

# BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

## Protocol concerning Potential Criticisms

### Introduction

1. This protocol is intended to assist participants, witnesses, legal representatives and others to understand how the Commissioner intends to approach any potential criticisms which may be made of a person during the course of the COI.
2. It is inevitable that criticisms will be made of individuals, entities or organisations during the COI's proceedings. Such criticisms may arise from an affidavit provided by a witness, an organisation's position statement, the oral evidence of a witness, from documents provided to the COI or otherwise. The Commissioner may in due course have to make a finding and/or reach a conclusion in relation to such criticisms if relevant to his Terms of Reference. This may involve the making of explicit or significant criticism of a person (be that an individual, entity or organisation) in the written report which, under his Terms of Reference, the Commissioner is required to submit to His Excellency, The Governor.
3. The Commissioner has made clear that he will ensure that all persons are treated with procedural fairness.<sup>1</sup> In accordance with his duty to ensure procedural fairness, the Commissioner will not include any explicit or significant criticism of a person in his report unless that person has been given reasonable opportunity to respond to that criticism.
4. Until the Commissioner has reached a concluded view on a criticism, it remains a "potential criticism". The Commissioner will only reach a concluded view once he has considered all relevant evidence, including any evidence that the subject of a potential criticism has provided to the COI.

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<sup>1</sup> See, for example, the transcripts of the COI hearings Day 2 (6 May 2021) at page 12ff; Day 11 (14 June 2021) at page 24ff; Day 25 (13 July 2021) at page 13ff.

## **The COI's general approach to potential criticisms**

5. The Commissioner, supported by many, bears in mind the need to ensure that the COI's proceedings are conducted in as transparent a manner as possible, are effective and progress without unnecessary delay.
  
6. The Commissioner's general approach therefore will be to ensure that significant criticisms of relevant individuals and organisations are aired, as far as practicable, during the course of the COI's investigation and hearings. This can be achieved in different ways:
  - (a) Sending a "Warning Letter"<sup>2</sup> to an individual, entity or organisation identifying potential criticism(s) and the evidence substantiating such criticism(s).
  
  - (b) Giving the individual, entity or organisation an opportunity to lodge a written statement and/or disclosure of relevant documents in response to potential criticisms.
  
  - (c) Ensuring, where necessary, that significant potential criticisms are explored in oral evidence.
  
  - (d) Where a significant potential criticism is made or relevant documents emerge after a witness has given oral evidence, giving that witness an opportunity to respond in writing and/or by recalling that witness so that those criticisms can be explored in further oral evidence.

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<sup>2</sup> Such letters have been described as "Salmon Letters" in the Eastern Caribbean jurisprudence. The term derives from a recommendation made in the report of the Royal Commission on Tribunals of Inquiry (Cmnd. 3121), published in November 1966. Chaired by Rt Hon. Lord Justice Salmon, the Royal Commission had been appointed to review the workings of the Tribunals of Inquiry (Evidence) Act, 1921 rather than the procedure in all forms of inquiry. The utility of its recommendations has been subject to judicial criticism. In the circumstances, the Commissioner prefers the more modern language of "warning letter".

7. The above is not intended as an exhaustive list. Given the breadth of the Terms of Reference, the range of individuals, entities and organisations which may be the subject of potential criticism and that the potential criticisms raised may vary in their nature and seriousness, it is important to recognise that there may be other ways in which an individual, entity or organisation subject to potential criticism can be given a fair opportunity to respond to that criticism.
8. The Commissioner will have regard to the circumstances in each case when considering the best way of ensuring procedural fairness while minimising delay including how much time those being criticised should be allowed to respond to any potential criticisms. Those circumstances may include the nature of any potential criticism, the basis for it, the extent to which the subject of the criticism already has access to or knowledge of the documents which inform the criticism and whether the person, entity or organisation criticised has legal representation.

### **Warning Letters**

9. A warning letter is not intended to be a pleading, nor should it be taken as such. Its purpose is to provide its recipient with an outline of potential criticisms, the evidence which is capable of substantiating such criticism and to explain how the recipient may respond to the criticisms raised.

### **Participants raising potential criticisms of witnesses**

10. A participant to the COI is a person designated as such under Rule 13 of the COI Rules. Participants may seek to make potential criticisms of a witness. In that event, the participant concerned must comply with the following paragraphs of this protocol.
11. First, potential submissions must not be sent directly to the person of whom the participant wishes to make criticisms. The decision as to whether a potential criticism submitted by a participant will be put to a person and, if so, in what form is a matter for the Commissioner. Accordingly, participants must submit potential

criticisms as a Word document to the following email address [andrew.king@bvi.public-inquiry.uk](mailto:andrew.king@bvi.public-inquiry.uk).

