

**IN THE MATTER OF THE TERRITORY OF THE VIRGIN ISLANDS COMMISSION OF INQUIRY 2021
AND THE COMMISSION OF INQUIRY ACT (CAP 237) ("the Act")**

**SUPPLEMENTARY NOTE ON THE POSITION STATEMENT ON GOVERNANCE OF THE ELECTED
GOVERNMENT OF THE VIRGIN ISLANDS**

**This document should be read with the Position Statement submitted to the Commission of
Inquiry on behalf of the Ministers**

1. The Position Statement does not assert that, as a matter of law, the Constitution of the Virgin Islands has been breached by the PEFM, although, as is well known, the constitutionality of SAMLA 2018 is the subject of current proceedings in the High Court of the Virgin Islands between two private citizens and the FCDO, to which the Attorney General is a party.
2. In paragraph 11, the elected Government contends that there has been a failure on the part of the UKG and the former Governor to *respect* the constitutional *settlement* of 2007. As the Attorney General said in her letter Secretary of the Commission dated 14 June, 2022, that was not intended to be a submission of law but as indicated by the heading to the relevant section, which is entitled, “The relationship with the UK Government – political disagreements”, a *political* statement. Indeed, the elected government has been making the same statement to the previous Governor and the FCDO for some years.
3. In the elected Government’s view, to make good that assertion, it is unnecessary for it to show specific instances of illegality since the lack of respect it alleges may be manifested as much by constitutionally *lawful* as by unlawful means.
4. The constitutional settlement of 2007 devolves exclusive power over all matters, including economic and financial policy to the ministers save for the special responsibilities reserved to the Governor by section 60 of the Constitutional Order 2007. These special responsibilities are external affairs, defence, internal security, the terms and conditions of service of public officers and the administration of the courts. By section 57, he is obliged on matters of internal security to follow the advice of the National Security Council unless

he considers doing so would adversely affect Her Majesty's interest. By section 38 of the Constitution, the function of the Deputy Governor is, inter alia, to assist the Governor in the discharge of those responsibilities, and he remains subject to the Governor's direction.

5. The 2007 Order was accompanied by declarations that acknowledged the "*distinct cultural identity*" and "*the free and independent spirit*" of the people of the Virgin Islands, that they "*have expressed a desire for their Constitution to reflect who they are as a people and a country and their quest for social justice, economic empowerment and political advancement*", and

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;

Now, therefore, the following provisions have effect as the Constitution of the Virgin Islands.

6. While the elected Government fully accepts that these solemn preambular declarations did not give rise in themselves to legal obligations, it believes that the promises of those political statements and the political commitments made in the White Papers [1999 White Paper "*Partnership for Progress and Prosperity*"; 2012 White Paper "*Security, Success and Sustainability*"] to a "modern partnership" based on mutual respect and the principle of self-determination are not currently being fulfilled.
7. The matters to which it refers in its Position Statement demonstrate, in its view, that the UKG has not acted in full respect for those principles, which should involve affording the people of the Virgin Islands "*the highest degree of control over the affairs of their country at this stage of their development*" [BVI Constitution, preamble; and see the 1999 White Paper at ¶ 1.19].

8. Instead, the elected Government believes, as it has set out in its Position Statement (at ¶ 130), the UKG has sought to place extra-constitutional constraints on the autonomous control by the elected Virgin Islands Government of its own vital economic and financial policies and to dictate policy choices that are for the Virgin Islands Government to decide if the constitutional settlement, and the right to the highest degree of self-government it is said to embody, is to be fully respected. The UKG also declines to allow the elected Government to assume responsibility for important spheres of governmental activity even where those matters are not constitutionally reserved to the Governor and where they would more logically lie with the elected Government, such as disaster management.
9. Further, the cooperation necessary between the respective elements of the Government depends on consultation and mutual understanding even where the issue is not one on which the Constitution compels it. In the recent experience of the elected Government, decisions have been taken acutely affecting the interests of the Territory and those matters for which the elected Government is responsible, without consultation or even effective notice. One such example is the instigation of the Commission of Inquiry.
10. They observe that if the elected Government is not enabled to develop the self-reliant and independent capacities to undertake these responsibilities, it is difficult to see how they will achieve the self-determination to which they have a right (as to which see paragraphs 13 et seq. below).
11. The 1999 White Paper asseverated that the modern partnership would be ‘based on consultation and mutual understanding’ [*ibid.* ¶ 2.4] but when these concerns are raised, they are not entertained in a way that gives the elected Government the confidence they have been heard and fairly considered.
12. That is not an untypical experience in the Overseas Territories. Then, there is no one to appeal to. As the House of Commons Select Committee on Foreign Affairs has found there is a lack of democratic scrutiny of the administration of the Virgin Islands by the Overseas Territories Directorate (OTD) to which the Governor reports in the exercise of his functions. [Global Britain and the British Overseas Territories: Resetting the relationship; Fifteenth Report of Session 2017–19 at ¶12, 13, 34-38]. Good governance and accountability should surely cut both ways. If public trust in the locally elected institutions

would be increased by greater transparency and accountability, it follows that trust would also be enhanced by greater transparency and accountability of the exercise of the Governor's responsibilities and of the OTD.

