integrity of the record of proceedings. Those speaking are reminded to speak slowly and clearly and towards their microphones.

Attendance of the public and press at a hearing

21. The need to comply with COVID-19 safeguards means that it is not possible for members of the public or media to attend hearings in person. However, unless the Commissioner directs that a hearing or part of a hearing should be in private, all hearings will be live streamed on a dedicated YouTube channel. That will allow both the public and the media to follow the hearings as they take place. The link to the channel will be available on the COI's website.

22. The live stream will be subject to a three-minute time delay. In the event that a witness gives an answer which contains information that may not be given publicly, then the time delay will allow either Counsel to the Commission, the legal representative of a participant or a witness or the witness themselves to raise the matter within that three-minute period. The Commissioner will then direct that the live stream be paused and the hearing will go into private session. Once the Commissioner has determined the matter and/or any evidence that needs to be taken in private has been heard, the live stream will be resumed.

The Rt Hon Sir Gary Hickinbottom
Commissioner
1 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol for the Redaction of Documents

Introduction

1. This Protocol is made under section 9 of the Commissions of Inquiry Act 1880 (Cap 237).

2. For the BVI Commission of Inquiry ("COI") to fulfil its Terms of Reference, it will need to see all documents provided to it in complete (i.e. unredacted) form. Documents provided to the COI by members of the public or Providers of Documents ("PoDs") will go through a two-stage process. The first stage is the provision of documents to the Commission alone ("first stage disclosure"). The second stage (which, for the reasons set out in this Protocol, will not apply to all documents) is the provision of documents that the COI considers necessary to use in evidence ("second stage disclosure").

3. All documents provided to the COI will be held on a secure Data Management System until such time as it is necessary to make second stage disclosure. Not every document provided to the COI will need to go through second stage disclosure. For those that do, there may be legitimate reasons for the COI to apply redactions to a document.

4. This Protocol sets out the COI's approach to the redaction of documents that fall for second stage disclosure. Its purpose is to ensure that providers of documents ("PoDs") and members of the public understand how the COI intends to deal with documents that fall within this category.

5. This Protocol should be read together with the Protocol for the Provision of Documents to the BVI Commission of Inquiry.

6. The procedures set out in this Protocol are not intended to cover every eventuality or every procedural issue that may arise. Where the interests of justice and fairness require it then the COI may need to depart from this

Protocol. That may be particularly so where a document has been provided by a member of the public. This Protocol may be amended from time-to-time, in which case the amended version will be published on the COI's website.

Definitions

7. In this Protocol:

"Redaction" is the removal of information from a document, usually by blacking out words. A need to redact information may arise for a number of reasons including to protect, where it is appropriate to do so, the identities of individuals or to remove information that is sensitive and irrelevant to the COI's work.

"Document" means anything in which information of any description is recorded, whether in paper or in electronic form. It will include but is not limited to, contract documents, governing/constitutional documents, guides/codes of conduct, design plans, technical drawings, blueprints, reports (internal and external), reviews, committee/board minutes, meeting/attendance notes, manuscript notes, memoranda, letters (including fax), leaflets, circulars, emails (internal and external) legislation, policy documents/statements, witness statements, photographs, video and audio recordings and physical evidence.

"Member of the public" means an individual who has not been the subject of a letter of request but has voluntarily provided documents to the COI through the COI's website or by other means.

"Provider of documents" ("PoD") means any person, institution or organisation which has been asked to provide documents to the COI. For the avoidance of doubt, it includes, but is not limited to, the Government of the BVI, individual ministries, departments, statutory boards and associated agencies. It also includes, but is not limited to, a public officer exercising an official function, a person elected to public office, a member of any board, committee or any similar body established by any law in force in the BVI. A PoD does not include a member of the public who has voluntarily provided information or documents to

the COI through its website or by other means.

Redaction at the second stage process

8. Where a document is to be used in evidence, it will normally be the subject of the second stage process. However, this process may be rendered inappropriate and/or unnecessary if (for example) a document is only to be used in a private hearing (i.e. a hearing not held in public in respect of which no report of the hearing shall be published) or if it may be possible to use a document at a public hearing without referring to that part of it which requires redaction.

9. For the avoidance of doubt, where a member of the public has confirmed that they wish to remain anonymous in the sense that they do not wish anything to be used in evidence or published which, directly or indirectly, will lead to their identification as a source of information, or that they wish the information they submit to remain confidential and not to be used in evidence or in the Commissioner's report, any necessary redactions to documents provided by that member of the public will be made to respect those wishes. The paragraphs that follow therefore apply to those members of the public who have not sought such an assurance of confidentiality.

10. When the COI has decided that a document should go through the second stage process, then it will invite the member of the public or the PoD who provided the document to indicate, within a specified time, which part or parts of the document if any, should be redacted. Reasons must be given for each proposed redaction. The Commissioner expects those seeking redactions to take a proportionate approach to such requests.

11. The COI will ensure redaction of personal data in accordance with the applicable data law. The COI's approach to redaction of personal data is governed by the relevance of that data to the COI's work and the necessity of its disclosure, save where express consent for the disclosure or publication of the personal data has been provided by the data subject or their representative.

12. The COI will treat as personal data information such as private addresses, private telephone numbers and dates of birth. Such information will normally be redacted without the need to apply to the Commissioner. Members of the public or PoDs will be provided with a copy of the document concerned, marked with the COI's proposed redactions of personal data. Where the member of the public or PoD identifies any personal data which has not been redacted and wishes to apply for its redaction on the grounds that its disclosure is not relevant and necessary for the purposes of the COI, an application must be made in writing to the Commissioner within the deadline set for review of the document.

13. The deadline for a member of the public or PoD responding further to paragraphs 10 or 12 will usually be seven (7) days from receipt of the document but may be a shorter or longer period where the Commissioner considers such a period appropriate. Any application for an extension of that period should made as soon as possible and certainly before the expiry of any deadline.

14. The COI may request a member of the public or PoD to identify their proposed redactions (including of personal data) in advance of the COI producing a marked copy pursuant to paragraph 12. In such circumstances, the member of the public or the PoD will usually be asked to provide two copies of the document or documents on which redactions are sought. The first copy should have any material which it is sought to redact shaded but visible; the second copy should have the same material marked out so that it is no longer visible.

15. The Commissioner will consider all requests for redaction. If he does not consider that grounds for redaction have been made out, the COI will notify the member of the public or PoD concerned before the information which is the subject of the request for redaction is disclosed further.

16. Anyone who contends that a document produced or provided to the Inquiry should be anonymised or redacted otherwise than in accordance with the preceding paragraphs of this Protocol may make a written application to the Commissioner. The application should be accompanied by a copy of the document marked up with the proposed redaction(s) and must contain a brief

statement of the grounds on which it is made.

17. Any application made under paragraphs 13 and 16 above should be submitted by email to the Secretary to the COI at steven.chandler@bvi.public-inquiry.uk.

The Rt Hon Sir Gary Hickinbottom

Commissioner

5 March 2021

Amended 1 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol concerning the provision of written witness evidence

Introduction

1. A "witness" is a person from whom the Commissioner intends to receive written and/or oral evidence. The Commissioner will decide from whom he wants to hear oral or written evidence whether or not that person has been given participant status.

2. Anyone who believes they may have evidence relevant to the Commissioner's Terms of Reference is welcome to approach the Secretary to the Commission of Inquiry ("the COI"). The means by which this can be done are set out on the COI's website. If the Commissioner decides that such evidence may be likely to assist his investigation then the COI Team will decide what steps, if any, need to be taken. It may not be necessary or appropriate to take evidence from every person who approaches the COI.

3. Unless otherwise directed by the Commissioner, written evidence will be in the form of an affidavit.

4. For the avoidance of doubt, members of the public, witnesses and participants should not submit affidavit evidence on any matter without prior discussion with the COI. If such evidence is submitted unsolicited, that does not mean that the Commissioner will necessarily consider it to be relevant: as with all evidence, he will determine whether, and the extent to which it is relevant.

5. The purpose of this protocol is to ensure that:

   (a) participants, witnesses and legal representatives understand the process by which the COI will seek written evidence from a witness; and

(b) written evidence conforms to a common standard and is set out in a form which is most useful to the Commissioner.

6. This protocol is not intended to cover every eventuality that may arise in relation to written evidence. Where it is necessary for the efficient progress of the COI, the Commissioner may direct that written evidence is provided in a form other than that provided by this protocol.

The provision of written evidence

7. Where the Commissioner wishes to obtain written evidence from a person, then the COI Team will send that person a written request. If the person has legal representation, the request will be sent or copied to the relevant legal representative. The request for an affidavit may be included in a letter dealing with other matters such as the provision of disclosure.

8. The request will set out those matters to be covered in the affidavit. There may be cases where the request is directed to more than one witness and contains a description of the matters each witness needs to be addressed. Where appropriate, the COI Team may ask a witness to make more than one affidavit to cover different topics. It may issue further or supplementary requests following receipt of an affidavit.

9. The request for an affidavit will set a date for compliance. This may vary depending on the nature and extent of the evidence requested. The Commissioner will consider applications for an extension of time to provide an affidavit. Such requests must be submitted by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk) as soon as possible and in any event before the expiry of the time allowed. Any queries about the content of this protocol, the form of an affidavit or the content of a request should also be similarly raised.

10. Where a witness is legally represented the affidavit should be provided:

(a) in final signed form;

(b) following the format set out at paragraphs 13-22 below; and

(c) be limited to addressing the matters set out in the request. Where a witness or his or her legal representative considers that the affidavit should address other matters, then they must speak to the COI Team before the affidavit is signed and before the expiry of any date by which it was to be submitted.

11. Where a witness is not legally represented then the COI Team may:

(a) invite the witness to a meeting for the purpose of discussing the request for an affidavit; and/or

(b) ask the witness to provide an unsigned affidavit in draft so as to decide whether:
(i) it requires clarification or amplification,
(ii) it conforms with paragraphs 13-22 below; or
(iii) it can be sworn and submitted to the COI.

12. The COI may ask a legally represented witness to follow the procedure set out in paragraph 11, in which case a legal representative may attend any meeting between the COI Team and the witness.

Format and Structure of the Affidavit

13. Any affidavit submitted to the COI must be typed on single-sided ANSI A Letter size paper (8.5ins width x 11ins height) and adopt the following format:

(a) Arial font with point size 12.

(b) Line spacing of 1.5 with each page numbered sequentially in the bottom right-hand corner of each page.

(c) Paragraphs numbered sequentially (i.e. 1, 2 ,3, 4 etc).

(d) Have all numbers, including dates, expressed in figures.

(e) Give the reference to any document or documents mentioned in bold text defined by square brackets, in the body of the affidavit.

(f) At the top right hand corner of the first page (and on the backsheet) there should be clearly written:

(i) The initial and surname of the person making the affidavit ("the deponent").
(ii) The number of the affidavit in relation to the named deponent.
(iii) The identifying initials and number of each exhibit referred to.
(iv) The date on which the affidavit was sworn.

14. The affidavit must, if practicable, be in the deponent's own words, should be expressed in the first person and should:

(a) commence 'I (full name) of (address) make oath and say as follows: ……'

(b) if giving evidence in his or her professional, business or other occupational capacity, give the address at which the deponent works in (a) above, the position he or she holds and the name of the organisation on whose behalf the affidavit is being made. Personal addresses should not be given.

15. Where appropriate a brief biography should be included setting out the deponent's experience and qualifications to make the statement.

16. The affidavit must indicate which of the statements in it are made from the deponent's own knowledge and which matters of information or belief and, if so, the source for any matters of information and belief. That is particularly important where the maker of the affidavit has been asked to address questions on behalf of an organisation.

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    (a) be signed by the deponent;

    (b) be sworn or affirmed by the deponent; and

    (c) contain the full name, address and qualifications of the person before whom it is sworn or affirmed.

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20. Any document to be used in conjunction with an affidavit must be exhibited to it. If there is more than one such document or the document is more than 10 pages in length, then these (or it) must be included in a separate bundle which is arranged chronologically or in some other convenient order. The bundle must be indexed and paginated in the bottom right hand corner.

21. Exhibits should be referenced in the body of the affidavit using the following system "**[XY/*]"** where XY are the initials of the deponent and '*' the number of the exhibit. Exhibits should be numbered sequentially. The same sequence should be used when preparing a bundle of exhibits.

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    (a) produced to and verified by the deponent;

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Submission to the COI

24. The signed and authenticated affidavit, together with any accompanying exhibit or bundle of exhibits should be submitted in electronic PDF format by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk). The affidavit should be separate from any exhibit or bundle of exhibits. Where the affidavit and exhibits are too large to send in one email, the deponent or his or her legal representative should contact the COI in advance.

25. The email submitting the affidavit and any accompanying exhibit or bundle of exhibits should confirm where the signed and authenticated originals are being held and that these will be retained for inspection.

26. Where the affidavit or any exhibit contains information which the deponent or the organisation on whose behalf the affidavit has been made contends should be redacted, then two further copies of the document to be redacted (be it the affidavit and or an exhibit) should be provided in electronic PDF format. These further copies should be in the following forms:

(a) one where the redaction sought is shaded but still visible; and

(b) the other where the same material is marked out so that it is no longer visible.

27. At the same time, and unless otherwise directed by the Commissioner, a copy of the affidavit in its final form before it was signed and authenticated should be provided in electronic Word format.

28. At the same time, and unless otherwise agreed with the COI, the deponent or the relevant legal representative should deliver five hard copies of the affidavit together with any accompanying exhibit or bundle of exhibits to the COI at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town, Tortola.

29. Where further to paragraph 26 above, redaction of the affidavit or any accompanying exhibit or bundle of exhibits will be sought, then additional hard copies of the document which it is said should be redacted must also be provided. Five of these copies must be marked in accordance with paragraph 26(a); five must be marked in accordance with paragraph 26(b).

30. If the circumstances warrant it, the Commissioner may permit a deponent to submit a signed affidavit which has not been authenticated together with any accompanying exhibit or exhibits. Any application to be permitted to submit a signed but unauthenticated affidavit must be made with reasons and submitted by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk). The form and content of any affidavit and accompanying documents submitted in this way must still otherwise conform with the provisions of this protocol as set out above.

31. Deponents and their legal representatives (where applicable) should proceed on the basis that the COI will treat any affidavit submitted pursuant to the preceding paragraph as if it had in fact been authenticated.

Submission of statements rather than affidavits

32. Further to paragraph 6 above, the Commissioner may permit a witness to submit written evidence in the form of a signed statement rather than an affidavit. Any application to be permitted to submit a signed statement rather than an affidavit

must be made with reasons and submitted by email to Andrew King, Senior Solicitor to the COI (andrew.king@bvi.public-inquiry.uk).

33. Any such statement must be signed as follows:

(a) There should be a statement of truth on the last page of the statement which should follow immediately on from the text of the statement. The statement of truth should be in the following terms:

"I [insert statement maker's name] believe that the facts set out in this statement are true. I understand that proceedings for perjury may be brought against a witness who wilfully gives false evidence concerning the subject matter of the Commission of Inquiry."

(b) The full name of the statement maker should then appear in typescript below the statement of truth;

(c) The signature of the statement maker should appear below the typed name;

(d) The date on which the statement is signed should then appear.

(e) Subject to the Commissioner granting prior approval, the use of an electronic signature is permissible.

34. Any statement submitted to the COI must, insofar as applicable conform to the requirements for an affidavit as set out in the preceding paragraphs of this protocol. Regard should be had specifically to:

(a) Paragraphs 13 to 17 concerning the format and structure of a statement.

(b) Paragraphs 20 to 22 and paragraph 23(c) concerning documents which are exhibited to a statement.

(c) Paragraphs 26 to 29 concerning the submission of a signed statement and any accompanying exhibits to the COI.

The Rt Hon Sir Gary Hickinbottom
Commissioner
1 June 2021
Amended 23 August 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Protocol concerning Potential Criticisms

Introduction

1. This protocol is intended to assist participants, witnesses, legal representatives and others to understand how the Commissioner intends to approach any potential criticisms which may be made of a person during the course of the COI.

2. It is inevitable that criticisms will be made of individuals, entities or organisations during the COI's proceedings. Such criticisms may arise from an affidavit provided by a witness, an organisation's position statement, the oral evidence of a witness, from documents provided to the COI or otherwise. The Commissioner may in due course have to make a finding and/or reach a conclusion in relation to such criticisms if relevant to his Terms of Reference. This may involve the making of explicit or significant criticism of a person (be that an individual, entity or organisation) in the written report which, under his Terms of Reference, the Commissioner is required to submit to His Excellency, The Governor.

3. The Commissioner has made clear that he will ensure that all persons are treated with procedural fairness.[1] In accordance with his duty to ensure procedural fairness, the Commissioner will not include any explicit or significant criticism of a person in his report unless that person has been given reasonable opportunity to respond to that criticism.

4. Until the Commissioner has reached a concluded view on a criticism, it remains a "potential criticism". The Commissioner will only reach a concluded view once he has considered all relevant evidence, including any evidence that the subject of a potential criticism has provided to the COI.

[1] See, for example, the transcripts of the COI hearings Day 2 (6 May 2021) at page 12ff; Day 11 (14 June 2021) at page 24ff; Day 25 (13 July 2021) at page 13ff.

The COI's general approach to potential criticisms

5. The Commissioner, supported by many, bears in mind the need to ensure that the COI's proceedings are conducted in as transparent a manner as possible, are effective and progress without unnecessary delay.

6. The Commissioner's general approach therefore will be to ensure that significant criticisms of relevant individuals and organisations are aired, as far as practicable, during the course of the COI's investigation and hearings. This can be achieved in different ways:

   (a) Sending a "Warning Letter"[2] to an individual, entity or organisation identifying potential criticism(s) and the evidence substantiating such criticism(s).

   (b) Giving the individual, entity or organisation an opportunity to lodge a written statement and/or disclosure of relevant documents in response to potential criticisms.

   (c) Ensuring, where necessary, that significant potential criticisms are explored in oral evidence.

   (d) Where a significant potential criticism is made or relevant documents emerge after a witness has given oral evidence, giving that witness an opportunity to respond in writing and/or by recalling that witness so that those criticisms can be explored in further oral evidence.

[2] Such letters have been described as "Salmon Letters" in the Eastern Caribbean jurisprudence. The term derives from a recommendation made in the report of the Royal Commission on Tribunals of Inquiry (Cmnd. 3121), published in November 1966. Chaired by Rt Hon. Lord Justice Salmon, the Royal Commission had been appointed to review the workings of the Tribunals of Inquiry (Evidence) Act, 1921 rather than the procedure in all forms of inquiry. The utility of its recommendations has been subject to judicial criticism. In the circumstances, the Commissioner prefers the more modern language of "warning letter".

7. The above is not intended as an exhaustive list. Given the breadth of the Terms of Reference, the range of individuals, entities and organisations which may be the subject of potential criticism and that the potential criticisms raised may vary in their nature and seriousness, it is important to recognise that there may be other ways in which an individual, entity or organisation subject to potential criticism can be given a fair opportunity to respond to that criticism.

8. The Commissioner will have regard to the circumstances in each case when considering the best way of ensuring procedural fairness while minimising delay including how much time those being criticised should be allowed to respond to any potential criticisms. Those circumstances may include the nature of any potential criticism, the basis for it, the extent to which the subject of the criticism already has access to or knowledge of the documents which inform the criticism and whether the person, entity or organisation criticised has legal representation.

Warning Letters

9. A warning letter is not intended to be a pleading, nor should it be taken as such. Its purpose is to provide its recipient with an outline of potential criticisms, the evidence which is capable of substantiating such criticism and to explain how the recipient may respond to the criticisms raised.

Participants raising potential criticisms of witnesses

10. A participant to the COI is a person designated as such under Rule 13 of the COI Rules. Participants may seek to make potential criticisms of a witness. In that event, the participant concerned must comply with the following paragraphs of this protocol.

11. First, potential submissions must not be sent directly to the person of whom the participant wishes to make criticisms. The decision as to whether a potential criticism submitted by a participant will be put to a person and, if so, in what form is a matter for the Commissioner. Accordingly, participants must submit potential

criticisms as a Word document to the following email address andrew.king@bvi.public-inquiry.uk.

12. Second, the participant should not delay in raising potential criticisms. These must be raised as soon as the participant becomes aware of them. Doing so will allow the Commissioner to consider if there is a need to call the person criticised. That the person criticised has not been scheduled to give oral evidence should not prevent the participant from raising potential criticisms. Criticisms sought to be made must be raised in accordance with any direction of the Commissioner as to timing, and in any event, once a person criticised has been scheduled to give oral evidence, then any additional criticisms should be raised no less than 7 (seven) days before the scheduled date on which that person is due to give evidence.

13. Participants must not therefore proceed on the basis that they need collect all potential criticisms of an individual, entity or organisation before submitting them for the Commissioner's consideration. Nor should a participant proceed on the basis that they can wait until 7 days before a witness gives oral evidence to advance potential criticisms or that they can give less than 7 days' notice of such criticisms where a witness is scheduled.

14. Disregard of the timings set out above will cause significant disruption to the COI's timetable and may require an investigation into the conduct of the participant seeking to make criticisms of another person. A participant would need to provide good reason for the Commissioner to permit a potential criticism to be put in circumstances where that participant has not adhered to this protocol. Where such permission is sought, the Commissioner will consider the matter on a case by case basis having regard to all the circumstances including the access enjoyed by the participant to the documents on which potential criticisms are founded.

15. Third, potential criticisms must be set out in the form of a table ('the Table"), with one column detailing the criticism being raised and the second identifying all the evidence said to be capable of substantiating that criticism. Each potential criticism should be formulated in plain language. Evidence relied upon should

be clearly identified for example by giving the document a title together with its date and nature (e.g., "letter to …" or "Cabinet Paper dated XXX"). Where the evidence relied on has a COI reference, then it is enough to give that reference.

16. The Commissioner will not permit a potential criticism to be put where the evidence capable of substantiating that criticism has not been identified. Nor will he allow a potential criticism to be put which has been formulated to avoid identifying all or any of the evidence to be relied upon.

17. Where a potential criticism is founded on a proposition of law, then the legal basis of that proposition needs to be fully set out.

18. The table should be accompanied by a covering letter explaining: (a) how the potential criticisms raised are relevant to the Terms of Reference; (b) confirming whether the participant has ownership and control of any evidence relied upon as capable of substantiating the criticism advanced; (c) confirming that the participant has identified all evidence capable of substantiating the criticism; (d) confirming whether any redactions have been, or are being sought, in relation to that evidence and, if so, the grounds (including legal privilege, confidentiality or public interest immunity) for such redactions; and (e) give reasons for the redactions sought.

19. The Commissioner expects that any potential criticisms will be founded on documentary evidence that has already been disclosed to the COI, given the previous requests that have been made to participants for the disclosure of all material relevant to the Terms of Reference. Where the documentary evidence relied upon has not been disclosed to the COI previously, then the participant will need to explain that failure in the covering letter.

20. A participant seeking to make potential criticisms based on documentary evidence should bear in mind that fairness may require that a criticised person, entity or organisation be provided with access to unredacted documents. Accordingly, where redactions are sought or have been made, the participant must explain in the covering letter why no unfairness arises.

21. If redactions are sought then, unless these have already been provided, the documents must be provided in in the form of an indexed and paginated bundle provided to the COI at the same time as the Table. That bundle must be provided in two separate forms: one where the redactions sought are marked in black so that they cannot be seen; the second where the redactions sought are shaded but still visible.

Confidentiality

22. Participants, witnesses and their legal representatives owe an obligation of confidentiality to the Commissioner. A participant will breach that duty if they disclose any point and to any other person other than the COI or their legal representative any information concerning the potential criticisms which that participant has submitted to the Commissioner. The same duty applies to the legal representative of the participant concerned. A participant and/or their legal representative must obtain a written waiver of the duty of confidence from the Commissioner before making any wider disclosure. An application for a waiver must be made in writing with reasons.

23. Those who have been notified of potential criticisms also owe an obligation of confidentiality to the Commissioner. That obligation means that they cannot disclose the contents of a warning letter or any accompanying enclosures to any other person except their legal representative, without first obtaining a written waiver of the duty of confidence from the Commissioner. Again, any application for a waiver must be made in writing with reasons.

The Rt Hon Sir Gary Hickinbottom
Commissioner
27 August 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 1

1. By an application dated 28 April 2021, the Attorney General ("the Attorney") applied for a direction that she and various other entities of the BVI Government (which the application identified) be permitted to participate in this Commission of Inquiry ("COI"), those entities participating in and being represented at the whole of the Inquiry through her or by Counsel authorised and instructed by her. I heard the application on 4 May 2021, but the Attorney wished to make further written submissions on the extent to which the Rt Hon Sir Geoffrey Cox QC and/or Withers might on her behalf represent those government entities in the light of an apparent BVI Government announcement that they have been retained by the Government to conduct an independent review of the matters under inquiry. Those submissions were made in writing on 7 May 2021, and I thank the Attorney for them; and, of course, for her helpful oral submissions at the hearing.

2. The application is made under section 12 of the Commissions of Inquiry Act 1880 ("the COI Act"), paragraph 13 of the COI Rules and paragraph 3 of the COI Protocol for Representation under that section. Section 12 provides:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

References to "section 12" in this ruling are to that section. Paragraph 3 of the Protocol requires an application to be made in writing for a direction by the Commissioner confirming the representation; and provides that, in the absence of such a direction, representation will not be allowed.

3. The application raises the following issues:

(i) Does the Attorney fall within the scope of section 12; and, thus, is she in her own right entitled to participate in the whole of the inquiry?

(ii) Do the government entities listed in the schedule to the application fall within the scope of section 12; and, thus, are they entitled to participate in the whole of the inquiry?

(iii) If they are, should the Attorney represent them as participants in the COI?

(iv) If so, is there any legal constraint on the Attorney instructing Sir Geoffrey Cox and/or Withers to assist her in that task including, where she considers it appropriate, designating him or members of Withers to appear on her behalf for the government entities by whom she is instructed?

4. I will deal with those issues in turn.

5. The Attorney relied upon three bases for her contention that she fell within the scope of section 12 as a person who, in her own right, was implicated or concerned in the matter under inquiry in the COI.

6. First, she said that it is likely that she, as senior law officer, would wish to make submissions and/or lodge information on improving the standards of governance and the operation of the agencies of law enforcement and justice. That may be so; but the Attorney can, like anyone else, lodge material with the COI relevant to its terms of reference. It is not necessary for her to be a participant so to do.

7. Second, she submitted that, as Attorney, she was required to act in the public interest, and that role in itself was sufficient to bring her within the scope of section 12. She accepted that there was potential conflict of interest – or, as she put it, "tension" – between her advising a Minister or other arm of government and her obligation to act in the public interest: but that is inherent in her statutory role as senior law officer and something which, she said, she is well-used to navigating. However, as the Attorney readily accepted in the course of the hearing, in an inquiry such as this, it is the role of Counsel to the Inquiry to ensure that the public interest is guarded, and to make any submissions necessary to ensure that that is the case. In respect of this COI, under section 13 of the COI Act, the Attorney has appointed Mr Rawat to be Counsel to the Inquiry. That is how her obligation to the public interest is satisfied. He, of course, has no potential conflict of interest to negotiate: he is solely concerned with the public interest. No doubt that is why the COI Act provides for such a role.

8. I was unpersuaded, therefore, by those submissions of the Attorney. However, I found her submissions on the third basis upon which she relied to have much more force. She submitted that, first, as the head of a government department (the Attorney General's Chambers), she is essentially in the same position as a Minister in respect of governance within that department; and she has a particular interest in the operation of the justice system in respect of which the COI terms of reference require me to make recommendations, if appropriate. Second, she submitted that, as Attorney, she has a unique role in governance generally: whilst she accepted that the Governor was ultimately responsible for governance, as Attorney, she has a role in both in ensuring that governance is good, and in identifying poor governance and then taking steps to rectify it by advising on appropriate standards and how they may be effected.

9. As I indicated at the hearing, I find these submissions to be compelling. In my view, these functions of the Attorney mean that she is concerned with matters under inquiry in the COI, namely the operation of the justice system and governance in the BVI including, as paragraph 3 of my terms of reference states, the need "to give the people of the Virgin Islands confidence that government is working in a fair, transparent and proper manner".

