



OFFICE OF THE GOVERNOR  
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**Ref: GOV/LEG/29**

15 July, 2021

Mr. A. King  
Senior Solicitor  
Commission of Inquiry  
Tortola VG1110

Dear Mr. King

Thank you for providing sight of the Ministers' position statement on Governance, and the subsequent supplementary submission.

I take this opportunity to comment on a small number of points within the Ministers' primary statement and enclose some further information.

### **Paragraph 11: Publicly Accessible Registers**

On 14 December 2020, the UK Government published a draft Order in Council prepared in accordance with Section 51 of the Sanctions and Anti-Money Laundering Act, 2018. The draft Order sets out the UK Government's expectations for publicly accessible registers of company beneficial ownership in the Overseas Territories. In light of statements made by all the inhabited Territories, including BVI, on the adoption of publicly accessible registers, the UK Government decided that it was not necessary to make the Order under section 51; the UK will keep this under review. The UK will continue to work with all Territories to support their implementation of publicly accessible registers of company beneficial ownership by the end of 2023.

### **Paragraph 16 & 17: RDA**

I attach a copy of a letter (**Annex A**) from the Director of Overseas Territory Directorate to the then Premier Honourable Orlando Smith, dated 21 August 2018 that sets out more information in relation to the establishment of the Recovery and Development Agency.

## **Paragraph 24: Loan Guarantee**

The loan guarantee was offered to the Government of the British Virgin Islands with fiscal responsibilities attached to it set out by the Cabinet Office of the UK Government. I attach a copy of the Cabinet Office documentation (**Annex B**) giving an overview of contingent liability process. It is for the BVI Government to decide whether or not to accept a loan guarantee. This remains a supportive offer to the British Virgin Islands Government with conditions that meet the stringent accounting requirement for public sector contingent liabilities.

## **Paragraph 31: Chairing of Cabinet**

Section 2(3) of the Constitution makes clear that the reference to the holder of any office shall be construed as including a reference to any person who, under and to the extent of any authority in that respect, is for the time being performing the functions of that office.

Section 38(2) 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, subject to such exceptions and conditions as the Governor may from time to time so specify.'*

Accordingly, 'the Governor' includes the person acting as Governor, who presides over Cabinet in accordance with section 49 (1) of the constitution.

I attach an exchange of letters between the then leader of the Constitutional Review Team and former Chief Minister Orlando Smith (**Annex C**) which sets out this common understanding of the UK and the Virgin Islands Governments in this issue.

Chairing of Cabinet has been an ongoing discussion with the current Premier - I enclose an exchange between the Premier and the previous Governor in relation to the ability to attend and/or chair Cabinet remotely, something we have recently accommodated for the Premier whilst he was himself in isolation through joining by Webex.

## **Paragraph 35: Disaster Management Act**

Both the previous Governor and I have continued to make clear that Disaster Management involves a key national security aspect and therefore should be retained within the Governor's responsibilities. My predecessor had much discussion on this with the Premier (**Annex D**), resulting in both parties requesting advice from the Attorney General.

In December 2020 a memo from Augustus Jaspert requested that the budget for Disaster Management remain within the budget for the Governor's Group 2021. This was not actioned and so the Appropriation Act was signed with a conditional note that setting a budget line in a different group did not constitute the reallocation of departmental governance.

My letter of the 23<sup>rd</sup> April 2021 set out my position following consultation with the Premier. I set out my view that this matter should be addressed as part of the proposed constitutional review and was clear that I would reserve the question of assent if the bill was put forward as currently drafted.

### **Paragraph 39: Direction of Public Service**

I enclose a copy of a letter dated 15<sup>th</sup> May 2020 from the previous Governor to the Premier (**Annex E**) in response to the letter issued on the 9<sup>th</sup> May 2020.

### **Paragraph 106: Integrity in Public Life Bill**

My letter of the 25 March (**Annex F**) set out my full support for the introduction of legislation enhancing integrity in public life, rather than the bill as was then drafted, on which I offered suggested amendments.

### **Paragraph 132: Public Service**

The public service needs to be able to operate impartially and to advise ministers without fear or favour. While management of the public service sits within the Governor's group, financial support to enable capacity building sits with the Financial Secretary. Additionally, good policy formulation by officials is dependent on clear Ministerial Policy guidance. It is not feasible to drive effectiveness and capacity of the public service without both of these.

In addition to the clarifications given to the Ministers' Governance statement, I respond to the question of the Registrar of Public Interests

Under Section 112 of the Constitution, the Registrar of Interests is appointed by the Governor. Section 112 also requires all members of the House of Assembly (including Ministers) to declare their interests to the Registrar.

That there were concerns over the Register is demonstrated by the attached letter of 18 June 2019 from the Premier to Mr Ben Merrick (**Annex G**), then Director, Overseas Territories Directorate in the Foreign and Commonwealth Office. In that letter the Premier stated that the "Register of Interests of Ministers will be made public immediately following further consultation with the Governor". The Register nonetheless remained closed to the public.

In light of the Governor's responsibility for the position of Registrar of Interests, and in the interest of upholding good governance and ensuring compliance with the Constitution, it was legitimate for the Governor to request information from the Registrar of Interests and to support her encouragement of members of the House of Assembly to comply with their obligations. Section 13 of the Register of Interests Act 2006 contains no prohibition on such a request. The Governor did not request nor did the Registrar provide details of what had been entered in the Register. Rather the Registrar shared information on who was non-compliant.

I am of course happy to discuss Governance further and will attend the Commission as requested.

Kindest regards

A handwritten signature in black ink, appearing to read "John Rankin". The signature is written in a cursive style with a large initial "J".

John J. Rankin CMG  
Governor of the Virgin Islands

Official



Foreign &  
Commonwealth  
Office

Ben Merrick  
Director  
Overseas Territories  
King Charles Street  
London, SW1A 2AH

[www.gov.uk/fco](http://www.gov.uk/fco)

The Hon Dr D Orlando Smith OBE  
Premier  
Office of the Premier  
Government of the British Virgin Islands  
33 Admin Drive  
Road Town  
Tortola VG1110  
British Virgin Islands

21 August 2018

*Dear Premier,*

1. I am pleased that Lord Ahmad had a productive recent visit to the British Virgin Islands. It is encouraging to hear that progress has been made on the establishment of the Recovery and Development Agency (RDA), in particular that a Chief Executive Officer has been appointed. The UK funded loan advisor has also been embedded in the Ministry of Finance. Now is the time to continue to increase the pace of the recovery, as Lord Ahmad said during his visit, there is much work still to be done before the islands are fully recovered.
2. My team are already working with the loan advisor and colleagues in the BVI Ministry of Finance on a joint strategy document that will set out the detail of the loan guarantee, and the process to establish this. I wanted to set out the five main steps for setting up the loan guarantees. It is worth noting that much of the work outlined below has already commenced. As you will appreciate, the process is necessarily technical and thorough, but I want to reassure you that we are keen to help drive momentum, and support your Government through the whole process.

### **Recovery Plan**

3. As you know, the cornerstone of the recovery is the BVI Government's Recovery Plan, which details the work needed across the Territory to effect a strong and sustainable recovery. It is important that the Plan is finalised and agreed quickly. Once approved, the RDA, as the primary delivery agency, will need to assess the

## Official

value of projects and the timescales for completion. This will need to be coupled with a realistic assessment of BVI's operational capacity to carry out those works.

### **Fiscal Analysis**

4. Once the RDA is confident in the above assessment, it can make an accurate calculation of the level of financing required and how that might be sequenced. The Ministry of Finance will need to assess how much of this can be funded out of the proposed borrowing under the UKG guarantees, up to the value of £300 million. The Ministry of Finance have already started a preliminary debt sustainability analysis, which I understand will shortly be available. This will allow your Cabinet to decide on the affordability of sustaining this level of borrowing. This analysis will also underpin internal UKG analysis to set up the guarantee. It is at this point that your Government may need to take decisions around mobilising revenues and expenditure consolidation to support fiscal sustainability.
5. In addition, the BVI Government and UKG will need to agree amendments to the Protocols for Effective Financial Management given the new borrowing will likely cause the BVI Government to remain out of compliance with the existing borrowing ratios. A date to return to compliance will need to be mutually agreed alongside interim targets and measures on public financial management in line with the High Level Framework for UK Support to BVI Hurricane Recovery.

### **Loan Structuring and Procurement**

6. The Ministry of Finance and loan advisor will need to set out the structure of the loan and guarantee package to the FCO and HM Treasury that both suits the needs of the BVI Government and ensures value for money for the UKG. This process has already started. The loan advisor and Ministry of Finance have also begun engaging with financing institutions to gauge the market. Once complete, the process of legal drafting for the loan agreement (between the BVI Government and lender(s), guarantee (between the UKG and each lender) and counter indemnity terms (between the UKG and BVI Government) can begin. As you know, while the guarantee structure and associated loans are being arranged the BVI Government has available existing undrawn loans, ensuring that there should be no delay to project implementation for lack of funding.

### **HMT Contingent Liability**

7. Across all of the above steps, the FCO and HM Treasury will be conducting an assessment of the guarantee using the data available from the Recovery Plan and Debt Sustainability Analysis (amongst others). Officials at the Ministry of Finance have been appraised of this process, known as the Contingent Liability Approval Framework. This is a key step before any guarantee from the UKG can

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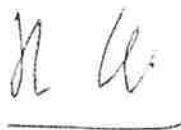
be finalised not least because it is a requirement for statutory accounting in the UK. This process will also verify that the BVI Government can afford to repay any loans and ensures that BVI Government accounts are robust. A key element of this is ensuring that strong oversight of project delivery and financial accountability is in place. This will be provided for through the RDA in respect of project implementation and by the Ministry of Finance in respect of debt sustainability and management.

8. As part of setting up a new contingent liability, HM Treasury requires appropriate risk monitoring mechanisms to be put in place. In this instance, a financial technical advisor will be appointed who will report directly to the Governor and to me as Senior Responsible Officer for the FCO. The advisor's primary responsibility will be to work with the Ministry of Finance to monitor the guaranteed loans, work on refinancing, communications and fiscal sustainability strategies and advise the FCO and HM Treasury on any relevant issues that affect the status of the guarantee.

**Parliamentary notification**

9. Once the contingent liability process is completed there is a legal obligation for the UKG to notify Parliament. Members of Parliament can request further information on the liability for 14 sitting days after the notification is made and it will be up to the FCO as the responsible Department to provide the further information before the guarantee structure is fully approved. Thereafter, provided all terms have been agreed between the BVI Government and lenders, the BVI Government will be able to execute the new guaranteed loan facilities and access the associated funding.
10. I am sure you will appreciate the necessity of such a comprehensive process. The UK remains committed to supporting BVI throughout, and I am pleased that our officials continue to work together for the benefit of the long term recovery of the British Virgin Islands.

*Yours sincerely,*

A handwritten signature in black ink, appearing to be 'N. A.', written over a horizontal line.

**Director Overseas Directorate  
Foreign and Commonwealth Office**



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P. O. Box 702  
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## MEMORANDUM

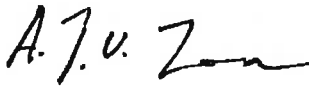
**REF. No:** GOV/FOR/01  
**TO:** Premier  
**FROM:** Governor  
**Copies:** Deputy Governor  
Deputy Premier  
**DATE:** 17<sup>th</sup> October 2019

**SUBJECT: MEMORANDUM OF UNDERSTANDING FOR THE EFFECTIVE  
MANAGEMENT OF THE EARLY RECOVERY PROJECT INVESTMENTS**

1. I am following up on my previous Memo to you dated 22 May 2019 on the subject noted above.
2. As noted in the Information Paper that was discussed at Cabinet on 15 May 2019, following the UK's immediate humanitarian response to hurricanes Irma & Maria, the UK subsequently provided approximately US\$16.4m to support a range of early recovery projects that were implemented in partnership with the Government of the Virgin Islands (GOVI).
3. At the meeting of Cabinet on 15 May 2019 it was agreed that a Memorandum of Understanding (MOU) between GOVI and the UK Government would be executed to confirm the hand-over to GOVI of all infrastructure, equipment, resources and products of services procured by the UK for the early recovery projects.
4. I had signed the MOU on behalf of the UK Government, attached a copy to my previous Memo, and handed a copy to you for your signature on behalf of GOVI.
5. As I have not yet received a signed copy of the MOU from you or any written feedback relating to the contents of the MOU, another copy (unsigned) is attached to this Memo. Once you have signed and returned this copy to my Office, I will ask Ben Merrick to counter-sign on behalf of the UK Government.



6. Should you have any questions or comments relating to the contents of the attached MOU please let me know and my Office would be happy to set up a discussion to address these.
7. As you will be aware, the UK Government is accountable to the UK public for ensuring the proper use, value for money, and the sustainability of all UK support to GOVI and the BVI. While the attached MOU remains unsigned the UK Government does not have the assurance it requires in relation to the early recovery projects.
8. This lack of assurance in relation to past support has the potential to jeopardise the ability of the UK and GOVI to work in partnership in the future. An example of this is that I have had to recently advise the Foreign and Commonwealth Office (FCO) to explore whether another Overseas Territory would be able to store a black-start generator procured by the UK to be a resource for deployment across the Caribbean region – originally this was to be stored in BVI under the care of GOVI, giving BVI immediate access in the event of an emergency.
9. So as to ensure all stakeholders are aware of the UK Government's requirements relating to proper use, value for money, and sustainability going forward I suggest that our respective Offices should ensure that appropriate agreements are in place prior to the provision of any future UK support to GOVI for capital expenditure.