12. Second, the participant should not delay in raising potential criticisms. These must be raised as soon as the participant becomes aware of them. Doing so will allow the Commissioner to consider if there is a need to call the person criticised. That the person criticised has not been scheduled to give oral evidence should not prevent the participant from raising potential criticisms. Criticisms sought to be made must be raised in accordance with any direction of the Commissioner as to timing, and in any event, once a person criticised has been scheduled to give oral evidence, then any additional criticisms should be raised no less than 7 (seven) days before the scheduled date on which that person is due to give evidence.
13. Participants must not therefore proceed on the basis that they need collect all potential criticisms of an individual, entity or organisation before submitting them for the Commissioner's consideration. Nor should a participant proceed on the basis that they can wait until 7 days before a witness gives oral evidence to advance potential criticisms or that they can give less than 7 days' notice of such criticisms where a witness is scheduled.
14. Disregard of the timings set out above will cause significant disruption to the COI's timetable and may require an investigation into the conduct of the participant seeking to make criticisms of another person. A participant would need to provide good reason for the Commissioner to permit a potential criticism to be put in circumstances where that participant has not adhered to this protocol. Where such permission is sought, the Commissioner will consider the matter on a case by case basis having regard to all the circumstances including the access enjoyed by the participant to the documents on which potential criticisms are founded.
15. Third, potential criticisms must be set out in the form of a table ("the Table"), with one column detailing the criticism being raised and the second identifying all the evidence said to be capable of substantiating that criticism. Each potential criticism should be formulated in plain language. Evidence relied upon should

be clearly identified for example by giving the document a title together with its date and nature (e.g., “letter to ...” or “Cabinet Paper dated XXX”). Where the evidence relied on has a COI reference, then it is enough to give that reference.

16. The Commissioner will not permit a potential criticism to be put where the evidence capable of substantiating that criticism has not been identified. Nor will he allow a potential criticism to be put which has been formulated to avoid identifying all or any of the evidence to be relied upon.
17. Where a potential criticism is founded on a proposition of law, then the legal basis of that proposition needs to be fully set out.
18. The table should be accompanied by a covering letter explaining: (a) how the potential criticisms raised are relevant to the Terms of Reference; (b) confirming whether the participant has ownership and control of any evidence relied upon as capable of substantiating the criticism advanced; (c) confirming that the participant has identified all evidence capable of substantiating the criticism; (d) confirming whether any redactions have been, or are being sought, in relation to that evidence and, if so, the grounds (including legal privilege, confidentiality or public interest immunity) for such redactions; and (e) give reasons for the redactions sought.
19. The Commissioner expects that any potential criticisms will be founded on documentary evidence that has already been disclosed to the COI, given the previous requests that have been made to participants for the disclosure of all material relevant to the Terms of Reference. Where the documentary evidence relied upon has not been disclosed to the COI previously, then the participant will need to explain that failure in the covering letter.
20. A participant seeking to make potential criticisms based on documentary evidence should bear in mind that fairness may require that a criticised person, entity or organisation be provided with access to unredacted documents. Accordingly, where redactions are sought or have been made, the participant must explain in the covering letter why no unfairness arises.

21. If redactions are sought then, unless these have already been provided, the documents must be provided in the form of an indexed and paginated bundle provided to the COI at the same time as the Table. That bundle must be provided in two separate forms: one where the redactions sought are marked in black so that they cannot be seen; the second where the redactions sought are shaded but still visible.

### **Confidentiality**

22. Participants, witnesses and their legal representatives owe an obligation of confidentiality to the Commissioner. A participant will breach that duty if they disclose any point and to any other person other than the COI or their legal representative any information concerning the potential criticisms which that participant has submitted to the Commissioner. The same duty applies to the legal representative of the participant concerned. A participant and/or their legal representative must obtain a written waiver of the duty of confidence from the Commissioner before making any wider disclosure. An application for a waiver must be made in writing with reasons.
23. Those who have been notified of potential criticisms also owe an obligation of confidentiality to the Commissioner. That obligation means that they cannot disclose the contents of a warning letter or any accompanying enclosures to any other person except their legal representative, without first obtaining a written waiver of the duty of confidence from the Commissioner. Again, any application for a waiver must be made in writing with reasons.

**The Rt Hon Sir Gary Hickinbottom**  
**Commissioner**  
**27 August 2021**