10. For those reasons, I conclude that the Attorney falls within the scope of section 12; and thus, subject to my statutory powers to restrict participation set out in section 2 of the COI Act, she is entitled to participate in her own right at the whole of the inquiry.

11. Turning to the government entities listed in the schedule to the application, the application states that these comprise "Government ministries, offices, departments and other Government entities". Insofar as there might be ambiguity in that description, at the hearing, the Attorney confirmed that she is instructed to act for each of the Ministers marked in blue on the schedule in organogram form attached to the application together with the area of government assigned to him in accordance with section 56(5) of the Virgin Islands Constitution Order 2007 as amended; and the Cabinet Secretary and her office. That, however, is not all of the Ministers: the Minister for Education, Culture, Youth Affairs Fisheries and Agriculture and the Minister for Transportation, Works and Utilities, and their departments etc, are not included, at least as yet. Nor is the Governor's Office, or the Deputy Governor's Office.

12. The Attorney submitted that, for the purposes of section 12 of the COI Act, "person" should be construed widely, and sufficiently widely to include government departments and other state agencies or entities. I agree.

13. I am easily persuaded that the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to the application are concerned with the matters under inquiry. (For convenience, in this ruling, I will refer to all of the government entities included in the schedule as "the Ministers etc".) As the Attorney submitted, the COI is concerned with the decisions, administrative systems, practices and policies – in short, governance – for which Ministers have responsibility. In my view, each clearly falls within the purview of section 12; as do the ministries, departments and other government entities within the area of government assigned to each including those persons employed within those areas of government. Similarly, the Cabinet Secretary.

14. Thus, with the caveat as to my powers to restrict participation to which I have already referred, the Ministers etc so identified are entitled to participate in the whole of the hearing.

15. The Attorney submitted that she could, and should, represent them all. I again agree. By section 58 of the Constitution, the Attorney is the principal legal adviser to all arms of the BVI Government including Ministers. There is no conflict of interest in her acting for each of the Ministers etc whom she seeks to represent in the course of this COI: they each have an identical interest in governance. The Attorney is clearly properly sensitive to potential conflicts of interest in acting for Ministers and those for whom Ministers are constitutionally responsible: in her guidance to Ministers and other public servants, Revised Inquiry Response Unit Guidance Note No 5 dated 27 April 2021, she makes clear that "if actions of yours that could be said to be not in the proper exercise of your duties are the subject of the Inquiry, then you should seek personal legal representation". In acting for Ministers and other public servants, I am confident that, throughout the course of the COI, she will continue to exercise with all diligence her obligation to avoid such conflicts of interest; and, if and when such conflicts arise, she will notify me of them and withdraw from representing the relevant public official.

16. For those reasons, at the hearing, I gave a direction that the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to this direction are concerned with the matters under inquiry and shall be entitled to appear by the Attorney General at the whole of the COI.

17. Finally, the Attorney General applies for a direction that Sir Geoffrey Cox and Withers act on her behalf in representing the Ministers etc. Sir Geoffrey has very recently been admitted as a legal practitioner in the BVI, and is willing and able to assist and represent the Attorney General in the COI. It was said in the application that Sir Geoffrey was not aware of any conflict of evidence in so doing.

18. There would usually be no difficulty in respect of this – indeed, no application would normally be necessary, given the convention that the Attorney General can appear by way of any member of her Chambers or any legal practitioner with rights of audience in the BVI instructed by her.

19. However, as Mr Rawat pointed out at the hearing, on 21 April 2021, a tweet appeared on the official BVI Government Twitter page, as follows:

> "The Attorney General has asked Sir Geoffrey Cox QC to carry out an independent and objective view of the matters that are the subject of the COI in order to assist the COI in due course."

It had the following hashtags: "#working together", "#BVI" "#COI", "#collaboration", and "#HOA".

20. That was followed on 26 April with an official press release from the BVI Government, purportedly issued by the Governor's Office, which read as follows:

> "… The Attorney General, on behalf of the Virgin Islands Government, has asked Sir Geoffrey Cox QC to carry out an objective internal review of all aspects of the governance of the Virgin Islands, including areas of Government activity to which the CoI's requests have in the main been addressed, and to advise the Government of his conclusions.
>
> This work will, among other things, enable the Attorney General to better assist the Commission of Inquiry in the coming months and draw relevant matters to its attention. Sir Geoffrey will also, where appropriate, represent the Attorney General and the Government at the forthcoming oral hearings before the Commissioner.
>
> Sir Geoffrey Cox QC, who is currently in quarantine, intends to hold a series of meetings with Government Ministers in the next few weeks, initially virtually, and then on completion of quarantine, in person, and will visit Ministries and Departments to explore relevant issues in detail with policy and decision-makers…".

21. Neither the Attorney, nor anyone else in the BVI Government who might have given her instructions to establish an internal review, had made contact with the COI either before, or indeed after, this announcement. As Mr Rawat submitted, the press release gave the BVI public the unequivocal impression that, in parallel with the COI, the

Attorney, on behalf of the BVI Government, had instructed Sir Geoffrey to undertake an internal review of the matters under inquiry.

22. This development gave rise to obvious concerns about the multiple roles it was envisaged that Sir Geoffrey and Withers had, including the apparent conflict of interest in those roles; and also the adverse impact that the proposed review might have upon the COI. At the hearing, Mr Rawat posed several questions for the Attorney's response, namely:

(i) The proposed review had been described as "independent" – but of whom is it independent?

(ii) On whose behalf had Sir Geoffrey been instructed to undertake the review? The Attorney is the law officer for the whole of government and that, under the Constitution, includes the Governor. The BVI public, he submitted, may consider it a strange turn of events for the Governor to seek an internal review having established the COI; but the press release had been purportedly issued by the Governor's Office, which suggested that that is exactly what he had done.

(iii) What are the terms of reference of the internal review, and when will it be completed?

(iv) While it is said that it will enable the Attorney to draw relevant matters to the COI's attention, why does it fall to the Attorney to determine relevance for the COI?

(v) Will the Attorney be giving the COI access to documents on the same basis that Sir Geoffrey will see them which, presumably, will be unredacted?

(vi) Will the conclusions of Sir Geoffrey's review be published or otherwise put into the public domain? The public statements are that the conclusions will be presented to "Government": in what form will they be presented to Government? Are they to be presented only to Cabinet?

(vii) If Sir Geoffrey's review is going to go over ground that falls within the scope of the COI's terms of reference, and if he is going to speak to witnesses from whom I as Commissioner would wish to hear, then is it proposed that the

product of that review (and even the evidence it is based on) will be provided to the COI, which would be the normal convention?

23. As Mr Rawat submitted, the culmination of these questions was that, now Sir Geoffrey had been instructed to undertake an internal review and to reach conclusions on governance of the BVI, then he becomes someone from whom I as Commissioner may wish to hear as a witness. It followed that, having publicly announced this review, the Attorney needed to explain why there is no potential conflict of interest, not just in relation to Sir Geoffrey, but also in relation to any other lawyers (e.g. from Withers) who may be assisting in this review.

24. The Attorney asked to respond to these challenging questions by way of written submissions, which she provided on 7 May 2021.

25. In her submissions, the Attorney says that Mr Rawat's concerns, which I shared, "appear to arise from a misunderstanding of the press release following a statement by the Premier in the House of Assembly, which is related to subsequent decisions of Cabinet of 28 April 2021". Any misunderstanding by the COI could not have been helped by the fact that (i) the COI had not been provided with a copy of the Premier's statement, (ii) the COI had not been provided with a copy of, or even the gist of, the Cabinet decisions on 28 April 2021, or the proposal that the Attorney proposed in due course making submissions to the COI on behalf of Ministers, and (iii) the Premier's announcement in the House of Assembly, and the subsequent tweet and press release announcing the review to be undertaken by Sir Geoffrey, were made days before the Cabinet had discussed the issue and made any decisions in respect of it.

26. However, the position has now been helpfully clarified in the Attorney's submissions, for which I am very grateful. Neither the tweet nor the press release gave a clear (or, indeed, accurate) representation of the true position.

27. First, the Attorney General confirms that the 26 April 2021 press release did not emanate from the Governor's Office as it purported to do. This, she says, has been corrected on the electronic version on the Government website, by the replacement of the Governor's Office with the Premier's Office as the source of the statement. Nevertheless, it could only have been a source of confusion for the BVI public that it appeared the Governor had instructed Sir Geoffrey to conduct a review of governance in parallel with the COI his predecessor had established.

28. Indeed, it is clear from the Attorney General's submissions that the Governor has played no part in instructing Sir Geoffrey, nor has the House of Assembly, nor have two Government Ministers. Sir Geoffrey has been instructed only by those three Ministers and other government entities scheduled to the Attorney's application heard on 4 May to which I refer above.

29. In any event, the Attorney states that the instruction of Sir Geoffrey took place following Cabinet decisions made on 28 April 2021. I have not seen any Cabinet minutes or papers; but it seems that the tweet and press release announcing the review were made several days before the Cabinet discussed the proposed review and made decisions on it.

30. However, the Attorney has now given the gist of those decisions in her written submissions of 7 May 2021. As I have indicated, they are not properly reflected in either the tweet or the press release. The decisions are as follows ("the government entities" referring to the Ministers etc listed in the Attorney's application):

> "a. that the government entities should seek actively to participate in the COI;
>
> b. that the government entities should participate through the Attorney General and be represented by leading counsel, the Right Honourable Sir Geoffrey Cox QC, who is appointed and instructed by the Attorney General to advise and represent her;
>
> c. that each of the government entities should make appropriate arrangements to enable the Attorney General, and counsel appointed by her, to carry out a full objective review of those matters under its responsibility that the Attorney General or counsel advises are necessary to be examined in connection with preparing for participation in the COI."

31. In her submissions, the Attorney goes on to say:

> "It is… my intention that, under my supervision, written and oral submissions should be prepared on behalf of the government entities, with a view to seeking your permission to present them at the appropriate time, in respect of matters pertaining to your terms of reference, including the administrative systems, practices and policies of government and improvements to the standards of governance in the Virgin Islands."

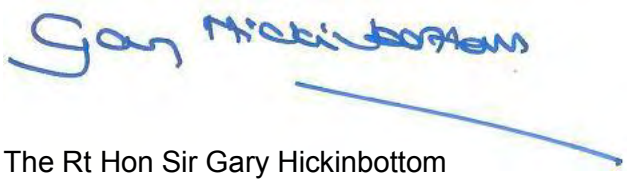
32. Some time ago, the COI wrote to each Member of the House of Assembly, including each Minister, asking for submissions and any information he or she might hold in respect of any matter within the scope of the terms of reference. None has responded. To date, the Ministers etc have acted only in reaction to requests made by the COI.

This is the first time that the Ministers etc have indicated that they propose making submissions to the COI on the matters under inquiry.

33. I thank the Attorney for her helpful submissions and clarification. However, I am nearly four months into a six month COI. It is disappointing that the intentions of the Ministers etc with regard to their proposed course were not indicated to the COI earlier. It is disappointing that the first the COI knew of those intentions was a tweet and a press release, neither entirely clear or accurate, and apparently made some days before the Cabinet discussed the issue of the form of participation in the COI. It is disappointing that, even now, the work on preparing the submissions appears not yet to have started. There is no indication in the Attorney's submissions as to how long the exercise of preparing the written submissions (presumably with supporting documents) might take.

34. However, those are matters for another day. Now that the Attorney has explained that what is intended is merely that she proposes to lodge submissions and information on matters subject to the COI on behalf of the Ministers etc, and Sir Geoffrey will assist her in preparing those submissions, the additional concerns about conflicts of interest diminish. Sir Geoffrey and Withers will simply be acting on behalf of the Attorney, and assisting her in preparing submissions that will be made to the COI in writing and, assuming my permission, also orally. They face the same issues of potential conflicts that the Attorney does – no more and no less – and the Attorney remains responsible for ensuring that, as and when conflicts arise, she informs the COI and she (and they) withdraw from representing relevant public officials.

35. For those reasons, the Order I made on 4 May 2021 shall be construed accordingly.



The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 2

1. On 26 April 2021, as sole Commissioner of this Commission of Inquiry ("COI"), I issued a summons to Ms Patsy Lake to appear before me on 6 May 2021 for the purpose of being examined under oath or affirmation and requiring her to produce at this hearing the following documents:

> "(a) All documents concerning every contractual arrangement that you as an individual entered into with the BVI Government and/or any BVI public departments and/or bodies in the last 3 years to date.
>
> (b) All documents concerning every contractual arrangement that any company and/or business, which you are or were connected, entered into with the BVI Government and/or any BVI public departments and/or bodies in the last 3 years to date."

2. By way of background, briefly, Ms Lake is the Deputy Chair of the BVI Airports Authority, a member of the Social Security Board and a Director of the Cyril B Romney Tortola Pier Park. She is also a business woman, with a variety of commercial interests, who it was understood had entered into a number of contracts with various arms of the BVI Government, not only in her own name, but also through various businesses and companies.

3. At the start of that hearing, Terrance B Neale of McW Todman & Co on behalf of Ms Lake made two applications, namely:

   (i) An application dated 4 May 2021 made under section 12 of the Commissions of Inquiry Act 1880 ("the COI Act"), paragraph 13 of the COI Rules and paragraph 3 of the COI Protocol for Representation under Section 12 for a direction that, as a person whose conduct is the subject of inquiry under this Act, or who is concerned in matters under inquiry in the COI, Ms Lake is entitled to participate in the whole of the inquiry; and that Mr Neale represents her in that capacity.

   (ii) An application dated 5 May 2021 to set aside the summons as being (i) in breach of section 15 of the COI Act as it requires Ms Lake to provide documents to the COI which may incriminate her and (ii) in breach of the rules of natural justice as it may result in adverse consequences for her without providing her

full particulars as to why she is being summoned and requested to produce documents and thus she has no proper opportunity to obtain legal advice and/or properly prepare a defence or response.

4. At the hearing, I refused both applications, and said that I would later provide my reasons for doing so. These are those reasons.

5. Section 12 provides:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

References to "section 12" in this ruling are to that section. Paragraph 3 of the Protocol requires an application to be made in writing for a direction by the Commissioner confirming representation as a participant under section 12; and provides that, in the absence of such a direction, representation for a participant will not be allowed. However, by paragraph 26 of the COI Rules, the Commissioner may permit a witness to have Counsel present when giving evidence to the COI.

6. Mr Neale submitted that Ms Lake was at least "concerned" with the matters under inquiry simply because she had been summoned as a witness; but, given the lack of specificity in the summons compounded by the risk that, in giving evidence and/or producing documents, she may self-incriminate. The summons, he submitted, appeared to be a "fishing exercise" for evidence to formulate a case against Ms Lake. Whilst that particularly bore on the second application to set aside the summons, he submitted that it also clearly put Ms Lake within the scope of section 12.

7. However, in my respectful view, eloquent as Mr Neale's submissions were, they are based upon a false premise: whilst statute has given me many of the powers of a High Court Judge (including the power to summons witnesses and call for the production of documents: section 10 of the COI Act), the process in which I am engaged is investigatory and inquisitorial not, as in the courts, adversarial. It is not part of the function of the COI to "make a case" against anyone; but rather to see whether there is information that corruption, abuse of office or other serious dishonesty in relation to public officials has taken place, and to gather information relevant to the standards of governance and operation of the agencies of law enforcement and justice for the

purposes of making any recommendations in those areas that I consider appropriate. Ms Lake has been called to give evidence, and produce documents, that I consider relevant to those terms of reference, no more and no less.

8. I do not accept that Ms Lake falls within section 12 simply because, in my view, she may have information and documents relevant to my terms of reference, and has thus been summoned. If it had been the statutory intention that the scope of section 12 should include every witness (who would then have a right to participate, by way of Counsel, in the whole of the Inquiry), it would have been simple enough for it to have said so in terms; and, had that been the intention, I have no doubt that it would have done. In the colloquial sense, every person who lives in the BVI (and many who do not) are "concerned" about the COI: but, for participation in the whole of an Inquiry, section 12 requires a person to be "implicated, or concerned in" the matters under inquiry. That clearly imposes a minimum threshold of a person's interest in the subject matter of the COI which, in my view, merely being a witness does not meet. Nor do I consider the position different because, hypothetically, a witness may object to answering a question or produce a document during the course of his or her evidence because of the risk of self-incrimination, particularly when the potential self-incrimination feared may or may not have anything to do with the COI's terms of reference.

9. Whilst of course each application will have to be considered on its own merits, in the usual course, neither will merely being a witness make it desirable that a person becomes a participant in the inquiry for the purposes of section 12. Certainly, I am unpersuaded that it is desirable that Ms Lake should be represented by Counsel throughout the whole COI: Mr Neale did not make any submissions to the contrary.

10. I deal further with self-incrimination, and with the principles of natural justice, below in the context of Mr Neale's second application; but, for the reasons I have given, as things currently stand, I do not accept that Ms Lake falls within the scope of section 12. If circumstances change, then of course it is open to her to make a further application under that section.

11. However, for the purposes of the hearing on 6 May 2021, as I explained to Mr Neale, that determination would not adversely affect Ms Lake at all, because I would make an order under paragraph 26 of the COI Rules that Mr Neale be present during her giving evidence. That would enable him to give Ms Lake any advice she required on any

particular question or document, and also allow him to make any submissions on his second application (that the summons should be set aside). That is, in the event, how matters proceeded.

12. I therefore turn to Mr Neale's second application, to set aside the summons on the basis that it breached section 15 of the COI Act and/or the rules of natural justice, or alternatively to vary the summons so that it breaches neither.

13. Section 15 of the COI Act requires witnesses who are summoned to attend and give evidence, or produce documents, to obey the summons or risk criminal proceedings for refusal without good cause. However, there is the following specific proviso:

> "Provided always, that no person giving evidence before the commission shall be compellable to incriminate himself, and every such person shall, in respect of any evidence given by him before the commission, be entitled to all the privileges to which the witness giving evidence before the High Court is entitled in respect of evidence given before such Court."

14. Mr Neale submitted that:

(i) The summons breaches section 15 and the strand of natural justice that requires procedural fairness because the requirement to answer questions is unrestricted and the requirement to produce documents is very broad in scope. Mr Neale submitted that it appears to be a fishing exercise as part of a wider exercise to make a case against Ms Lake rather than a bona fide request for specific information/documents to assist the COI.

(ii) The request for documents is flawed because, in respect of arrangements between companies etc with which Ms Lake might be connected and the BVI Government, she may not have access to such documents or others might have rights of confidentiality over them which would mean she could not produce them.

(iii) In any event, the COI is able to obtain all of the requested documents from the BVI Government, and so the summons is unnecessary.

(iv) The summons breaches both section 15 and the rules of natural justice because giving evidence and/or producing documents has "possible adverse consequences" for Ms Lake, and the scope of the summons is vague and general and she has not been given any reason for having been summoned.

As the summons does not set out why she has been called to attend and produce documents, Ms Lake is unable to say whether an answer or a document would incriminate her or even take advice as to whether it might do so.

15. Dealing with these in turn:

(i) The schedule to the COI Act comprises a form of summons which, whilst not mandatory for a section 10 summons under the Act, is an example form that may be used. It is a materially identical form to that which is mandatory in the High Court (see rule 33.2(1) and (2) of the Eastern Caribbean Supreme Court Civil Procedure Rules ("ECSC CPR") and Form 12 appended to those Rules). It is a summons to appear at a hearing to give evidence "respecting such inquiry" and to bring any specified documents. It does not require any further reasons for the summons, or particulars of the questions that may be put. Just as questions in the High Court are limited to those relevant to the claim before the court, the questions at a COI are of course limited by its terms of reference. Relevance is, in any event, a matter for me to determine, with those terms of reference in mind. I deal with the "fishing exercise" point above: it is the COI's function to obtain information that bears upon its terms of reference, its process being investigatory and inquisitorial. At the hearing, Mr Neale did not pursue any suggestion that I had issued the summons in anything but good faith. In any event, any such a suggestion has no foundation.

(ii) The fact that Ms Lake may not have access to all of the documents concerning contractual arrangements between companies etc with which she is connected and the BVI Government, or others may have confidentiality rights over such documents, does not make the summons invalid or otherwise unlawful. Ms Lake retains all her privileges over the documents sought. Whether, under the COI Act, the privilege associated with self-incrimination attaches to documents is a moot point, but not one that I need to consider and determine at this stage: in my view, it cannot affect the validity of the summons. Ms Lake of course does not have to produce documents that are not in her possession or control; and she can make clear where others may have confidentiality rights over documents that are within the scope of her summons and within her power or control, and I can ensure that such rights are properly respected.

from any appropriate source. But, in any event, it is not true to say that the COI is able to obtain all the documents requested of Ms Lake from the BVI Government. First, the COI is unable to request from the Government documents concerning arrangements between the Government and companies etc with which Ms Lake is connected because we cannot necessarily identify all of those companies etc. Second, Ms Lake will have internal documents which the Government may not have. Third, the documents produced by the Government in response to a request are not in all cases complete.

(iv) I have dealt with the bulk of the submissions in relation to (iv) above. However, it is important to appreciate the principle underlying the privilege against self-incrimination. It is an evidential matter. Although the position has been altered both in England & Wales and in the BVI by statute, at common law, no person is bound to answer any question in civil proceedings if the answer to that question would in the opinion of the court have a tendency to expose him or her to any criminal charge, penalty or forfeiture which the court regards as reasonably likely to be pursued. It cannot, therefore, undermine the validity or lawfulness of a summons even where a question might be asked in respect of which the privilege might be invoked. Indeed, questions are allowed to be asked even where the answer may, or will inevitably, be covered by the privilege: but the privilege means that the deponent can object to answering a question, if the court accepts that the privilege is properly raised. The COI Act reflects these common law principles so far as evidence is concerned. As I have already indicated, the position with regard to documents is not so clear – and it is not necessary for me to determine now whether the privilege can be raised under the COI Act in respect of documents – but, insofar as it can be raised, then similar principles will apply.

16. For those reasons, at the hearing, I concluded that the summons was not unlawful as being in breach of either section 15 of the COI Act or the rules of natural justice.

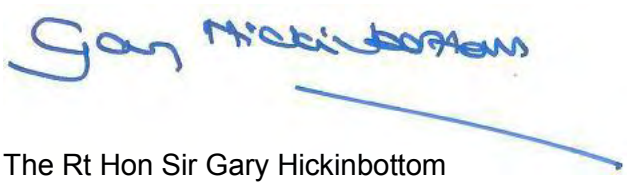
17. Mr Neale raised one further point. He submitted that I have power to issue summonses only under section 10 of the COI Act which gives me the power of a High Court Judge to issue them. It is the usual practice of the High Court to give 14 days' notice of a

hearing at which attendance is required by summons (ECSC CPR Rule 33.5(1)). In Ms Lake's case, there were only 8 days.

18. I do not consider there is any force in this submission. Whilst it may be the usual practice of the High Court to give 14 days' notice, it is clear that the court can permit shorter notice (rule 33.5(2)). Unlike court proceedings, the COI has a short, defined period in which its proceedings must be completed: to require 14 days' notice in respect of every summons issued would undermine that timetable. It would be contrary to the public interest to delay the COI in that way.

19. It is my firm view that it is not necessary for 14 days' notice on a summons to be given. What is required, of course, is sufficient time for a witness to prepare and take any advice he or she may wish to take – but that is a different question. In a hearing such as that of Ms Lake's summons, a short period will usually be sufficient to ensure that the witness has that time.

20. However, at the 6 May hearing, I gave Mr Neale the opportunity to make submissions that Ms Lake required further time to give him instructions and take his advice, or otherwise to prepare for the hearing. He confirmed that, in the event, she did not require any further time, and wished the hearing to proceed that day (with Mr Neale in attendance to give such advice as she wished to take during the course of the hearing), which it did; and, during the course of the hearing, Ms Lake agreed to provide documents in her possession or control relating to her contractual dealings with government bodies.



The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 3

1. On 4 May 2021, I heard an application by the Attorney General ("the Attorney") on behalf of three BVI Government Ministers ("the three Ministers") and the departments, offices and other Government bodies for which they are each responsible, and other identified Government entities including herself as Attorney, for a declaration that they are concerned in matters under inquiry in this Commission of Inquiry ("COI") and are entitled to appear by the Attorney or by Counsel instructed by her at the whole of the COI. The three Ministers were Hon Andrew Fahie (Premier and Minister of Finance), Hon Carvin Malone (Minister of Health and Social Security) and Hon Vincent Wheatley (Minister of Natural Resources, Labour and Immigration). They are all, of course, also Members of the House of Assembly ("Members of the House").

2. The Attorney, supported by the Solicitor General, the Rt Hon Sir Geoffrey Cox QC and two partners of Withers, submitted that each such person was concerned with the current and future governance of the British Virgin Islands, and thus sufficiently concerned in the matters under now under inquiry that they fell within the scope of section 12 of the Commissions of Inquiry Act 1880 ("the COI Act"), and were thus entitled to be represented by Counsel at the COI; and that she, as Attorney, was uniquely well-placed to appear for them as they wished her to do. She relied upon rule 13(6) of the COI Rules which encourages persons with joint or similar interests to be represented by single Counsel. In later written submissions, the Attorney indicated that she had been instructed by each of the three Ministers to carry out a full objective review of those matters under his responsibility so that she could prepare written submissions on their behalf "in respect of matters pertaining to [the COI] terms of reference, including the administrative systems, practices and policies of government and improvements to the standards of governance in the Virgin Islands". In that endeavour, she was to be assisted by members of her Chambers, and the Rt Hon Sir Geoffrey Cox QC and Withers.

3. I granted that application, and declared that the three Ministers and departments, offices and other Government bodies for which they are each responsible, and the other Government entities as identified in a schedule prepared by the Attorney and attached to the order, are concerned with the matters under inquiry and shall be entitled

to appear by the Attorney or by Counsel instructed by her at the whole of the COI (Order No 1 dated 4 May 2021). That is the order which, on their behalf, the Attorney sought.

4. Within hours, however, I received an application from Hon Vincent Wheatley, who had been summoned to give evidence to the COI on 6 May 2012, for a declaration that, as a Minister, he is concerned and/or implicated in the COI; and that he be represented in the COI by the BVI law firm Silk Legal (BVI) Inc ("Silk Law").

5. The Attorney, on behalf of Hon Vincent Wheatley, applied for an adjournment of the summons hearing to 7 May 2021, because a sitting of the House of Assembly had been called for 6 May and the Minister understandably wished to attend. I granted that application.

6. On 6 May 2021, Silk Legal applied on behalf of all of the Members of the House, excluding the Attorney but including the three Ministers as Members of the House, that they be permitted to represent those Members in their official capacity in the COI, on the basis that they fell within the scope of section 12 of the COI Act as being implicated and/or concerned in the matters under inquiry. The application was copied to the Speaker and to the Attorney. On 7 May 2021, the Speaker confirmed the instructions that Silk Legal had been instructed by all Members of the House, excluding the Attorney, and they wished Silk Legal to represent them "in their official capacities" in the COI. I should make clear that, as Mr Rowe confirmed at the hearing on 7 May 2021, the application was not made by the House of Assembly as a body – it could not be because it excluded the Attorney – but rather by 14 of the 15 Members of the House as individuals in their official capacity as part of the legislature.

7. I set down both applications for hearing on 7 May 2021, when Richard G Rowe and Daniel Fligelstone Davies of Silk Legal appeared for the Applicants. The Attorney with the Solicitor General, and Counsel to the Inquiry, also appeared. After the hearing, on 9 May 2021, Silk Legal lodged further written submissions, which I have of course also taken into account.

8. The application dated 4 May 2021 (referred to in paragraph 4 above) was not pursued, and I formally dismissed it at the hearing.

9. The application dated 6 May 2021 raises two issues:

(i) Do Members of the House of Assembly, as individuals but individuals who are part of the legislature, fall within the scope of section 12 of the COI Act; and, thus, are they entitled to participate in, and be represented by Counsel at, the whole of the inquiry?

(ii) If so, by whom should they be represented?

10. In relation to (i), section 12 provides:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

11. That right to be represented "at the whole of the inquiry" is subject to a Commission's powers under section 2 of the COI Act to prescribe how the Inquiry shall be executed, which necessarily includes the power to manage the participation of any person, reflected in paragraph 13(6) of the COI Rules which expressly gives me power to determine the nature and extent to which a participant and/or Counsel representing that participant can take part in this COI.