Gus Jaspert  
**HM Governor**



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## MEMORANDUM

**REF:** GOV/FOR/01  
**TO:** Premier  
**FROM:** Governor  
**Copies:** Deputy Governor  
Deputy Premier  
**DATE:** 22<sup>nd</sup> May, 2019

### **SUBJECT: MEMORANDUM OF UNDERSTANDING FOR THE EFFECTIVE MANAGEMENT OF THE EARLY RECOVERY PROJECT INVESTMENTS**

1. As noted in the Information Paper that was discussed at Cabinet on 15 May 2019, following the UK's immediate humanitarian response to hurricanes Irma & Maria the UK subsequently provided approximately \$16.4m to support a range of early recovery projects that were implemented in partnership with the Government of the Virgin Islands (GOVI).
2. At the meeting of Cabinet on 15 May 2019 it was agreed that a Memorandum of Understanding between GOVI and the UK Government would be executed confirming the hand-over to GOVI of all infrastructure, equipment, resources and products of services procured by the UK for the early recovery projects. Accordingly I attach for your signature the aforementioned Memorandum of Understanding.
3. I have signed on behalf of the UK Government and would be most grateful if the attached Memorandum of Understanding could be signed on behalf of GOVI and a copy returned to my Office.
4. Additionally, although already shared with the Permanent Secretaries of the relevant Ministries at the time of each project's completion, I would like to share with you technical assistance reports produced by the consultancy services procured for the early recovery projects (as set out below):

- a. Design and Implement Support for Promotion of Employment in Construction and Maritime Sectors
  - i. Support for the promotion of employment in the construction and maritime sectors
  - ii. Draft Labour-Policy Paper (DLPP) providing support to labour policy reform for post-disaster and recovery needs
- b. Housing Recovery Support
  - i. Recommended Draft Virgin Islands housing recovery and adaptation policy
  - ii. Support to recovery in the British Virgin Islands – Housing Recovery
- c. British Virgin Islands Ministry of Communications and Works Technical Assistance Programme
  - i. Completion Report and Recommendations for implementing Asset Management System and Structural Reform of PWD and DW&S
- d. Port Purcell Preparedness Assistance
  - i. Port Preparedness Implementation Plan
  - ii. Port Preparedness Training & Costing Plan
  - iii. Hurricane Preparedness & Recovery Plan
- e. Resilient Telecommunications Briefing Paper



Augustus J.U. Jaspert  
**HM Governor**

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## Memorandum of Understanding

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### Memorandum of Understanding for the Effective Management of the Investment made by the Government of the United Kingdom of Great Britain and Northern Ireland

#### Between

**The Government of the United Kingdom of Great Britain and Northern Ireland (UKG)  
represented by the Foreign and Commonwealth Office (FCO)**

#### and

**The Government of the Virgin Islands (GOVI) represented by the Premier's Office  
(together the Participants)**

1. This Memorandum of Understanding (MOU) sets out the terms and understanding between the Participants for the effective management of the infrastructure, equipment, resources and products of services procured by the UK Government (UKG) for projects implemented in support of the reconstruction and recovery of the British Virgin Islands (BVI) following hurricanes Irma and Maria listed at ANNEX A.

#### **Background**

2. The hurricane disasters of 2017 caused widespread damage to the BVI with total damages estimated at approximately US\$3bn. This presented an unprecedented challenge for recovery. In addition to humanitarian and military support provided for the immediate response, the UKG also committed funds to support to the Government of the Virgin Islands (GOVI) during the early recovery phase, prior to the establishment of the long-term recovery and development programme. The early recovery projects covered under this MOU are listed at ANNEX A.

#### **Purpose**

3. The purpose of this MOU is to provide clarity on the nature of the partnership between the Participants in relation to the projects listed at ANNEX A. The MOU details the investment that the UKG has provided in support of these early recovery projects and the commitments the GOVI has made in respect of those projects, including to be responsible for the on-going operations and maintenance of equipment and to maximise the impact of capacity building support to ensure long-term sustainability. The following overarching conditions (which may be further detailed in any separate arrangements for each project) are accepted by the Participants:
  - a. The UKG has provided infrastructure, equipment, resources and products of services procured as part of the projects listed at ANNEX A to the GOVI for their use.
  - b. The infrastructure, equipment, resources or products of services cannot be sold, leased or loaned without the prior approval of the UKG.
  - c. The infrastructure, equipment, resources or products of services will be used, managed and maintained in accordance with the manufacturers' or service

providers' recommendations. Where possible repair work will not invalidate the warranty of the infrastructure, equipment or resources.

- d. The infrastructure, equipment, resources or products of services will be used in accordance with BVI law and where appropriate only operated by a trained and competent operator.
4. The UKG accepts to:
    - a. Hand the infrastructure, equipment, resources or products of services over to the GOVI for their on-going use, maintenance and management in accordance with clause 3. and any separate arrangements for individual projects.
  5. The GOVI accepts to:
    - a. Engage in the correct management, maintenance and use of the provided infrastructure, equipment, resources or products of services in accordance with clause 3. above and any separate arrangements for individual projects, and assume responsibility for all benefits and outcomes once they have been handed over.

#### **Reporting**

6. To meet the reporting requirements of the UKG:
  - a. The GOVI will provide the UKG with any documentation that may be required to ensure compliance with this MOU and as may be reasonably requested by UKG.

#### **Funding**

7. The approximate UKG funding for all the infrastructure, equipment, resources and products of services procured for the projects listed at ANNEX A was US\$16.4 million.

#### **Termination**

8. The UKG may end its participation in this arrangement by giving written notice to the GOVI in the following circumstances:
  - a. Failure by the GOVI to manage, maintain or use the infrastructure, equipment, resources or products of services according to this MOU.
  - b. Force majeure.
9. Where the UKG ends its participation in this arrangement due to the circumstances described in 8 a. the UKG may request that any or all of the infrastructure, equipment, resources or products of services (or the equivalent value in US\$ as reasonably determined through international accounting best practice) are returned to the UKG by GOVI within 90 days or another reasonable timeframe as may be agreed by the Participants.

ANNEX A to MOU: Early Recovery Projects

ID	Project	Infrastructure, Equipment, Resource, or Service	GOVI counterpart
1	Vocational Training	<p>Provision of technical assistance to H.Lavity Stoutt Community College (HLSCC) to design a comprehensive vocational training programme for the construction and maritime sectors and investment in training facilities and materials.</p> <p>Policy advice to Ministry of Natural Resources and Labour, Ministry of Education and Building Regulations Unit (Premier's Office) and Department of Public Works.</p>	<p>Ministry of Education and Culture</p> <p>Ministry of Natural Resources and Labour</p> <p>HLSCC</p>
2	Prison Officer Support – Provision of prison officers to support HMP Balsam Ghut prison staff, including on the job mentoring.	Temporary deployment of 13 prison officers from the UK followed by the provision of a further team of 12 prison officers.	HMP Balsam Ghut
3	Prison Infrastructure Repairs and Support	Completion of infrastructure repairs to strengthen security, safety and living conditions at the prison, and provision of a	HMP Balsam Ghut
4	Housing Recovery Support	<p>Provision of housing and engineering expertise to support Housing Recovery Unit.</p> <p>Provision of building materials and funds to contract construction firms to repair houses for 76 vulnerable families (and provide 4 temporary houses).</p> <p>Provision of surplus materials to aid disaster preparedness projects of the Department for Disaster Management</p>	<p>Housing Recovery Programme of the Ministry of Health and Social Development</p> <p>Department for Disaster Management</p>
5	Power reconnection	Funding for a team of 27 linesmen, trucks and equipment to support BVI Electricity Corporation (BVI-EC) to reconnect 2,700 homes and businesses (20%) thereby reducing reconnection time by two months. The teams also reconnected more than 250	BVI-EC

		street lamps to strengthen security.	
6	Health	Provision of equipment to address mosquito infestation, inspection of water quality, a pick-up truck and mobile primary health care.	Ministry of Health and Social Development
7	Telecommunications Assessment	Funding for a study on how to strengthen telecommunications resilience in BVI.	Ministry for Communications and Works.
8	Police Support	Support to the Royal Virgin Islands Police Force (RVIPF), including deployment of UK, Cayman and Bermudan police to augment RVIPF capability, and a further programme of capacity building and provision of two specialist vehicles and equipment to the firearms teams.	RVIPF
9	Temporary Court House	Support to complete the construction of a temporary Magistrate's Court  Connection of the court and prison by audio-visual link.	Magistrates Court  HMP Balsam Ghut
10	Water and Sewage	Funding for immediate and urgent repairs to water and sewage infrastructure (including reservoirs) and purchase of equipment.	Department of Water and Sewage
11	Cash Assistance Programme	£2m to support 1,076 vulnerable households in close partnership with the Ministry of Health and Social Development.	Ministry of Health and Social Development
12	Vehicles and Equipment	Provision of six pick-ups, two small dump trucks, two large dump trucks and three back-hoe trucks to be managed by the Ministry for Communications and Works to support road repair, water and sewage.	Ministry of Communication and Works
13	Debris Clearance Equipment	Vehicles and equipment to support clearance of hurricane debris, including: three pick-ups, one flatbed truck, two tow trucks, two bucket trucks, one car crusher, three trailers, a compressor, debris clearance kits and three generators.	Ministry of Communication and Works
14	Infrastructure Advisers	Provision of a team of specialist infrastructure advisers (roads, power and water/sewage) to support the Ministry for Communications and Works develop proposals for an asset management plan & system and for restructuring of the Public Works Department and Department of Waste and Sanitation.	Public Works Department  Department of Waste and Sanitation

15	Ports Assessment	Funding for a detailed assessment of Port Purcell and the port in Virgin Gorda by technical experts. The report detailed short, medium and long term recommendations on how to improve the functioning of these key goods ports.	BVI Ports Authority
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**OFFICE OF THE GOVERNOR**  
P. O. Box 702  
Road Town, Tortola  
Virgin Islands

Telephone: (284) 468-3501

Honourable Premier  
Office of the Premier  
Ralph O'Neal Administration Complex

21 February 2020

*Dear Premier,*

I am writing in reference to your letter to Lord Ahmad of 17 February.

Whilst I welcome the good governance commitments set out therein, I do not agree with much of the content of the letter, which I consider to be unnecessarily confrontational and misrepresentative of my conduct as Governor. Specifically, it is disappointing that you continue to raise, and misconstrue, the discussion we had at Cabinet on governance on 9 January 2020. The accurate record of that conversation is set out in the minutes of that meeting and this was agreed by all of Cabinet, including all Ministers at the time. This was an impartial record taken and documented by the Cabinet Secretary. Given this record was agreed, I do not consider that it is in the best interests of the people of the Virgin Islands to continue to correspond on the matter.

I also strongly refute the assertions you make regarding my intentions, actions and behaviour. I do not intend to address each one in turn other than to formally record that the assertions in your letter are without foundation. The overall tone of your letter I find deeply disrespectful.

More broadly, I welcome your ongoing expressed wish to improve governance, transparency and accountability in the Territory as set out in both your letter to Lord Ahmad and your statement last week and I hope we can work effectively together and with the relevant institutions on these matters. As you are aware, the Deputy Governor's Office in partnership with other Ministries and agencies has been spearheading work on the good governance agenda. Legislative and policy proposals to improve the standards and institutions to support strong integrity, including the introduction of the Ministerial Code, Register of Interests and the Integrity in Public Life Act are well underway. I will ask the Deputy Governor and his team to continue to work closely with your officials to support taking these, and other important governance initiatives, forward as a matter of urgency.

*A. J. C. 2*

Augustus Jaspert  
Governor

cc: Ben Mansel OTD FCO  
All Members of BVI Cabinet  
Deputy Governor



# FREEDOM LAW CHAMBERS

## ATTORNEYS-AT-LAW

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HEAD OF CHAMBERS: ANAND RAMLOGAN S.C.  
ASSOCIATES:

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Dr. Ché N. Dindial DVM (Dist) LLB (Hons), Douglas C. Bayley LLB (Hons), Vishaal Siewasaran LLB (Hons)

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Commissioner of Affidavits - Radha Persad

Door Tenant: - Alvin Shiva Pariagsingh LL.B(Hons)

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### In the matter of the Disaster Management Act 2003

AND

In the Matter of Sections 27, 35, 47 and 60 of the Virgin Islands Constitution Order 2007.

