

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 Col’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?

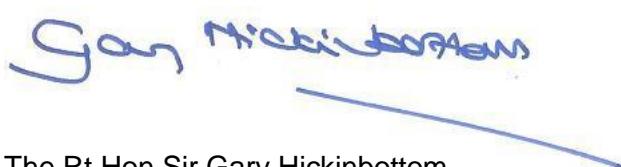
23. As Mr Rawat submitted, the culmination of these questions was that, now Sir Geoffrey had been instructed to undertake an internal review and to reach conclusions on governance of the BVI, then he becomes someone from whom I as Commissioner may wish to hear as a witness. It followed that, having publicly 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 signature is handwritten in blue ink. It consists of the prefix "The Rt Hon Sir", followed by the surname "Hickinbottom". A blue line is drawn from the end of the signature towards the right edge of the page.

The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021