12. Mr Rowe's primary submission was that individual members of the legislature had an interest in the subject of the third paragraph of the COI terms of reference, governance, sufficient for the purposes of section 12.

13. Mr Rawat set out reasons why it may not be necessary or appropriate for individual Members of the House to participate in the COI within the terms of section 12. For example, he submitted that it was open to each of them to make submissions or lodge information with the COI without being participants.

14. However, whilst I see the force of Mr Rawat's argument in relation to the lodging of submissions or information, I accept Mr Rowe's submission that an individual Member of the House has a sufficient interest in governance to bring him or her within section 12. Whilst it is perhaps not as direct an interest as that of a Minister, as appeared to be common ground at the hearing it is essentially the same interest as that held by the Government Ministers and their departments etc who, I found on 4 May 2021, fall within section 12. I emphasise that their respective interests are essentially similar because I am considering them only in their official capacities. It is uncontroversial that, if a

Minister or a Member of the House steps outside the proper scope of his official functions, then his or her position with regard to representation will change.

15. Therefore, I will declare that individual Members of the House of Assembly are concerned with the matters under inquiry; and thus, with the important caveat as to my powers in section 2 of the COI Act, they are entitled to participate in the whole of the inquiry.

16. Moving onto (ii), as the Attorney has properly reminded me during the course of this COI, most recently at the hearing of 4 May 2021, by section 58 of the Virgin Islands Constitution Order 2007 she is the principal legal adviser to the whole of the BVI Government, including both the executive and the legislature; and, as such, it is part of her role to advise and, if necessary, represent both Ministers and individual Members of the House in their official capacities. At the hearing, despite her heavy workload and whilst indicating the she maintained a neutral stance in respect of the application, she expressed herself ready, willing and able to represent each of the Members of the House in respect of the COI. As appeared to be common ground at the hearing, there was no conflict of interest in her acting for both Ministers and Members of the House, particularly as their respective interest in the COI was essentially the same. The Attorney accepted the proposition that, by instructing Silk Legal who would be paid for out of public funds, there would be an additional burden on the BVI public purse. That proposition is self-evident, and Mr Rowe did not seek to controvert it. However, he submitted that, in exercising my powers under section 2 of the COI Act with regard to representation, it would be unlawful for me to take into account the principle of proportionality including (as he submitted in his written submissions dated 9 May 2021) whether instructing his firm would result in "'duplication of efforts' and would not be financially prudent". The Attorney has made clear that, where she is representing public officials, she will ensure that participation by them in the COI will be reasonable and proportionate. That is as I would expect.

17. The obvious, efficient and cost-effective course would, on the face of it, therefore have been for the Attorney to represent the Members of the House as well as the Ministers etc whom she already represents.

18. However, in their submissions of 9 May 2021, the Members of the House, through Mr Rowe and Mr Davies, submit that that is not an appropriate course because, in their view, the Attorney has a clear conflict of interest. This does not arise as a result of her

already acting for the three Ministers and other public officials within the executive administration – there still does not appear to any suggestion that there is any such conflict – but because:

> "… [The Hon Mrs Dawn Smith was a permanent secretary to the Office of the Premier as recently as 2019 and was the general counsel to the Financial Services Commission, and… would be a compellable witness before the Commission of Inquiry": and
>
> "… [T]he Attorney General has a vested interest in the outcome of the enquiry [sic] as she has two brothers who will be subject to the inquiry. Mr Neil Smith, the former financial secretary for the Ministry of Finance (whom will be central to explaining the BVI Airways situation) and Mr Clive Smith who is the managing director of the BVI Airports Authority."

19. Further, the submissions say:

> "… [T]he Attorney General's Chambers is responsible for much of the issues relating to governance within the Territory, which are being investigated. It is not only likely that the Attorney General will be a participant and a witness in the proceedings, but we are aware that she has in fact been requested to give evidence before the Commission of Inquiry. In those instances, it would be open for the representatives of the present House of Assembly to cross examine her, as they are no doubt to be considered participants in the Commission of Inquiry."

In fact, by my Order No 1 (see paragraphs 1 and 3 above), the Attorney is already a participant in the COI for the purposes of section 12 of the COI Act.

20. It is unclear to what the submissions refer when they say that the Attorney "has been requested to give evidence before the Commission of Inquiry" – like all Members of the House, she has been invited to make representations on the matters under inquiry; and, as I have indicated, she has also been instructed by the three Ministers to make written submissions (with, no doubt, supporting information and documents) and oral submissions to the COI – but, whatever they have in mind, it is clear that the Members of the House for whom Silk Legal act reserve the right to be antagonistic to whatever she might put forward and may wish to controvert her and "cross examine" her on it.

21. I assume that, out of professional courtesy, Silk Legal's submissions dated 9 May 2021 were sent to the Attorney – but, although she may well wish or be required to respond in the context of some later application, the submissions do not invite or require her response in the application before me for the reasons set out below.

22. In considering representation, it is convenient to look, first, at the eleven Members of the House who currently have no representation in the COI; and, then, at the three Members (i.e. the three Ministers to whom I have referred) who are already represented as participants in the COI by the Attorney.

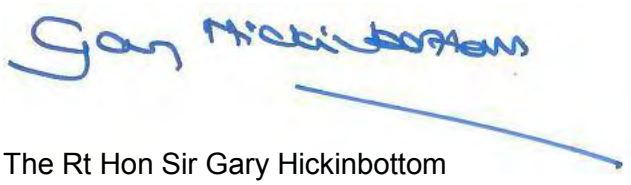
23. For whatever reason, it is clear from their submission dated 9 May 2021, the eleven Members do not have confidence in the Attorney representing them before the COI. Whether that view is justified or not – about which I do not express any view – it is a view I must respect. Section 12 entitles the eleven Members to representation by Counsel. They are not currently represented. It is clear that, holding the view of the Attorney that they do, they cannot be represented by her. They wish to be represented by Silk Legal. I shall make a direction that they be represented by Silk Legal (BVI) Inc.

24. The other three Members, i.e. the three Ministers, are in a somewhat different position. Despite the submissions they have made to me through Silk Legal as to the Attorney, they are currently persons who are represented by her as a result of Order No 1. In the application they made that resulted in that Order, they expressed confidence in the Attorney, and submitted through her that there was no reason why she should not represent them. The submissions they have made through Silk Legal are to the diametrically opposite effect.

25. The three Ministers cannot have it both ways. I accept that a Member of the House who is also a Minister has two constitutionally distinct public posts. In some circumstances, I also accept that it might be possible to distinguish those two roles. However, here, leaving aside the common ground that the interests of a Minister and those of a Member of the House in governance are essentially the same, it is not conceptually possible for the same person, no matter how many hats he may wear, both to have confidence in the Attorney with regard to matters of governance and not to have confidence in her in respect of the same matters.

26. In respect of the three Ministers whom the Attorney already represents in the COI, they shall therefore continue to be represented in this COI by the Attorney. If any of them wish to be represented by Silk Legal as regards any of their official capacities in any part of the COI, then he must make a properly argued application on notice to the Attorney. I will deal with any such application on its merits. The application currently before me is wholly and patently inadequate for that task.

27. In the circumstances, it is unnecessary for me to consider any of the other submissions made before me, including that of Silk Legal that, in exercising my section 2 powers, it is unlawful for me to take into account proportionality. It is to be hoped that all Counsel who represent public officials will only seek to do so in a reasonable and proportionate manner, as the Attorney has assured me will be the case so far as those whom she represents are concerned. I shall, however, leave that issue formally open to be considered in any future application in which it is material.



The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 4

1. On 3 May 2021, as sole Commissioner of this Commission of Inquiry ("COI"), I issued a summons to Mr Bevis Sylvester to appear before me today, 13 May 2021, for the purpose of being examined under oath or affirmation. Mr Sylvester is the Chairman of the BVI Airports Authority, and Regional General Manager of Delta Petroleum (Caribbean) Limited, a wholesale and retail distributor of fuel in the BVI and the Caribbean. The summons followed Letters of Request which the COI had sent to Mr Sylvester on 6 and 7 April 2021 seeking documents and information from him in his capacity as Chairman of BVIAA and in his personal capacity respectively. In neither case had Mr Sylvester made any response to those requests prior to the service of the summons upon him.

2. On 11 May 2021, Ms Nelcia St Jean of McW Todman & Co on behalf of Mr Sylvester made an application under section 12 of the Commissions of Inquiry Act 1880 ("the COI Act") to represent him at the hearing. At the hearing, I refused that application, and now provide reasons for that refusal.

3. Section 12 provides:

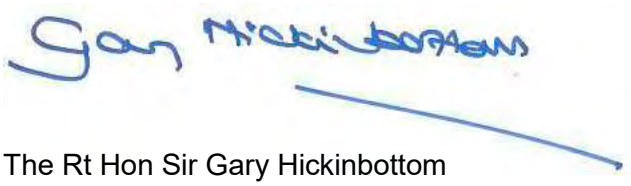
> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

References to "section 12" in this ruling are to that section. Paragraph 3 of the COI Protocol for Representation under Section 12 requires an application to be made in writing for a direction by the Commissioner confirming representation as a participant under section 12; and provides that, in the absence of such a direction, representation for a participant will not be allowed. However, by paragraph 26 of the COI Rules, the Commissioner may permit a witness to have Counsel present when giving evidence to the COI.

4. Ms St Jean said that her submissions on the section 12 application exactly mirrored those made on 6 May 2021 by Terrance Neale of her firm on behalf of Ms Patsy Lake – the Deputy Chairman of the BVIAA and a business woman – when she had been summoned that day.

5. The applications being materially the same, I can deal with this application very shortly: I refused Mr Sylvester's application for the same reasons upon which I refused the application made on behalf of Ms Lake as set out in my Ruling No 2 dated 10 May 2021.

6. However, for the purposes of today's hearing, I made an order under paragraph 26 of the COI Rules that Ms St Jean be present during Mr Sylvester giving evidence. That enabled her to give him any advice he required on any particular question or document and thus Mr Sylvester was not at all adversely affected by my result of the section 12 application.



The Rt Hon Sir Gary Hickinbottom

Commissioner

13 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 5

1. Under my Instrument of Appointment dated 19 January 2021, my terms of reference fall under two heads. First, under paragraphs 1 and 2, I am required to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to public officials may have taken place in recent years; and, if so, whether the conditions that allowed such dishonesty may still exist. Second, under paragraphs 3 and 4, I am required to make any appropriate recommendations with a view to improving the standards of governance and/or the operation of the agencies of law enforcement and justice, an obligation which is independent of those under paragraphs 1 and 2. Over the last four months, I have been seeking to fulfil all those terms of reference.

2. By an application dated 12 May 2021, the Attorney General ("the Attorney") applied for a direction that, amongst other things:

   (i) in addition to the persons identified in the schedule to Order No 1 dated 4 May 2021, the Attorney shall represent two further Cabinet Ministers (the Minister of Transportation, Works and Utilities Hon Kye Rymer; and the Minister of Education, Culture, Youth Affairs, Fisheries and Agriculture Hon Natalio Wheatley) and the two Junior Ministers (Hon Sharie B de Castro and Hon Shareen D Flax-Charles) and the departments, offices and other Government bodies for which they are each responsible; and

   (ii) the Cabinet is a person concerned in the subject matter of the COI and shall be represented in the COI by the Attorney.

   The application also made submissions on my Ruling No1 dated 10 May 2021, without seeking any specific further order. At the hearing, I made the direction sought under (i), and a limited direction under (ii); and now set out my reasons for making those directions.

3. The background to this application is not entirely happy.

4. As I explained in Ruling No 1, on 28 April 2021, the Attorney applied for a direction that three Cabinet Minsters (the Premier and Minister of Finance Hon Andrew Fahie; the Minister of Natural Resources, Labour and Immigration Hon Vincent Wheatley; and the Minister of Health and Social Development Hon Carvin Malone) ("the three Ministers") and the departments, offices and other Government bodies for which they are each responsible were concerned in the subject matter of the COI; they were thus, under section 12 of the Commissions of Inquiry Act 1880 ("the COI Act"), entitled to be represented at the whole of the COI; and they be represented by the Attorney General or by Counsel instructed by her.

5. The Attorney's primary submission was that the COI is concerned with the decisions, administrative systems, practices and policies – in short, governance – for which Ministers have responsibility and thus each falls within the purview of section 12; as do the ministries, departments and other government entities within the area of government assigned to each Minister. She submitted that, as the senior law officer without any conflicts of interest as between those she sought to represent, she was ideally placed to represent the Ministers etc for whom she made the application. I pressed her, but she confirmed that she was not at that stage instructed to represent any other elements of the executive government, including those on whose behalf she now applies; although she expressly left open the possibility that she may be so instructed in the future. I granted that application.

6. On 5 May 2021, I received an application from the Minister of Natural Resources, Labour and Immigration Hon Vincent Wheatley that he be represented by Silk Legal (BVI) Inc ("Silk Legal") on the basis that he fell within the scope of section 12 of the COI Act as being implicated and/or concerned in the matters under inquiry.

7. The next day, 6 May 2021, I received an application from Silk Legal on behalf of all of the Members of the House of Assembly, excluding the Attorney but including all the Ministers as Members of the House, that they be permitted to represent in the COI those Members in their official capacity. This too was on the basis that they were concerned in matters under inquiry. The application was copied to the Speaker and to the Attorney. On 7 May 2021, the Speaker confirmed the instructions that Silk Legal had been instructed by all Members of the House, excluding the Attorney, and they wished Silk Legal to represent them "in their official capacities" in the COI.

8. At the hearing of that application on 7 May 2021, the Attorney indicated that she was ready, willing and able to represent the Members of the House in their official capacity, and saw no conflict of interest with the Ministers in so doing; but otherwise she maintained a neutral stance to the application. As I said in Ruling No 3 dated 10 May 2021, the obvious, efficient and cost-effective course would, on the face of it, therefore have been for the Attorney to represent the Members of the House as well as the Ministers etc whom she already represented.

9. However, on 9 May 2021, I received further submissions from Silk Legal on behalf of the Members of the House, to the effect that they objected to the Attorney representing them, not because of a conflict of interest with the Ministers etc, but because of the "clear" conflict of interest between the Attorney's official role and her other interests. The Members expressly reserved the right to be antagonistic to any submissions the Attorney may make to the COI on behalf of herself or anyone she represented.

10. In the circumstances, the Members having lost confidence in the Attorney, I made an order that, save for the three Ministers, the Members of the House should be represented in the COI by Silk Legal. As for the three Ministers, I directed that they would continue to be represented by the Attorney unless and until they made a particularised application as to why they wished to be represented by Silk Legal. On the basis of the instructions received by Silk Legal, they clearly could not be represented by both the Attorney and Silk Legal.

11. In support of the current application – that the Attorney represents all of the Ministers and the areas of government assigned to them – each Minister has signed a declaration that he or she has full confidence in the Attorney. No explanation was given for the volte face – in the case of the three Ministers, a double volte face within the course of barely a week – so I asked the Attorney and Silk Legal to write to me with an explanation. I have now received those letters. They provide no explanation, simply confirming the changes of mind that the Ministers have had over the last week or so.

12. I do not propose to probe further into this unhappy story. Enough time, effort and cost have been wasted upon it. The Ministers involved certainly have not had a shortage of legal advice. Generally, of course, a participant in the COI may have the Counsel of his or her choice – and I made clear at the hearing on 6 May 2021 that the Attorney

representing all Ministers and indeed all other Members of the House had obvious advantages including the saving of public money. But I should make clear that I will not allow the progress of the COI to be disrupted by those, whether public officials or not, seeking to participate without due thought and consideration; and, in the future, I shall not hesitate to use my powers under section 2 of the COI Act to prevent it.

13. However, as things stood at the time of the hearing on 13 May 2021, the four Ministers who made the application wished then to be represented by the Attorney and not Silk Legal; and, whatever the unsatisfactory background, they should be allowed to be so. I gave directions accordingly, now set out in Order No 5.

14. At the 13 May 2021 hearing, I also directed that the Cabinet was a person concerned in the subject matter of the COI. I was reticent about making such a direction, as (i) Sir Geoffrey Cox (on behalf of the Attorney General) said that the Cabinet had not yet discussed whether it wished to be a participant and, if it does, who should represent it – recent history has shown that nothing can be taken for granted; (ii) all five elected members of the Cabinet are already participants and can make submissions together as such; and (iii) the Governor, whilst not a member of the Cabinet, chairs Cabinet meetings and is a member of the Cabinet Steering Group, and so submissions on behalf of Cabinet may be misconstrued as being endorsed by him – a possibility compounded by the fact that there have in the past been statements which were less than clear as to which elements of the BVI Government the Attorney and the IRU in fact represented, including a press release wrongly purporting to come from the Governor's Office.

15. However:

(i) I am satisfied that "the Cabinet" is a legal person, created by section 47 of the Virgin Islands Constitution Order 2007, consisting of the Premier, four other Ministers and the Attorney.

(ii) As with individual Ministers, the Cabinet is concerned in a matter under inquiry, notably governance.

16. I was therefore prepared to make a declaration that the Cabinet falls within the scope of section 12, and is therefore entitled to be represented by Counsel at the whole of the COI. However, once the Cabinet have considered the matter and made a decision that it wishes to participate – and who should represent it – it must inform me of how and through which Counsel it wishes to participate. I will take any necessary steps to avoid further confusion in relation to participation and representation in the COI.

17. Finally, at the hearing of 13 May 2021, Sir Geoffrey and Withers LLP on behalf of the Attorney submitted that my Ruling No 1 "expressed criticisms of the Attorney General and Ministers to which they were given no opportunity of responding and which, before they become a part of the published record on the Inquiry, they wish to answer", namely:

> "(i) that no Member of the House of Assembly or Minister had responded to the COI's request for submissions or information,
>
> (ii) that the Attorney General's submission, dated 7 May 2021, was the first time that the Ministers etc have indicated that they propose making submissions to the COI in the matters under inquiry" (paragraph 1(d) of their Written Submissions).

18. In those Written Submissions, it is pointed out that, in the Attorney's letter dated 10 March 2021 to the COI, she indicated that "she would wish to make submissions 'on behalf of the Government' on the matters under inquiry once [I as Commissioner] had assembled and identified material based on which he could conclude that conduct of the relevant type may have taken place" (paragraph 7.3). It is suggested that that position was maintained in the Attorney's letter of 7 May 2021, which indicated that "she wishes herself and on behalf of the Government ministries to make a single comprehensive submission not only on matters of governance but on all limbs of [my] terms of reference" (Paragraph 7.4). It was said that the Attorney is "targeting the end of June to have ready her submissions on the assumption that the Inquiry will have identified those issues and the evidential basis for its possible conclusions" (paragraph 7.7). In other words, the Ministers etc who the Attorney represents do not propose making any submissions on any part of the terms of reference until after all of the evidence has been heard and I have indicated to them, not only "possible conclusions", but also "the evidential basis" for them.

19. I will deal with the Attorney's criticisms of my Ruling shortly. It is however more important that I deal with the position of the Ministers etc as now portrayed by the Attorney, and I will do that first.

20. It is clear from the Written Submissions to which I have referred that, left to their own devices, the Ministers etc would not propose to make any submissions to the COI other than by responding to my "possible conclusions", including their "evidential basis", in respect of each term of reference, i.e. they propose being merely reactive to possible criticism I might be minded to make. That suggested course would not only be singularly unhelpful to me in performing my task, but it appears to be the result of muddled thinking.

21. The Attorney's letter of 10 March 2021, to which I have already referred, said that "the BVI Government" – we now know that to be just the executive – wished to make submissions once I had assembled evidence "on which [I] could conclude that conduct of the relevant type may have taken place". That could only have been a reference to paragraphs 1 and 2 of my terms of reference, which are the only terms that potentially involve any possible consideration of "conduct". It could not have referred to paragraphs 3 and 4, which require me to consider governance and the operation of the law enforcement and justice systems. Whilst I see that at least some of those in public office may not be able to make submissions as to suspected serious dishonesty in public office without knowing what the suspicion might be, there is – and has never been – any possible constraint on those concerned in (and responsible for) governance in the BVI making submissions on what they consider good governance to be, the standards by which governance is measured in the BVI, and the extent to which their executive ministries and administrative departments and groups currently measure up to those standards. Contrary to the submissions made on behalf of the Attorney, such submissions could have been made by or on behalf of Ministers etc whether or not they were participants in the COI within the terms of section 12 to the COI Act. I would have expected that Ministers etc, concerned with governance, would have been actively preparing submissions on governance for my assistance. They clearly did not have to wait until they applied for such status to prepare and make such submissions; nor, equally clearly, did they or do they have to await the end of the evidence and my expression of "possible conclusions" on governance and the operation of the law enforcement and justice systems, and the "the evidential basis" for them. That is not how a COI such as this could sensibly be conducted.

22. Of course, that is not to say that criticisms of Ministers etc will be made without them having a proper opportunity to respond. I will ensure that they are given such an opportunity. But one important strand of that opportunity is my seeking their submissions on the matters of governance to which I have referred above – and, equally, on similar issues which arise in relation to the operation of the law enforcement and justice systems. This provides an opportunity, not simply to defend practices which I may in due course consider to be less than optimal (which seems to be their only concern), but to set out for my assistance such matters as the standards of governance they consider appropriate for the BVI and the extent to which those standards are currently met. This is their opportunity, not only to assist the COI in relation to these matters, but to put forward any positive submissions they may wish to make.

23. I am glad to say that the Attorney through Sir Geoffrey was able to give me some comfort in relation to these matters. At the 13 May 2021 hearing, he said that the instructions of the Ministers etc to the Attorney were to assist the COI in any way they could, including seeking out and reporting to me any "wrong doing" that they found. The Attorney has asserted privilege over those instructions and I have not seen them; but they no doubt also cover any poor governance, and suboptimal operation of the law enforcement and justice systems, that they may find. Further, Sir Geoffrey said that work on governance had begun. He was coy as to what had in fact been done, except that some case studies were being worked up. Whilst the evidential value of governance case studies self-selected by those responsible for maintaining good governance may be questionable, I am glad that some work has started.

24. Those afforded participant status in any inquiry do not have an unfettered right to make submissions at a time and on matters of their choosing. Such an approach would render an inquiry unworkable. Whether participants can make written submissions, on what matters and to what extent is a matter for me as Commissioner. Ultimately, it is for me to decide how participants can best assist me in fulfilling my terms of reference.

25. I will shortly be writing to those who now have participant status giving them an opportunity to submit written Position Statements. To ensure that participants remain focused, I will ask them to set out their position on specific questions going to governance and the operation of the law enforcement and justice systems insofar as they are concerned with

these issues. Such Position Statements will better allow me as Commissioner to direct the future work of this Inquiry.

26. Finally, I should deal with three other matters raised at the 13 May 2021 hearing.

27. First, as I have indicated, Sir Geoffrey criticised my Ruling No 1 for not fairly reflecting the correspondence.

28. I can deal with this shortly. The Attorney's letter of 7 May 2021 referred to a Cabinet decision of 28 April 2021 "that the government entities [e.g. the Ministers etc] should seek actively to participate in the COI"; and, consequentially, it was her intention to prepare written and oral submissions "in respect of matters pertaining to [my] terms of reference, including the administrative systems, practices and policies of government and improvement to the standards of governance in the Virgin Islands". Everything about the letter suggested that this was a new approach. I took it at face value, i.e. that the Ministers etc proposed "actively to participate in the COI", rather than merely react to any possible adverse findings I might in due course be minded to make. I welcomed that apparent new approach. However, it now seems that the letter was not intended to be as helpful and constructive as I read it to be. I have earlier in this Ruling, however, dealt with the assistance from the Ministers etc from which I would benefit; and I look forward to receiving that assistance.

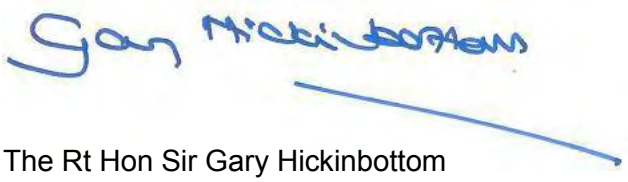
29. Second, at the application on 13 May 2021, the Ministers etc appeared by way of five Counsel: the Solicitor General, Sir Geoffrey Cox and two partners and an associate of Withers. One can only speculate at the cost to the BVI public purse. On 4 May 2021, the Attorney assured me that representation by her would always be reasonable and proportionate. In the public interest, I would remind her of that obligation.

30. Third, towards the end of the hearing on 13 May 2021, Sir Geoffrey gave a peroration to the effect that some of the (as he emphasised, elected) Ministers and those who work in their areas of government had a perception that the COI had been imposed on the BVI "from above" and was not truly independent and impartial. They were thus particularly concerned that they had a full opportunity to make submissions to the COI.

31. With respect to Sir Geoffrey and those he represents, his submissions did not paint the full picture. I well-understand the concerns of all those who live in the BVI as to the

potential consequences of the COI for them and their territory. However, whilst there are those who may not welcome the COI, many have come forward who do welcome an independent and impartial inquiry into how public life operates in the BVI. In any event, as I have described, the Ministers etc will be given every opportunity to make submissions to the COI. It is for them to take the opportunities they are given.

32. In any event, may I again make clear that I have been appointed to conduct an independent and impartial inquiry into the matters set out in my terms of reference; and the people who live in the BVI may rest assured that I will ensure that the process, findings and recommendations of this COI are truly independent and impartial. My team and I will not be deflected from that task.