### Legal Opinion

#### Issue:

*Whether the governance and/or control of the British Virgin Islands (BVI) Department for Disaster Management (DDM) should be vested in the Governor General or the Cabinet/Minister of Government?*

#### BVI Statutory Framework:

1. The BVI Department for Disaster Management (DDM) is charged with the coordination and integration of comprehensive disaster management into sustainable development policies, planning and programming with a special emphasis on disaster prevention, mitigation, preparedness, response and recovery and established pursuant to **Section 5 of the Disaster Management Act 2003 (the Act)**.
2. The Director of the DDM is appointed by the Governor General (*Governor*) [Section 5 of the Act].
3. Pursuant to **Section 4 of the Act** the Governor is responsible for :  
  
*(a) to cause to be prepared a comprehensive plan and programme which shall be integrated into and coordinated with other plans and programmes of the Government and which shall include*

## FREEDOM LAW CHAMBERS

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- (i) mitigation of injury and damage caused by hazards;*
  - (ii) emergency relief;*
  - (iii) identification of areas, people, building and infrastructure particularly vulnerable to hazards;*
  - (iv) taking measures for building and other development standards, safety measures for securing permanent structures and other mitigation measures designed to eliminate or reduce disasters or the impacts of hazards;*
  - (v) authorization of the erection or other construction of temporary works designed to mitigate danger, damage or loss from other hazards, and the procedures therefore;*
  - (vi) organization of personnel and establishment of chains of command;*
  - (vii) coordination of emergency management activities;*
  - (viii) any other matter he thinks necessary or expedient;*
- (b) in accordance with the plan and programme for emergency management of the Territory, and out of funds appropriated for these purposes, to procure and requisition supplies, medicines, materials and equipment, to institute training programmes and public information programmes;***
- (c) to take all preparatory steps, including the partial or full mobilization of emergency services;*
- (d) to ensure the furnishing of adequately trained and equipped forces for disaster response and recovery;*
- (e) out of funds appropriated for that purpose, to carry out studies and surveys of industries, resources and facilities in the Territory as may be necessary to ascertain the capabilities of the Territory for emergency management phases of Mitigation, preparedness, response and recovery And to plan for the most efficient emergency use thereof.***

## FREEDOM LAW CHAMBERS

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4. By virtue of the Act, the Governor is therefore vested with the authority to oversee, manage, implement and co-ordinate disaster response, mitigation, preparedness and recovery. The role of the Director and by extension the DDM, is to assist *the Governor in coordinating the general policy of the Government relating to the mitigation of, preparedness for, response to and recovery from, emergencies and disasters in the Territory* [See Section 6 of the Act].
5. The duties of the Director are subject to the *direction of a special or general character in relation to the policy to be followed in the exercise of the powers conferred and the duties imposed on him by or under this Act as the Governor gives*. [Section 8].
6. The Governor also sits as chairman of the National Disaster Management Council [See Schedule pursuant to Section 9(2)]. It is not necessary to review the function of the Council as it is not charged with executing, implementing or managing the DDM. Its function is merely to review, advise and make recommendations on matters concerning disaster management.[Schedule 1 (11)]
7. The Governor is empowered to manage funds allocated to the DDM pursuant to Section 4 (1) (b) and (e).
8. There is also provision for the establishment of an Emergency Disaster Fund under Part 10 of the Act, to be *applied towards recovery efforts and the adoption and promotion of preventive measures before, during and after a disaster emergency*. [Section 27]. The Fund is to be managed by a Committee (“the Fund Committee”) comprising the Financial Secretary, as *ex officio* Chairman, and not more than four other persons, appointed by instrument under the hand of the Governor after consultation with the Minister [Section 26(2)].

### **Constitutional Framework:**

9. The BVI is a dependent territory of the United Kingdom with a framework of a parliamentary representative democratic dependency. Accordingly, its governance structure is comprised

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of the Governor and the Executive with executive authority of the Virgin Islands being vested in Her Majesty. This “executive authority” is then exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him or her. The Cabinet headed by the Premier forms part of the Executive.

10. The Governor’s powers and duties are defined at Section 35 (2) of the Constitution:

**Section 35(2)**

(2) The Governor shall have such powers and duties as are conferred or imposed on him or her by this Constitution or any other law and such other powers as Her Majesty may from time to time be pleased to assign to him or her.

11. Special responsibilities are delegated unto the Governor by virtue of Section 60:

**Section 60(1)**

*60.—(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;*

*(d) the terms and conditions of service of persons holding or acting in public offices, without prejudice to section 92; 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.*

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12. **Section 27** (1) of the Constitution gives the Governor General the power to declare a public emergency, subject to the need for consultation with the cabinet or Premier [Section 27(6)]:

*A period of public emergency may be declared by the Governor, by proclamation published in the manner provided in subsection (2), when—*

*the well-being or security of the Virgin Islands is threatened by war, invasion, general insurrection, public disorder, natural disaster or other public emergency; and*

*the declaration is considered necessary by the Governor to maintain or restore peace and order.*

13. Section 47(3) empowers the Cabinet with the 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.

### Discussion:

14. The Cabinet, unless a matter falls within the remit of section 60, has the responsibility to formulate and implement policies as it relates to EVERY aspect of government. This is the core function of an elected government in a constitutional democracy based on the Westminster model of governance.

15. The democratic will of people is of paramount importance. The preamble notes:

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*“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...”*

16. In Attorney General v Joseph [2006] CCJ 3 (AJ) Wit J characterised the preamble as, “filling the Constitution with meaning” and breathing “life into the clay of the more formal provisions in that document”. The highlighted words of the preamble affirm that a democratic institution should be given the mandate to exercise the highest degree of control over the affairs of the country. The Governor is not elected by the people – the government is. This view has been underscored by the Courts. In Civil Appeal 37 of 2003 Attorney-General of St Lucia v Martinus Francois , Justice of Appeal Rawlins stated:

*“In a real and practical sense, under our Westminster Model Constitutions, the Cabinet is the center of executive action, although the executive authority is vested in Her Majesty. In the main, executive functions of the State are actually exercised by the Ministers who form the Cabinet and the Government.”*

17. Disaster management is not a matter that is covered by section 60. It does not form part of the constitutional mandate of the Governor’s jurisdiction and hence it is a matter for which the cabinet can assume responsibility subject to appropriate legislative intervention to amend or repeal and replace the **Disaster Management Act 2003**.
18. The role of the DDM includes:
- a. drafting of laws and implementing regulations that establish the legal authority for the development and implementation of the disaster management programme and organization;

- b. planning, development, coordination, and implementation of operational plans and procedures are fundamental to effective disaster response and recovery and
  - c. the development of fiscal and administrative procedures designed to support a disaster management programme.
19. The role and function of the DDM is plainly a matter that falls within the remit of the executive which is responsible for policy formulation and implementation. The imposition of responsibility for planning, devising, implementing and co-ordinating disaster preparedness, management and policy unto the Governor by virtue of the Disaster Management Act 2003 is therefore an additional responsibility conferred by parliament which it is free to change.
20. It is arguable that the DDM is tangentially relevant to two aspects of the Governor's powers under the Virgin Islands Constitution Order 2007: external affairs and a state of emergency. Such peripheral relevance does not however bring disaster management within the mandatory constitutional remit of the Governor such that the executive is unable to carry out these functions.
21. Local disaster management does not necessarily impact on external affairs. A cursory glance at the functions of the DDM shows that it is more than able to execute its mandate as part of the government. Disaster preparedness is done to *avoid* a disaster from escalating into an emergency. Preparation for and management of a disaster is aimed to prevent a state of emergency at which point the constitutional reins pass from the government to the Governor.
22. Section 27 is very specific in application. Only in periods of grave natural disaster or public emergency, may it be invoked. In cases of an urgent threat to the state, Section 27 permits the delegation of powers to the Governor General to issue decrees, to censor information, and to suspend legal processes and rights. The purpose for which this special authority is granted is limited. It is aimed at resolving the threat to the state and public in order to restore



the status quo. It anticipates that constitutional and other legal rights and processes will be restored with the consequential return to normal law and order. It is to be used conservatively, and the Governor is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system.

23. By way of comparison, the Cayman Islands has a Disaster Preparedness and Hazard Management Law. The Governor appoints the Director who has wide powers to oversee, manage, implement and co-ordinate disaster preparedness and management. The government has however assumed a pivotal role in this critical agency creating a National Disaster Fund under the *Public Management and Finance Law (2018 Revision)*. Section 4A(4) states:

*Pursuant to this Law, the Management Executive shall advise Cabinet on the use of the Fund and shall be responsible for the management of the monies disbursed from the Fund to carry out any of the activities required to give effect to the purposes of the Fund as directed by Cabinet.*

**Need for Change?**

24. Currently there are two divergent views on where the DDM should be assigned. One view is that the DDM would be correctly placed with the Premier's Office or another Government Ministry, while the other view is that it should be the responsibility of the Governor. Currently, the DDM is a government department which operates under the legal authority of the Governor General.
25. The sentiments for change echo largely as a result of the unprecedented damage caused to the BVI by hurricane Irma in 2017. The effects of Hurricane Irma in the British Virgin Islands were significant in terms of both human and socio-economic impact on the Territory. It caused widespread destruction, and killed a total of four people.
26. The hurricane caused extensive damage to property and infrastructure in the Territory, and caused statistically significant levels of depopulation. The Governor for the first time ever,

declared a state of emergency under the Territory's constitution. Radio facilities had been significantly damaged and the state of emergency had to be announced by distribution of flyers around the capital, Road Town. The UK's Foreign Secretary Boris Johnson visited Tortola on 13 September 2017 and said that he was reminded of photos of Hiroshima after it had been hit by the atom bomb. Approximately 85% of housing were damaged or destroyed. After the storm, it took almost 6 months to restore public electricity to the entire country.

27. The aftermath of the hurricane left food, potable water, fuel and medicine highly limited. Residents had to queue, sometimes for hours, in the sun to obtain necessities. None of the banks functioned for several days afterwards, and the Territory became a purely cash economy for a period of weeks.
28. The building which housed the DDM was almost totally destroyed in the storm. Accordingly, the relief and recovery efforts had to be coordinated from a conference room in Peebles Hospital.
29. There is no doubt that the DDM, under the authority of the Governor General, failed miserably to anticipate and/or respond to Hurricane Irma. Therefore, there is a need for a revamp in policy and legislation to ensure the BVI's disaster preparedness and management is more robust, effective and efficient.
30. The need for change in the wake of disaster is not uncommon. The **Organisation of American States Caribbean Emergency Legislation Project at Part II pages 141 to 146** deals with the comparison of different legislative framework and development:

*Nearly all significant or overarching legislative/administrative development relating to emergency/disaster law occurs in countries recently after they have suffered major disaster or emergency events. This factor is closely related to the alignment of political will within the country, to avoid suffering such significant injury or damage in the future. As expressed in the context of the UN International Strategy for Disaster Reduction,*

*“The post-disaster reconstruction period provides the best time to introduce disaster reduction into sustainable development planning. When perceived as a distinct set of activities, risk management initiatives are placed in competition with other environmental and developmental objectives, rather than being seen as integral parts of the same whole. Therefore, political commitment and social acceptance of the value of risk reduction are necessary to increase the sustainability of communities.”<sup>2</sup>*

*Similar responses were noted in many different countries, often focused on re-assigning disaster focal point responsibilities to agencies better able to promote intra-governmental coordination...*

31. During the disasters of 2017, members of the public were calling on their elected representatives to assist them. Not being adequately informed and familiar with the disaster management procedures, many citizens were not properly served by the response effort which followed. Elected representatives are in tune with the weaknesses of the community at large and specifically their constituencies. They are particularly aware of the vulnerable families and the structural deficiencies to the physical infrastructure of their districts.
32. From a financial standpoint, the Territory learned the importance of investing in financial instruments which pay dividends in the face of a disaster, the hard way. The decision to sign up to the Caribbean Catastrophe Risk Insurance Facility (CCRIF) was only taken after being hit by Irma and Maria, though this facility was available to decision makers long before the disaster. This was another area where exposure to relevant information about the threat of disasters could have propelled the policy decision to ensure better financial preparedness was implemented. This also is an area where the Governor would be powerless to implement policy to ensure enhanced financial preparedness.
33. Positioning the Cabinet to take full responsibility to make policies in an integrated way to address the various deficiencies before, during, and after a disaster is a critical step for the

Territory to be sufficiently prepared to respond to a disaster, since disaster response begins with preparedness.

**Conclusion:**


34. Disaster preparedness and management does not interfere with the power of the Governor General to declare a state of emergency. It is an executive function that properly resides under the constitutional jurisdiction of the cabinet.
35. The role of the Governor envisaged by the constitution under section 27 is limited to declaring a state of public emergency. This declaration is a constitutional trigger which gives the Governor the power to make “*such regulations for the Virgin Islands as appear to him or her to be necessary or expedient for securing the public safety, the defence of the Virgin Islands or the maintenance of public order, or for maintaining supplies and services essential to the life of the community.*”
36. The *legal* power to declare a state of emergency does not mean that the executive function of disaster preparedness and management is subsumed within it. It is neither a constitutional imperative nor legislative corollary. This is properly a matter for the elected government of the day. It falls within its executive authority.
37. The fact that disaster preparedness and management was not included among the “special responsibilities” given to the Governor in section 60 (1) supports the conclusion that it was intended that this would be matter for the government: *expressio unius est exclusio alterius*.
38. In the circumstances, it is open to the government to repeal the Disaster Management Act 2003 and replace it with a more modern statutory framework which reflects the constitutional division of responsibilities between the cabinet and the Governor. Whilst the Governor alone has the power to declare a state of emergency and make regulations, it is the cabinet that has responsibility to formulate and implement policies for disaster preparedness and management in the exercise of its executive authority.

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And we so advise.

This 17<sup>th</sup> day of November, 2020

  
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# Overview of contingent liability process

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**3.1** This chapter provides an overview of the contingent liability process of which the checklist process is just one part. The process and associated checklist increase scrutiny, control, and oversight of public sector contingent liabilities. This will support the Treasury in meeting its core objective of placing the public finances on a sustainable footing.

**3.2** There are 4 key stages that a contingent liability will go through: policy development; Treasury approval; Parliamentary notification and approval; and reporting. Each of these stages is described below. Note that the timings associated with each stage where Treasury is involved are indicative and will depend on available resources and the complexity of the policy issue. Therefore it is possible that less time could be required to process more routine cases while more time could be needed for especially complex cases. Furthermore, in particularly urgent cases, some of the stages may be run in parallel.

## Policy development

**3.3** This is the first stage that a contingent liability goes through. It is at this stage that a policy is being developed which gives rise to a contingent liability. As highlighted in chapter 2, the relevant policy officials, in conjunction with departmental finance teams, are responsible for determining whether a particular policy gives rise to a contingent liability and subsequently classifying / reclassifying the contingent liability.

