

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 Ministers (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.

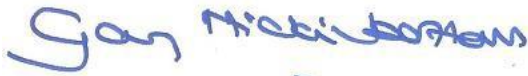
22. Of course, that is not to say that criticisms of Ministers etc will be made without them having a proper opportunity to respond. I will ensure that they are given such an opportunity. But one important strand of that opportunity is my seeking their submissions on the matters of governance to which 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