The Rt Hon Sir Gary Hickinbottom

Commissioner

17 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 1

UPON the application of the Attorney General dated 28 April 2021 made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880

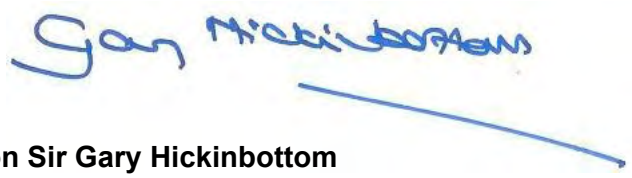
AND UPON hearing the Attorney General and Counsel to the COI

IT IS DECLARED THAT the Attorney General is concerned with the matters under inquiry and shall be entitled to appear by herself or by Counsel of her designation at the whole of the COI

AND THAT the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to this order (marked in blue) are concerned with the matters under inquiry and shall be entitled to appear by the Attorney General or by Counsel instructed by her at the whole of the COI

AND IT IS DIRECTED THAT the Attorney General shall, by 4pm on Friday 7 May 2021, lodge written submissions with the COI in respect of the role of the Rt Hon Sir Geoffrey Cox QC and Withers, and, upon the basis of those written submissions, the Commissioner will determine whether Sir Geoffrey Cox QC and/or advocates from Withers may be instructed by the Attorney General to appear for Government Ministers etc as aforesaid at any part of the COI

DATED this 4th day of May 2021

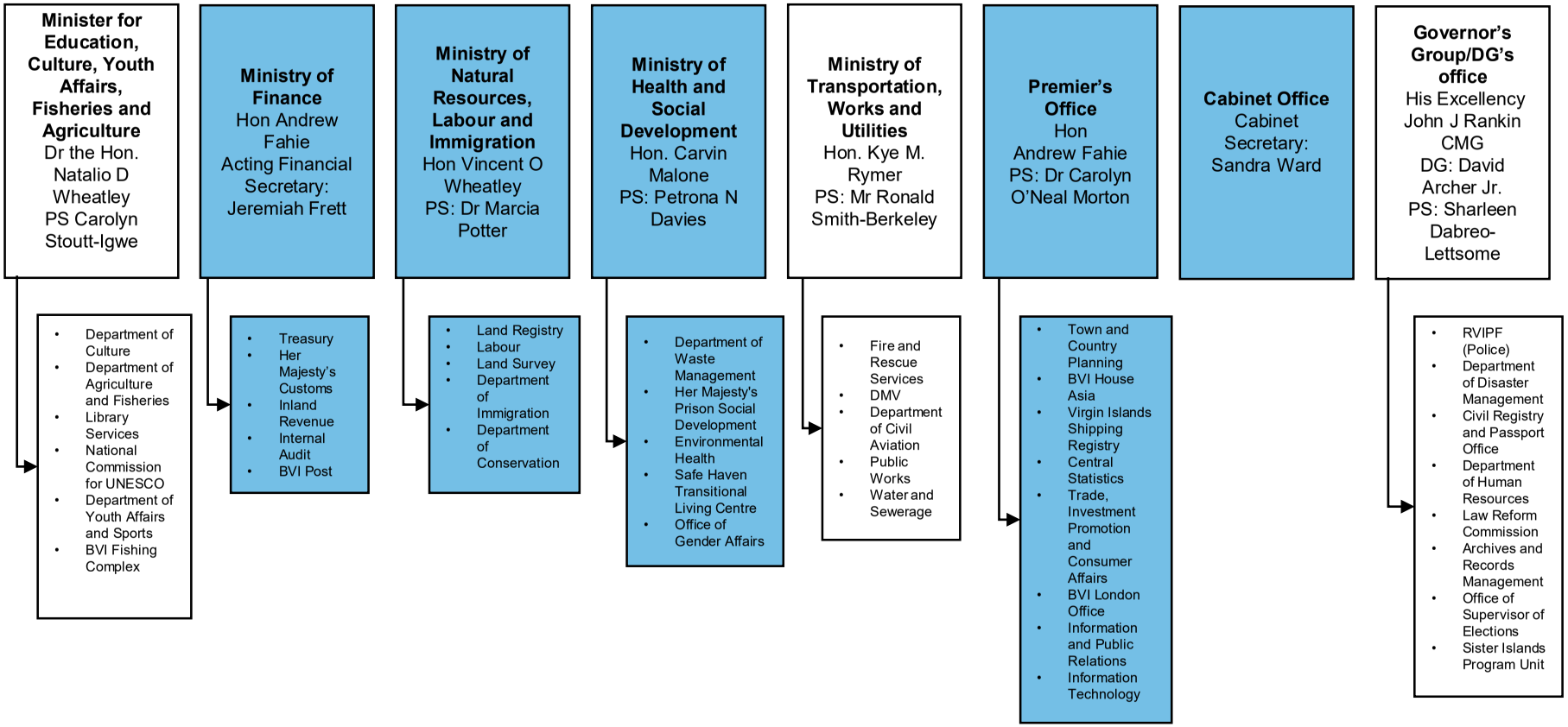
Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

Schedule

Ministries, Offices, Departments and other entities of the Government of the Virgin Islands



28 April 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 2

UPON Miss Sandra Ward, the Cabinet Secretary, being summonsed to appear before the Commissioner at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town for the purpose of being examined under oath or affirmation

AND UPON hearing the Solicitor General and Ms Sara-Jane Knock of Withers for Miss Ward, and Counsel for the Inquiry

AND UPON hearing the oral evidence of Miss Ward

IT IS DIRECTED THAT Miss Ward shall, by 5pm on Friday 7 May 2021:

1. Conduct further searches and provide an updated response to the COI's letter of request No. 16 to her dated 16 March 2021; and

2. Where there are no approved/final Cabinet minutes, provide copies of draft Cabinet minutes held by the Cabinet Office which fall within the scope of all the COI's letters of requests to her to date.

DATED this 4th day of May 2021

Signed:

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 3

UPON the application dated 4 May 2021 of Mr Terrance B. Neale of McW. Todman & Co to act as Counsel for Ms Patsy Lake made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880 ("the Section 12 Application")

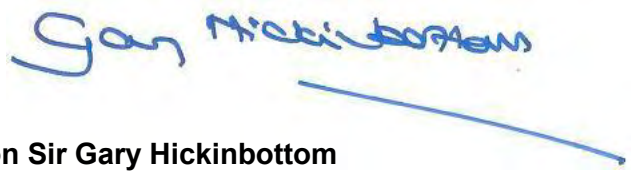
AND UPON the application of Mr Neale made on behalf of Ms Lake dated 5 May 2021 to set aside and/or vary the summons dated 26 April 2021 ("the Summons Application")

AND UPON hearing Mr Neale and Counsel to the COI, the Solicitor General in attendance for the BVI Government Ministers etc listed in the schedule to Order No 1

IT IS DECLARED THAT the Section 12 Application be dismissed but pursuant to COI Rule 26 Ms Lake be permitted to have Mr Neale present when giving evidence to the COI

AND THAT the Summons Application be dismissed.

DATED this 6th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 4

UPON the application dated 4 May 2021 of Hon Vincent Wheatley made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880 for a declaration that he is a person concerned in the Commission of Inquiry ("COI") and that Richard G Rowe and Daniel Fligelstone Davies of Silk Law (BVI) Inc represent him as Counsel in the COI ("the 4 May 2021 application")

AND UPON the application dated 6 May 2021 of the Members of the House of Assembly (apart from the Attorney General) made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880 for a declaration that each is a person concerned in the COI and that Silk Legal (BVI) Inc represent him or her as Counsel in the COI ("the 6 May 2021 application")

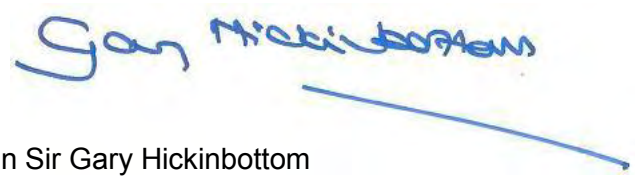
AND UPON hearing Richard G Rowe and Daniel Fligelstone, the Attorney General with the Solicitor General for the BVI Government Ministers etc listed in the Schedule to Order No 1, and Counsel to the Inquiry

IT IS DIRECTED THAT the 4 May 2021 application be dismissed

AND IT IS DECLARED THAT each Member of the House of Assembly is concerned with the matters under inquiry and, subject to the Commissioner's powers in section 2 of the Commissions of Inquiry Act 1880, shall be entitled to participate and be represented by Counsel at the whole of the COI

AND IT IS DECLARED THAT the each of the eleven Members of the House of Assembly listed in the attached Schedule shall be represented in the COI by Silk Legal (BVI) Inc

DATED this 10th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

APPENDIX A

Schedule to Order No 4

Hon Julian Willock
Hon Natalio D Wheatley
Hon Kye M Rymer
Hon Melvin M Turnbull
Hon Julian Fraser
Hon Alvera Maduro-Caines
Hon Mark H Vanterpool
Hon Marlon A Penn
Hon Neville Smith
Hon Sharie B de Castro
Hon Shareen D Flax-Charles

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 5

UPON the application dated 12 May 2021 by the Attorney General made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880 for a declaration that the Cabinet is a person concerned in a matter under inquiry in the Commission of Inquiry ("COI") and shall be entitled to appear by the Attorney General or by Counsel instructed by her at the whole of the COI.

UPON the application dated 12 May 2021 by the Attorney General for the Minister of Transportation, Works and Utilities Hon Kye Rymer, the Minister of Education, Culture, Youth Affairs, Fisheries and Agriculture Hon Natalio Wheatley and the two Junior Ministers (Hon Sharie B de Castro and Hon Shareen D Flax-Charles), and the departments, offices and other government bodies for which they are each responsible, and other Government entitles as scheduled to this order (found in Schedule 1) are concerned with a matter under inquiry in the COI and shall be entitled to appear by the Attorney General or by Counsel instructed by her at the whole of the COI.

AND UPON the application dated 12 May 2021 by the Attorney General to vary the COI Order 4 to delete the names of Hon Natalio Wheatley, Hon Kye Rymer, Hon Sharie B de Castro and Hon Shareen D Flax-Charles from the schedule attached to Order No 4 and amend the last paragraph of the Order by deleting "eleven" and substituting "seven".

AND UPON hearing the Solicitor General, Sir Geoffrey Cox QC, and Mr Hussein Haeri, Ms Lauren Peaty, Mr Niki Olympitis of Withers LLP for the Applicants and Counsel to the Inquiry.

IT IS DECLARED THAT the Cabinet is a person concerned with a matter under inquiry and, subject to the Commissioner's powers in section 2 of the Commissions of Inquiry Act 1880, shall be entitled to participate and be represented by Counsel at the whole of the COI.

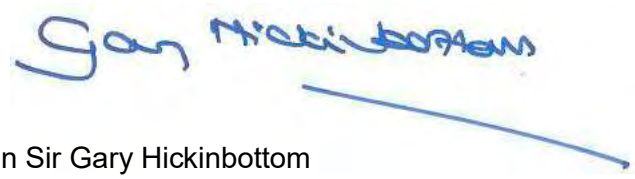
IT IS DIRECTED THAT the Minister of Transportation, Works and Utilities Hon Kye Rymer, the Minister of Education, Culture, Youth Affairs, Fisheries and Agriculture Hon Natalio Wheatley and the two Junior Ministers (Hon Sharie B de Castro and Hon Shareen D Flax-Charles), and the departments, offices and other government bodies for which they are each responsible, and other Government entitles as found in Schedule 1 to this order shall be entitled to appear by the Attorney General or by Counsel instructed by her at the whole of the COI.

IT IS DIRECTED THAT by 4pm on 13 May 2021, Silk Law (BVI) Inc confirm in writing to the COI which Members of the House of Assembly they now represent.

IT IS DIRECTED THAT by 4pm on Monday 17 May 2021, Silk Law (BVI) Inc and the Attorney General to provide the COI with a written explanation as to how and why the four Members of the House of Assembly listed at paragraph 2 above last week instructed Silk Law (BV) Inc to represent them in the COI on the basis that they had no confidence in the Attorney General as a result of her conflict of interest but have now made an application to be represented by the Attorney General in that capacity.

IT IS DECLARED THAT henceforth the Members of the House of Assembly whom Silk Legal (BVI) Inc represent are those listed in Schedule 2 hereto.

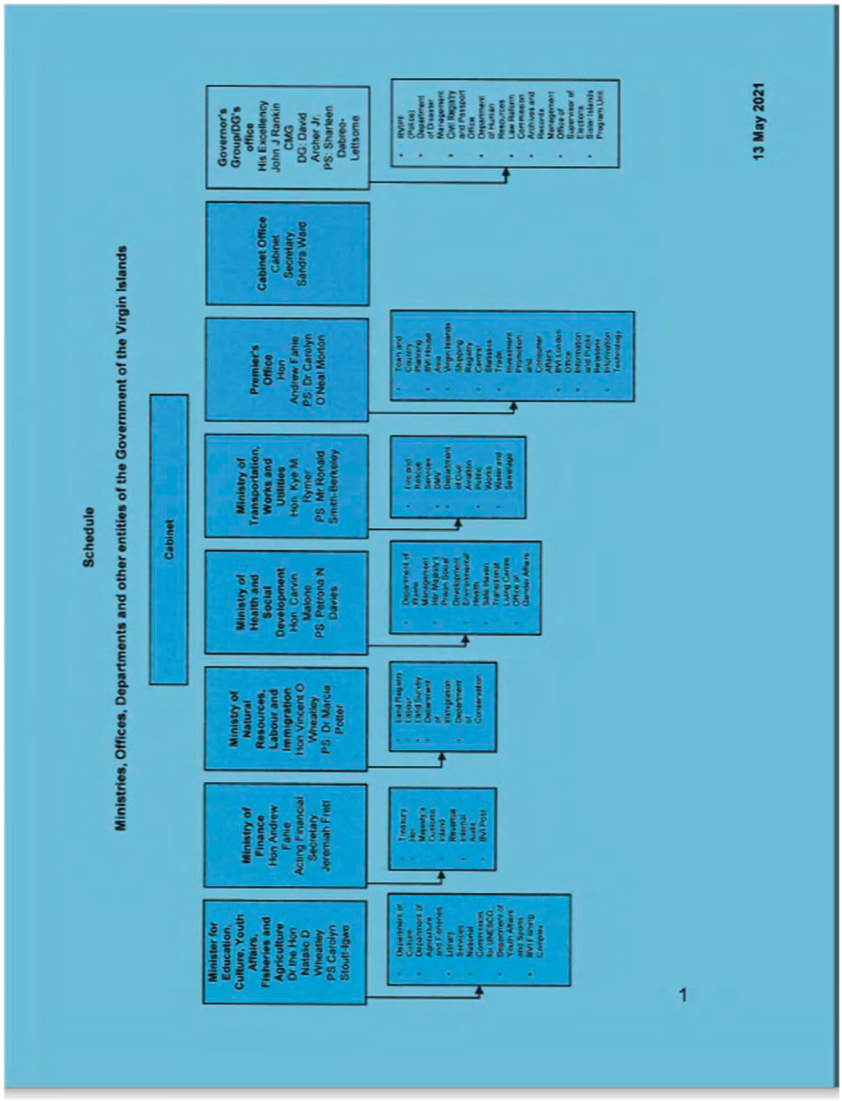
DATED this 13th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

Schedule 1


Schedule
Ministries, Offices, Departments and other entities of the Government of the Virgin Islands
Cabinet
Governor's Group/DG's office
His Excellency John J Rankin CMG
DG: David Archer Jr.
PS: Sharleen Daltreo-Lettsome
Cabinet Office
Cabinet Secretary
Sandra Ward
Premier's Office
Hon. Andrew Fahie
PS: Dr Carolyn O'Neal Motton
Ministry of Transportation, Works and Utilities
Hon. Kye M. Rymer
PS: Mr Ronald Smith-Berkeley
Ministry of Health and Social Development
Hon. Carvin Malone
PS: Petrona N Davies
Ministry of Natural Resources, Labour and Immigration
Hon Vincent O Wheatley
PS: Dr Marcia Potter
Ministry of Finance
Hon Andrew Fahie
Acting Financial Secretary
Jeremiah Frett
Minister for Education, Culture, Youth Affairs, Fisheries and Agriculture
Dr the Hon Natalio D Wheatley
PS Carolyn Stout-Igwe
13 May 2021
1

Schedule 2

Initial Schedule to Order No 4 (those represented by Silk Law (BVI Inc)

Hon Julian Willock
Hon Natalio D Wheatley
Hon Kye M Rymer
Hon Melvin M Turnbull
Hon Julian Fraser
Hon Alvera Maduro-Caines
Hon Mark H Vanterpool
Hon Marlon A Penn
Hon Neville Smith
Hon Sharie B de Castro
Hon Shareen D Flax-Charles

Revised Schedule to Order 5 (those represented by Silk Law (BVI Inc)

Hon Julian Willock
Hon Melvin M Turnbull
Hon Julian Fraser
Hon Alvera Maduro-Caines
Hon Mark H Vanterpool
Hon Marlon A Penn
Hon Neville Smith

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 6

UPON the application dated 11 May 2021 of Ms Nelcia St. Jean of McW. Todman & Co to act as Counsel for Mr Bevis Sylvester made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880 ("the Section 12 Application")

AND UPON hearing Ms St. Jean and Counsel to the COI, the Solicitor General in attendance for the BVI Government Ministers etc listed in Schedule 1 to Order No 5 and Mr Daniel R. Fligelstone Davies of Silk Legal (BVI) Inc in attendance for each of the seven Members of the House of Assembly listed in Schedule 2 to Order No 5

IT IS DECLARED THAT the Section 12 Application be dismissed but pursuant to COI Rule 26 Mr Sylvester be permitted to have Ms St. Jean present when giving evidence to the COI

AND UPON hearing the oral evidence of Mr Sylvester

IT IS DIRECTED THAT Mr Sylvester shall, by 5pm on Monday 17 May 2021 provide the COI with:

1. A substantive response to the COI's letter of request No. 1 dated 6 April 2021 which was addressed to him in his capacity as Chairman of the BVI Airports Authority Board ("BVIAA");

2. Confirmation of the date of your appointment as Chairman of the BVIAA;

3. Copies of all correspondence between him and the BVI Government and/or any BVI public departments and/or bodies regarding his appointment to the Board of the BVIAA, including but not limited to his letter of appointment as Chairman of the BVIAA;

4. Copies of all documents relating to his acquisition of a lease of Crown Land, including but not limited to any correspondence relating to the acquisition between him and the BVI Government and/or any BVI public departments and/or bodies;

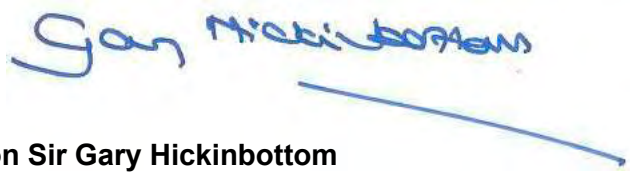
5. Copies of all correspondence between him and/or BVIAA and Mr Terrance Neale regarding Members of the Board of BVIAA being required to make any declarations of interest;

6. A copy of the report prepared by a consultant company engaged in or around December 2019 to assess the future of air transportation in the BVI and/or the organisation of the BVIAA;

7. Copies of all reports prepared by or on behalf of the BVI Government and/or BVIAA in the last 10 years to date in relation to any runway expansion projects in the BVI; and

8. Copies of all Minutes of the Board of the BVIAA in the last 3 years to date in relation to runway expansion in the BVI.

DATED this 13th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 7

UPON Mr Ian Penn, the Chief Immigration Officer, being summoned to appear before the Commissioner at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town for the purpose of being examined under oath or affirmation

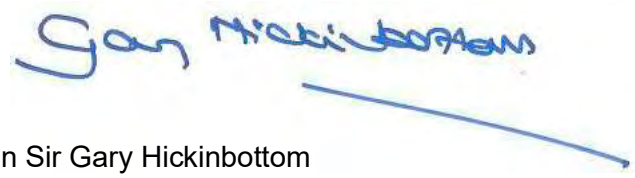
AND UPON hearing the Solicitor General and Ms Lauren Peaty of Withers for Mr Penn, and Counsel for the Inquiry

AND UPON hearing the oral evidence of Mr Penn

IT IS DIRECTED THAT Mr Penn shall, by 4pm on Tuesday 18 May 2021:

1. Provide a copy of the expedited extract of the Cabinet Memo No. 008-2020
2. Provide the two attachments to the email (in its native form) that was sent from Greg Romney on 19 July 2020:
   a) Copy of Joint Revision 4; and
   b) Joint Task Force Revision 1
3. Confirmation as to the dates when the Immigration Department started background checks.
4. Review the Letter of Request dated 13 April 2021 and confirm that there are no further or relevant information that falls within the scope of this request.

DATED this 13th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 8

UPON Dr Carolyn O'Neal-Morton, the Permanent Secretary of the Premier's Office, being summoned to appear before the Commissioner at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town for the purpose of being examined under oath or affirmation

AND UPON hearing Counsel for the Inquiry, Sir Geoffrey Cox QC, the Solicitor General and Mr Hussein Haeri of Withers in attendance for Dr O'Neal Morton, and Mr Richard G Rowe and Mr Daniel Fligelstone Davies of Silk Legal (BVI) Inc in attendance for the House of Assembly Members listed in Schedule 2 to Order 5.

AND UPON hearing the oral evidence of Dr O'Neal-Morton

IT IS DIRECTED THAT Dr O'Neal-Morton shall, by 4pm on Tuesday 25 May 2021:

1. Review the Letter of Request dated 8 March 2021 addressed to the Premier and provide copies of all documentation/information/correspondence that has not yet been provided, including all appendices to those documents

2. All documentation/information/correspondence should be provided in native form and in correct order

DATED this 18th day of May 2021

Signed:

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 9

UPON Mr Jeremiah Frett, the Financial Secretary, being summoned to appear before the Commissioner at the BVI International Arbitration Centre, 3rd Floor, Ritter House, Wickham's Cay II, Road Town for the purpose of being examined under oath or affirmation

AND UPON hearing Counsel for the Inquiry, Sir Geoffrey Cox QC, the Solicitor General and Mr Hussein Haeri of Withers in attendance for Dr O'Neal Morton, and Mr Richard G Rowe and Mr Daniel Fligelstone Davies of Silk Legal (BVI) Inc in attendance for the House of Assembly Members listed in Schedule 2 to Order 5

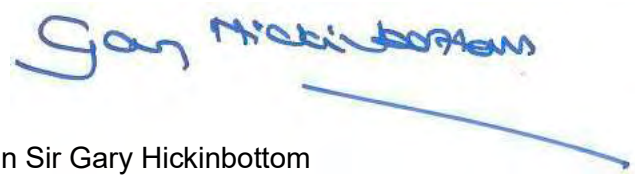
AND UPON hearing the oral evidence of Mr Jeremiah Frett

IT IS DIRECTED THAT Mr Frett shall, by 4pm on Tuesday 25 May 2021:

1. Review the Letter of Request dated 5 March 2021 addressed to the Minister of Finance and provide copies of all documentation/information/correspondence that has not yet been provided, including all appendices to those documents

2. All documentation/information/correspondence should be provided in native form and in correct order

DATED this 18th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 10

UPON listing a directions hearing following receipt of the Attorney General's written submission dated 19 May 2021 on the role of the IRU, Cabinet minutes, the state of disclosure, Legal Professional Privilege and Public Interest Immunity

AND UPON an application by the Attorney General for an adjournment of the directions hearing

AND UPON hearing Counsel for the Inquiry, Sir Geoffrey Cox QC, the Solicitor General, Mr Hussein Haeri, Mr Niki Olympitis and Ms Lauren Peaty of Withers for the Attorney General, Mr Richard G Rowe and Mr Daniel Fligelstone Davies in attendance for the House of Assembly Members listed in Schedule 2 to Order 5

IT IS DIRECTED THAT the application for an adjournment is refused

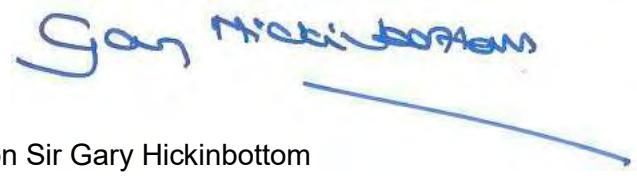
AND IT IS DIRECTED THAT by 4pm on Tuesday 25 May 2021:

1. By 4 p.m. on Monday 31 May 2021, all recipients of a Letter of Request to make an affidavit as to the completeness of the response to the Commission of Inquiry

2. By 4 p.m. on Monday 31 May 2021, the Attorney General, as the person instructed on behalf of the Government Ministers and departments, offices and other Government bodies for which they are all responsible as set out in the schedule to Order No.2, make an affidavit confirming whether or not she has satisfied herself that all reasonable efforts have been made to comply with the Letters of Request issued by the COI to Government Ministers and public officers whose interests she represents in the COI, and, if so, whether she is so satisfied

3. By 4 pm on Tuesday 25 May 2021, the Attorney General shall confirm whether she intends to maintain Legal Professional Privilege and/or Public Interest Immunity with respect to any specified class of document which falls to be disclosed to the COI and to identify that class or classes of document

DATED this 20th day of May 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 11

UPON listing a directions hearing on 2 June 2021 and upon receipt of written submissions dated 28 May 2021 filed on behalf of the Attorney General on the question of the disclosure of recordings of Cabinet meetings

AND UPON hearing Mr Bilal Rawat (Counsel to the Commission), Mrs Fiona Forbes-Vanterpool (Principal Crown Counsel) and Mr Hussein Haeri, Mr Niki Olympitis and Ms Sara-Jane Knock of Withers LLP on behalf of the Attorney General for the BVI Government Ministers etc listed in Schedule 1 to Order No 5 and Mr Richard G Rowe in attendance for the seven House of Assembly Members listed in Schedule 2 to the same Order

AND UPON the Commissioner having set out those topics which will it is proposed will be investigated at forthcoming public hearings

IT IS DECLARED THAT the Commissioner declines to make a Ruling that electronic recordings of the Cabinet meetings are not as a class of documents disclosable to the Commission of Inquiry

AND IT IS DIRECTED THAT the BVI Government Ministers etc listed in Schedule 1 to Order No 5 and the House of Assembly Members listed in Schedule 2 to the same Order shall, by 4pm on Wednesday 9 June 2021, lodge both in electronic and hard copy format any written submissions identifying any issues within the topics listed at a. to f. below which they consider the Commissioner should investigate and any witnesses on those topics which they consider he should call:

a. The interests held and declared by elected Ministers and other Members of the House of Assembly.
b. Questions arising from the position statements submitted by participants and others on governance and the law enforcement and justice systems.
c. The work of the Auditor General, the Internal Auditor, and the Complaints Commissioner.
d. The composition and function of statutory boards.
e. The purchase and leasing of Crown Land.
f. The system under which the BVI Government enters into contracts, both in general and in relation to specific contracts.

DATED this 2nd day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 12

UPON listing a directions hearing on 4 June 2021 and upon receipt of written submissions filed on behalf of the Attorney General on the question of the disclosure provided by the Registrar of Interests

AND UPON hearing Mr Bilal Rawat (Counsel to the Commission), Mrs Fiona Forbes-Vanterpool (Principal Crown Counsel) on behalf of the Attorney General for the BVI Government Ministers etc listed in Schedule 1 to Order No 5 and Mr Richard G Rowe in attendance for the seven House of Assembly Members listed in Schedule 2 to the same order

IT IS DIRECTED THAT the BVI Government Ministers etc listed in Schedule 1 to Order No 5, the House of Assembly Members listed in Schedule 2 to the same order and any former Members of the House of Assembly who are summoned to appear before the Commissioner on 14 June 2021 shall, by 4pm on Wednesday 9 June 2021:

1. Lodge any application objecting to the use of any information and documents provided by the Registrar of Interests to the Commission of Inquiry at a public hearing and/or in the Commissioner's Report.

2. Lodge any application that information and documents provided by the Registrar of Interests to the Commission of Inquiry and relating to them should only be considered at a private hearing.

DATED this 4th day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 13

UPON hearing Mr Bilal Rawat (Counsel to the Commission)

IT IS DIRECTED THAT the Attorney General and an appropriate person from the Governor's Office shall, by 9am on Thursday 17 June 2021, confirm in separate letters addressed to the Commissioner and sent by email to andrew.king@bvi.public-inquiry.uk :

1. a list of all persons who are known to have had access to the Ministers' Position Statement on Governance dated 1 June 2021; and

2. the enquiries that have been made as to who fall within the scope of paragraph 1 and of those persons to ascertain who may have leaked this document.

DATED this 16th day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

APPENDIX A

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 14

UPON the application dated 17 June 2021 of Mr Lewis S Hunte QC of Hunte & Co Law Chambers to be present when Dr Kedrick Pickering gives evidence under Rule 26 of the COI Rules ("the Rule 26 Application")

AND UPON hearing Mr Hunte and Counsel to the Commission

IT IS DECLARED THAT the Rule 26 application be granted.

DATED this 17th day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom

Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 15

IT IS DIRECTED THAT

1. The participants in the Commission of Inquiry (i.e. the BVI Government Ministers etc listed in Schedule 1 to Order No 5, and the House of Assembly Members listed in Schedule 2 to the same order) and, if so advised, His Excellency the Governor shall by 4pm on 12 July 2021, file written submissions in response to criticisms made of them in the Position Statements on governance and the operation of the law enforcement and justice systems or in any oral evidence given in respect of the Position Statements.

2. Written submissions filed further to paragraph 1 of this Order must be no more than 15 pages in length including any annexes, appendices and schedules. They must be in the format previously directed for Position Statements.

3. If any such person considers that it is necessary for the Commissioner to receive further evidence in response to such criticisms, then that evidence must be filed in affidavit form with the written submissions together with any application that the Commissioner calls or recalls witnesses to give oral evidence. Any such affidavit evidence must comply with the requirements sent out in the Protocol concerning the provision of written witness evidence.

4. If anyone else considers that he or she has been criticised in any Position Statement and wishes to respond, then they should apply to the Commissioner to file a response.

DATED this 18th day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 16

UPON the application dated 29 June 2021 of Mr Paul B. Dennis QC of O'Neal Webster to represent Dr Orlando Smith at the Commission of Inquiry ("the COI") pursuant to section 12 of the Commissions of Inquiry Act 1880

AND UPON hearing Mr Dennis QC

IT IS DECLARED THAT, under Rule 26 of the COI Rules, Mr Dennis QC may be present at the COI hearings when Dr Orlando Smith gives evidence.

DATED this 29th day of June 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 17

UPON the written application dated 8 July 2021 of Mr Stephen Daniels of Capital Law & Associates to represent Mr Wendell Gaskin at the Commission of Inquiry ("the COI")

IT IS DECLARED THAT, under Rule 26 of the COI Rules, Mr Daniels may be present remotely at the COI hearings when Mr Gaskin gives evidence remotely.