**3.4** The Treasury's checklist process becomes relevant as soon as it has been determined that a contingent liability may be incurred as a result of the policy. Therefore, at this stage, the relevant policy official should consult this guidance on whether the contingent liability would be in scope of the checklist and if so, how to complete the checklist. If questions remain on completing the checklist, the official should consult the relevant Treasury officials (in most cases, this will be a member of the associated spending team in the first instance).

**3.5** Once the checklist is completed, it should be submitted to the relevant Treasury officials for approval. The Treasury expects at least 5 working days to assess the completed checklist, although in many cases the process will be iterative and therefore may depend on how quickly officials drafting the checklist are able to provide further information in light of comments.

**3.6** If the checklist is approved, the policy official would then be expected to seek final approval from the relevant departmental minister and accounting officer. As part of seeking that approval, the policy official should make clear that the contingent liability has passed the Treasury's internal contingent liability approval process.

**3.7** However, if the checklist is not approved and officials proceed with the policy, they should make clear in their advice to ministers and accounting officers that the contingent liability has not been approved and therefore formal Treasury approval of the contingent liability is unlikely.

**3.8** The checklist may not be approved for several reasons. For example, it might be the case that Treasury officials feel that they do not have sufficient information to make a judgement as the checklist has not been answered as comprehensively as expected. It might also be the case that the Treasury officials do not consider the contingent liability to be consistent with the Treasury's core objective of ensuring the sustainability of public finances. This could be the case

if, for example, the expected loss in the future is particularly large and not supported by a strong rationale or value for money assessment.

## Treasury approval

**3.9** 'Managing public money' makes clear that departments must obtain Treasury consent before making commitments which could lead to expenditure. Contingent liabilities are commitments which could lead to expenditure. Therefore, once a contingent liability has been approved by the relevant departmental minister and accounting officer, it must be submitted to the Treasury for formal approval. This process is likely to take 5 working days if ministerial approval is judged necessary otherwise it is likely to be less.

**3.10** Treasury officials will make a judgement on whether the contingent liability needs approval by the Chief Secretary of the Treasury (and in specific cases, the Chancellor of the Exchequer). If it does, the advice to ministers will be based on whether or not the contingent liability passed the checklist in the first stage. Note that while getting Treasury approval for a contingent liability will be particularly challenging if it has not passed the checklist, ministers may still reject the contingent liability for other reasons even it has passed the checklist.

**3.11** Treasury approval of a contingent liability is on the understanding that the department concerned accepts the risk of paying out if the liability crystallises. Departments should include contingent liabilities with the other financial risks they manage. Spending pressures created by an unaffordable contingent liability should be dealt with by the department in discussion with its Treasury spending team in the usual way. Treasury agreement to a contingent liability does not affect normal Treasury controls over access to the Reserve.

## Parliamentary notification

**3.12** Parliament expects advance notice of any commitments to future use of public funds for which there is no active request for resources through Estimates. Therefore, once the Treasury has approved the contingent liability, a departmental Minute will need to be drafted in order to notify Parliament that the department or its arm's length body (ALB) is incurring a contingent liability (unless the contingent liability is incurred in the normal course of business; is statutory in nature; or is below £300,000 in value).

**3.13** Departmental Minutes must be approved by the Treasury and should be accompanied by a written ministerial statement. As part of this approval, the Treasury will expect assurance that those contingent liabilities within the scope of the checklist have passed it. The Treasury aims to complete this approval within 5 working days. In urgent cases, this approval may be run in parallel with the approval of the checklist. Further information on the Parliamentary notification process and the range of contingent liabilities to which it applies is available in Annex 5.4 in 'Managing public money'.

## Reporting

**3.14** The final stage of the contingent liability is reporting. The contingent liability will be reported through the Estimates and in departmental or ALB annual report and accounts.

**3.15** Following publication in the departmental or ALB accounts, the Treasury will publish on a consolidated basis, as part of the Whole of Government Accounts (WGA), contingent liabilities for the whole public sector. This will enable an assessment of the risks associated with contingent liabilities for the public sector.

# Completing the contingent liability checklist

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4.1 This chapter first sets out the scope of the contingent liability checklist. It then describes each section of the checklist providing detailed guidance on every question with examples where necessary. It is expected that officials initiating the policy that give rise to potential contingent liabilities that are in scope of this process will complete the contingent liability checklist as part of the overall policymaking process.

## Scope of the checklist

4.2 In all cases, relevant Treasury officials should be made aware of any potential contingent liabilities that could be considered novel, contentious, or repercussive. The relevant Treasury official will usually be a member of the associated spending team.

4.3 Of the contingent liabilities with a maximum exposure of £3 million or more, only those that are considered novel, contentious, or repercussive will be in scope of this checklist. As such, contingent liabilities taken on in the normal course of business (that is, those that are business as usual) will be exempt from this process and will not require a checklist to be filled out. 'Managing public money' explains that in order for a liability to be considered business as usual, the organisation should be able to show that the activity is an unavoidable part of its business and/or Parliament could reasonably be assumed to have accepted that such liabilities can rest on the sole authority of the Appropriations Act. Further information and examples of such liabilities are provided in Annex 5.4 of 'Managing public money'.

4.4 Furthermore, 'Managing public money' makes clear contingent liabilities with a maximum exposure of less than £300,000 do not need to be notified to Parliament. As such, such small contingent liabilities are also exempt from the checklist process.

4.5 Contingent liabilities with a maximum exposure of £300,000 or more but less than £3 million will still need to be approved by the Treasury and notified to Parliament but will not be required to go through the checklist. Nonetheless, for this class of contingent liabilities, the relevant Treasury official may require the contingent liability to go through the checklist process if it is deemed particularly novel, contentious, or repercussive.

4.6 While many contingent liabilities would not be required to go through the checklist process, it would be considered best practice for policy officials to use the checklist as part of the policymaking process.

## The contingent liability checklist

4.7 The contingent liability checklist has been designed in order to ensure that policies giving rise to contingent liabilities are consistent with the Treasury's objective of safeguarding the sustainability of public finances. The checklist is composed of five sections: rationale; exposure; risk and return; risk mitigation and management; and affordability. Each section provides important information about the proposed contingent liability and will be assessed both individually and in conjunction with the other sections.



## 1. Rationale

4.8 The first section in the checklist relates to the rationale for the contingent liability. The aim of this section is to make sure that the reasons for incurring a particular contingent liability are robust and that the rationale would stand up to scrutiny.

### **Question A: What is the problem that needs to be solved (the market failure) and why is government intervention necessary?**

4.9 This question concerns the problem that needs to be addressed. A market failure is a situation in which the free market is unable to allocate resources efficiently. Market failures come in many different forms. For example, the market may not result in an efficient outcome due to an information asymmetry (that is, when one party has more information than the other). For instance, when making a loan, the lender knows less about the likelihood of repayment than the person they are lending to. This may lead to a situation where lending is either less in volume or higher in price than that would be achieved if there was perfect information. If it is not possible to achieve perfect information, the government may provide a guarantee to encourage lending.

4.10 The answer should explain why government intervention is necessary and likely to address the problem. If the problem could be fixed without government intervention, then the answer should make clear why government intervention would be a more effective solution.

4.11 In some cases, it may not be possible to link the intervention to a market failure. In such cases, a clear explanation should be given as to why the government is intervening despite the lack of a market failure.

### **Question B: Why is incurring / modifying a contingent liability necessary to address the market failure?**

4.12 This question focuses on whether incurring a contingent liability is necessary to address the market failure. Specifically, the answer should explain how it addresses the underlying market failure (or at least part of it). The answer should also explain why addressing the market failure is best accomplished through incurring a contingent liability rather than an increase in spending today that would also target the market failure.

4.13 The creation of a contingent liability with the sole purpose of avoiding an increase in spending today would not be considered a sufficient reason to incur a contingent liability as it creates a potential spending obligation in the future and therefore does not necessarily support the Treasury's objective of ensuring the sustainability of public finances.

4.14 In cases where it is not possible to link the contingent liability to a market failure, a clear explanation should be given as to why the contingent liability is more effective than an equivalent increase in spending in solving the underlying problem.

### **Question C: What other alternatives have been explored? For example, direct spending such as subsidies. Why were these rejected?**

4.15 An answer to this question should detail the alternatives that have been explored. This could include both alternative forms of government intervention as well as no direct government intervention.

4.16 This answer should also explain why incurring the contingent liability is a more effective solution to addressing the market failure than the alternatives. If a market failure is not possible to identify, then this answer should explain why the contingent liability is the most effective form of government intervention.

## 2. Exposure

4.17 The second section of the checklist relates to the exposure created by the contingent liability. This refers to the magnitude of costs the Exchequer would face if the contingent liability was to crystallise and to how long the Exchequer is exposed to such costs.

### **Question A: What is the maximum size of the contingent liability, if any?**

4.18 This answer should state the total cost to the Exchequer if the contingent liability crystallised completely. The maximum size is considered the worst case scenario and is thus useful to provide an idea of the scale of risk potentially facing the public sector. For example, if the government guaranteed losses on a portfolio of loans, the maximum size of the contingent liability would be the cost the government would face if all the loans in the portfolio defaulted completely.

4.19 The answer should also explain how the maximum size was calculated. Using the example above, this would be the maximum number of people that could take out a loan multiplied by the maximum size of each of those loans.

4.20 If it is impossible to estimate the maximum size of the contingent liability and it is deemed unquantifiable, the answer should justify why such an estimate cannot be obtained and provide a qualitative analysis of the likely size.

### **Question B: Why is this size necessary? If there is no explicit maximum, please explain why.**

4.21 This question seeks to understand the rationale behind the size of the contingent liability. As such, the answer should explain why the size chosen is optimal for solving the underlying market failure.

4.22 If there is no maximum, the answer should make clear why there is no explicit maximum.

### **Question C: What is the maturity of the contingent liability, if any? Specifically, when does it cease to exist?**

4.23 While maximum size gives an idea of the scale of risk, this question seeks to find out how long the public sector will bear that risk (that is, what is the maturity of the contingent liability?).

4.24 The answer should give information on both when the policy giving rise to the contingent liability concludes as well as how long the contingent liability may last. For example, if the government provided a 10-year guarantee from the year 2000 up until the year 2020, the policy would exist for 20 years but the risk would remain until the year 2030 (if a 10-year guarantee was provided on a loan given in 2020, the contingent liability would exist until 2030).

### **Question D: Why is this maturity necessary? If there is no explicit maturity, please explain why.**

4.25 Similar to question 2.B, this question seeks to understand the rationale for the maturity of the contingent liability. The answer should make the case for the maturity stated in response to 2.C. For instance, using the example above, the answer to this question should explain why a 10-year guarantee was required to address the market failure and why the policy needs to exist for 20 years.

4.26 If there is no explicit maturity, the answer should make clear why not and if not whether the contingent liability has a review clause (for example, that the contingent liability will be reviewed at a particular date in the future). It will be important to review contingent liabilities that have no explicit maturity to ensure that when they have served their purpose they are allowed to mature.

**Question E: If, prior to maturity, the contingent liability no longer proves to be value for money, is there an exit strategy? If yes, how would it work? If no, why not?**

**4.27** Contingent liabilities can have long lifespans and therefore it is important to retain flexibility to deal with changing risks. This answer should make clear whether there is a policy for either relinquishing the obligation associated with the contingent liability or changing the terms of the contingent liability in the future, especially if future circumstances change.

**4.28** For example, if the contingent liability became more likely to crystallise, the answer should set out how the public sector could reduce or eliminate its exposure to the contingent liability.

### **3. Risk and return**

**4.29** This section of the checklist focuses on the risk and return posed by the contingent liability. It is particularly important in enabling the Treasury to assess the fiscal risks faced by the whole of the public sector and therefore assist it in safeguarding the sustainability of public finances. While section 2 focused on the worst case scenario, this section aims to understand the *most likely* scenario as well as the causes of such scenarios.

**4.30** Many of the questions in this section seek numbers that may be difficult to estimate. Officials should provide quantification as much as possible and if necessary provide ranges to indicate the uncertainty associated with the estimate. The Government Actuary's Department (GAD) is a non-ministerial department that provides bespoke modelling services and may therefore be able to assist in deriving the estimates sought in this section.<sup>1</sup>

**4.31** If numbers are not provided, the answer should make clear why it was not possible to provide any estimate and provide a qualitative analysis. The Treasury will require the estimates requested in order to approve the contingent liability and will only consider approving contingent liabilities without such estimates in special circumstances.

**4.32** It should be made clear if estimates are provisional and dependent on the outcome of commercial negotiations. In such cases, if there are material changes to the estimates following a negotiation, the Treasury would expect to see the revised estimates.

**Question A: What are the triggers for potential crystallisation of the contingent liability?**

**4.33** The response to this question will be helpful in assessing which factors could trigger realisations in the government's portfolio of contingent liabilities. For example, it would allow the Treasury to ascertain what proportion of contingent liabilities crystallise following a fall in the price of a particular commodity or a change in a particular macroeconomic variable.

**4.34** Therefore, the response should list all events that could cause crystallisation, giving an indication of proportion that would be expected to crystallise as a result of the event. For example, a fall in the price of a particular commodity of 25% would cause crystallisation of 50%, or a 1% rise in inflation in a particular region would cause 10% crystallisation.

**4.35** Responses should avoid simply saying a credit event would lead to crystallisation of the contingent liability but focus on what factors could cause the credit event.