13. The elected Government believes that the principle of self-determination in international law is also relevant. The duty of the UKG is to *develop the self-government* of the Virgin Islands people, taking due account of their political aspirations and to assist them in the progressive development of their free political institutions according to their particular circumstances and stage of advancement. [Article 73 of the Charter of the United Nations].

14. The UK Government has stated that its guiding principles for its relationship with the overseas territories are to be found in Article 73 of the UN Charter. [1999 White Paper, ¶ 2.2]

15. The International Court of Justice has observed of Article 73,

147. In the Court's view, it follows that the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination. [2019 ICJ Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 ¶ 147]

16. The General Assembly has stated that

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a *dynamic state of evolution and progress* towards a 'full measure of self- government'. As soon as the territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73e continues. [GA res 1541 (XV), Annex, Principle II. *italics supplied*]

17. A Non-Self-Governing Territory can be said to have reached a full measure of self-government by its emergence as a sovereign independent State, free association with an independent State or integration with an independent State. [GA res 1541 (XV), Annex,

Principle VI; cited in the Western Sahara Case, ICJ Rep 1975 p 12, 32.]. In 1970, in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (the Friendly Relations Declaration), the General Assembly recognised a new category, “the emergence into any other political status freely determined by a people.” A right to self-determination is recognised in the International Covenant on Civil and Political Rights [ICCPR, Art 1(3)], which extends to the British Virgin Islands.

18. The elected Government observes that these principles of international law import a general obligation to maintain a *continuous process* of development of self-government so as to place the people of the Virgin Islands in a position ultimately to choose a new political status.
19. The UK Government has stated to the United Nations Secretariat of the Special Committee on Decolonization that the OTs *were* now internally self-governing, *subject only to the UK retaining powers to enable it to carry out its obligations under international law*. [Working paper prepared by the Secretariat on the BVI, 9 February 2011, UN Doc No. A/AC.109/2011/6, ¶ 56.]
20. However, the elected Government does not accept that the controls effected by the PEFM, the pressure to adopt the RDA, and the unilateral action of the UK Government to impose a public register of beneficial ownership following SAMLA 2018 before it becomes a global standard, are necessary to fulfil the UK’s obligations under international law. It contends these measures are predominantly insisted upon to satisfy the interests of the UK.
21. Again, for the purposes of the Inquiry, the elected Government does not believe it is necessary either to allege or establish a *breach* of international law amounting to an internationally wrongful act for which the UK is responsible. It accepts that Article 73 expresses general principles and undertakings, and the content of the positive obligation to facilitate and maintain progress towards a full measure of self-government, particularly of its timeframe, is imprecise.

22. However, it believes, as asserted at paragraph 25 of the Position Statement, that these guiding principles of international law inform and are an important part of the background to the elected Government's central contention that the concept and promise of a "*modern partnership*" based on "mutual respect" is not being fulfilled [FCO's 1999 policy paper, p. 11].
23. In summary, the elected Government believes the UKG appears to attach higher priority to managing its contingent liabilities than to institutional capacity-building and the progressive development of self-government in the Virgin Islands in accordance with Article 73. It is not necessary to argue that matters have reached the stage at which UK is in *breach* of its international legal obligations to make this point.
24. For the avoidance of doubt, the elected Government believes that there *have* been instances when lack of respect for the partnership embodied in the constitutional settlement has been evinced by the former Governor in clear breaches of the Constitution or a disregard for the laws of the Virgin Islands. See the express allegation at paragraphs 30-31 of the Position Statement.
25. Other examples include the former Governor's successful request to the Registrar of Interests in November 2020 for disclosure of information concerning the register of interests, (and now made available to the Inquiry) which it is submitted he ought to have known could at the very least arguably be considered as a breach of her Oath of Office and of section 13(1) of the Register of Interests Act. These instances risk conveying the impression that the laws of the Virgin Islands do not apply in full to the office of Governor.
26. The Position Statement outlines and seeks to explain, therefore, from the point of view of the elected Government, the causes of a recent breakdown of trust within the Government of the Virgin Islands, and its corrosive effects on effective and good government in such a system. It also seeks to explain a central problem with good governance in the Virgin Islands, which is the condition and chronic neglect of the

public service and of its critical policy development functions. For that neglect, 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.

Attorney General