DATED this 10th July 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 18

UPON Mr Clive Smith, Managing Director of the BVI Airports Authority, being summoned to appear before the Commissioner remotely for the purpose of being examined under affirmation

AND UPON hearing the Counsel for the Inquiry

AND UPON hearing the oral evidence of Mr Smith

IT IS DIRECTED THAT Mr Smith shall, by 4pm on Monday 26 July 2021, provide a full response to the Letter of Request for an affidavit dated 14 June 2021 in the form of an affidavit with any documents relevant to the response exhibited thereto.

DATED this 19th July 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 19

UPON the directions hearing of 19 July 2021

AND UPON hearing Counsel for the Inquiry, Mr Olympitis on behalf of the Attorney General for the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to Order No 5 dated 13 May 2021 ("the elected Ministers etc"), and Mr Fligelstone Davies of Silk Legal for the Members of the House of Assembly identified in that same Order

IT IS DIRECTED THAT, in respect of the Affidavits and Disclosure (as defined in the COI's letter to the Attorney General dated 6 July 2021) and any further evidence or disclosure that is lodged in relation to Statutory Boards, by 4pm on 30 July 2021 the Attorney General on behalf of the elected Ministers etc shall:

1. confirm the personal data upon which they wish to rely, together with confirmation that the relevant individuals upon whose data they wish to rely have agreed that those data can be made public;

2. confirm whether any privilege asserted in her letter of 12 July 2021 and to the schedule of proposed redactions set out in the letter of 16 July 2021 is maintained; and, if so, identifying the passages over which privilege is maintained; and

3. in respect of the parts of the Cabinet papers that relate to Statutory Boards, confirms whether any Cabinet confidentiality is maintained; and, if so, identifying the passages over which confidentiality is maintained.

DATED this 19th July 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No.20

UPON the directions hearing of 8 September 2021

AND UPON hearing Counsel for the Inquiry, and Mr Hussein Haeri and Ms Lauren Peaty on behalf of the Attorney General for the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to Order No 5 dated 13 May 2021 ("the elected Ministers etc").

IN RESPECT of the Response of the Office of the Premier's Response to the Auditor General and Internal Auditor Reports concerning the Farmers and Fishers and Schools and Churches Grant Programmes and its annexes ("the Response") sent to the COI by the IRU on behalf of the Attorney General on 7 September 2021

IT IS DIRECTED THAT by 12 noon on 8 September 2021, the Attorney General shall:

1. confirm to the COI that the Response has been sent to both the Auditor General and the Internal Auditor in a form that they can be readily accessed by them.

IT IS FURTHER DIRECTED THAT by 4pm on 8 September 2021, the Attorney General shall:

2. confirm to the COI that the Premier and the Permanent Secretary agree with the whole contents of the Response and that they have nothing to add to it;

3. indicate which documents within the annexes of the Response have not been disclosed to the COI previously, and give an explanation as to why they have not been previously been disclosed to the COI;

4. indicate whether there are any proposed redactions to the Response, and if so, provide one copy to show the redactions seeking to rely upon that is marked but still visible; and the other showing the same redactions marked out so that they are no longer visible, with detailed reasons given for any proposed redactions; and

5. confirm that she will not make submissions on matters that fall within the Terms of Reference other than matters which arise during the course of the current hearings and/or without permission from the Commissioner. Any application for permission must be made in a proper form and promptly. In particular, any such application must confirm whether any documents are being disclosed with the submissions that have not been disclosed to the COI previously, and give an explanation as to why they have not been previously been disclosed to the COI.

IT IS FURTHER DIRECTED THAT by 12pm on 9 September 2021 the Attorney General shall:

6. confirm in writing the legal support she will provide to the Auditor General and Internal Auditor, if so requested.

DATED this 8th day of September 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 21

UPON the directions hearing of 16 September 2021

AND UPON hearing Counsel for the Inquiry, and Mr Hussein Haeri and Ms Lauren Peaty on behalf of the Attorney General for the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities, as scheduled to Order No 5 dated 13 May 2021 ("the elected Ministers etc").

IN RESPECT of the Elected Ministers Response to the Governor's Position Statement and the proposed redactions as set out in the Application of 11 September 2021

IT IS DIRECTED THAT by 2pm on 16 September 2021, the Attorney General shall:

1. Provide a single bundle with two versions of the annex, one with translucent redactions and the other with opaque redactions to be uploaded onto Relativity; and
2. Provide three hard copies of the annexes set out at paragraph 1 to the International Arbitration Centre.

DATED this 16th day of September 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No. 22

UPON hearing oral evidence from Dr Orlando Smith and Mr Neil Smith in relation to the BVI Airways Project;

AND IN RESPECT of the civil proceedings between BVI Airways Inc & Colchester Aviation LLC and the BVI Government.

IT IS DIRECTED THAT by 4pm on 22 October 2021, the representative of the BVI Government in relation to those civil proceedings, Mr Andrew Gilliland of Martin Kenney & Co. shall provide:

1. The statements of Neil Smith, Clive Smith, Taryn Lewis, Steve Augustine, Patricia Romney, Neils Herbold, Scott Weissman and Jerry Willoughby together with any exhibits.
2. The present state of any civil proceedings issued in the United States on behalf of, or against, the BVI Government in connection to the BVI Airways Project. Please include the names of the parties involved in the litigation, an outline of the claim(s).
3. The present state of any civil proceedings issued in the BVI on behalf of, or against, the BVI Government in connection to the BVI Airways Project. Please include the names of the parties involved in the litigation, an outline of the claim(s).
4. Confirmation, insofar as you are aware, of the present state of the Royal Virgin Islands Police Force investigation into the matter.

DATED this 15th day of October 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 23

UPON the directions hearing of 22 October 2021

AND UPON HEARING Counsel for the Inquiry and Sir Geoffrey Cox QC, Mr Edward Risso-Gill and Ms Sara-Jane Knock on behalf of the Attorney General for the Government Ministers and departments, offices and other Government bodies for which they are each responsible, and other Government entities as scheduled to Order No 5 dated 13 May 2021 ("the elected Ministers etc") and Mr Richard Rowe of Silk Legal for the other Members of the House of Assembly

IT IS DIRECTED THAT the Attorney General shall:

1. By 4pm on Friday 22 October 2021, notify the COI of dates of availability for the hearing for the further questioning of HE the Governor for the period 15-26 November 2021.

2. By 4pm on Tuesday 26 October 2021, in relation to the application to cross-examine, notify the COI (i) in respect of the precise areas upon which she wishes to question the Governor; and (ii) confirmation of whether she wishes to question Mr Augustus Jaspert, and if so, the precise areas upon which she wishes to question him.

3. By 4pm on Friday 29 October 2021:
   a) provide substantive responses to the outstanding requests for disclosure/information as set out in the appendix to this Order;
   b) provide an electronic copy of the file from the Auditor General on Blunder Bay; and
   c) file written submissions in relation to the scope of section 13 of the Register of Interests Act.

4. By 4pm on Friday 5 November 2021:
   a) provide the COI with any affidavit in relation to the public service budget upon which the elected Ministers wish to rely, including any further evidence in relation to the training budget for the public service;
   b) provide any further written submissions of her own on governance, limited to 15 pages;

c) if PII or any other ground for non-disclosure is maintained over either the bundle on radar barges or the transcripts from days 50 and 52 concerning radar barges, then a properly formulated application with evidenced reasons for each suggested redaction shall be made to the COI, failing which the Commissioner will proceed on the basis that all of that material can be publicly disclosed; and

d) if PII or any other ground for non-disclosure is maintained over documents annexed to the elected Ministers Response to the Governor's Position Statement, then a properly formulated application with evidenced reasons for each suggested redaction shall be made to the COI, failing which the Commissioner will proceed on the basis that all of that material can be publicly disclosed.

AND IT IS FURTHER DIRECTED THAT both the Attorney General and Silk Legal shall:

5. By 4pm on Friday 29 October 2021, lodge with the COI a list of matters upon which they wish to make closing submissions.

6. By 4pm on Friday 12 November 2021, lodge any such written submissions, insofar as the Commissioner by further direction allows.

AND IT IS FURTHER DIRECTED THAT Silk Legal shall:

7. By 4pm on Tuesday 26 October 2021, file any written submissions in relation to the Sea Cow's Bay Project.

8. By 4pm on Friday 29 October 2021, file any submissions in writing in relation to the scope of section 13 of the Register of Interests Act.

AND IT IS FURTHER DIRECTED THAT:

9. In respect of any documents that the Commissioner identifies in order to rely on in his report, the Attorney General is to make an application in respect of PII or any other ground that the document or relevant part not be disclosed be made within five days of being given notice. Any such application must be properly made, with reasons for each suggested redaction. If no proper application is made within that time, then the Commissioner will proceed to refer to the document in the report on the basis that there is no objection to it being made public.

10. Otherwise than as above, if anyone wishes to provide any further disclosure or information to the COI, an application to do so must be made as soon as possible attaching the proposed disclosure and explaining why such disclosure has not been made earlier.

APPENDIX

	Date of Request	IRU Ref	Request Recipient	Nature of Request/Task
	5 October 2021	R0143	Dr O'Neal Morton	Complete list of Applicants & Application forms for recipients of Stimulus Grants – Farmers & Fishers
	11 October 2021	R0148	Attorney General	Information arising following evidence of Dr O'Neal Morton on 8 October
	21 October 2021	R0153	Cabinet Secretary	Copies of Cabinet papers etc re meeting that took place on or around 9 January 2021
				Written submissions on customs legislation

DATED this 22nd day of October 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 24

UPON the application dated 15 November 2021 that Alex Hall Taylor QC of Carey Olsen (BVI) LP assisted by Sara Malik of that same firm act as Counsel for His Excellency John Rankin CBE made under section 12 of the Commissions of Inquiry Act 1880, the COI Rules and the COI Protocol for Representation under section 12 of the Commissions of Inquiry Act 1880

IT IS DECLARED THAT under Rule 26 of the COI Rules the application be granted, and His Excellency John Rankin CBE shall be entitled to be represented by Mr Hall Taylor QC when giving further evidence

AND UPON the application dated 15 November 2021 under Rule 27(3) of the COI Rules that Mr Hall Taylor QC be permitted to question His Excellency John Rankin CBE either through Counsel to the Inquiry or directly

IT IS DIRECTED THAT that application be adjourned and dealt with following the questioning of His Excellency by the Attorney General (or Counsel on her behalf) on behalf of the elected Ministers etc.

DATED this 16th day of November 2021

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 25

UPON the directions hearing of 17 November 2021

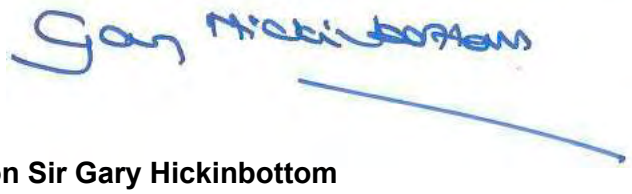
AND UPON HEARING Counsel for the Inquiry, Mr Edward Risso-Gill and Ms Sara-Jane Knock on behalf of the Attorney General for the Ministers and departments, offices and other Government bodies for which they are each responsible and other Government entities as scheduled to Order No 5 dated 13 May 2021 ("the elected Ministers etc"), Mr Richard Rowe of Silk Legal for the other Members of the House of Assembly, and Mr Alex Hall Taylor QC of Carey Olsen LP for His Excellency the Governor

AND UPON the Attorney General for herself and all those she represents, and Silk Legal for all those who they represent, confirming that there are no further legal issues in respect of the COI which they wish or intend to raise

IT IS DIRECTED THAT:

1. The Attorney General's application dated 5 November 2021 to admit the Fifth Affidavit of Dr Carolyn O'Neal Morton dated 1 November 2021 is granted.
2. The Attorney General's application dated 12 November 2021 to admit the Thirteenth Affidavit of Mr Jeremiah Frett of that same date out of time is granted.
3. The Attorney General or a member of her Chambers who is instructed on behalf of the National Security Council ("the NSC") and suitably briefed shall attend the hearing of 24 November 2021 in order to provide representations in relation to the PII application made on behalf of the NSC dated 10 November 2021, if required.
4. By 10am on Monday 22 November 2021, the Attorney General shall provide the COI with a more focused indication of (i) the questions or areas of questions it is proposed to put to the Governor at the hearing on 24 November 2021 and ii) documents relevant to those questions.
5. An extension of time is granted for Silk Legal to provide their closing submissions of 12 November 2021 so that those submissions are in time.

DATED this 17th day of November 2021

Signed: 

The Rt Hon Sir Gary Hickinbottom
Commissioner

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

ORDER No 26

UPON the Attorney General's application dated 3 February 2022 to admit the First Affidavit of Maya Barry, Principal Crown Counsel in the Attorney General's Chambers.

IT IS DECLARED THAT the application is granted.

DATED this 7th day of March 2022

Signed:

The Rt Hon Sir Gary Hickinbottom
Commissioner

British Virgin Islands Commission of Inquiry

The Commissioner's Opening Statement for Press Conference

Friday 22 January 2021

1. You all have the Terms of Reference of the Commission of Inquiry which I have been appointed to conduct under the Territory's Commissions of Inquiry Act. These are to consider whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years.

2. As the Governor has said, this independent Inquiry has been called in the light of increasing concern about the governance of the BVI, which includes allegations in respect of transparency around public spending and contracts, political interference in statutory bodies, and a growing climate of fear and intimidation. If true, such matters could risk undermining democracy itself. It is in those circumstances that I have agreed to undertake this Commission - for the benefit of the BVI and all who live and work here.

3. Although as Commissioner I have considerable powers, the Commission is not a court of law. Under the Terms of Reference, it is not part of my role to ascertain whether individuals in public office have been guilty of a crime or some other form of serious dishonesty. I am required to consider all of the information submitted, and make findings as to whether anyone in public service here *may* have been guilty of corruption, abuse of office or other serious dishonesty in relation to their service. If I conclude that there is nothing possibly amiss with the governance of these Islands, I will say so; and that will be the end of it. But, if I find there is some possible substance to the concerns, then, as the Terms of Reference require, I will have to consider what might be done about them, and make recommendations for action, for example in terms of whether criminal proceedings might be brought against any individuals. It would then be for the criminal courts to determine whether crimes have been committed. However, I am able to make all sorts of other recommendations, if I consider them to be appropriate in light of the findings I have made, for example recommending tightening up the controls over administrative processes.

4. I was sworn in as Commissioner this morning, and my work begins today. I will be supported by a team, including the Secretary to the Inquiry (Mr Steven Chandler, who has already been appointed and who is here), and also the Solicitor and Counsel to the Commission (both shortly to be appointed). Once the full team is in place, we will be able to consider our detailed procedures, which will be placed on our website.

5. But I can say this now, the Terms of Reference require me to report within six months, that is by July. Given the nature of the concerns and that timeline, we must press forward with all speed; and that is what I propose to do.

6. The crucial first step is for anyone with information that might assist the Inquiry to send that information and any written material in support to the Commission so that I can consider it. You may send information in any form; but perhaps the easiest way for the

public to get in touch is electronically. From today, there will be an independent and secure Inquiry website (bvi.public-inquiry.uk) which will not only have information about the Inquiry, but will have a portal by which anyone can raise queries and submit information which falls within the Terms of Reference and which they consider may be helpful. Other means of sending in information will be put on to the website, and will include email, WhatsApp and, for those who would prefer to do so, there will be a postal address in the UK to which you can send information by post or courier. We are currently working on whether we can have a sufficiently safe and secure drop box here.

7. I strongly urge members of the public – the website is now live - and the public service to engage with the Inquiry, and particularly to use the website. This is your Inquiry, and I would like to hear from you and encourage you to get in touch. Over the next couple of weeks, I will be inviting a number of people, whom I believe might be able to assist the Inquiry, to come and talk to me; and we propose holding sessions at various locations on Tortola and on the sister islands to give people an opportunity to come and speak to me. Details of these sessions will appear on the website. However you wish to engage with the Inquiry, perhaps by another means or privately, let us know, and we will do what we possibly can to accommodate you.

8. I hope that the vast majority of information to which I have referred will be sent to us over the course of the next month or so, so that we can move on to the next stage of the Inquiry; but, if anyone needs more time, then again tell us and we will accommodate you if we possibly can.

9. I know from the correspondence I have already seen that some people feel afraid of coming forward to make their concerns known. Those are people who have the right to be heard. I have therefore set up a rigorous system for honouring and ensuring confidentiality. The website asks anyone providing information whether he or she wishes the information and their identity to remain confidential. If they do, then the information will not be shared outside of the Inquiry Team and will be treated in strictest confidence. Whether or not given in confidence, any evidence given to the Inquiry is, by virtue of the Act, in any event absolutely privileged and cannot be used in any court against the person giving it - as distinct of course from against any other person - in any civil or criminal proceedings except those for perjury and contempt within the Inquiry itself. That does not of course mean that all witnesses are immune from subsequent criminal proceedings, if there are any, prompted by other evidence arising in the Inquiry.

10. Once the initial wave of information has been submitted to the Commission, I will then need to decide how, and from whom, to seek further information. The Act provides me with extensive powers to collect information and summon individuals to provide information if that is required. We may make contact of course with those who have provided information to ask for further details; or contact individuals implicated by the information we have received – although, I stress, without disclosing the information's source where that is confidential.

11. I expect our focus to be on the written material that we obtain. However, I will consider whether it would be helpful to have oral evidence from any witnesses, particularly to ensure that any individuals implicated have a full and fair opportunity to respond. I

propose to hold any hearings here, shortly after Easter and in any event to be completed by the end of May. The precise details, of course, will be dependent upon the course of the Covid-19 pandemic and any restrictions that may be in place as a result of that. Covid-19 Protocols will of course be fully observed by my team and all those involved.

12. I will have to consider whether the hearings should be public – and, if so, whether they should be live on line – or whether parts of the hearing should be heard privately in camera. During these hearings, witnesses called may appoint their own lawyer to ask questions. I will ensure that any hearing is procedurally fair for all. As with every stage of the Inquiry, I will set out clearly in public statements and written updates on the website how each process will work.

13. I expect formal hearings to be concluded by the end of May; and the final stage of the Inquiry will be for me to write a report and make recommendations to the Governor, as I have already indicated. In doing that, I shall keep well in mind the nature of the Inquiry at this stage; and I shall concentrate on matters of real substance and importance to the present and future well-being of the Islands.

14. I very much look forward to commencing this important work; and, in anticipation, thank the people of BVI for their assistance and cooperation in performing my task.

The Rt Hon Sir Gary Hickinbottom
22 January 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS STATEMENT

28 January 2021

The independent Commission of Inquiry was appointed by the previous Governor Augustus J.U. Jaspert on 18 January to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. On 22 January, the Right Honourable Sir Gary Hickinbottom was sworn in as the sole Commissioner and subsequently delivered a press conference to provide more information on the process. At this press conference, he explained that there was an independent and secure Inquiry website (www.bvi.public-inquiry.uk) which not only has information about the Inquiry, but has a portal by which anyone can raise queries and submit information which falls within the Inquiry's Terms of Reference and which they consider may be helpful.

The Commissioner welcomes and encourages public input into the Inquiry and therefore places great importance on the Inquiry website. Anyone with information to share is encouraged to safely and securely contact the Inquiry team using the website.

There are extremely robust security and privacy measures in place to protect information submitted to the Inquiry team via the website, or any other means, including both the information submitted and the privacy of the individual submitting it. The website has undergone substantial penetration testing and safeguarding to ensure its security. Any data shared through the website will be stored in the UK, protected by UK GDPR laws. There are also robust safeguards in place to ensure only authenticated users can access the website. Security testing takes place on a regular basis to ensure the safety of the website and users, and ensure full compliance with international standards.

The Inquiry team would like to reassure those who wish to make contact, or submit information, via the website that they can do so in the knowledge that their personal information will be treated in absolute confidence and held securely by the Inquiry team. Neither the information nor its source, nor anything that might indicate its source, will be made public without an individual's express agreement.

Steven Chandler
Secretary to the Commission

28 January 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSIONER TO VISIT ANEGADA, JOST VAN DYKE AND VIRGIN GORDA ON MONDAY 1 FEBRUARY

The Commissioner, Sir Gary Hickinbottom, will visit the sister islands on Monday 1 February and be available to meet with residents of the islands who would like to speak with him. He will be happy to explain how the independent Commission of Inquiry will work, its purpose, and how people can get involved if they so wish.

The Commissioner's schedule is set out below. If you would like to speak with him during his visit or hear more about the Inquiry and its role, then please come along to the venues detailed below in the appropriate time window.

Meetings can be 1-to-1 and held in private:

On Anegada: 8.30am to 9.45am at the Anegada District Office

On Virgin Gorda: 11.00am to 12.15pm at the Hazel Point Building (2nd Floor)

On Jost Van Dyke: 2.00pm to 3.15pm at the Albert Chinnery Building, District Office

You can contact the Secretary to the Commission on the day via WhatsApp (on 284 340 9078) if you have any questions about the visit.

Steven Chandler
Secretary to the Commission

29 January 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

APPOINTMENT OF COUNSEL TO THE INQUIRY

On the recommendation of the Commissioner, the Rt Hon Sir Gary Hickinbottom, and as provided for in the Commissions of Inquiry Act, the Honourable Dawn J Smith, Attorney General of the British Virgin Islands, today appointed Mr Bilal Rawat as Counsel to the Commission of Inquiry.

The Commissioner said:

"I am delighted Bilal Rawat has been appointed to this key role. He brings a wealth of relevant expertise and experience, and will be an invaluable member of the Inquiry team. I look forward to working with him and the other members of the team in conducting this Inquiry for the benefit of the BVI and all who live and work here."

Bilal Rawat was called to the Bar of England and Wales in 1995. He was appointed to the Attorney General of England and Wales' A Panel of civil counsel in 2015 and has been a member of the Special Advocate Panel since 2009. He has particular expertise in relation to inquiries, civil and public law.

Steven Chandler
Secretary to the Commission

3 February 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY: UPDATE

The Commission of Inquiry ("the Commission") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Commissioner was sworn in on 22 January and began his work from that date.

Under its Terms of Reference, the Commission is required to report within six months. Given that time frame, it is essential that the Inquiry team uses its time as efficiently as possible, which can only be achieved by splitting the team's time between BVI and the UK. The Commissioner, Sir Gary Hickinbottom, and the Secretary to the Commission, Steven Chandler, will therefore depart the BVI for the UK on Thursday 4 February after a productive first visit to the islands.

This visit has been extremely useful in identifying the areas and issues on which the Commission will focus its initial attention. The Commissioner would like to thank all those he has met and heard from while he has been in the BVI. Although based in Tortola, he was pleased to be able to visit each of the three sister islands where he received an equally warm welcome. The Commissioner is extremely grateful for the information that has been shared to date, and for the cooperation and constructive engagement he has received during his visit.

The Commissioner and the Secretary are returning to the UK to consult with the recently appointed Counsel to the Commission to consider the initial wave of information the Commission has received. With Counsel to the Inquiry, the Commissioner will then decide how best, and from whom, to seek further information.

It is the intention of the Inquiry team to return to the BVI before Easter. The proposed oral hearings will take place in Territory after Easter to be concluded no later than the end of May. Timings are of course dependent on the impact of COVID travel restrictions. Through press statements and the website, the Commission will keep the people of the BVI updated as to progress and any change in timings that might be necessary.

Between now and the return to Territory, if anyone wishes to meet/speak with the Commissioner, they should contact the Secretary who will be able to arrange a remote meeting by (e.g.) WhatsApp. In any event, the Commissioner encourages anyone who has information that might assist the Inquiry to send that information and any written material in support to the Inquiry team so that he can consider it. The safest and most secure way to do this is via the independent and secure Inquiry website (www.bvi.public-inquiry.uk); but other means of sending in information are set out on the website. All information will be received and held in strict confidence.

Once again the Commission thanks the people of the BVI for their continued engagement and support.

Steven Chandler
Secretary to the Commission

4 February 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

MAKING REQUESTS FOR INFORMATION AND DOCUMENTATION

The Commission of Inquiry ("the Commission") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Commissioner was sworn in on 22 January and began his work from that date.

The Commissioner is extremely grateful for the information that has been shared to date, and for the constructive engagement he received during his visit to the Islands in January/February; and for the information which continues to flow in.

The next stage of the Inquiry, expected to last several months, will involve seeking further information and documentation predominantly from public officials, including elected and statutory officials.

The Commissioner has been informed and welcomes that it is BVI Government policy that all ministries, departments, statutory bodies and Government-owned entities provide appropriate and timely cooperation with the Inquiry. He also understands that the Attorney General, assisted by Withers Solicitors, will coordinate the implementation of that policy.

The Commissioner wants to reassure the population of the BVI, and its public officers in particular, that whatever mechanisms government adopts to assist the Commission there is nothing to prevent those in public office who have concerns from coming forward directly to the Commission. They have every right to do so, and if they do their information and input into the Inquiry will be kept strictly confidential.

The Commission encourages anyone who would like to submit information relating to the Inquiry to do so as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the Commission has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address, a WhatsApp phone number for messages or audio/video calls, and a UK postal address – all detailed on the website. All information will be received and held in strict confidence.

Steven Chandler
Secretary to the Commission

15 February 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

MAKING REQUESTS FOR INFORMATION AND DOCUMENTATION: UPDATE 1

The Commission of Inquiry ("the Commission") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. Sir Gary Hickinbottom is the sole Commissioner.

Following on from the Commissioner's visit to the BVI in January/February and the information submitted to the Commission to date, the Commissioner and his team have started the second stage of the Inquiry. This involves obtaining further information and documentation predominantly from public officials, including elected and statutory officials.

The Commissioner has the powers of a High Court Judge to require production of information and documents by way of summons. However, given that the BVI Government has indicated that it will fully and promptly cooperate with any requests for information/documents, the Commissioner is initially making requests for voluntary disclosure. The Commission will continue to make these requests over the coming weeks to enable it to fulfil its Terms of Reference.

It is the Commissioner's intention next week to set out in a statement how he expects requests for information and documentation to be met. It will also outline how the Commissioner intends to enforce the production of documents and information if requests for voluntary disclosure are not met.

In the meantime, the Commission renews its open invitation to anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the Commission, to submit that information as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the Commission has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+44 (0)7832 111254), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

Steven Chandler
Secretary to the Commission

26 February 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

CLARIFICATION ON THE ROLE OF THE IRU – IT IS NOT PART OF THE COMMISSION OF INQUIRY

The Commission of Inquiry ("the Commission") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. Sir Gary Hickinbottom is the sole Commissioner.

It has been brought to the Commissioner's attention that recent publicity and information about the BVI Government's (BVIG) Inquiry Response Unit (IRU) is having a misleading effect resulting in confusion about the IRU's role and function. To be clear, the IRU is **not** part of the independent Commission of Inquiry. It is a unit set up by the BVIG to work in conjunction with the Attorney General's Chambers with a modest but helpful goal of assisting with the mechanics of producing information requested by the Commission of Government officials. The Commissioner has written to the Attorney General to register his concerns about this publicity, and asking for it to be corrected.

While the Commissioner welcomes the establishment of the IRU to help implement the BVIG's expressed policy that all ministries, departments, statutory bodies and Government-owned entities provide appropriate and timely cooperation with the Inquiry, he wants to reassure members of the public, and public officers, that the IRU is wholly separate from the Commission. The Commission is, and will remain, entirely independent of the BVIG.

Members of the public cannot engage with the Commission through the IRU: if they wish to engage with the Commission, they should contact it directly.

The Commission renews its open invitation to anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the Commission, to submit that information as soon as possible via the secure website portal (www.bvi.public-inquiry.uk).

As well as the website portal, the Commission has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+44 (0)7832 111254), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

Steven Chandler
Secretary to the Commission

4 March 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

PROTOCOLS FOR THE PROVISION AND FOR THE REDACTION OF DOCUMENTS FOR THE COMMISSION OF INQUIRY

The Commission of Inquiry ("the COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. Sir Gary Hickinbottom is the sole Commissioner.

Exercising his powers under section 9 of the Commissions of Inquiry Act, the Commissioner has today published two Protocols, one concerning the 'Provision of Documents' to the COI, and the other concerning the 'Redaction of Documents'. They can be found on the COI's website at www.bvi.public-inquiry.uk.