**Question B: What is the likelihood of complete crystallisation over what timeframe?**

**For example, time  $t$  = X%, time  $t+1$  = Y%, time  $t+2$  = Z%, etc**

**4.36** This question seeks to understand the likelihood of complete crystallisation over the lifespan of the contingent liability. For example, if a contingent liability had a maturity of 5 years,

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<sup>1</sup> For more information on how GAD may be able to provide support please visit [www.gov.uk/gad](http://www.gov.uk/gad) or email [enquiries@gad.gov.uk](mailto:enquiries@gad.gov.uk).

this answer would provide the probability that the contingent liability completely crystallises by the end of year 1, by the end of year 2, by the end of year 3, by the end of year 4, and by the end of year 5. Note that the probability of complete crystallisation by the end of year 5 cannot be lower than that by the end of year 1 because the probability of complete crystallisation in year 5 would include the probability that the contingent liability crystallised in year 1, year 2, year 3, and year 4.

**4.37** If the contingent liability had a maturity of just 1 year, it would be more appropriate to use monthly or quarterly figures for the probability. A judgement should be made on using an appropriate timeframe. An indication should be provided on the uncertainty associated with the probability estimates.

**Question C: What is the distribution of possible losses over the life of the contingent liability? For example, loss of A with likelihood of B, loss of C with likelihood of D, etc**

**4.38** The distribution of possible losses is very helpful in assessing the risks to the Exchequer. For example, if the government guaranteed losses on a portfolio of loans with the maximum exposure as £10 million, the response to this question should explain that there is a 55% of no loss, a 5% of a £2 million loss, a 20% chance of a £5 million loss, a 15% chance of a £8 million loss, and a 5% chance of a £10 million loss (that is, a 5% chance of complete crystallisation). Note that the distribution is used to given the range of all possible outcomes so the probabilities should sum to 100%.

**4.39** The above example has provided five scenarios with the associated probabilities and losses. While more scenarios would generally be preferred as they provides greater information, the policy context will largely determine what is feasible. For example, it might be the case that there are only two scenarios (either there is no loss or complete crystallisation). If we use the same example as above, it could be that there is 72% chance of no loss but a 28% chance of a £10 million loss (that is, a 28% chance of complete crystallisation).

**Question D: What is the expected loss associated with the contingent liability?**

**4.40** The expected loss is a particularly important summary statistic. It is calculated by using the information in the response to question 3.C. Specifically, it is calculated by multiplying the potential losses with their respective probabilities and then taking the sum of them.

**4.41** For instance, building on the first example in 3.C, the expected loss would be £2.8 million ( $[55\% \times £0 \text{ million}] + [5\% \times £2 \text{ million}] + [20\% \times £5 \text{ million}] + [15\% \times £8 \text{ million}] + [5\% \times £10 \text{ million}]$ ).

**4.42** Note that the second example in 3.C also has an expected loss of £2.8 million ( $[72\% \times £0 \text{ million}] + [28\% \times £10 \text{ million}]$ ). While expected loss is a very useful summary statistic, these examples show that even if expected losses are the same on two different transactions, the underlying distributions may be quite different.

**4.43** It is unlikely that the expected loss will be exactly zero as this would imply that either the probability of complete crystallisation is zero or the maximum exposure of the contingent liability is zero or that both are zero.

**Question E: How do the risks compare to the returns on the contingent liability?**

**4.44** The answer to this question should summarise the risks to the Exchequer and compare them against the returns. For example, using the contingent liability described in 3.C, the risks would be the distribution of losses (as well as the expected loss). The returns would be the fee that the government may have charged in order to provide the guarantee.

4.45 The above would give an indication of how the risks compare with the returns in financial terms. However, there will also be wider policy benefits which should also be summarised and quantified where possible.

#### 4. Risk management and mitigation

4.46 Good management and governance arrangements may lead to and reduced likelihood of a contingent liability crystallising. It may also mean that the public sector is better able to react to changing market conditions.

4.47 This section focuses on the policies for risk management and mitigation associated with the contingent liability.

##### **Question A: Who will manage the risks associated with the contingent liability and what is the governance process around the management of these risks?**

4.48 The answer should make clear the body immediately in charge of managing the risks associated with the contingent liability. This could be an agency, a government department, or indeed the Treasury. It could also be a specific committee within a government department.

4.49 If the body immediately in charge of managing the risks is not a government department, the answer should then state which is the lead government department (that is, the department to which the body reports to) and whether the Treasury has any oversight in the process and if so, how that oversight structured.

4.50 Furthermore, the answer should explain how the governance process works around managing the risks. For example, if the contingent liability suddenly becomes more likely to crystallise, it should make clear what the body responsible for managing the risks is able to do and how it would make such decisions.

##### **Question B: What risk mitigation tools have been explored? For example, partial guarantees, collateral, controls on risk-taking behaviour, reinsurance, etc**

4.51 While question 4.A focuses on the processes set up to manage the risks associated with the contingent liability, this question seeks to understand which measures have been taken to reduce the risks. For example, a government guarantee of a bank loan may result in moral hazard as banks will have less incentive to robustly screen borrowers given that if they default, the government will pay. Therefore, in this case, as part of the guarantee, the government could set controls on risk-taking policy ex-ante. This could include setting conditions on the credit-worthiness of borrowers or setting minimum requirements on the loan (for example, a minimum loan-to-income ratio).

4.52 Risk mitigation tools could come in various forms but the aim of such tools will be to reduce the likelihood that the contingent liability crystallises or in the case that it does crystallise reduce the loss from crystallisation (for example, through requiring collateral).

4.53 Therefore, the response to this question should explain which risk mitigation tools are being used and why. Furthermore, it should describe other tools that were considered but not utilised and explain why.

##### **Question C: Is the Exchequer being adequately compensated for bearing the risk associated with the contingent liability? For example, guarantee fees, contingent claims, profit-sharing, etc**

4.54 This is similar to question 3.E as it seeks to understand the return to the Exchequer but also explores what mechanisms can discourage poor management. The answer should set out how the Exchequer is being compensated for bearing the risks in monetary terms. For example, the

answer could explain that the Exchequer is receiving guarantee fees. If this is the case, it should also make clear the size of such fees. The answer should then explain how the fees were calculated and whether the compensation is calculated on a commercial basis. If the fee is calculated on a commercial basis, it must be greater than the expected loss associated with the contingent liability.

**4.55** If the Exchequer is not being compensated on a commercial basis, then the answer should clearly set out why.

**Question D: How should the Exchequer guard against the residual risk? For example, contingency fund, setting aside financial assets, hedging, etc**

**4.56** This question follows on from questions 4.B and 4.C. If not all of the risk has been mitigated through utilising risk mitigation tools and the compensation received also does not cover all of the risk associated with the contingent liability, then the Exchequer will bear some risk (residual risk). This answer should explain how best the Exchequer should guard against the residual risk by providing several options (for example, one option is having a contingency fund to cover the residual risk).

## **5. Affordability**

**4.57** This section assesses the impact of crystallisation of the contingent liability on departmental budgets. Evaluating the affordability of a contingent liability in this way is similar to evaluating the affordability of public spending.

**Question A: If the contingent liability crystallised, to what extent would it be possible to meet the required payment out of the department's existing budget?**

**4.58** A response to this question should make clear the impact on the department's existing budget if the contingent liability completely crystallised.

**Question B: What is the ratio of the contingent liability's expected loss to the department's available resource?**

**4.59** This question uses the expected loss determined in 3.C and takes a simple ratio of that to the department's available resources. This is intended to provide a simple and consistent metric on affordability.

**4.60** For example, if the expected loss is £1 million and the department's available resources are £100 million, the metric would be 1%. If the expected loss is only £500,000, this may appear smaller, but if at the same time the department's available resources are £2 million, the metric would be much higher at 25%. All else constant, the latter case would be more risky in terms of affordability even though it has a lower expected loss.

**Question C: If the contingent liability crystallised, how would it affect public sector net borrowing (PSNB) and public sector net debt (PSND)?**

**4.61** Depending on the specific circumstance, the crystallisation of contingent liabilities may impact on PSNB and PSND. The response to this question should explain the ways in which crystallisation may impact on PSNB and PSND.

**4.62** For example, if crystallisation of the contingent liability is met completely through the department's existing budget without any knock-on impacts, it will not impact on forecast PSNB and PSND. However, if a claim is made on the Reserve, then depending on the nature of the contingent liability, it may impact both PSNB and PSND.

# Contingent liability checklist

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## 1. Rationale

- A: What is the problem that needs to be solved (the market failure) and why is government intervention necessary?
- B: Why is incurring / modifying a contingent liability necessary to address the market failure?
- C: What other alternatives have been explored? For example, direct spending such as subsidies. Why were these rejected?

## 2. Exposure

- A: What is the maximum size of the contingent liability, if any?
- B: Why is this size necessary? If there is no explicit maximum, please explain why.
- C: What is the maturity of the contingent liability, if any? Specifically, when does it cease to exist?
- D: Why is this maturity necessary? If there is no explicit maturity, please explain why.
- E: If, prior to maturity, the contingent liability no longer proves to be value for money, is there an exit strategy? If yes, how would it work? If no, why not?

## 3. Risk and return

- A: What are the triggers for potential crystallisation of the contingent liability?
- B: What is the likelihood of complete crystallisation over what timeframe?  
For example, time  $t = X\%$ , time  $t+1 = Y\%$ , time  $t+2 = Z\%$ , etc
- C: What is the distribution of possible losses over the life of the contingent liability? For example, loss of A with likelihood of B, loss of C with likelihood of D, etc
- D: What is the expected loss associated with the contingent liability?
- E: How do the risks compare to the returns on the contingent liability?

## 4. Risk management and mitigation

- A: Who will manage the risks associated with the contingent liability and what is the governance process around the management of these risks?
- B: What risk mitigation tools have been explored? For example, partial guarantees, collateral, controls on risk-taking behaviour, reinsurance, etc
- C: Is the Exchequer being adequately compensated for bearing the risk associated with the contingent liability? For example, guarantee fees, contingent claims, profit-sharing, etc
- D: How should the Exchequer guard against the residual risk? For example, contingency fund, setting aside financial assets, hedging, etc

## 5. Affordability

- A: If the contingent liability crystallised, to what extent would it be possible to meet the required payment out of the department's existing budget?
- B: What is the ratio of the contingent liability's expected loss to the department's available resource?
- C: If the contingent liability crystallised, how would it affect public sector net borrowing (PSNB) and public sector net debt (PSND)?

### **HM Treasury contacts**

This document can be downloaded from  
[www.gov.uk](http://www.gov.uk)

If you require this information in an alternative  
format or have general enquiries about  
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**Our Ref: OP/C4/001**

12<sup>th</sup> January, 2021

His Excellency the Governor  
Mr. Augustus J. U. Jaspert  
Governor of the Virgin Islands  
Office of the Governor  
Road Town  
Tortola VG1110

Dear Governor Jaspert:

**RE: Chairing of Cabinet Meeting today**

Good day, God's Blessings and Happy New Year to you and your family. May I also take this opportunity to welcome you back to the Territory after your Christmas vacation abroad. I do hope that you were able to have an enjoyable holiday, albeit that it was a brief one.

As you are aware, on 7<sup>th</sup> January, 2021, Cabinet agreed to fix its next meeting for Wednesday, 13<sup>th</sup> January, 2021, and that Members would attend "in person". Your current quarantine, in accordance with the COVID-19 public health protocols for persons arriving into the Territory, of course, makes it impossible for you to be present at this meeting in person.

Section 49(1) of the Virgin Islands Constitution Order 2007 requires the attendance of the Governor at Cabinet Meetings, so far as practical. Where it is not practical for the Governor who is in the Territory to attend a Cabinet Meeting, the Constitution has provided for this situation. Section 49(2) provides for the Cabinet Meeting to take place with the Meeting being presided over by the Premier, or in the Premier's absence, the Deputy Premier.

You would agree that Good Governance must be conducted in accordance with the Constitution. In the present circumstances where, due to you being quarantined under the COVID-19 protocols based on your recent arrival from the UK, you are in the Territory but unable to attend Wednesday's in-person meeting of the Cabinet, it is clear that Section 49(2) of the Virgin Islands Constitution Order 2007 is automatically activated for the said Cabinet Meeting.

Do have an enjoyable day.

Yours in BVILOVE,



.....  
Andrew A. Fahie  
Premier and Minister of Finance

cc: All Cabinet Members  
Cabinet Secretary



Office of the Governor  
Government House  
P. O. Box 702  
Road Town, Tortola  
Virgin Islands

Telephone: (284) 468-3512

**Ref. No: GOV/GMD-SI/PO&D/02**

12<sup>th</sup> January, 2021

Honourable Andrew A. Fahie  
Premier and Minister of Finance  
Road Town, Tortola  
British Virgin Islands VI 1110

Dear Premier,

**Cabinet and Protocols**

I refer to your letter dated 12<sup>th</sup> January, 2021 relating to the chairing of Cabinet, and your letter dated 10<sup>th</sup> January 2021 to Lord Ahmad of Wimbledon concerning my recent return to the Territory and the protocol measures that were undertaken.

Out of concern, and with an abundance of caution, for the safety of my staff and others I am willingly and voluntarily undertaking 14 days self-isolation, working remotely throughout, to ensure that there is no risk to my office or to the public.

I will be performing my full duties virtually throughout this period as I agree that we need to remain vigilant and to take all precautionary measures for the safety of all concerned.

As you know, up until my departure from the UK on the 7<sup>th</sup> of January 2021, the official COVID-19 prevention protocols allowed for four (4) days quarantine and not for fourteen (14) days as is now required. These new measures were introduced as part of the travel ban for persons departing from or transiting through the UK and went into effect on 11<sup>th</sup> January 2021.

I note your support of me working remotely, to fulfill the functions of my office and constitutional duties, while in voluntary self-isolation.

The Constitution [section 49(1)] says I am required to attend and preside at meetings of the Cabinet when practicable to do so. Given the precedent set over the last year, we know it is practicable for the Governor to chair Cabinet online remotely and I look forward to doing so at the Cabinet meeting tomorrow.

My actions have always been and will remain in the best interest of the people of the Virgin Islands. I remain steadfast and unmoving in my position to govern to the best of my ability up until I remit this post as Governor, and in this regard your support is always welcomed and encouraged.

Sincerely,

A handwritten signature in black ink, appearing to read "A. J. U. 2" followed by a horizontal line.

Augustus Jaspert  
**HM Governor**

Cc: Deputy Governor  
All Members of Cabinet



Foreign &  
Commonwealth  
Office

K1.174  
King Charles Street  
London  
SW1A 2AH

19 March 2008

Governor  
British Virgin Islands

Tel: [REDACTED]  
Fax: [REDACTED]  
E-mail: [REDACTED]

*Dear Governor,*

#### **CHAIRMANSHIP OF CABINET - ABSENCE OF GOVERNOR**

You asked for my view on whether the person appointed as deputy to the Governor can preside at Cabinet meetings in the absence of the Governor, or whether, when the Governor is unable to preside but has appointed a deputy to the Governor rather than an acting Governor, it should be the Premier who presides.

Under the Constitution, section 37(1), when the Governor is absent from the Virgin Islands or for any other reason unable to perform the functions of his office, the Deputy Governor or (in the stated circumstances) such other person as Her Majesty may designate by instructions given by a Secretary of State shall act in the office of Governor and shall perform the functions of that office.

However, under section 39 of the Constitution, where the Governor is absent from the seat of Government but not the Virgin Islands, or is absent from the Islands or suffering from an illness either of which he believes will be of short duration, he may appoint a deputy to the Governor. An acting Governor may not be appointed in these situations.

While during the constitutional negotiations it was generally accepted by both sides that section 2(3) of the Constitution covered the point, the exchange of letters between Mr Ian Hendry and Dr Orlando Smith of 23 and 24 April 2007 was intended to make clear that although there was no reference to "acting Governor" in section 49(2) of the Constitution, the reference to "Governor" also included the acting Governor, and only if both the Governor and the acting Governor were absent would



the Premier preside. The discussion and letters dealt with this issue specifically, and the question of the role of the deputy to the Governor under section 49(2) was not addressed.

While these letters do not constitute legally binding instruments, they do set out the common understanding of the UK and the Virgin Islands Governments on this issue, and it is our expectation that both sides would respect them.

Setting the letters aside for a moment, in my view it is clear that under section 39 of the Constitution it would be open to the Governor, if the circumstances for appointment were met, to appoint a deputy to the Governor and to specify that one of his or her functions would be to preside at meetings of Cabinet. The reason for this is that it is open to the Governor to specify that the deputy will perform "such of the functions of the office of Governor as may be specified in the instrument". This is without limitation.

The issue therefore seems to boil down to the question whether or not the content of the exchange of letters now precludes the Governor from specifying that one of the functions of the deputy is to attend and preside at Cabinet meetings.

It is my view that although the Constitution itself does not preclude a deputy to the Governor from presiding at Cabinet meetings, and there is therefore a constitutional and legal basis for the deputy so to preside, it is clear from the exchange of letters that it was the intention of both Governments at the time that where there was no Governor or acting Governor to preside at Cabinet meetings, the Premier would preside.

*Yours ever,*

*SJDickson*

Susan J Dickson  
Legal Counsellor



*Office of the Chief Minister  
British Virgin Islands*

**Ref: L2/049**

24<sup>th</sup> April, 2007

Mr. Ian Hendry, CMG  
Leader, UK Constitutional Review Team  
Foreign & Commonwealth Office  
King Charles Street  
London SW1A 2AH

Dear Mr. Hendry,

**Re: New Constitution of the Virgin Islands**

We have discussed the meaning of the references to “the Governor” in section 49 (1) and (2) of the draft new Constitution of the Virgin Islands. I can confirm that the BVI interpretation of the references is that, as a result in particular of section 2 (3) and section 37 (1) of the Constitution, the term “the Governor” includes any person for the time being duly authorized to act as Governor under section 37 (1). Accordingly, the Governor presides in the Cabinet, the person acting as Governor by virtue of section 37 (1) presides in the absence of the Governor, and the Premier presides in the absence of both the Governor and the person so acting as Governor.

It is my understanding that this interpretation is shared by the UK as confirmed by your letter to me of 23<sup>rd</sup> April, 2007.

Yours sincerely,

D. Orlando Smith  
Chief Minister

cc: His Excellency the Governor, Mr. David Pearey



Foreign &  
Commonwealth  
Office

23 April 2007

King Charles Street  
London SW1A 2AH

Dr Orlando Smith  
Chief Minister  
Road Town  
British Virgin Islands

Dear Chief Minister,

### **New Constitution of the Virgin Islands**

We have discussed the meaning of the references to “the Governor” in section 49(1) and 49(2) of the draft new Constitution of the Virgin Islands. The UK interpretation of these references is that, as a result in particular of section 2(3) and section 37 of the Constitution, “the Governor” includes any person for the time being duly authorised to act as Governor under section 37(1). Accordingly, the Governor presides in the Cabinet, the person acting as Governor by virtue of section 37(1) presides in the absence of the Governor, and the Premier presides in the absence of both the Governor and the person so acting as Governor.

It is my understanding that this interpretation is shared by the BVI, and I should be grateful for your confirmation that this is the case.

Yours sincerely,

*Ian Hendry*

Ian Hendry  
Leader, UK Constitutional Review Team

cc: HE The Governor





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Government House  
P. O. Box 702  
Road Town, Tortola  
Virgin Islands

Telephone: (284) 468-3512

Ref. No: GOV/DIS/01

4<sup>th</sup> December, 2020

Honourable Andrew A. Fahie  
Premier and Minister of Finance  
Road Town, Tortola  
British Virgin Islands VI 1110

Dear Premier:

### **Governance of the Department of Disaster Management**

I am disappointed that I was not consulted on your proposed Machinery of Government changes, namely the movement of the Department of Disaster Management (DDM) from the Governor's Group to the Premier's Office, before they appeared in the budget. This is not a partnership approach to governance.

While I welcome a collaborative, whole of Government approach to disaster management, it is ultimately the responsibility of the Governor to ensure the safety and security of the Territory. Disaster preparedness must be considered a vital part of ensuring and maintaining this.

As the law stands, the Governor's responsibility for Disaster Management is made abundantly clear by the Disaster Management Act 2003, under which coordination of the Government's general policy for disaster management is ultimately for the Governor.

Specifically, it is the Governor's duty both to prepare a comprehensive disaster management plan, as well as to make preparations for disasters, including through the use of funds appropriated for that purpose. To achieve this, the Act provides for the Governor to appoint and supervise a Director of the Department of Disaster Management, who in turn is responsible for the running of the DDM.

This is consistent with the clear connection between disaster management and the Governor's special responsibility for internal security under the Constitution. As you are aware, where a matter falls within the Governor's special responsibilities, then, subject to any other law, executive authority rests with the Governor. Section 60 of the Virgin Islands Constitution states that the *'Governor shall be responsible for the conduct of any business of the Government of the Virgin Islands, including the administration of any department of government, with respect to [...]internal security'*. Moreover, where a matter, including assent to new legislation, involves these special responsibilities, the Constitution ensures that decision-making ultimately rests with the Governor.

In terms of the Deputy Governor, he may assist me under section 38(1)(a) of the Constitution, or indeed under my more general discretion under section 38(2), which allows me to assign *"any or all of the functions of the office of Governor"* to the Deputy Governor.

The Constitution sets out the process by which executive authority may be delegated to Ministers, and it is clear that such delegations are subject both to the Governor's special responsibilities, as well as other provisions of BVI law, including, in this case, the Disaster Management Act. Any change to the allocation of responsibility for disaster management would therefore require new legislation, as your own legal advice made clear. Given that such legislation would be likely to involve my special responsibilities, I would need to give particularly careful attention to the question whether I could properly assent to it.

I firmly believe that the current allocation of responsibilities for disaster management achieves the right balance in allowing the Governor to discharge my constitutional responsibilities, while fully involving you and Ministers. Although the Department of Disaster Management rightly sits in the Governor's group, I agree that disaster management is an issue for which all parts of BVI's government should share delivery. The current approach enables this. In particular, as Premier, you have an important role in the disaster management process. You co-chair with me the National Disaster Management Council (NDMC). Moreover, Ministers have direct oversight of their respective parts of disaster management.

The 2014 review of the National Disaster Management Council (NDMC) was carried out in order to integrate disaster management at sector level and to build leadership at Ministerial level. The NDMC is led by Permanent Secretaries from each Ministry. Ministers have direct responsibility for areas of disaster management embedded within their Ministries. The DDM has established roles concentrating on disaster management directly in Ministries; from the Health Disaster Management Programme, which is led by the Health Disaster Coordinator in the Ministry of Health and Social Development, to the Climate Change programme in the Ministry of Natural Resource and Labour.

In 2001, the Caribbean Disaster Emergency Management Agency (CDEMA) promoted a comprehensive approach linking all the elements of the Disaster Management cycle, namely preparedness, response, mitigation and recovery. The 'recovery' element, as longer-term development, rightly sits under you as Premier, as set out in the Recovery and Development Act 2018. These NDMC arrangements provide for the required partnership approach recommended by CDEMA.

In his written legal opinion, Mr Ramlogan makes unfounded assertions about the performance of the DDM and BVI's disaster preparedness and management. External evaluations of the Disaster Management programme over the years have lauded the approach of the BVI. In 2015, the Emergency Management Accreditation Programme (EMAP) validated the programme; BVI became the first territory outside of the United States and Canada to be granted international accreditation. BVI remains the only territory within the 19 CDEMA Participating States to have achieved this outstanding accomplishment. The programme met

all 64 standards, which made it in full compliance with worldwide industry standards. Furthermore, the Comprehensive Disaster Management Audit (CDM Audit) carried out by CDEMA in 2018 scored BVI highly across all phases of the disaster management cycle.

Undoubtedly, Hurricanes Irma and Maria had a devastating impact on BVI and there are always lessons to be learnt. However, the impact, potential casualties and recovery may have been much worse if not for the hard work of those with responsibility for disaster management across the Ministries and the vital support provided by the UK, including the Royal Marines and the Royal Engineers helping to re-establish power and water. Such UK support is able to be leveraged primarily due to the responsibility for disaster management being held by the Governor.

To sum up, the law is clear that the Governor is ultimately responsible for disaster management, and that it is within my authority to allocate the function of disaster management to the DG. Ministers are already involved in the work of the DDM through the NDMC, and have direct oversight of aspects of disaster management within their own portfolios. This approach has been validated by the exceptional results of the CDM Audit and EMAP validation.

Given the position under the law, DDM and the subject of Disaster Management should of course be presented correctly in the Budget Estimates as being under the remit of the Governor's Group.

To deviate from this would, as your own advice made clear, require legislative change, which I firmly believe would be best considered as part of your Constitutional Review proposals.

As I have made clear, where legislation presented to me involves the Governor's special responsibilities, I would have to pay particularly careful attention to whether I could properly assent to it.

Sincerely yours,



Augustus J. U. Jaspert  
**HM Governor**

CC: Cabinet Members



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 Government House  
 P. O. Box 702  
 Road Town, Tortola  
 Virgin Islands

Telephone: (284) 468-3512

18<sup>th</sup> December, 2020

Honourable Andrew A. Fahie  
 Premier and Minister of Finance  
 Road Town, Tortola  
 British Virgin Islands VI 1110

Dear Premier:

**Governance of the Department of Disaster Management**

In response to your letters dated 9<sup>th</sup> and 14<sup>th</sup> December, my position remains as set out in my letter dated 4<sup>th</sup> December.

As the constitution and the Disaster Management Act 2003 stands, the Governors responsibility is clear.

Given the position under the current constitution and law, DDM and the subject of Disaster Management should be presented correctly in the Budget Estimates as being under the remit of the Governor's Group.

To deviate from this would, as your own advice made clear, require legislative change, which I continue to firmly believe would be best considered as part of your Constitutional Review proposals.

Sincerely yours,

Augustus J. U. Jaspert  
**HM Governor**

Cc: Attorney-General  
 Cabinet  
 Deputy Governor  
 PS, DGO



**OFFICE OF THE GOVERNOR**  
P. O. Box 702  
Road Town, Tortola  
British Virgin Islands  
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Facsimile: (284) 494-5790

# MEMORANDUM

**Ref. No.:** GOV/LEG/08  
**TO:** Clerk, House of Assembly  
**FROM:** Acting Governor  
**DATE:** 22<sup>nd</sup> December, 2020  
**RE:** Appropriation (2021) Act, 2020

I have assented to the Appropriation (2021) Act 2020, but clarify that in doing so, do not endorse any purported regroupings or movement of financial controls within the budget estimate; unless in line with current Governance structures, and until these are altered through a proper, lawful process, including where necessary, assent to legislation reallocating responsibility.

David D. Archer, Sr.  
**Acting Governor**



## MEMORANDUM

**FROM:** Attorney General  
**TO:** Premier & Minister of Finance  
**cc:** His Excellency, the Governor  
**DATE:** 21 December 2020

**Our Ref.:** AGC SS/5/1/1/1K

***Re: Interpretation from the Courts (Department for Disaster Management)***

---

1. I refer to your memorandum dated 17 November 2020 on whether the governance and/or control of the Department for Disaster Management (DDM) should be vested in the Governor or instead, in a Minister of the Government of the Virgin Islands ("the Government"). You also asked me, as Attorney General, to refer this question to the Court of Appeal for a ruling under the provisions of the Attorney General's Reference Act, 2011 (the "AG's Reference Act").