The Protocols are designed to facilitate the prompt delivery of documents to the COI by ensuring that members of the public and those individuals, organisations or institutions who are requested or compelled to provide documents are aware of and understand the COI's procedures for the provision of documents, and the redaction of any documents it intends to disclose further. The Protocols will assist those who may be requested or compelled to provide documents to the COI by reducing the risk of delay.

The COI renews its open invitation to anyone who believes they have information that may assist the Inquiry and who has not yet submitted it to the COI, to submit that information as soon as possible via the secure website portal (www.bvi.public-inquiry.uk).

As well as the website portal, the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+44 (0)7832 111254), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

Steven Chandler
Secretary to the Commission

5 March 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

APPOINTMENT OF SOLICITORS TO THE INQUIRY

The Commission of Inquiry ("COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. Sir Gary Hickinbottom is the sole Commissioner.

Two solicitors, Mr Andrew King and Ms Rhea Harrikissoon, have been appointed to the COI's legal team, joining Mr Bilal Rawat (Counsel to the Inquiry). They bring with them a range of relevant knowledge and experience.

Mr King qualified as a solicitor in private practice in 2009. In 2010 he joined the UK's National Crime Agency (formerly the Serious Organised Crime Agency) until he moved to the UK Government Legal Department (formerly the Treasury Solicitor's Department) in 2014 where he held a number of roles primarily dealing with public law litigation.

Ms Harrikissoon qualified in private practice in 2012, specialising in childcare and family law. She joined the UK Government Legal Department in 2015 and has extensive experience in public law challenges, and more recently with public inquiry work including the Brook House Inquiry and Infected Blood Inquiry. Ms Harrikissoon was the Solicitor to the Windrush Lessons Learned Review.

Steven Chandler
Secretary to the Commission

15 March 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY TEAM TO RETURN TO THE BVI NEXT WEEK

The Commission of Inquiry ("the COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Commissioner, the Rt Hon Sir Gary Hickinbottom, was sworn in on 22 January and began his work from that date.

The COI is currently engaged in the second stage of the Inquiry, namely obtaining further information and documentation in response to the information already provided by members of the public. The COI has to date sent over 100 letters of request for information/documents to public officials, including elected and statutory officials.

Members of the COI team intend to return to the British Virgin Islands next week to continue with the information gathering stage of the COI. The Commissioner will be accompanied by Mr Steven Chandler (Secretary to the COI) and Mr Andrew King (Senior Solicitor to the COI). All three will of course observe the current 14 days quarantine requirement on arrival.

The Commissioner is currently considering holding preliminary hearings in the BVI in late April and early May, prior to the main oral hearings. The Commissioner will publish rules to regulate the conduct and management of the COI's hearings shortly.

In the meantime, the Commissioner continues to encourage anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the COI, to submit that information directly to the COI as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+44 (0)7832 111254), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

The Commissioner would like to remind members of the public, and public officers, that the BVI Government (BVIG) Inquiry Response Unit (IRU), which has been set up to facilitate responses to requests for information made to public servants by the COI, is wholly separate from the COI. The COI is, and will remain, entirely independent of the BVIG. Members of the public cannot engage with the COI through the IRU: if they wish to engage with the COI, they should contact the COI directly. If they wish, public servants too may of course make direct contact with the COI if they have relevant information.

If anyone wishes to meet/speak with the Commissioner on his return to the Islands, they should contact the Secretary who will be able to arrange a face-to-face or a remote meeting (for example by WhatsApp).

Once again the Commissioner thanks the people of the BVI for their continued engagement and support.

Steven Chandler
Secretary to the Commission of Inquiry

22 March 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY TEAM RETURNS TO THE BVI

The Commission of Inquiry ("the COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Commissioner, the Rt Hon Sir Gary Hickinbottom, was sworn in on 22 January and began his work from that date.

The Commissioner arrived back in the BVI on Thursday 1 April, with Mr Steven Chandler (Secretary to the COI) and Mr Andrew King (Senior Solicitor to the COI). All three are observing 14 days quarantine. Following their return, the COI team will continue with the information gathering and production of documents stage of the COI. Further members of the COI team are expected to join the Commissioner later this month.

The Commissioner is currently considering holding some initial hearings in the BVI in late April and early May. The Commissioner will publish rules to regulate the conduct and management of the COI's hearings later this week.

In the meantime, the Commissioner continues to encourage anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the COI, to submit that information directly to the COI as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+ 1 (284) 340 9078), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

If anyone wishes to meet/speak with the Commissioner, they should contact the Secretary who will be able to arrange a face-to-face or a remote meeting (for example by WhatsApp).

Steven Chandler
Secretary to the Commission of Inquiry

6 April 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY PROCEDURAL RULES AND PROTOCOLS FOR LEGAL REPRESENTATION AND WITNESS EXPENSES

The Commission of Inquiry ("the COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

Exercising his powers under section 9 of the Commissions of Inquiry Act ("the Act"), the Commissioner has today published 'COI Rules', dealing with matters of evidence and procedure, and two further Protocols, one concerning applications for legal representation and the other for witness expenses. They can be found on the COI's website at www.bvi.public-inquiry.uk.

The Commissioner has a wide power to determine the procedures by which the COI will conduct its work. Given the pandemic, it is important that the COI is able to work as flexibly as possible.

The Rules published today will assist all those who may be involved in the COI particularly relating to hearings. The two further Protocols give guidance as to the process by which the Commissioner will consider applications to be represented by counsel and claims for appropriate witness expenses (which exclude any fees and expenses incurred by a person in respect of legal representation or advice).

The Commissioner continues to encourage anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the COI, to submit that information directly to the COI as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+ 1 (284) 340 9078), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

If anyone wishes to meet/speak with the Commissioner, they should contact the Secretary who will be able to arrange a face-to-face or a remote meeting (for example by WhatsApp).

Steven Chandler
Secretary to the Commission

13 April 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY UPDATE: FIRST HEARINGS

The Commission of Inquiry ("the COI") was announced on 18 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

In line with the Commissioner's intention that the COI should operate in as flexible a manner as possible and given the need to maintain its progress, the Commissioner intends to begin hearings in Road Town in the week commencing 3 May 2021.

Over recent weeks, the COI has sent out letters of request seeking information and documents relevant to its Terms of Reference. These requests continue. Whilst the requests have resulted in many documents being lodged with the COI, for which the Commissioner is grateful, he considers that hearings are now required to facilitate the prompt and full production of relevant information and documents.

That will be the purpose of the initial hearings, which are therefore likely to be short and conducted in private so as to ensure that documents and information that cannot at present be disclosed in public can be securely provided to the COI. However, mindful of the need for openness where possible, following each hearing he will give directions for any publicity of that hearing he considers appropriate.

The first summons requiring a respondent to appear before the Commissioner for examination on oath or affirmation, and to provide information was issued today.

The Commissioner expects that further hearings will be necessary over the coming weeks. The COI will issue further press notices as necessary to update the public as to the timetable and nature of future hearings.

The 'COI Rules', dealing with matters of evidence and procedure, and two further Protocols, one concerning applications for legal representation and the other for witness expenses, were published by the Commissioner on 13 April 2021. The Rules will assist all those who may be involved in the COI. The two Protocols give guidance as to the process by which the Commissioner will consider applications to be represented by counsel and claims for appropriate witness expenses (which exclude any fees and expenses incurred by a person in respect of legal representation or advice). They can be found on the COI's website at www.bvi.public-inquiry.uk.

The Commissioner continues to encourage anyone who believes they have information that may assist the Inquiry, who has not yet submitted it to the COI, to submit that information directly to the COI as soon as possible via the secure website portal (www.bvi.public-inquiry.uk). As well as the website portal, the COI has provided a number of different and secure ways for individuals to share information

with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+ 1 (284) 340 9078), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence.

Steven Chandler
Secretary to the Commission

23 April 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

THE COMMISSIONER'S OPENING STATEMENT FOR COI HEARINGS

The Commission of Inquiry ("the COI") was announced on 19 January 2021 to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years; to consider the conditions which may have allowed any such serious dishonesty to take place and whether they may still exist; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the British Virgin Islands. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The Commissioner started COI hearings today in Road Town. His Opening Statement is attached to this Notice.

Steven Chandler
Secretary to the Commission

4 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

The Commissioner's Opening Statement for COI Hearings
Tuesday 4 May 2021

As you are all aware, considering that it would be in the public welfare – that is, in the public interest – on 19 January, the then Governor issued a Commission of Inquiry ("COI") to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years; to consider the conditions which may have allowed any such serious dishonesty to take place and whether they may still exist; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the British Virgin Islands.

I was appointed the sole Commissioner; and, since January, with the COI team, quietly but with purpose and determination, I have been fulfilling those terms of reference. They require me to report to the Governor with my findings and recommendations by July, but, if necessary, the Governor is able to extend that time to October. Whether an extension may be required is a matter I will consider over the next few weeks

To date, many have come forward with information, through the COI website portal or other means, and by face-to-face and remote meetings. I am very grateful to all those who have come forward. I should emphasise that, if anyone has information which they have not yet sent to us, which they consider falls within the scope of the COI and may be useful, they should contact the COI through the website portal or by any of the other ways set out on our website page which can be found at www.bvi.public-inquiry.uk. Any such information received by the COI will remain strictly confidential.

As well as information volunteered in that way, the COI team have made requests for voluntary production of information, mainly from Ministers and other public officials who have provided a substantial number of documents. I understand this has involved public servants putting in a considerable amount of work to respond to the requests. Whilst some have asked for additional time, none has suggested that he or she has been unable to comply fully with the COI requests as a result of lack of resources. I sincerely thank them for their efforts, which I much appreciate.

Much information has thus been gathered, and much progress made. However, we have now reached a stage when oral hearings are required to ensure further progress can be made, and at the required rate.

One of the focuses of the initial hearings will be production of information. As I have said, in response to COI requests for voluntary production, in most instances, the recipient of the request has provided information and documents, with an indication that he or she has fully complied with the request. It is vital that I do have all information and documents relevant to the Inquiry, and some of these initial hearings will be to give me appropriate comfort that that is indeed the case. However, as I indicated at the outset of the COI, I intend to be flexible with regard to the conduct of the Inquiry, including the hearings, so that we make progress in an efficient way – whilst, of course, always ensuring that all are treated fairly.

In respect of documents which have been produced, various Ministers through the Attorney General have reserved their position on whether information and documents they have produced – and are continuing to produce – may be made available to the public. Consequently, some of the initial hearings will be held in private; so that, if there is reference to information or documents in respect of which privilege or confidentiality is maintained, such issues can be considered before the relevant material is made public. However, at each hearing, having heard any submissions on the point, I will determine whether the hearing (or part of it) needs to be kept private; or whether it can properly be made public and, if so, how. I have well in mind both the understandable interest that the public has in the COI, and the importance of the principles of transparency and openness.

However, in respect of a private hearing such as this, until I make a declaration that the hearing (or part of it) can be made public in some way, everything that occurs at the hearing will remain strictly confidential. Everyone involved in the hearing is subject to the obligation of confidentiality. Unless and until I declare otherwise, no one is allowed to publicise any part of it, in any way. If there is any such publicity, then I can – and usually will – investigate the cause of the leak and take appropriate action against anyone who has caused or facilitated the breach of confidence.

Further, it is important that I emphasise that no recordings can be made of any hearing – public or private – save for the authorised recording that I am causing to be made. A transcript will be made of each hearing. If the hearing is private, then a transcript may be provided to participants on the basis of a confidentiality undertaking. If a hearing is public – or if I direct that a private hearing be made public – then the default position will be that the relevant transcript will be posted on the COI website.

In commencing this next stage of the Inquiry, may I again stress that, although I have many of the powers of a High Court Judge, the COI is not a court of law. I am simply conducting an investigation, as required by my terms of reference; and the hearings are not adversarial, but inquisitorial. I would ask all those who may be involved in the hearings to bear that in mind. Counsel to the Inquiry, Mr Bilal Rawat, is not here to promote any cause: he has been appointed, by the Attorney General on my recommendation, to promote the public interest and to ensure, so far as he can, that the COI complies with its terms of reference for the benefit of all who live in this territory. That too is my overarching and primary consideration. I hope, and expect, all witnesses and those who might represent them to share those aims.

The Rt Hon Sir Gary Hickinbottom
4 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

MISINTERPRETATION OF THE COMMISSIONER'S OPENING STATEMENT

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The Commission held its first hearing yesterday (4 May 2021). The Commissioner began by making an opening statement on the progress of the COI so far, the purpose of the initial hearings he intends to hold, and the reason why at least some of those hearings need to be private at least in the first instance. The statement made clear that the Commissioner is committed to openness and transparency. The full text of the statement is available on the COI website.

This Press Notice has been issued to correct a misinterpretation that has arisen in the media's reporting of the Commissioner's opening statement as to his decision to hold private hearings. The suggestion in some media reporting that the Commissioner wishes hearings to be in private or "secret" has no foundation. It is his wish that each hearing is made public to the fullest extent. However, he is required to take into account the rights and obligations of those who appear before him.

A number of governmental bodies have provided documents to the COI. In respect of these documents, the Attorney General has confirmed that the Government reserves its position as regards its rights of privilege and confidentiality. These issues affect how such documents can be used and disclosed by the COI. The Commissioner has decided that his initial hearings need to be in private to allow for the secure provision of information and documents over which such rights are or may be maintained. The provision of such information and documents is necessary to the continued work of the COI.

However, the Commissioner's intention is that, wherever possible, the work of the COI should be conducted in public so as to keep the BVI public aware of its progress. In respect of yesterday's hearing, he has invited the Attorney General to make submissions as to why he should not publish the full transcript. Once he has received those submissions, the Commissioner will decide whether the transcript can be published, with necessary redactions if appropriate. It is his intention that these transcripts be made available on the COI website. Public access to the transcripts will ensure transparency and avoid the misreporting of hearings. In respect of hearings in which there are no issues such as privilege and confidentiality, it is the Commissioners' intention that they be live-streamed.

At the first hearing, the Commissioner heard oral submissions from the Attorney General on her application to participate in the COI in her own right and on behalf of a number of identified government bodies. The Commissioner subsequently received evidence from the Cabinet Secretary, Ms Sandra Ward. The Commissioner has issued orders following the hearing, which will in any event be published on the COI website shortly.

Steven Chandler
Secretary to the Commission

5 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY – HEARINGS UPDATE

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The COI has held a series of hearings over the last two weeks of which the primary focus has been the production of information and documents. There are further such hearings this week. However, the Commissioner has also heard a series of applications concerning formal participation in the COI, and has made orders allowing the Cabinet, Ministers, Members of the House of Assembly and, in her own right, the Attorney General to be formal participants on the basis of their particular constitutional interest in governance.

In respect of production of information and documents, the hearings followed letters of request of mainly Ministers and other public officials to make voluntary disclosure to the COI. The disclosure made following those requests, although purportedly full, appeared incomplete; and, after five days of hearings at which the Commissioner took evidence from a number of summonsed witnesses, it was clear that the disclosure made was substantially incomplete and in poor order. The COI has written to the Attorney General with a view to remedying these deficiencies promptly, so that the Inquiry may be efficiently progressed.

Additionally, to facilitate the next stage of the COI, the Commissioner is anxious to understand the views of the Ministers and Members of the House of Assembly on governance. They have made no representations to him to date. He has therefore, through their legal representatives, written to the Ministers, Members of the House and the Attorney General asking them to set out their position on governance by reference to a series of questions.

The Commissioner has asked for the deficiencies in disclosure to be remedied and for the position statements to be lodged with him by Monday 31 May 2021. The next stage of the hearings will commence shortly after that date.

The Commissioner in his opening statement on 4 May, and in a subsequent Press Notice on 5 May, made clear why the initial hearings were to be private at least in the first instance, namely that the Attorney General wished to preserve any rights of privilege and confidentiality in any documents or information that might be referred to in the hearing. It is the Commissioner's wish that each hearing is made public to the fullest possible extent. He has provided the Attorney General with an opportunity to make submissions on whether she considers it necessary to black out (redact) any parts of each transcript before it is made publicly available. Once the Commissioner has received those submissions, he will publish the transcript with any redactions he

considers necessary. The Commissioner is resolved to publish the transcripts as soon as possible after each hearing. To date, two transcripts have been published on the COI website, and more will follow in the coming week.

In the meantime, following the hearings the Commissioner has made a number of Orders, many requiring witnesses to produce documents previously requested but not yet disclosed; and Rulings to explain the reasons for the main decisions set out in his Orders. All the Orders and Rulings have now been published on the COI website. A list of hearings to date and those scheduled to take place in the coming week has also been published on the COI website.

In the next stage of the hearings, issues of privilege etc and redaction should not arise; and it is the Commissioner's intention that all hearings will be live streamed.

Steven Chandler
Secretary to the Commission

17 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY – FURTHER UPDATE

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The press Statement issued yesterday by the Premier Hon Andrew A Fahie has been brought to the Commissioner's attention; and he would like to confirm the position with regard to live streaming COI hearings. The default position is that hearings will be live streamed. However, in respect of all hearings to date (including the hearing on 18 May 2021 at which the Premier gave evidence), the Attorney General on behalf of the Premier and other Ministers etc whom she represents has asked for the hearings to be held in private to ensure that the rights to confidentiality and the Ministers' privileges, with respect to any documents or information that might be referred to, are maintained. The Commissioner is bound to respect those rights and privileges.

The Commissioner has, however, required transcripts of these hearings to be made public on the COI website as soon as the Attorney General has indicated which passages, if any, she considers it necessary to black out (redact) from the transcript, and the Commissioner has ruled on those requested redactions.

The Commissioner regrets that this procedure, required at the behest of the Ministers, has meant that the hearings cannot be live streamed, and there is an inevitable delay in making transcripts public.

The initial hearings were rendered necessary because the documents which have been disclosed by public officials appeared to be substantially incomplete and in very poor order, such that, in some cases, it was difficult or impossible to ascertain anything useful from them. At the hearing on 20 May 2021, on behalf of the Attorney General, Sir Geoffrey Cox QC, explained that checks on the disclosed documents had been made, and regrettably the documents disclosed represented the entirety of the available documents and the order in which they are in fact kept. The Commissioner has directed that the Ministers and other recipients of letters of request for documents check again and swear affidavits confirming that disclosure is complete; and an affidavit from the Attorney General (or another senior lawyer in her team) confirming that she is satisfied that all reasonable steps have been taken to give the requested disclosure. These affidavits are due to be lodged by 31 May 2021.

The Commissioner has also directed the Attorney General on behalf of the Ministers to set out their views in Position Statements on specific questions on governance he has posed to them. The Attorney General has confirmed that that will be provided by 31 May 2021. The Commissioner has made similar requests to the House of Assembly Members represented by Silk Legal, the Governor and others who have a

particular interest in governance and/or the operation of law enforcement and justice in the BVI. The invitation to provide a Position Statement allows those given the right to participate in the COI, and others with a special interest in the subjects under inquiry, a proper opportunity to set out, before further hearings take place, those matters which they say should inform the work of the COI.

Once these affidavits and Position Statements have been lodged with the COI, the oral hearings will resume. The Commissioner reiterates that it is his intention that all future hearings will be live streamed.

In the meantime, although the Commissioner appreciates that for some people live streaming will be a more convenient way in which to engage with the COI, the transcripts of the hearings to date are being published on the COI website as soon as they are available. The Commissioner knows that these transcripts are being read, with care and interest, by many who live in the BVI. He would urge all of those interested in the COI to read the transcripts as and when they can.

If anyone has information bearing upon the matters being considered in the hearings as revealed in the transcripts, or otherwise in the scope of the COI, who has not yet submitted it to the COI, they are asked to submit that information directly to the COI as soon as possible. As well as the secure website portal (www.bvi.public-inquiry.uk), the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+1 284 340 9078), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence, and will not be disclosed to anyone outside the COI team without the express authorisation of the person giving the information. The fact that hearings are public does not detract from that assurance.

Steven Chandler
Secretary to the Commission

21 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY – NEW DOCUMENT MANAGEMENT SYSTEM

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

Ahead of the beginning of the resumed hearings, the COI team has procured a new specialist document management system called 'Relativity'. This system is widely used by a number of prominent UK public inquiries when conducting hearings. It is as secure as the current system, with equally robust and safe mechanisms to protect information provided to the COI. It can be used to simplify the provision of documents to the COI by government bodies.

The new document management system will not change the ways in which members of the BVI public will be able to submit information directly to the COI. Anyone who believes they have information relevant to the COI or arising from an issue revealed in the transcripts published on the COI's website is asked to provide that information as soon as possible.

As well as the secure website portal (www.bvi.public-inquiry.uk), the COI has provided a number of different and secure ways for individuals to share information with the Inquiry Team, including a dedicated email address (contactcoi@bvi.public-inquiry.uk), a WhatsApp phone number for messages or audio/video calls (+1 284 340 9078), and a UK postal address (The Secretary, BVI Commission of Inquiry, Room RB 1.11, 22 Whitehall, London SW1A 2EG). Please be assured that all information will be received and held in strict confidence, and will not be disclosed to anyone outside the COI team without the express authorisation of the person giving the information.

Steven Chandler
Secretary to the Commission

28 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY – LIVE STREAMING OF HEARINGS

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The Commissioner has emphasised that he wants the inquiry to be conducted in as open and transparent a manner as possible. He expects those who have been granted the right to participate in the inquiry and their legal representatives to make every effort to assist him in ensuring a transparent process and that the BVI public are given accurate information as to the COI's progress.

For reasons that have been explained previously, the initial hearings of the COI were conducted in private. Transcripts of those hearings are available on the COI's website.

However, going forward, wherever possible, COI hearings will be conducted in public. Because of Covid-19 restrictions, the public are not able to attend the hearings in person; but the hearings will be live streamed via the COI's dedicated YouTube channel. The channel can be accessed via this link: BVI COI YouTube channel. The link will also be available on the COI's website.

There may be occasions where for good reason it will be necessary to hold a private hearing or go into private session (e.g. where some confidential government document is being considered). However, the Commissioner will ensure that these occasions are kept to a minimum.

The live stream will be subject to a three-minute time delay. In the event that a witness gives an answer which contains information that may not be made public, then the time delay will allow either Counsel to the Commission, the legal representative of a participant or a witness to raise the matter. The Commissioner will then direct that the live stream be paused and the hearing will go into private session. Once the Commissioner has determined the matter and any confidential evidence heard in private, the live stream will be resumed.

The next hearing is scheduled for Wednesday 2 June 2021 at 10am, when the Commissioner will hear legal submissions on behalf of the Attorney General on the extent to which Cabinet documents should be disclosed to the COI and thereafter to the public. The Commissioner has not received any application that this hearing be in private. It will therefore be live streamed. Further, the transcript of proceedings will be made available on the COI's website as soon as possible after the hearing.

Steven Chandler
Secretary to the Commission

31 May 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSIONER'S OPENING STATEMENT AT FIRST PUBLIC LIVE STREAMED HEARING, 2 JUNE 2021

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The COI held its first public hearing today, streamed live on the COI's dedicated YouTube Channel. At the start of the hearing, the Commissioner made an opening statement. A copy of that statement is attached to this Notice. In his Statement the Commissioner confirmed his wish that all future hearings should be held in public and streamed live so that the BVI public can better follow the work of the COI.

He has repeatedly expressed his readiness to use the wide powers he has to direct the COI's procedures to ensure the COI is able to work as flexibly and efficiently as possible. That is particularly important given the pandemic. At the hearing, the Commissioner expressed his hope that all those involved in the COI will work to ensure that it proceeds in an organised and efficient manner. To minimise the risk of disruption to the COI's work, the Commissioner yesterday published a revision to the COI Rules and its protocol on the redaction of documents. The Commissioner also published two new protocols: one concerning the conduct of the hearings; the second the provision of written witness evidence to the COI. These can all be found on COI's website at www.bvi.public-inquiry.uk.

In his Statement, the Commissioner also set out the timetable and intended topics for future substantive hearings to resume on 14 June. He noted that, given the deficient state of the documents produced and the sheer weight of issues which have been brought to the attention of the COI for investigation, it is clear that he will not be able to deliver his report by July. He has therefore sought an extension from His Excellency the Governor who has been kind enough to indicate that he is in principle willing to grant such an extension, but who has asked the Commissioner to report on progress of the COI by mid-July before he appoints a date by which he will require the Commissioner to report. The Commissioner remains committed to completing his investigation into the subject matter under inquiry and delivering his report with all due speed.

Steven Chandler
Secretary to the Commission

2 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

The Commissioner's Opening Statement for COI Hearing Wednesday 2 June 2021

I am delighted that this hearing is being live-streamed. The hearings to date, which have focused on production of information and documents, could not be public because, through the Attorney General, the BVI Government Ministers and Ministries she represents reserved their rights and privileges in respect of the information and documents being discussed. I stress that those Ministers and Ministries were entitled to rely upon such rights and privileges that they have to keep documents and information from the public; but it regrettably meant that the hearings could not be public. As I will explain, we are now beyond that stage; and, absent exceptional circumstances, all future hearings of the COI will be live-streamed.

As you are all aware, in January, I was appointed by the then Governor to conduct a Commission of Inquiry ("COI") to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to public officials may have taken place in recent years; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the British Virgin Islands.

In the first stage of the Inquiry, in addition to considering information which was helpfully submitted by members of the public, the COI made requests for voluntary production of information, mainly from Ministers and other public officials. Many documents were provided, and I am deeply grateful to the public officials who, on top of their regular duties, have been involved in a considerable amount of work to respond to the requests. I sincerely thank them for their efforts.

However, the initial COI hearings held in May, to which I have already referred, confirmed that the documents produced were significantly incomplete and in generally very poor order. Often, it was impossible to ascertain the story that they told. For example, I heard evidence from witnesses over several days on the BVI Government contracts in respect of radar barges simply to try and understand how those contracts might have come into being. Even now, the COI does not have a full set of the relevant documents. At the hearing on 20 May 2021, Sir Geoffrey Cox QC on behalf of the Attorney General frankly and properly conceded that the BVI Government's files are in "severe disarray", and that (he said) largely explained why the documents produced to the COI had been in such very poor order.

That has inevitably had a serious adverse impact on the progress of the COI. In particular, it is inevitable that the analysis of the documents, and the COI hearings, will be significantly more difficult and take substantially longer.

I promptly took a number of steps to mitigate the problems that have resulted.

First, on 20 May 2021, I directed that, by 31 May, each Minister and other public official who had responded to a letter of request for documents, having made any further checks necessary, should swear an affidavit setting out the steps they had taken to identify documents covered by each request and to confirm that they considered they had taken all reasonable steps to ensure that disclosure is complete. I directed that those assurances be supported by an affidavit by the Attorney General (or a senior member of her team) confirming that, in her view, reasonable

steps have been taken to ensure the documents produced are complete. The Attorney General has asked for an extension to lodge those affidavits to 7 June, which I have granted.

Second, I have commissioned a specialist IT system called Relativity to manage the documents that we have. This system is widely used in public inquiries and major judge-led inquests in England and Wales including some which receive material of a highly personal nature (such as the Inquiry into the Grenfell Tower Fire and the Infected Blood Inquiry) or which engage national security (such as the Undercover Policing Inquiry and the Jermaine Baker Inquiry). The system provides me with the necessary confidence that documents provided to the COI will continue to be held in a secure way; but it also has powerful search and analysis functionality which, with the affidavits to which I have referred, will reduce the risk that poor or incomplete documents will disrupt future hearings.

Third, I had already invited those who have participant status, such as the Attorney General and elected Ministers and Members of the House of Assembly, and others with an interest in these matters to provide me with position statements setting out their response to specific questions regarding governance and the operation of the law enforcement and justice systems. This gives an early opportunity for those with a constitutional interest in these matters to inform the work of the COI. These position statements are still being received but, subject to any compelling objection, I propose publishing them on the COI's website so that the public can better follow our work.

The next step, which will begin shortly, is for the COI to issue letters requesting corporate statements from the relevant Ministries which, in respect of particular topics of interest, set out the relevant facts as they see them and explain the available documents. These, I hope and expect, will again ameliorate deficiencies in the documents and will enable more focused hearings going forward.