2. My advice is that:

- (a) the *Disaster Management Act, 2003* (the "Act") vests authority for DDM in the Governor. There is no ambiguity or absurdity in the legislation and this is not an issue that is directly addressed by the *Virgin Islands (Constitution) Order, 2007* (the "Constitution");
- (b) Which entity should be responsible for DDM is a question of policy and as such, not suitable for reference under the AG's Reference Act which is only concerned with the resolution of questions of law or fact, such as the correct interpretation of the Constitution or legislation;
- (c) The Act can be amended to re-assign responsibility for the Department for Disaster Management to a Minister of Government; and

- (d) The parties should consider a mediated solution to ensure that there is effective handling of all facets of disaster management irrespective of where the lead responsibility lies.

3. In providing my opinion, I have reviewed the Constitution, the Act and the AG's Reference Act among other authorities and materials. I have also reviewed the following correspondence which were directed, copied or provided to me by you (the "Premier") or His Excellency the Governor (the "Governor"):

- i. Memorandum from the Premier to the Attorney General dated 13 November, 2020 (Re-Assignment of Disaster Management under the Premier's Office);
- ii. Memorandum from the Premier to the Attorney General dated 17 November, 2020 (Interpretation from the Courts, etc.);
- iii. Opinion from Freedom Law Chambers (Ramlogan, SC) dated 17 November, 2020 (the "Ramlogan Opinion");
- iv. Letter dated 4 December, 2020 from the Governor to the Premier dated 4 December, 2020 (Governance of the Department of Disaster Management);
- v. Letter dated 9 December, 2020 from the Premier to the Governor in response to the Governor's letter of 4 December, 2020;
- vi. Letter dated 14 December from the Premier to the Governor;
- vii. Letter dated 18 December, 2020 from the Governor to the Premier;
- viii. Letter dated 18 December, 2020 from the Premier to the Governor; and
- ix. Letter dated 27 April, 2010 (provided by the Premier) from the then Governor to the Permanent Secretary in the Premier's Office citing the

Comprehensive Disaster Management Policy approved by Cabinet in 2009 which placed responsibilities for disaster mitigation and recovery under the Premier and provided for mitigation and risk reduction to be handled by the Town and Country Department and the then Development Planning Unit. It also called on the Permanent Secretary to appoint a chair of the Mitigation Sub-Committee as it was no longer being chaired by the Deputy Governor (the "2010 Letter")

#### **Background**

4. By correspondence beginning with his letter of 13 November, 2020 to the Attorney General, the Premier set out his position that disaster management is not one of the Governor's special responsibilities under section 60 of the Constitution and that therefore the responsibility for disaster management should be assigned to a minister in accordance with section 56(1). He stated that there were many weaknesses in the aftermath of Hurricanes Irma and Maria which "...exposed the inefficiencies in the level of preparedness across the Territory...".

4. The Premier also asserts that:

"... one of the root causes of this problem is the inadvertent placement of the Department for Disaster Management (DDM) under the Governor's Group, which placement is inconsistent with the provisions of the ...[Constitution] and leads to the inefficient coordination with the rest of Government in terms of policy, planning and preparedness."

5. The Premier's position has been reinforced or reiterated in the Premier's subsequent correspondence and in the Ramlogan Opinion.

6. By letter dated 4 December, 2020 the Governor responded to the Premier's assertions stating:

The Constitution sets out the process by which executive authority may be delegated to Ministers, and it is clear that such delegations are subject both to the Governor's special responsibilities, as well as other provisions of BVI law, including, in this case, the Disaster Management Act. Any change to the



allocation of responsibility for disaster management would therefore require new legislation.... Given that such legislation would be likely to involve my special responsibilities, I would need to give particularly careful attention to the question whether I could properly assent to it.

7. The Governor also expressed his firm belief that any legislative change "...would be best considered as part of [the]... Constitutional Review proposals."

8. There has been a series of correspondence by the Premier and between him and the Governor as well as a direct request from the Premier to the Attorney General to commence proceedings under the AG's Reference Act.

9. On 5 November, 2020 the *Disaster Management Bill, 2020* had a first reading in the House of Assembly. Among other things, it provides for specific roles for the Governor and the Premier and notably, for the legislated duties of the Governor to be performed *in consultation with* the Premier.

10. On 15 December, 2020 the House of Assembly passed the *Appropriation (2021) Act, 2020* including budget estimates placing the funding for the Department of Disaster Management under the Ministry of Transportation, Works & Utilities and effectively defunding the Governor's group in respect of disaster management.

#### **Responsibility for Disaster Management**

11. *Disaster management* is not listed in section 60 of the Constitution as one of the Governor's special responsibilities. However, the Governor contends that "... it is ultimately the responsibility of the Governor to ensure the safety and security of the Territory... " and that... "[d]isaster preparedness must be considered a vital part of ensuring this."<sup>1</sup> Even if the latter statement is accepted, it is not the same as saying that responsibility for disaster management cannot, as a constitutional matter, reside elsewhere.

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<sup>1</sup> Governor's Letter (4 December, 2020) p. 1

12. The word 'disaster' is mentioned only once in the Constitution – in section 27 which empowers the Governor to declare a public emergency in respect of several eventualities, one of which is in respect of a natural disaster. In fact, since the terminology 'disaster management' (unlike subjects such as 'external affairs', 'defence' or 'internal security') is not mentioned in the Constitution at all, it must be a question of substance whether *disaster management* can only be the responsibility of the Governor or can be assigned to a Minister. In any event, the stated concern of the United Kingdom to retain 'sufficient authority to guard against the Overseas Territories becoming a liability... in circumstances of natural disaster' must be noted.<sup>2</sup>

13. The closest the existing law comes to a definition of disaster management is in the Disaster Management Act, 2003 which, in section 4, gives the Governor clearly enumerated responsibilities in respect of what is termed (without definition) *disaster management*. Here, the Governor's role includes ensuring the preparation of a comprehensive plan and programme; procuring supplies, materials and equipment; mobilizing emergency services and conducting studies and surveys from funds appropriated for that purpose. Further, s. 6 of the Disaster Management Act provides for the DDM Director to assist the Governor in coordinating the general policy of the Government in relation to mitigating, preparing for, responding to and recovering from emergencies and disasters.

14. When construing legislation, the first rule of statutory interpretation is to consider the natural or ordinary meaning of the particular words or phrases in the relevant legislation. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the lawmakers that it is proper to look for some other possible meaning. These principles were set out in the seminal case of *Pinner v Everett* [1969] 1 WLR 1266, 1273 and re-affirmed just last month by the Privy Council in *Attorney General of the Turks and Caicos Islands v. Misick and Ors.* [2020] UKPC 30: see paragraph 38.

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<sup>2</sup> This is recorded, for example, in the 2005 Report of the Constitutional Commissioners at para 9.15  
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15. There is nothing in the plain, natural or ordinary meaning of the language used in the Disaster Management Act which leads to any ambiguity or absurdity. The result is that the Governor unquestionably has responsibility for, and control over, DDM. This is not a constitutional question as the Governor's authority in this respect properly derives from statute.<sup>3</sup> Simply put, it is a matter of policy whether the governance and control of the DDM remains vested in the Governor or is assigned to a Minister of Government.

**Attorney General's Reference Act, 2011**

16. Under s. 3(1) of the *Attorney General's Reference Act, 2011* an Attorney General has the discretion, with the approval of Cabinet, to refer important questions of law and fact to the Court of Appeal for hearing and consideration. An example of where similar legislation was employed in the Eastern Caribbean Supreme Court occurred in *In the Matter of the Attorney General's Reference (Constitutional Questions) Act Cap. 17.18 of the Revised Laws of St. Lucia* SLUHCVAP 2012/0018 where there was need for clarity in respect of a typographical error in St. Lucia's constitution relative to their final appellate court.

17. Having considered the matter fully, there does not seem to be anything in the instant case to merit reference under the Act given the clear and plain meaning of the provisions of the Act. The solution is to decide on the policy position and back it up with supporting legislation.

**Mediated Outcome?**

18. In their correspondence, both the Premier and the Governor refer to the 2017 disasters and their aftermath, for example, to underscore the assistance from the United Kingdom in restoring order or the exclusion of elected representatives from access to resources and information that could have been used to assist their communities. In fact, this period seems to have provided at least a renewed impetus for the current

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<sup>3</sup> This is also supported by the Objects and Reasons to the Disaster Management Bill, 2003 which speaks about *conferring* certain powers and duties on the Governor and also *imposing* on him a 'wide range of duties that relate to ensuring that certain plans and preparations are made before the Territory is threatened by a hazard.'

debate. It can also be the case study for what disaster management is as a matter of practice and create a starting point for an improved partnership approach to disaster management in the Virgin Islands.

19. The breadth and content of the correspondence between the Premier and the Governor evidence a number of concerns that are ripe for resolution and that even an amendment to the Act will not, in and of itself, properly address. It also underscores the need to properly define the ambit of disaster management and the roles, responsibilities and accountability measures for various actors. From all indications and by its very nature, disaster management is a high stakes responsibility requiring multi-sector participation. Fortunately, the *Disaster Management Bill* takes some steps forward by prescribing responsibilities for both the Governor and the Premier and defining *disaster management* among other improvements.

20. I also say this in the context of the House of Assembly's responsibility for the passage of legislation and the Governor's power of assent under ss. 71 and 79 of the Constitution, respectively. Recent history<sup>4</sup> has demonstrated that Governors will use their power of assent to prevent legislation passed by the House of Assembly from coming into force. Indeed, the Governor has clearly stated in his correspondence that where legislation involves his special responsibilities that he would have to pay 'particularly careful attention' to whether he could properly assent to it.

21. Ultimately, it may therefore be most prudent for the Governor and the Government to engage in mediated discussions in a bid to amicably resolve the current impasse since the Governor's co-operation through assent would be ultimately required to achieve the desired outcome.

### Conclusion

22. The Act unequivocally vests responsibility for *disaster management* in the Governor. As there is no ambiguity or absurdity created by the provisions of the Act or

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<sup>4</sup> For example, with the *Computer Misuse and Cybercrime Act* in 2014 and again in 2019 and most recently the *Cannabis Licencing Act* and the *Drugs (Prevention of Misuse)(Amendment) Act*

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the Constitution, it is not appropriate to make an application to the Court under the AG's Reference Act for an interpretation. The obvious recourse is for the House of Assembly to amend the Act to transfer responsibility for disaster management to a Minister of Government. As it turns out, the Disaster Management Bill, 2020 had its first reading in the House of Assembly on 5 November, 2020.



Dawn J. Smith  
Attorney General

4811-9546-6709, v. 1



Office of the Governor  
Government House  
P. O. Box 702  
Road Town, Tortola  
Virgin Islands

Telephone: (284) 468-3512

**REF: GOV/LEG/08**

23 April, 2021

Honourable Andrew A. Fahie  
Premier and Minister of Finance  
Premier's Office  
Government of the Virgin Islands  
Cutlass Towers, 2<sup>nd</sup> Floor  
Road Town, Tortola VG1110

Dear Honourable Premier

**Disaster Management Act, 2021**

I refer to our conversations of 10 and 17 February and my letter of 18 February concerning the Disaster Management Act, 2021 (DMA2021).

Ensuring effective disaster management is of the highest priority in BVI and an area of work in which all parts of BVI's Government and the emergency services should be involved, working in a collaborative fashion. In some instances, as happened following Hurricane Irma in 2017, external support to help ensure the safety and security of the Territory will also be required, with a further need for effective coordination and joined-up working. I am committed to maintaining that approach to best meet the Territory's needs.

It is the responsibility of the Governor under the Constitution to ensure the security of the Virgin Islands. Disaster management clearly involves internal security and external affairs, both of which fall to the Governor under Section 60 of the Constitution. I continue to believe that key disaster management policy responsibilities should remain within the Governor's Group in order that I am able to fulfil those constitutional responsibilities. The DMA2021 represents a major transfer of policy and power of direction away from the Governor's Group

Accordingly, I would not be able to assent to DDM2021 as currently drafted.

The Constitutional Review which you have proposed will, however, present an opportunity to consider further the balance of responsibilities for particular issues under the Constitution. It would be prudent for decisions on such matters to be made on completion of the Review rather than in advance. I would therefore respectfully ask

Honourable Premier  
23 April, 2021  
Page 2

you to agree that DMA2021 be redrafted as appropriate following the Constitutional Review.

Should you not be willing to agree to that approach, I will reserve the question of assent to the Foreign Secretary for his consideration.

*Yours sincerely*  
*John Rankin*

John J. Rankin CMG  
Governor of the Virgin Islands



**OFFICE OF THE GOVERNOR**  
P. O. Box 702  
Road Town, Tortola  
Virgin Islands

Telephone: (284) 468-3502/16  
Facsimile: (284) 494-5790

15<sup>th</sup> May, 2020

Hon. Andrew A. Fahie  
Premier  
Premier's Office  
R. T. O'Neal Building  
Road Town, Tortola  
British Virgin Islands

Dear Honourable Premier:

I have received a number of letters recently from you which include unfounded allegations and factual inaccuracies relating to both myself and other officials.

I refer specifically in this letter to your letter of 9<sup>th</sup> May which referred to our discussion immediately preceding the joint press conference we undertook. Your letter misrepresents that discussion and includes allegations I consider to be without foundation.