With those measures in place, we can resume substantive hearings, which I propose to do on Monday 14 June. As I have said, unless I exceptionally grant an application that a hearing be heard in private, all hearings will be live-streamed, and a link to that recording will be available on the COI website. If, during the course of a hearing, Counsel to the Commission or a participant or a witness considers that the evidence being given is privileged or confidential or otherwise cannot properly be given in public, than that person will make that clear to me and the live-stream will be temporarily suspended whilst that point is aired and determined. The live stream will be resumed as soon as it can be. In addition to a live-stream recording, once available, transcripts of hearings will continue to be published on the website.

I propose holding hearings from 14 June on the basis of a four day week, Monday to Thursday, which will give Fridays and weekends as preparation time. Hearings will generally commence at 10am and be concluded by 4.30pm; but I will remain flexible, and the COI is fully prepared to sit outside those times and days to ensure that our work proceeds efficiently and effectively. Key information concerning the conduct of hearings has been set out in a protocol published yesterday. Those who have attended the private hearings will already be aware of some of this information. Publishing it ahead of the public hearings has the important benefit of assisting the BVI public better to follow the public hearings.

I would like now to give some more detail about the forthcoming hearings.

I propose dealing with the subject matter under inquiry by topic. Although this may mean that some witnesses will be called more than once, again this will ensure that the work of the COI proceeds in an organised and efficient manner, and will give the participants a full opportunity to engage with the process. Whilst I repeat I propose to be flexible and other issues may arise during the course of the hearings, the proposed order in which I intend to take topics is as follows:

(1) The interests held and declared by Members of the House of Assembly and elected Ministers.
(2) Questions arising from the position statements submitted by participants and others on governance and law enforcement and justice.
(3) The work of the Auditor General, the Internal Auditor and the Complaints Commissioner.
(4) The composition and function of statutory boards.
(5) The purchase and leasing of Crown Land.
(6) The system under which BVI Government enters into contracts both in general and in relation to specific contracts.

That is an ambitious programme; but one which is, in my view, necessary under my terms of reference. I intend to allocate a specific number of days to each topic.

I expect those who have the privilege of participant status and their legal representatives to make every effort to assist me and my team in maintaining the progress of the COI. One way in which that can be done is if participants now make submissions on the topics I have set out, identifying any issues within those topics they consider I should investigate and witnesses whom I should call. To have these points raised shortly before hearings relating to a topic are about to commence would be disruptive to the hearing schedule. Participants should therefore send any submissions they wish to make on those matters, in writing to the COI, by 9 June 2021. I do not expect any difficulty with participants complying with that direction given that they have provided much of the documentation received by the COI on these topics; and, at least in the case of those who have instructed the Attorney General, work has been progressing for some months. As and when the COI can give more information on each topic, for example as to which witnesses will be called, then it will do so. I expect the first information to be sent out to participants today or tomorrow. A rolling timetable will be available to the public on the COI website.

I want to say something about redaction, because this is something else which has the potential for interfering with our timetable. It is something with which the lawyers in this room will be familiar. For the benefit of the public, redaction is a process by which certain information which cannot be made public is blanked out. There may be good reasons why a document needs to be redacted: for example, it may contain personal data or information otherwise confidential or privileged. What is redacted is ultimately a decision for me as Commissioner, taking into account both the relevant law and all the circumstances including the views expressed by both participants and others that this inquiry should be as transparent as possible.

On 5 March 2021, the COI published a redaction protocol. It is detailed but, put simply, it allows those who provide documents to the COI to make representations as to why information should be redacted from the documents which they have provided. However, I am concerned that the problems surrounding the disclosure received from government bodies will undermine the effectiveness of that protocol. Whilst respecting rights of privacy and confidentiality, it is

important to maintain and safeguard the hearing programme. I have therefore published an updated redaction protocol, which allows the COI to invite those providing documents to identify any information they want redacted, and the reasons for that request, but without rendering it necessary to rule on every redaction issue before a hearing. Such issues will only be determined as and when necessary, in the light of how hearings in fact proceed. There is a balance to be struck between ensuring that sensitive information which for legitimate reasons needs to be redacted is not put into the public domain, and the COI being as transparent as possible, a balance which I consider the new protocol provides. I expect the legal representatives of participants to work with the COI Team in a proactive way to find a pragmatic solution to any issues that arise.

I stress that none of this exercise will compromise in any way the COI's undertaking to members of the public who have made information available on a confidential basis that that material will remain confidential and the source of it will remain anonymous.

I intend to press forward with the public hearings as quickly as is consistent with my terms of reference, which require the inquiry to be not only faithful and impartial, but full.

However, irrespective of those efforts, it will be clear to all that it is not now possible for me to deliver my report by 19 July 2021, the initial date for its delivery in my Instrument of Appointment. Indeed, it is inconceivable that the hearings will be over by that date. I have therefore written to His Excellency the Governor seeking an extension of that time. The Governor has been kind enough to indicate that, given the matters to which I have alluded and the sheer weight of issues which have been brought to the attention of the COI for investigation, he is in principle willing to grant such an extension; but he has asked me to report on progress of the COI by mid-July, before he appoints a date by which he will require me to report. I am grateful to His Excellency. He, and all those who live in the BVI, may rest assured that I will press forward with the inquiry, and deliver my report, with all due speed.

The Rt Hon Sir Gary Hickinbottom
2 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COI REVISED PRIVACY NOTICE

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The COI has revised its Privacy Notice to reflect the fact that for the purposes of applicable UK data protection legislation, the COI is the sole data controller of the data it collects and holds. The Foreign, Commonwealth and Development Office's (FCDO's) role is restricted to providing IT infrastructure (with its sub-processors) to the COI. That has been the case since the COI was established. The FCDO's role throughout has thus been as a data processor.

At the hearing yesterday the Commissioner reiterated that his is an independent inquiry. As the sole "data controller" under UK data protection law, the COI exercises overall control over the purposes and means of the processing of personal data. A "data processor" under UK data protection law cannot decide what to do with personal data. All personnel who process data on behalf of the COI only do so on instructions from the COI and owe a duty of confidentiality to the Commissioner.

Throughout the course of his inquiry, the Commissioner has ensured that all information provided to him is held securely. The IT systems used by the COI have been robustly tested to ensure they meet the required standards of data security. Those who have made contact with the COI or who wish to do so or to submit information to it can continue to do so in the knowledge that any information provided will continue to be held securely and safely.

Steven Chandler
Secretary to the Commission

3 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COI HEARINGS IN WEEK BEGINNING 14 JUNE 2021

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

As explained in the Commissioner's Statement on 2 June 2021, the COI intends to resume substantive hearings on Monday 14 June 2021. During this first week of hearings, the Commissioner intends to hear witness evidence from elected Ministers and other Members of the House of Assembly, and some former Members, particularly on their held and declared interests.

However, a number of issues have been raised by those representing participants in the COI which require resolution before the witness evidence can proceed, and in particular before the final order of witnesses can be determined. The Commissioner will therefore hold a Directions hearing on Monday 14 June at 9am to determine these issues. It is expected that witness evidence will commence at 10am that day. The Commissioner intends that all the matters canvassed at the hearing will be live-streamed on the COI's YouTube channel so that the BVI public can continue to follow the work of the COI.

The list of witnesses expected to appear on Monday 14 June 2021 and those confirmed for later in the week is attached to this Press Notice, and is also published on the COI's website at www.bvi.public-inquiry.uk. It is expected that, following the Directions hearing, the COI will be able to publish a full schedule of the witnesses who will be giving evidence next week.

Steven Chandler
Secretary to the Commission

10 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Commissioner: The Rt Hon Sir Gary Hickinbottom

Secretary: Steven Chandler

BVI International Arbitration Centre
3rd Floor, Ritter House
Wickham's Cay II
Road Town, Tortola

Room RB 1.11
22 Whitehall
London SW1A 2EG

Tel: +1 (284) 340 9078
Email: steven.chandler@bvi.public-inquiry.uk

List of Hearings

(as at 10 June 2021)

(To be live streamed. Link available at: BVI COI YouTube channel)

Week commencing 14 June 2021

DATE/TIME	PERSON
Monday 14/6/21 at 9.00am	Directions Hearing
Monday 14/6/21 at 10.00am	1. Hon Marlon A Penn 2. Hon Alvera Maduro-Caines 3. Hon Mark H Vanterpool 4. Hon Julian Fraser 5. Hon Melvin M Turnbull 6. Hon Julian Willock
Monday 14/6/21 at 11.00am	1. Hon Dawn J Smith 2. Hon Sharie B de Castro 3. Hon Shereen D Flax-Charles
Monday 14/6/21 at 2.00pm	1. Hon Kye M Rymer 2. Hon Carvin Malone
Tuesday 15/6/21 at 10.00am	1. Hon Neville A Smith.
Tuesday 15/6/21 at 2.00pm	1. Hon Vincent O Wheatley
Wednesday 16/6/21 at 2.00pm	1. Dr Hubert Robinson O'Neal 2. Ms Ingrid Moses-Scatliffe 3. Mr Myron V Walwyn
Wednesday 16/6/21 at 4.00pm	1. Hon Natalio D Wheatley
Thursday 17/6/21 at 10.00am	1. Dr Daniel O Smith

	2. Dr Kedrick Pickering 3. Mr Ronnie W Skelton
Thursday 17/6/21 at 2.00pm	1. Mr Archibald C Christian
Friday 18/6/21 at 1.00pm	1. Hon Andrew A Fahie

10 June 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

MINISTERS' POSITION STATEMENT: BREACH OF CONFIDENTIALITY

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

An article has been published in the Virgin Island News Online (VINO) today which refers to, and heavily quotes from a Position Statement on governance submitted to the COI by the BVI elected Ministers. The Position Statement contains personal data and other information which the Attorney General has rightly accepted are likely to be confidential. Although it is the Commissioner's intention to publish all of the Position Statements, including that of the Ministers, as the Attorney General was aware, the COI team are currently in the process of ascertaining what rights of confidentiality might be asserted by, in particular, the Governor. As part of the exercise, with the Attorney General's approval, the Ministers' Position Statement has thus been shared with the Governor's Office, of course on the basis that they maintain the duty of confidence for the time being. The duties of confidence arising in the COI are owed to the Commissioner.

The Commissioner addressed this apparent breach of confidence at the commencement of the COI public hearing this afternoon. A copy of the draft transcript is attached to this Press Notice, and the hearing can be viewed on the COI's YouTube channel. As Counsel to the COI and the Commissioner set out, as soon as the article was brought to their attention, the Commissioner caused enquiries to be made of the small COI Team here in the BVI (comprising five people including Counsel to the COI), and the Commissioner is fully reassured that the leak did not emanate from anyone in the COI team. To that extent, the VINO article is wrong.

However, the leak must have been made by someone else with access to the Position Statement; and, in relation to the Statement, all who have such access owe a duty of confidence to the Commissioner.

The Commissioner takes the breach of confidence which has occurred extremely seriously. As he emphasised at the hearing, the COI can only be conducted on the basis that those who owe a duty of confidence to the Commissioner ensure that it is kept.

The Commissioner directed during the hearing that the Attorney General and the Governor's Office provide by 9am tomorrow (Thursday 17 June 2021): (i) a list of every person who has had access to this document; and (ii) confirmation that enquiries have been made as to who has had access to the document, as to enquiries they have made to ascertain who from that list may have leaked this document. An Order to that

effect has been made. Once these have been received, the Commissioner will make any further enquiries that he considers appropriate.

Steven Chandler
Secretary to the Commission

16 June 2021

COI Hearing Day 12 (16 June 2021)

Partial draft Transcript

COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat.

MR RAWAT (COUNSEL TO THE COMMISSION): Commissioner, our next witness due is Dr Hubert O'Neal. Before we call Dr O'Neal, may I raise one matter, which came to the attention of the COI just after we adjourned for lunch.

An article has been published online in Virgin Islands News Online, and its heading is "COI document reveals turf war between ex-Governor Jaspert and VI Government." The article refers to "a 33 page statement which was shared with our newsroom by senior sources within the Commission of Inquiry (COI). That 33 page document is a reference to the position statement that was filed and served with the COI on behalf of the elected Ministers on the 1st of June 2021. That followed on your invitation to a number of individuals and entities to file position statements on the question of good governance or governance and law enforcement and justice.

Prior to that date it had been shared with two Members of the House of Assembly who are represented by Silk Legal. The COI was informed of that on the 1st of June 2021. It has not yet been published by the COI, and save with one exception, which I will come to now, it has not otherwise been provided to any other participant or individual or body.

What has occurred--and this was with the agreement of the Attorney General--was that you directed that the position statement be shared with the Governor's Office, and the reason for that is something that I highlighted at the Directions Hearing on Monday which was that the content of the position statement had raised issues that, firstly, required obtaining further disclosure from the elected Ministers, but also putting those who are the subject of their criticisms on the notice of the content of the document. All those who receive documents from the COI in the accepted manner are bound by a duty of confidentiality to you as Commissioner. Insofar as it needs to be, that has been made explicit in the COI Rules, but it is in any way a convention by which all legal representatives are used to operating in any forum.

Since the article was drawn to our attention just as we adjourned for listen, you and I, Commissioner, have discussed the content of the article and its reference to the position statement emanating from senior sources within the Commission of Inquiry. If I make clear, that leaving yourself aside, Commissioner, the COI Team here numbers 5 people, including myself. Enquiries, therefore, have been made of all members of the COI Team over the lunchtime adjournment, and I am satisfied, and I believe, Commissioner, you are also satisfied, that this document did not emanate from within the COI or indeed from any source, however senior or junior. So I just wanted to set that out and put it on the record as to the steps we have taken in light of the article.

COMMISSIONER: Thank you, Mr Rawat. As you say Mr Rawat, this article has been brought to your attention and my attention during the short adjournment for lunch. Can I make make this clear that the substance of the leaked document will be the subject of this Inquiry. In the document, the Ministers make serious allegations that Governor Jaspert and

the United Kingdom Government have acted improperly, unconstitutionally, and illegally in the sense they have acted against international law in respect of matters of governance. Contrary to speculation in the media and, indeed, by some of the participants in this Inquiry, of course, I will investigate such criticisms.

But the criticisms that have been made have to be investigated in the proper way. The Attorney General lodged the Ministers' position statement on their behalf.
The statement is signed by all seven Ministers. Both she and they have confirmed that they have no redactions that they would wish to make prior to its publication. I stress that this document will be published with any appropriate redactions as soon as I have received submissions in respect of what redactions need to be made.

The position statement contains various personal information which the Attorney General has a duty to protect, as do I as Commissioner. Furthermore, it contains information that the Attorney General has said may be confidential, and she
has indicated that those who may have the benefit of that confidence include the Governor and the United Kingdom Government. That is why Mr Rawat as you have said, I have directed that the position statement and its appendices be sent to the Governor's Office so that he may make any submissions that he wishes to make in respect of redactions both of personal data and other confidential information that he considers should be made prior to a determination by me and then publication of this document.

Furthermore, I've also directed the Attorney General for legal submissions on the criticisms made which I have not yet received. Yet, further, as indicated in Monday's hearing, the Ministers have failed to disclose the documents they have which are, on any view, relevant to the criticisms which they make. I have directed them to make that disclosure to the Commission of Inquiry by tomorrow. They say that they will comply by Friday. These are matters which are due to be considered in the open hearings next week.

As you've said, Mr Rawat, over the course of the short adjournment that we had, you and I have caused enquiries to be made of the small COI Team here. They were relatively easy enquiries to make because the entire team save for the Secretary, who is working literally next door, are here in the hearing room. I've received comfort, as have you, that the leak did not emanate from anyone in this team. To that extent, this article is simply wrong.

But that means that the leak must have come from somewhere else, and it must have come from someone who owes a duty of confidence to me as Commissioner in this Inquiry. I take that extremely seriously. It's unfortunate that the Attorney General is not represented at the moment. I think this is the first time, this is pure coincidence. This is the first time she's not been represented at one of these hearings, but I direct the Attorney General and the Governor's Office to whom this document has been sent in the circumstances that you and I have outlined, to write to me by 9.00 am tomorrow with the list of every single person who has had access to this document and identifying enquiries they have made to ascertain who may have leaked this document.

I will, once I've received those letters, make any further enquiries that I consider appropriate, but this Commission of Inquiry will be conducted on the basis of a
proper confidentiality with all of the participants and all of those who are engaged in this process complying with their obligations of confidentiality to the full. This
Inquiry simply ca not be conducted on any other basis.

I know that the Attorney General is not represented; but, if a message could be sent through to her and to the Governor's Office immediately, that those are my directions. An order will follow later today.

MR RAWAT: Commissioner, can I, just in terms of your direction, can I invite you to consider whether a similar direction needs to be made to Silk Legal, given that two of those they represent had access to the position statement prior to its disclosure to the COI?

COMMISSIONER: The two individual members whom they represent who we know have had access to the position statement because they've referred to it in their own letters confirming their agreement with it indeed prior to us getting the position statement. In those circumstances is it sufficient that the Attorney General tells us who she has disclosed the document to under her duty of confidentiality?

MR RAWAT: Yes, that would satisfy the point that I have raised.

COMMISSIONER: And the direction of course will include any individuals to whom, any individuals who have had access to it have disclosed information. It will in that sense have a waterfall effect.

MR RAWAT: Thank you.

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

NEW COVID-19 MEASURES FOR COI HEARINGS

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The COI is holding its oral hearings in the International Arbitration Centre (IAC) in Road Town. Bearing in mind the BVI government's latest COVID-19 advice and the COI's continuing desire to protect the health, well-being and safety of witnesses, visitors and staff, the COI has strengthened its COVID-19 measures.

Witnesses are still able, if they wish, to give their evidence in person at the IAC but can now choose to give their evidence remotely via video link. Additionally, in order to keep to a minimum the number of people in the IAC and in the hearing room at any one time, witnesses' legal representatives can now only attend remotely via video link. They will not be able to attend in person even if a witness (whom they represent) decides to give evidence in person. The IAC is also currently limiting general access to its premises to key card holders only.

Even before this latest rise in COVID-19 cases, all visitors to the IAC have been required to follow strict COVID-19 measures including: wearing a mask/face covering, hand sanitising on arrival, and registering at the IAC reception. Once seated in the waiting room and hearing room, witnesses and other participants are able to remove their mask/face covering if they are comfortable doing so. Social distancing is encouraged in the hearing room, and across the IAC, at all times. The IAC, including the hearing room, is cleaned thoroughly at the end of each sitting day. Additional sanitising as appropriate is carried out between different witness sessions. These measures will continue.

All measures remain under constant review.

Steven Chandler
Secretary to the Commission

7 July 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COI HEARINGS AND COVID-19

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

Whilst the Commissioner wishes to complete the Inquiry expeditiously, the health and safety of all involved remains paramount. In the Press Notice of 7 July 2021, he announced strengthened COVID-19 measures for COI hearings. In line with the current health advice, further to the measures then announced, with immediate effect, witnesses will now not be able to attend hearings in person. They will instead attend remotely via video link. Relevant documents will be sent to them and any legal representatives electronically.

The Commissioner remains very sensitive to the evolving situation with regard to COVID-19, about which he has spoken with the Governor. The Commissioner will continue to monitor the situation on a daily basis.

Steven Chandler
Secretary to the Commission

9 July 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

THE COI'S FORTHCOMING WORK PROGRAMME: COMMISSIONER'S STATEMENT, 14 JULY 2021

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

At the start of the hearing session held this afternoon, the Commissioner delivered a statement setting out the COI's forthcoming work programme. A copy of that statement is attached to this Notice.

Steven Chandler
Secretary to the Commission

14 July 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Commissioner's Statement

Wednesday 14 July 2021

As you are all aware, in January, I was appointed by the then Governor to conduct a Commission of Inquiry ("COI") to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to public officials may have taken place in recent years; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the British Virgin Islands. I would like to thank the people of the BVI for their continuing assistance and support in this task. In particular, I am acutely aware that much of the work to provide evidence to the COI has fallen on the shoulders of public servants for whose continued efforts I repeat my thanks.

On 2 June 2021, I gave a statement detailing the COI hearings I proposed to hold to cover the following particular topics:

(1) The interests held and declared by Members of the House of Assembly and elected Ministers.
(2) Questions arising from the position statements submitted by participants and others on governance and law enforcement and justice.
(3) The work of the Auditor General, the Internal Auditor and the Complaints Commissioner.
(4) The composition and function of statutory boards.
(5) The purchase and leasing of Crown land.
(6) The system under which the BVI Government enters into contracts both in general and in relation to specific contracts.

Given that witnesses would likely be taking holidays during August, I did not propose having hearings that month; but I hoped that we could complete all of the above topics before the end of July, and I set a timetable to that end. Despite the many challenges we have had – primarily in evidence from the BVI Government being delayed – we have kept up with that timetable to date. We are due to complete registration of interests, governance and the law enforcement and justice systems, and the work of the Auditor General, Internal Auditor and Complaints Commissioner by the end of this week, with very few loose ends left to tie up. We have also done a good deal of work on contracts.

It was proposed that we would cover statutory boards next week and Crown land in the final week of July before breaking for August. To avoid a disjointed approach, I was keen to deal with each of these topics in one go. Regrettably, we are not currently in a position to proceed with either topic. Requests were made for evidence from Ministers some weeks ago, but, despite extensions of time, in respect of each, there is a good deal outstanding. Some evidence has not yet been lodged at all. Some of the evidence that has been lodged is patently incomplete. In the last week or so, the necessary restrictions in relation to Covid 19 have no doubt made the task of collecting and submitting the necessary evidence more challenging. In any event and despite the efforts that have been made by all, the Attorney General, through her Inquiry Response Unit (IRU), has been unable to give me any confident prediction as to when

we will have all of the relevant material in relation to these topics. Even when we do receive it, the COI team will need time to analyse it and prepare for the hearings.

I reiterate that I am determined to complete this Inquiry expeditiously. However, given the current circumstances with regard to the evidence, it will be impossible to have focused hearings on these topics now. They will be rescheduled. This means that there will be no hearings concerning statutory boards next week or Crown land in the week commencing 26 July. However, if we are able to call witnesses to tie up loose ends on the topics we have done, then we shall do so. As usual, details will be published on the COI website.

The rescheduling of these hearings does not of course mean that the work of the COI will stop. Far from it. We will continue to liaise with the Attorney General, her IRU and the public servants involved with a view to obtaining the outstanding evidence we have requested, and we will continue to analyse the information that we have to ensure that future hearings remain focused. However, this work need not be done in the BVI, and indeed can most efficiently be dealt with in the UK; and therefore we propose returning to the UK during the course of the next two weeks.

It is our intention to return to the BVI in late August, when, hopefully, we will be able to resume hearings with witnesses appearing in person at our hearing room at the International Arbitration Centre. In the event that in person hearings are not possible, we will continue with remote hearings.

In my statement of 2 June 2021, I said that, it being clear that I would be unable to deliver my report to His Excellency the Governor by 19 July, I had requested an extension; and the Governor had kindly indicated his willingness in principle to grant an extension. Before identifying a new date, he asked me to report on progress in mid-July. I have given the Governor that report and, on the basis of it, he has granted an extension to 19 January 2022. That is, I hope, out of an abundance of caution; but, in circumstances in which the hearings are unlikely to be complete until October, I am particularly grateful for the extension that has been granted. The Governor, and all those who live in the BVI, may rest assured that my team and I will continue to work tirelessly to deliver the report as soon possible.

The Rt Hon Sir Gary Hickinbottom
14 July 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY: UPDATE

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

As the Commissioner has confirmed, the COI will not hold hearings in August; and, as it is not possible to arrange hearings in respect of Statutory Boards and Crown Land prior to the August break as the Commissioner had hoped, the hearings earlier this week will be the last this month.

In his statement on 2 June 2021, the Commissioner explained that, given the history of inadequate and incomplete disclosure of documents and to ensure properly focused hearings, he was making requests for corporate witness statements in relation to these topics. These requests were largely addressed to Ministers, but the Commissioner was content for a Minister to decide if a public officer should provide the statement in his or her stead. The Commissioner expected the Inquiry Response Unit (IRU) to assist in the preparation of these statements. Despite requests having been made weeks before the recent rise in Covid 19 cases and multiple extensions of deadlines, in substantial part these statements are still awaited. Whilst the Commissioner is sensitive to the fact that the current Covid 19 situation in the BVI now makes it more difficult for some Government departments, it is vital that the material outstanding be provided as soon as possible to enable focused hearings to resume.

The Commissioner and his team will be returning to the UK to continue the task of preparing for the forthcoming hearings. They will return to the BVI in late August to complete the hearings. It is hoped that it will be possible by then for witnesses to appear in person at our hearing room at the International Arbitration Centre. The COI however has arrangements in place to allow for remote hearings should these become necessary. The COI will continue to keep the BVI public informed through its website.

The Commissioner reiterates his gratitude to the people of the BVI for their continuing help and support, and to the public officers upon whom the main burden has fallen to provide the documentation and evidence that is vital to enable the COI to carry out its work and fulfil its Terms of Reference.

Steven Chandler
Secretary to the Commission

21 July 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COI TEAM RETURN TO BVI

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

As envisaged, the COI team will be returning to the British Virgin Islands during the coming week to recommence hearings on Monday 6 September 2021. A provisional hearing programme will be published shortly.

In the meantime, in the light of the continuing Covid restrictions, the Commissioner has issued an amended protocol concerning the provision of written evidence to allow for evidence to be admitted in unsworn form, which can be found on the COI website.

Further to publishing reports issued by the Auditor General which were considered at hearings before the Commissioner, the COI has also, following redaction of personal data, recently published on its website nine reports issued by the Internal Auditor which were also considered at earlier hearings, namely:

1. COVID-19 Stimulus Draft Audit Report and Appendices I to III (2020).
2. Assistance Grants Programme 2006 to 2008 (2009).
3. House of Assembly – Assistance Grant Programme – Follow-Up Audit Report (2011).
4. Government Ministries – Assistance Grants Programmes Draft Audit Report (2014)
5. Her Majesty's Customs – Courier Clearance Operations and Partial Payment Programme (2020)
6. Her Majesty's Customs – Missing Revenue – Suspicion of Fraud – Investigation Report (2015)
7. Immigration Board: Belonger Application Process (2012)
8. Department of Immigration – Belonger Application Process – Follow-Up Audit Report (2014)
9. Petty Contract Administration (2012)

The COI has additionally published on its website HE the Governor's response to the BVI Government Ministers' Position Statement on Governance etc.

Steven Chandler
Secretary to the Commission

24 August 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

RESUMPTION OF COI HEARINGS

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

As previously indicated, the COI team will be returning to the British Virgin Islands during the coming week to resume hearings on Monday 6 September. The first six days of hearings will deal with the composition and function of Statutory Boards. A current hearing schedule is attached to this Notice. Updates to the schedule will be available on the COI's website as the hearings progress. Hearings will continue to be conducted in public via a live stream on the COI's dedicated YouTube channel.

Following the directions hearing on 13 July 2021, at which the applicability of the rules of procedural fairness to the work of the COI was considered, the resumed hearings will be used in part to afford public officials the opportunity to respond to potential criticisms arising from evidence received by the COI. However, in order to protect the interests of all who might be concerned and to safeguard their rights to confidentiality, neither details of potential criticisms nor the identification of those at whom they may be directed will be publicised in advance of the hearings.

Subject to COVID-19 restrictions allowing, witnesses will be expected to attend hearings in person. COVID-19 safety measures will continue to be implemented at the COI's offices and hearing room in the International Arbitration Centre (IAC) in Road Town, and remain under constant review.

Steven Chandler
Secretary to the Commission

25 August 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Commissioner: The Rt Hon Sir Gary Hickinbottom

Secretary: Steven Chandler

BVI International Arbitration Centre
3rd Floor, Ritter House
Wickham's Cay II
Road Town, Tortola

Room RB 1.11
22 Whitehall
London SW1A 2EG

Tel: +1 (284) 340 9078
Email: steven.chandler@bvi.public-inquiry.uk

List of Hearings

(as at 25 August 2021)

(To be live streamed. Link available at: BVI COI YouTube channel)

This following List of Hearings is correct as at 25 August 2021. However, the timetable is subject to change. Revised Lists will be published on the COI website.

Week commencing 6 September 2021

The hearings scheduled this week deal with **the composition and function of statutory boards**.