You will recall that prior to our statements on COVID-19, I respectfully asked that we uphold the order of precedence and protocol of the Territory and in line with the Constitutional roles we have. I respectfully suggested a private conversation in another room, which you declined. I am disappointed that you have chosen to misrepresent our conversation.

The press conference we undertook was an official Government event on Government channels. I expect all future official events to follow the correct order of protocol. Please can you ensure that this takes place.

Further, your allegations that I threatened to victimise you and the people of the Virgin Islands bear no relation to my recollection of the conversation. I am disappointed that you have chosen to make such serious allegations without foundation.

My priority is the people of the Virgin Islands and that will remain my focus. I am privileged to be in a position as the Constitutional head of government to work in partnership with yourself, all of Cabinet, the public service and communities for the good of all the people of this Territory. That is my only mandate and one I will not falter from, nor one



**Letter to Honourable Premier**  
**15<sup>th</sup> May, 2020**  
**Page 2**

that I will be dissuaded from fulfilling. I am acutely aware of the responsibilities on myself for the people of this Territory and also for the

example I set for the people. You, as Premier, I am sure will be likewise conscious of similar responsibilities. Your letter refers to a modern partnership based on mutual respect, a principle I am deeply committed to. I hope that you will reflect on the content and tone of your letter, and whether they reflect this principle.

I would welcome the formal retraction of your letter and request a written apology. I would also ask you not to refer to my family again in such correspondence.


Whether you choose to do this or not, please be assured that nothing will alter my dedication to serve the people of this Territory.

Yours sincerely,



Augustus J. U. Jaspert  
**Governor**

cc: Mr Ben Merrick, Director of Overseas Territories, UK Foreign and  
Commonwealth Office  
Hon. Carvin Malone, Deputy Premier and Minister for Health and  
Social Development





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**Ref: GOV/LEG/08A**

25 March, 2021

Ms. Dawn J. Smith  
Hon. Attorney General  
Attorney General's Chambers  
Government of the Virgin Islands  
TTT Building, 4<sup>th</sup> Floor  
P.O. Box 242  
Road Town, Tortola VG1110

Dear Attorney General

#### **Integrity in Public Life Bill**

I refer to the Integrity in Public Life Bills prepared respectively by your Chambers together with the Deputy Governor's Office ("the Original draft") and by the Premier.

The introduction of legislation enhancing integrity in public life has my full support. As noted by Governor Jaspert in his letter of 18<sup>th</sup> December (attached), Section 60 of the Constitution clearly sets out that terms and conditions of service of persons holding public office are the responsibility of the Governor. I would therefore be grateful if you could ensure continued close consultation with my office and that of the Deputy Governor in further drafting of legislation in this area.

I would also note the need to ensure that the legislation is consistent with other provisions of the Constitution, including in particular Section 112 on Registration of Interests and the powers and functions of the Complaints Commissioner, the Police and the Director of Public Prosecutions.

There is also a wider need to maintain the independence of the proposed Commission which will oversee the Integrity and Code of Conduct requirements, and to ensure that its decisions and the requirements of the legislation are not under the direction of a Minister whom the Commission will itself need to monitor in terms of compliance. In that context the provisions and powers set out in the Turks and Caicos Islands Integrity Commission Ordinance may provide a useful model on which to draw.

Otherwise, and without prejudice to the Original draft, I would offer the following comments on the Bill presented by the Premier:

Ms. Dawn Smith  
25 March, 2021  
Page 2

#### Establishment of Commission (Section 11)

It is for consideration whether appointment of members of the Commission on the advice of the Premier or the Leader of the Opposition potentially conflicts with the Commission's role in holding those persons or other Ministers and Members of the House of Assembly to account.

Without prejudice to that point, in order to achieve proper balance and independence in the Commission's membership, the make-up and system of appointment should be aligned with that of the Public Service Commission (as per Section 91 of the Constitution) and similar bodies. The number of members appointed by the Governor on the advice of the Premier and on the advice of the Leader of the Opposition should be the same.

#### Declarations of Interest (Section 5(3))

Section 5(3) would appear to allow the Minister to specify that only certain officers would be required to complete and file a Declaration of Interest. The requirement should apply to all Public Officers and not be subject to Ministerial discretion.

#### Acts of Corruption/Offences

The list of offences set out in Section 18 of the Original draft is more comprehensive and specific than that contained in Section 28 of the Premier's draft and is to be preferred. The point in the DPP's letter of 11 November (attached) on the need to cross-reference to Sections 79-89 of the Criminal Code 1997 is also noted.

#### Declarations of Gifts

The Bill should be aligned to Section 23 (1) of the Original draft i.e. there should be a prohibition on acceptance of gifts connected with the performance of duties save in limited specified exceptions. A limit on the value of gifts that can be accepted should also be included in regulations made under the Act.

#### Prosecutions (Section 32)

The prescription period for prosecutions should be aligned with wider criminal law – the rationale for the proposed five-year prescription period is not made out.

Ms. Dawn Smith  
25 March, 2021  
Page 3

Audit (Section 36)

Section 13 (2) of the Original draft should be followed i.e. it must be for the Auditor General, not the Minister, to appoint those who audit the Commission's account.

Confidentiality (Section 41)

There is a strong policy case for declarations of interests by Ministers and Members of the House of Assembly to be made public in line with best practice in other jurisdictions, including the UK. The provision also needs to be amended to take account of the Commission of Inquiry Act and the recent Register of Interests legislative amendment.

First Schedule

All Public Officers should be required to provide declarations of interest i.e. not just those above a certain rank.

As per the DPP's letter of 11 November, the Bill must not contravene Section 59 of the Constitution and the independence of the Director's decisions in respect of prosecutions.

The application of the Act to Heads of Diplomatic Missions, with the consequent requirement of declarations of interests, would be incompatible with the provisions of the Vienna Convention on Diplomatic Relations and should be deleted. In that context it should be noted that BVI offices e.g. in London and Hong Kong, and the Governor's Office, are not diplomatic missions.

Next Steps

I look forward to working with you further on Integrity in Public Life legislation and am copying the Deputy Governor, whose office will be pleased to provide past documents relating to the Bill on request.

*Yours sincerely*  
*John Rankin*

Mr. John Rankin CMG  
Governor of the Virgin Islands





18<sup>th</sup> June, 2019

Mr. Ben Merrick  
 Director  
 Overseas Territories Directorate  
 Foreign and Commonwealth Office  
 King Charles Street  
 London  
 United Kingdom

Dear Mr. Merrick,

#### **BEN MERRICK VISIT FOLLOW-UP**

It was my pleasure to receive you during your recent visit to the Territory from 3-6 June. I found our various meetings to be highly constructive. You will recall that during our bilateral meeting we discussed a number of important issues on which I stated the Territory's position:

##### *Register of Interests*

- Register of Interests of Ministers will be made public immediately following further consultation with the Governor

##### *Ministerial Code*

- A Ministerial Code will be adopted by October 2019 at the earliest with the advice of other Heads of Government and Ministers of Government within the Caribbean region

##### *Integrity Commission*

- An Integrity Commission will be established by the end of 2019 led by the Premier's Office as the lead ministry

##### *Procurement Act*

- The new Procurement Act will go to Cabinet by 1<sup>st</sup> October, 2019.

##### *Recovery Development Agency and UK Loan Guarantee*

- The Government of the Virgin Islands will consult with the public on the Recovery Development Plan and Agency and UK Loan Guarantee to determine a clear policy with the full input of the public within the next two weeks.
- The Government of the Virgin Islands would welcome the UK Government placing in writing their willingness to relax the Protocols for Effective Financial Management in relation to the UK Loan Guarantee, should it be exercised.

##### *Tender Waivers*

- Tender waivers are exceptions to the normal tendering process that should only be done for legitimate reasons that are clearly explained in the decision.

*Public Registers of Beneficial Ownership*

- Please see attached letter to His Excellency the Governor dated 14<sup>th</sup> June, 2019.

*Transparency and Accountability*

- Government of the Virgin Islands remains concerned that the numerous questionable actions by the past administration in terms (i.e. BVI Airways deal, Pier Park development where sufficient evidence exists but legal actions not pursued to date by the responsible authorities).
- Lack of accountability and transparency by the previous administration should not go unaddressed by law enforcement.
- As discussed, ALL actions deemed necessary to re-establish and strengthen transparency and accountability will be explored and implemented by my Government. However this must be done in concert with the requisite authorities sending a strong message that questionable actions of the past administration will not be tolerated

*Modern Partnership*

- Premier and Governor will work to improve their current relationship

Where these issues are a shared priority, my Government looks forward to working with UK colleagues.

Mr. Merrick, you have my highest assurances that my Government will follow-up on the matters above. I look forward to seeing you again in the Cayman Islands at the UK/OT International Trade Summit toward the end of the month.

Sincerely,



Andrew A. Fahie  
Premier and Minister of Finance

Cc. Lord (Tariq) Ahmad, Minister of State for Commonwealth and United Nations at the Foreign and Commonwealth Office  
His Excellency, Augustus Jaspert, Governor of the British Virgin Islands



# Foreign, Commonwealth & Development Office

Ben Merrick  
Director Overseas  
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The Hon. Andrew Fahie  
Premier  
Government of the Virgin Islands  
33 Admin Drive, Road Town  
Tortola VG1110  
British Virgin Islands

24 June 2021

Dear Premier Fahie,

Thank you for your letter of 30 April to the Foreign Secretary regarding the Drugs (Prevention and Misuse) Amendment Act, 2020 (DPMA) and the Cannabis Licensing Act 2020. The Foreign Secretary has asked me to reply on his behalf as the Director of Overseas Territories in the Foreign, Commonwealth and Development Office.

The Foreign Secretary set out his position on the DPMA in his letter of 9 April, and was clear on the reasoning behind his decision. I am glad to hear that you share the Foreign Secretary's concern about the recent seizures in the Virgin Islands and are mindful of the broader international context. Different measures can be used to measure impact in jurisdictions of different size, but it is clear that illegal drugs are a global threat. Drugs devastate lives, ruin families and damage communities all across the world. The UK Government's policy in this area is clear and anchored in education to reduce demand; tough and intelligent enforcement to restrict supply; evidence-based treatment to aid recovery; and coordinated global action. In January the Home Secretary and Health Secretary announced a £148 million package aimed at dismantling the organised criminal gangs who encourage this terrible trade, helping those in drug treatment and recovery to stop drug-related crime, and dealing with the significant health-related harms drugs pose in the UK. Whilst recognising the undoubted successes of law enforcement as you do in your letter, both in the BVI and the UK, there will always be more to do.

In the UK, the Home Secretary commissioned a major independent review in 2019, led by Dame Carol Black, to inform the Government's thinking on what more can be done to tackle the harm that drugs cause. The first part of that review was published last year and provides a detailed analysis of the challenges posed by drug supply and demand, including the ways in which drugs fuel serious violence. Part two of the review is focusing on prevention, treatment services and recovery. The Review findings will feed into wider cross-Government work to tackle the serious harms caused by substance misuse.

Regarding the Cannabis Licensing Act 2020, as the Governor highlighted in his statement of 10 December 2020, the necessary next step before consideration of assent, is for technical discussions to take place between the UK Home Office and the BVI government. This is important given it is the UK Government that is a Party to the 1961 Single Convention on Narcotic Drugs.

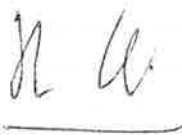


I understand that you wrote to the Home Office (Marcus Starling, Head of Drugs Misuse and Firearms Unit) on 9 March 2021 and Mr Starling responded the next day via email offering an initial discussion on a path forward. The Home Office have not yet received a response to that email. They remain keen to assist your government in making progress, particularly in respect to international regulations (including relevant obligations under Articles 23 and 28 of the 1961 Single Convention). Part of these discussions will address the need to provide the necessary assurances to the International Narcotics Control Board (INCB) about safeguards against potential diversion of cannabis to the illicit market. You mention that your proposed controls will conform to international best practice; that is hugely positive and will put BVI in a good position to make progress.

Finally, I would like to address some of the misconceptions regarding UK industry that you raise in your letter, where you quote information from an online news article. Such reporting highlights the intricacies of international regulations in this area and is a useful example of why I am keen to encourage constructive dialogue between our respective officials. The UK has a long and proud history of pharmaceutical innovation and enabling that through licensing with robust, yet proportionate control. The UK does not cultivate or export "medical marijuana/cannabis". Cannabis cultivation in the UK is solely for the purpose of extracting controlled cannabinoids to produce licensed medicines (those which hold a 'Marketing Authorisation'). It is these medicines that are exported. INCB reporting systems necessitate that the active content (the 'base drug') of these medicines are expressed in terms of their starting cannabis content. The INCB's 'Yellow List' contains the full list of internationally controlled narcotics drugs under the 1961 Convention, including conversion factors for calculating the base-drug content. To take one example, Sativex, a medicine licenced for use to alleviate symptoms of multiple sclerosis, is a liquid in the form of an oromucosal spray. For reporting purposes, every 1kg of cannabis extract is considered equivalent to 12.5kg of cannabis; therefore reported exports of cannabis are not exports of botanical material (cannabis flower or leaf).

This is a multifaceted area of international law, and it is incorrect to equate our desire to help build a similarly robust industry in BVI as a form of oppression, or as hypocritical. It is precisely because the UK Government wishes to ensure BVI meets the same international standards that we are keen to offer assistance in navigating this complex area. The UK's obligations as a Party to the 1961 Single Convention are also relevant. I sincerely hope that you will consider permitting your officials to open a dialogue with the Home Office on these issues, in order that we can make progress on this issue.

Yours Sincerely,



**Ben Merrick**  
Director, Overseas Territories