DATE/TIME	PERSON
Monday 6/9/21 at 10.00am	Directions hearing
Monday 6/9/21 at 2.00pm	Mr Edward Childs
Tuesday 7/9/21 at 10.00am	Ms Tasha Bertie
Tuesday 7/9/21 at 2.00pm	Hon Carvin Malone
Wednesday 8/9/21 at 10.00am	Mr Joseph Abbott-Smith
Wednesday 8/9/21 at 2.00pm	Hon Vincent O Wheatley
Thursday 9/9/21 at 10.00am	Dr Carolyn O'Neal-Morton

Week commencing 13 September 2021

The hearings scheduled on 13 and 14 September deal with **the composition and function of statutory boards**.

DATE/TIME	PERSON
Monday 13/9/21 at 10.00am	Dr Carolyn O'Neal-Morton
Tuesday 14/9/21 at 10.00am	Hon Andrew A Fahie

25 August 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COI HEARINGS RESUME ON MONDAY 6 SEPTEMBER 2021

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

As set out in the COI's Press Notice of 25 August, witnesses are currently expected to attend hearings in person unless they have good reason not to do so, for example they are quarantining, which requires them to attend remotely via video link. If a witness considers he or she has good reason to appear remotely, then they must contact the Secretary (steven.chandler@bvi.public-inquiry.uk) and the Assistant Secretary (juienna.tasaddiq@bvi.public-inquiry.uk) as soon as possible after notification that they are required to give evidence.

In addition, in the light of current BVI Government guidelines and in order to keep to a minimum the number of people in the International Arbitration Centre (IAC) and in the hearing room at any time, only one legal representative should accompany the witness in person. Other legal representatives for the witness, if they choose, can attend remotely via video link. They should let the Secretary and the Assistant Secretary know 24 hours in advance if they wish to do so. Alternatively, of course, they can follow proceedings via the COI's YouTube channel.

Legal representatives of participants whose clients are not that day giving evidence can only attend remotely. They should again let the Secretary and the Assistant Secretary know 24 hours in advance if they wish to do so. Alternatively, of course, they too can follow proceedings via the COI's YouTube channel.

COVID-19 safety measures at the COI's offices in the IAC remain under constant review.

Steven Chandler
Secretary to the Commission

3 September 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

EVIDENCE IN RELATION TO BELONGERSHIP

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

The Attorney General wrote to the Commissioner on 30 September 2021, a letter which she made public, raising a number of concerns about the evidence given to the COI by the Hon Vincent Wheatley on 28 September 2021 on issues pertaining to Belongership.

The Commissioner sent the Attorney General a response to her letter on the day he received it. However, prior to the Attorney General's letter, the Commissioner had written to her seeking further information in relation to the relevant matters, in respect of which the Attorney General has asked for more time to respond. Given that these matters may be the subject of further evidence in due course, the Commissioner does not consider it would be appropriate to publish his correspondence with the Attorney General, at least at this stage in the COI's proceedings: as always, he is anxious to maintain the integrity of evidence, and procedural fairness for all.

Steven Chandler
Secretary to the Commission

5 October 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

UPDATE AND FURTHER HEARING ON 24 NOVEMBER 2021

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner.

At a COI hearing on 22 October 2021, the Commissioner issued a number of directions to ensure the completion of all outstanding evidential matters. He has granted a number of extensions of time for compliance with those directions.

The Commissioner has now scheduled a further hearing commencing at 9am on Wednesday 24 November 2021 at which he will hear further evidence. The logistics and detailed timetable for that hearing are not yet finalised; but that evidence will include further oral evidence from HE Governor John Rankin. Following the provision of additional documentary evidence on behalf of the elected Ministers, the Commissioner also intends to take oral evidence from a small number of other witnesses. Those witnesses will be confirmed shortly.

Having received a list of those matters on which they wish to file joint closing written submissions, the Commissioner has given the Attorney General and the elected Ministers permission to do so limited to 20 pages. He has stressed the importance of adhering to that page count. Once those submissions are received, the Commissioner will consider if there is a need to hear oral submissions from Counsel instructed on behalf of the Attorney General and the elected Ministers. Any oral submissions are likely to be limited to matters arising from the written submissions.

Silk Legal on behalf of the Members of the House of Assembly (except the elected Ministers and the Attorney General) have neither submitted a list of any matters upon which they wish to make closing submissions as required by the Commissioner's 22 October 2021 Order, nor have they applied for an extension of time to do so. Similarly, they have neither filed submissions in relation to the Sea Cow's Bay Project (which they previously indicated they may wish to do), nor sought an extension of time. In the circumstances, Silk Legal will not be permitted to make oral closing submissions.

It is the Commissioner's intention to deal with all outstanding evidential matters, and any final oral submissions, on 24 November 2021.

Steven Chandler
Secretary to the Commission

11 November 2021

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

PRESS NOTICE

COMMISSION OF INQUIRY: EXTENSION

The Commission of Inquiry ("the COI") was issued on 19 January 2021 to look into whether corruption, abuse of office or other serious dishonesty may have taken place amongst public, elected and statutory officials in recent years; and to make appropriate recommendations as to governance and the operation of the law enforcement and justice systems in the BVI. The Rt Hon Sir Gary Hickinbottom is the sole Commissioner. Under Instruments of Appointment dated 19 January and 14 July 2021, the Commissioner was required to deliver his Report to His Excellency the Governor by 19 January 2022.

The COI has obtained very many documents from the BVI Government, a large number of which the Commissioner will wish to rely on in his Report. As recorded elsewhere, these documents have been produced often in very poor order. Further, despite directions from the Commissioner, the elected Ministers (including the Cabinet as such) have not taken timely advantage of opportunities to make applications to the Commissioner that documents (or parts of documents) which have been sent to the COI should not be disclosed to the public. Had such applications been made in a timely way, the Commissioner could and would have been able to have published the documents already, which would have helped the BVI public to understand the issues as they arose.

The COI was established expressly for the welfare of the people of the British Virgin Islands, and the Commissioner has throughout conducted it in an open and transparent manner, so that the public have had the opportunity of seeing the COI at work and the evidence that it has been obtaining. Such openness and transparency remain important.

Therefore, whilst publication is ultimately a matter for the Governor, the Commissioner has always intended, and still wishes, to deliver to the Governor not only the Report but also the evidence upon which the Report relies in a form that might be published. The Commissioner will certainly do what he can to encourage the Governor to publish them. However, the elected Ministers have continued to reserve their position on whether certain documents they have produced to the COI should be made available to the public, purporting instead to agree to their disclosure to the Governor but no further. This potentially impacts not just on the publication of the supporting evidence, but of the Report itself insofar it relies on that evidence.

Whilst wishing appropriately to respect confidentiality that may attach to documents such as Cabinet papers, the Commissioner is firmly intent on a course that will ensure, so far as possible, that the Governor is able to make the Report and the supporting evidence, in the form prepared by the Commissioner, available to the public.

These issues are still occupying the COI. Consequently, with regret, the Commissioner has asked the Governor to extend the time for delivery of his report and

supporting evidence. The Governor has today graciously indicated that he has granted a three month extension. The Commissioner is confident that, whatever the approach of the elected Ministers may now be, that will be sufficient time for him to determine any further applications that may be made to restrain publication, and to deliver his Report and supporting evidence to the Governor in a form which the Commissioner considers can be published at large.

The Commissioner will continue to work assiduously to deliver the Report, in that form, as soon as he can.

Steven Chandler
Secretary to the Commission

4 January 2022

APPENDIX 5

LIST OF HEARING TRANSCRIPTS

There were 55 days of COI hearings, all of which were transcribed and most of which were livestreamed. Listed below are the hearings and the witnesses that were heard each day, together with a link to the transcript and (where available) the audio-visual recording.

In the Report, where I have referred to a transcript of a hearing, I have done so in the following form, "TX Y page Z", where "X" is the day of the hearing, "Y" is the date of that hearing and "Z" is the page number, e.g. "T45 8 October 2021 page 189" is a reference to page 189 of the transcript for Hearing Day 45 on 8 October 2021.

Hearing Day	Date	Witness	Links to COI website (www.bvi.public-inquiry.uk)
Day 1	4 May 2021	Sandra Ward	Link to Transcript
Day 2	6 May 2021	Patsy Lake	Link to Transcript
Day 3	7 May 2021	Hon Vincent O Wheatley Dr Marcia Potter	Link to Transcript
Day 4	11 May 2021	Wade Smith Claude Skelton Cline	Link to Transcript
Day 5	13 May 2021	Bevis Sylvester Ian Penn	Link to Transcript
Day 6	18 May 2021	Dr Carolyn O'Neal Morton Jeremiah Frett Hon Andrew A Fahie	Link to Transcript
Day 7	20 May 2021	Greg Romney Leslie Lettsome Michael Matthews	Link to Transcript
Day 8	2 June 2021		Link to Transcript Link to A/V Recording Part 1 Link to A/V Recording Part 2
Day 9	4 June 2021		Link to Transcript Link to A/V Recording
Day 10	14 June 2021	Hon Mark H Vanterpool Hon Julian Fraser Hon Alvera Maduro-Caines Hon Melvin M Turnbull Hon Dawn J Smith Hon Sharie B de Castro Hon Shereen D Flax-Charles	Link to Transcript Link to A/V Recording
Day 11	15 June 2021	Hon Alvera Maduro-Caines Hon Neville A Smith Hon Kye M Rymer Hon Vincent O Wheatley	Link to Transcript Link to A/V Recording

Hearing Day	Date	Witness	Links to COI website (www.bvi.public-inquiry.uk)
Day 12	16 June 2021	Hon Julian Fraser Hon Melvin M Turnbull Dr Hubert R O'Neal Dr the Hon Natalio D Wheatley	Link to Transcript Link to A/V Recording
Day 13	17 June 2021	Dr D Orlando Smith Dr Kedrick Pickering Archibald C Christian Hon Marlon A Penn	Link to Transcript Link to A/V Recording
Day 14	18 June 2021	Hon Julian Willock Hon Andrew A Fahie Hon Mark H Vanterpool	Link to Transcript Link to A/V Recording
Day 15	21 June 2021	Hon Carvin Malone Ingrid Moses-Scatliffe Myron Walwyn Ronnie W Skelton	Link to Transcript Link to A/V Recording
Day 16	22 June 2021	Hon Dawn J Smith Hon Julian Fraser	Link to Transcript Link to A/V Recording
Day 17	23 June 2021	Mark Collins Tiffany Scatliffe Esprit Ian Penn Wade Smith Hon Marlon A Penn David D Archer Jr	Link to Transcript Link to A/V Recording
Day 18	28 June 2021	Sonia Webster	Link to Transcript Link to A/V Recording
Day 19	29 June 2021	Sonia Webster Dr D Orlando Smith Neil Smith	Link to Transcript Link to A/V Recording
Day 20	30 June 2021	Ryan Geluk Hon Mark H Vanterpool	Link to Transcript Link to A/V Recording
Day 21	1 July 2021	Erica Smith-Penn Sheila Brathwaite Myron Walwyn	Link to Transcript Link to A/V Recording
Day 22	6 July 2021	Dorea T Corea	Link to Transcript Link to A/V Recording
Day 23	7 July 2021	Dorea T Corea Tashima Martin Wade Smith	Link to Transcript Link to A/V Recording
Day 24	8 July 2021	Dr D Orlando Smith Dr Drexel Glasgow	Link to Transcript Link to A/V Recording
Day 25	13 July 2021	Jeremiah Frett Glenroy Forbes	Link to Transcript Link to A/V Recording
Day 26	14 July 2021	Hon Julian Fraser Phyllis Evans	Link to Transcript Link to A/V Recording

Hearing Day	Date	Witness	Links to COI website (www.bvi.public-inquiry.uk)
Day 27	15 July 2021	Wendell Gaskin	Link to Transcript Link to A/V Recording
Day 28	19 July 2021	Clive Smith Lorna Stevens Carleen Jovita Scatliffe	Link to Transcript Link to A/V Recording
Day 29	6 September 2021	Edward Childs	Link to Transcript Link to A/V Recording
Day 30	7 September 2021	Tasha Bertie Hon Carvin Malone	Link to Transcript Link to A/V Recording
Day 31	8 September 2021	Joseph Smith Abott Hon Vincent O Wheatley	Link to Transcript Link to A/V Recording
Day 32	9 September 2021	Dr Carolyn O'Neal Morton	Link to Transcript Link to A/V Recording
Day 33	14 September 2021	Hon Andrew A Fahie	Link to Transcript Link to A/V Recording
Day 34	16 September 2021	Hon Julian Fraser Hon Andrew A Fahie	Link to Transcript Link to A/V Recording
Day 35	17 September 2021	Dr Drexel Glasgow	Link to Transcript Link to A/V Recording
Day 36	20 September 2021	Myron Walwyn	Link to Transcript Link to A/V Recording
Day 37	21 September 2021	Hon Neville A Smith	Link to Transcript Link to A/V Recording
Day 38	22 September 2021	Wade Smith Lorna Stevens Carleen Jovita Scatliffe Steve Augustine	Link to Transcript Link to A/V Recording
Day 39	24 September 2021	Neil Smith Wendell Gaskin	Link to Transcript Link to A/V Recording
Day 40	27 September 2021	Hon Mark H Vanterpool Dr D Orlando Smith	Link to Transcript Link to A/V Recording Part 1 Link to A/V Recording Part 2
Day 41	28 September 2021	Joseph Smith Abbott Ian Penn Hon Vincent O Wheatley	Link to Transcript Link to A/V Recording
Day 42	30 September 2021	Carolyn Stoutt-Igwe Sharleen DaBreo-Lettsome Jeremiah Frett Glenroy Forbes Lenius Lendor	Link to Transcript Link to A/V Recording

Hearing Day	Date	Witness	Links to COI website (www.bvi.public-inquiry.uk)
Day 43	4 October 2021	Claude Skelton Cline	Link to Transcript Link to A/V Recording
Day 44	5 October 2021	Kedrick Malone Elvia Smith-Maduro Dr Carolyn O'Neal Morton Jeremiah Frett Glenroy Forbes	Link to Transcript Link to A/V Recording
Day 45	8 October 2021	Dr Carolyn O'Neal Morton	Link to Transcript Link to A/V Recording
Day 46	11 October 2021	Glenroy Forbes Hon Andrew A Fahie	Link to Transcript Link to A/V Recording
Day 47	12 October 2021	Hon Andrew A Fahie	Link to Transcript Link to A/V Recording
Day 48	14 October 2021	Joseph Smith Abbott Hon Vincent O Wheatley	Link to Transcript Link to A/V Recording
Day 49	15 October 2021	Ian Penn Sonia Webster Dorea T Corea	Link to Transcript Link to A/V Recording
Day 50	19 October 2021	HE John Rankin	Link to Transcript Link to A/V Recording
Day 51	20 October 2021	Augustus Jaspert Sonia Webster	Link to Transcript Link to A/V Recording
Day 52	21 October 2021	Augustus Jaspert Hon Andrew A Fahie	Link to Transcript Link to A/V Recording
Day 53	22 October 2021		Link to Transcript Link to A/V Recording
Day 54	17 November 2021	HE John Rankin	Link to Transcript Link to A/V Recording
Day 55	24 November 2021	HE John Rankin Ronald Smith-Berkeley Jeremiah Frett	Link to Transcript Link to A/V Recording

APPENDIX 6

INDEX OF DOCUMENTS

The index below lists the documents which accompany this Report in a separate bundle. Most of the documents, or parts of documents, to which I refer in the Report are here. Some simply provide background, but most are documents upon which I have relied to inform my findings, conclusions and recommendations, and are therefore important in aiding the reader's understanding of the issues considered in the Report. Not every document I refer to in the Report is listed in the index. For example, some (but very few) have been omitted because of confidentiality or privilege. Some are public documents, and are easily available online. Where that is so and the documents are not in the bundle, I have tried to give the web link in the relevant footnote.

Documents are listed by chapter, and appear in the order in which they are referenced in the Report. I have not duplicated documents. To further assist the reader, I have also included the paragraph and footnote numbers indicating where each document is first referenced in the Report. The page number indicates where the document appears in the bundle.

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Chapter 1: Background		
'Faulkner at the Front – The Demonstration of 1949: Its Beginning, Golden Jubilee and Implications' by Dr Quincy F Lettsome, published in The Nation Builders, Historical Supplement in the Virgin Islands Life & Style Magazine (June-July 2016)	Paragraph 1.21 footnote 14	1 – 2
1999 White Paper Partnership for Progress and Prosperity: Britain and the Overseas Territories (Cm 4264)	Paragraph 1.30 footnote 19	3 – 45
June 2012 White Paper, The Overseas Territories: Security, Success and Sustainability (Cm 8374)	Paragraph 1.34 footnote 25	46 – 173
Hon Marlon Penn Position Statement (11 June 2021)	Paragraph 1.36 footnote 26	174 – 192
Deputy Governor's Report 2018 6 Months in Office March-August 2018	Paragraph 1.44 footnote 43	193 – 239
Elected Ministers Position Statement (1 June 2021)	Paragraph 1.49 footnote 55	240 – 272
Report of the Ad Hoc Elections Legislation Committee (October 2020)	Paragraph 1.49 footnote 55	273 – 294
Governor Position Statement (Undated)	Paragraph 1.56 footnote 62	295 – 316
Cabinet Memorandum 281/2021: Ministerial Political Adviser (18 June 2021)	Paragraph 1.64 footnote 73	317 – 348
Expedited Extract of Cabinet Minutes: Memorandum 281/2021 Ministerial Political Adviser (22 July 2021)	Paragraph 1.64 footnote 73	349 – 352
Cabinet Handbook (November 2009)	Paragraph 1.65 footnote 77	353 – 390
Hon Julian Fraser Position Statement (31 May 2021)	Paragraph 1. 71 footnote 85	391 – 402

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Hon Julian Fraser Addendum to Position Statement (21 June 2021)	Paragraph 1.77 footnote 94	403 – 405
Attorney General Position Statement (undated)	Paragraph 1.85 footnote 101	406 – 418
Director of Public Prosecutions Position Statement (15 June 2021)	Paragraph 1.92 footnote 111	419 – 423
Commissioner of Police Position Statement (undated)	Paragraph 1.95 footnote 117	424 – 432
Commissioner of Police Report on Law Enforcement and Security in BVI: Recommendations for Improvement (8 December 2021)	Paragraph 1.97 footnote 120	433 – 436
Chief Immigration Officer Position Statement (undated)	Paragraph 1.98(ii) footnote 131	437 – 439
Jeremiah Frett Tenth Affidavit (24 September 2021)	Paragraph 1.140 footnote 198	440 – 453
BVI Government's Medium Term Fiscal Plan for 2021-2023	Paragraph 1.145 Footnote 204	454 – 519
Monthly Report (December 2020)	Paragraph 1.147 footnote 208	520 – 528
House of Commons Foreign Affairs Committee: Fifteenth Report of Session 2017-19: Global Britain and the British Overseas Territories: Resetting the Relationship (HC 1464) (21 February 2019)	Paragraph 1.147 footnote 208	529 – 576
Governor's Response to Elected Ministers Position Statement (15 July 2021)	Paragraph 1.149(ii) footnote 219	577 – 649
Budget and Actual Recurrent Revenue and Expenditure 2017-2020 – Q1	Table 6 footnote 227	650
Protocols for Effective Financial Management (PEFM)	Paragraph 1.171 footnote 242	651 – 665
Letter Baroness Sugg to Premier (29 April 2020)	Paragraph 1.172 footnote 244	666 – 668
Letter from the Governor's Office to the COI (6 December 2021)	Paragraph 1.175 footnote 248	669 – 670
Chapter 2: The Scope of the Commission of Inquiry		
Attorney General's Written Submissions on Paragraph 1 of the Terms of Reference (6 October 2021)	Paragraph 2.5 footnote 2	1 – 3
Attorney General's Written Submissions in Respect of the Definition of Corruption, Abuse of Office or Other Serious Dishonesty (7 June 2021)	Paragraph 2.15 footnote 12	4 – 14
Silk Legal's Written Submissions in Respect to Definitions (12 July 2021)	Paragraph 2.15 footnote 12	15 – 24
Written Submissions: Letter Withers BVI to COI (8 September 2021)	Paragraph 2.19 footnote 20	25 – 26
Hon Marlon Penn Position Statement (17 May 2021)	Paragraph 2.28 footnote 22	See Chapter 1

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Governor Position Statement (undated)	Paragraph 2.29 footnote 23	See Chapter 1
Elected Ministers Position Statement (1 June 2021)	Paragraph 2.30 footnote 25	See Chapter 1
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Letter from the Hon Alvera Maduro-Caines regarding the BVI Government Ministers' Position Statement	Paragraph 3.76 footnote 73	16
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Chapter 4: Elected Public Officials' Interests		
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House of Assembly Resolution No 3 of 2016 (gazetted on 19 May 2016)	Paragraph 4.57 footnote 81	1
House of Assembly Resolution No 12 of 2019 (passed on 2 September 2019 and gazetted on 12 September 2019)	Paragraph 4.59 footnote 85	2
Memorandum from Registrar to Governor: Status Report on the Members of the House of Assembly Non-Compliance with the Requirements of Section 3 of the Register of Interests Act 2006 (15 December 2020)	Paragraph 4.60 footnote 86	3 – 7
Submissions by Sir Geoffrey Cox QC and Edward Risso-Gill on behalf of the Attorney General (29 October 2021)	Paragraph 4.67 footnote 102	8 – 11
Elected Ministers' Response to Governor Position Statement (undated)	Paragraph 4.69 footnote 106	12 – 28
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Hon Neville Smith Affidavit (16 August 2021)	Paragraph 4.85(i) footnote 144	52 – 57
Submissions by Withers BVI on behalf of the Attorney General (undated)	Paragraph 4.89 footnote 153	58 – 60
Neville Smith Response to COI Warning Letter No 1 (undated)	Paragraph 4.92 footnote 161	61 – 70
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Letter COI from Attorney General (15 October 2021)	Paragraph 4.95(i) footnote 168	79 – 80
Letter Attorney General to Hon Andrew Fahie (24 January 2017)	Paragraph 4.95(iii) footnote 171	81 – 84
Letter Hon Andrew Fahie to Attorney General (4 January 2017)	Paragraph 4.95(iii) footnote 172	85 – 87
Cabinet Handbook	Paragraph 4.97 footnote 176	See Chapter 1
Premier Response to COI Request for Information/Documents No 1 (12 March 2021)	Paragraph 4.100 footnote 182	88
Attorney General's Written Submissions in Respect of the Definition of Corruption, Abuse of Office or Other Serious Dishonesty (7 June 2021)	Paragraph 4.103 footnote 187	See Chapter 2
Letter Premier to FCDO Director Overseas Territories Ben Merrick (18 June 2019)	Paragraph 4.106 footnote 191	89 – 90
Extract from Minutes of Cabinet Meeting No 30 of 2019 (7 November 2019)	Paragraph 4.107 footnote 193	91 – 107
Attorney General's Response to Enumerated Questions in COI Letter of 19 May 2021 in respect of the Legislative Programme on Governance (3 June 2021, updated 10 February 2022) and accompanying bundle of draft and finalised measures	Paragraph 4.108 footnote 196	108 – 456
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IAD Report: 'Ministry of Education and Culture Scholarship Administration 2003-2008' (March 2009)	Paragraph 5.2 footnote 3	1 – 28
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Guidelines for Assistance Grants (Disclosed in the Exhibit PE2 to Phyllis Evans' Second Affidavit)	Paragraph 5.10 footnote 21	77 – 78
IAD Report: Assistance Grant Programme 2006-2008 (May 2009) (including Memorandum Clerk of the House to the IAD Director (8 September 2009))	Paragraph 5.13 footnote 33	79 – 161
IAD Follow-up Report: Follow Up Audit Review Assistance Grant Programme 2006-2008 (March 2011)	Paragraph 5.14(v) footnote 48	162 – 173
Letter COI to Attorney General (21 September 2021)	Paragraph 5.29 footnote 70	174 – 180
Closing submissions on behalf of Attorney General and Elected Ministers (22 November 2021)	Paragraph 5.31 footnote 71	181 – 200
IAD Report: Government Ministries – Assistance Grants Programmes (August 2014)	Paragraph 5.42 footnote 75	201 – 238
Letter from Clerk to the House of Assembly to COI (1 April 2021)	Paragraph 5.63 footnote 100	239 – 240
House of Assembly of the Virgin Islands COVID-19 Assistance Application Form	Paragraph 5.64 footnote 101	241 – 242
Guidelines for Assistance Grants (COVID -19 Response, Pledge of $300,000 to each Elected Member)	Paragraph 5.65 footnote 102	243
Memorandum from Financial Secretary to Clerk of the House of Assembly: Request for Over-commitment – Assistance Grant (COVID-19) (7 July 2020)	Paragraph 5.67 footnote 104	244 – 245
IAD Report: COVID-19 Stimulus – Draft Audit Report (October 2020)	Paragraph 5.68 footnote 106	246 – 332
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Auditor General's Report: COVID-19 Stimulus Grants to Farmers and Fisherfolk (21 June 2021)	Paragraph 5.87 footnote 129	433 – 480
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Carolyn O'Neal Morton Response to COI Warning Letter No 3 (4 October 2021)	Paragraph 5.90 footnote 139	533 – 536
Supplemental Response of the Premier's Office to the reports of the Auditor General and Internal Auditor (undated)	Paragraph 5.90 footnote 142	537 – 548
Auditor General Response to COI Warning Letter (4 October 2021)	Paragraph 5.91 footnote 143	549 – 552

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BVI Government's Policy Response to the Coronavirus Crisis: Policy Paper (7 April 2020)	Paragraph 5.94 footnote 148	585 – 619
Revised Expedited Extract of Cabinet Minutes: Policy Response to COVID-19 Memorandum 117/2020 (12 April 2020)	Paragraph 5.94 footnote 149	620 – 621
Pre-Report to the Minister of Finance: Update on the Impact of the Coronavirus on the BVI economy and follow-up on the recommendations of the COVID-19 policy response paper (30 April 2020)	Paragraph 5.96 footnote 154	622 – 629
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Cabinet Memorandum No 343/2020: COVID-19 Economic Stimulus – Micro Small and Medium Enterprise (MSME) Businesses Grant Relief Awards (10 September 2020)	Paragraph 5.118 footnote 190	744 – 749
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Economic Stimulus Micro Small and Medium Enterprise (MSME) Businesses Grant Programme Policy Brief (7 July 2020)	Paragraph 5.122 footnote 200	752 – 760
Incomplete Cabinet Memorandum No 97/2020: Economic Stimulus for Farmers and Fishermen (COVID-19) (20 March 2020)	Paragraph 5.125 footnote 203	761 – 769

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Premier Response to COI Warning Letter No 5 (4 October 2021)	Paragraph 5.145 footnote 241	838 – 840
Extract of SSAC Report 2020 (undated)	Paragraph 5.151 footnote 252	841 – 845
Carolyn O'Neal Morton Fifth Affidavit (1 November 2021)	Paragraph 5.151 footnote 254	846 – 849
Cabinet Memorandum No 325/2021: Monitoring and Evaluation Policy of the Economic Stimulus Programmes (5 August 2021)	Paragraph 5.158 footnote 269	850 – 858
Record of Cabinet Decision re Cabinet Memorandum No 325/2021 (19 August 2021)	Paragraph 5.158 footnote 270	859 – 861
Auditor General's Response to the Response of the Premier's Office (4 October 2021)	Paragraph 5.167 footnote 297	862 – 896
Cabinet Memorandum No 236/2020: COVID-19 – Economic Stimulus – Daycares, Pre-schools, Private schools, Churches and Religious Organisations (16 June 2020)	Paragraph 5.198 footnote 347	897 – 902
Expedited Cabinet Extract on Cabinet Memorandum No 236/2020 (8 July 2020)	Paragraph 5.199 footnote 349	903 – 904
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Not every piece of legislation to which reference is made in the Report is attached. Some of the legislation referred to provides background, but it is not necessary to look at the text of the legislation itself to understand the Report. Other legislation is important, or even key, to the issues considered in the Report. Only the latter has been included. So, for example, although the primary Orders in Council setting out each Constitution are attached, not all of the amendment Orders are. Similarly, the text of some of the historic legislation is not required for an understanding of the report, and is not included.

For those interested in reading legislation not included in this bundle, most of the legislation not included is available online.

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