

**IN THE MATTER OF THE TERRITORY OF THE VIRGIN ISLANDS COMMISSION OF INQUIRY 2021**

**AND THE COMMISSION OF INQUIRY ACT (CAP 237) ("the Act")**

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**Response of the Elected Government to the Position Statement on Governance of His Excellency Governor John Rankin CMG**

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1. The Ministers do not discern any fundamental cause to disagree with the Governor in his general description, *so far as it goes*, of the characteristics of good governance set out at paragraphs 3 to 19 of his Position Statement, save that his summary omits or fails to accord sufficient prominence to one of the most fundamental features of good governance of all, which is democracy.
2. Most accepted definitions of good governance stress the centrality of democratic participation in their government by the governed, and of accountability to the electorate of those responsible for governing.
3. The right to free elections, to vote, stand in those elections and participate fully in the government of the territory of which one is a resident citizen is, in the United Kingdom, protected by Article 3 Protocol 1 of the European Convention on Human Rights and Freedoms, which guarantees "effective political democracy" (*see Sevinger and Eman v The Netherlands (2008) 46 E.H.R.R. SE14 at [14], [16] & [18]* [**Annex 8: Sevinger and Eman v Netherlands (2008) 46 EHRR SE14**] and *PY v France (2006) 42 E.H.R.R. 26 at [41] and [55]* [**Annex 5: Py v France (2006) 42 EHRR 26**]). The UK is under a similar international law duty to protect the right of Virgin Islanders to participate fully in the conduct of public affairs in the Virgin Islands either directly or through their chosen representatives by virtue of Article 25 of the International Covenant on Civil and Political Rights [**Annex 2: International Covenant on Civil and Political Rights**].
4. In this respect, therefore, the Ministers agree with the Governor that essential aspects of good governance is, "*being able to see and hold people accountable for decisions taken*" (¶36) and, "*Accountable government subject to scrutiny in the legislature.*" (¶9)
5. Under a Westminster model constitution, that is achieved by free and fair elections to a legislature to which those responsible for exercising executive authority are fully accountable and on whose confidence their authority depends.
6. In the Virgin Islands, as in the Overseas Territories generally, the Governor who is neither elected by those over whom he exercises executive authority nor accountable to them or to their elected legislature in any way, exercises very substantial executive power.
7. Section 60 of the Constitution of the Virgin Islands [**Annex 7: The Virgin Islands Constitution Order 2007**] provides,

**"Governor's special responsibilities**

**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;”

8. Further, by s.60 (8), where

“the Governor, acting in his or her discretion, determines that the exercise of any function conferred on any other person or authority (other than the House of Assembly) would *involve or affect* any matter mentioned in subsection (1), the Governor may, acting after consultation with the Premier, give directions as to the exercise of that function, and the person or authority concerned shall exercise the function in accordance with those directions.”

9. A major part of the Government of the Virgin Islands, therefore, is exercised by the Governor (on instructions of the UK Government or otherwise) without democratic participation by Virgin Islanders over whom his authority is exercised and without accountability to the Virgin Islands legislature. The Governor may also override the Virgin Islands legislature, pursuant to section 79, by declining to assent to a Bill and reserving it for the signification of her Majesty’s pleasure as he has recently indicated he will do with the Disaster Management Bill.
10. The only notional accountability for the exercise of his powers lies in the Secretary of State’s duty to account to the UK Parliament in which Virgin Islanders have no right to be represented. The practical reality is that there is no effective democratic and parliamentary scrutiny of the actions and exercise of authority of a Governor of the Overseas Territories. See *Report of the Foreign Affairs Select Committee Global Britain and the British Overseas Territories Resetting the relationship Fifteenth Report of Session 2017–19 at ¶ 12-13, 23, 34 to 36 and 57 and p. 29 at 3*. [**Annex 17: House of Commons Foreign Affairs Committee Fifteenth Report of Session 2017–19, Global Britain and the British Overseas Territories: Resetting the relationship**]. See also *The UK’s Response to Hurricanes in its Overseas Territories ¶24* [**Annex 14: House of Commons Foreign Affairs Committee Ninth Report of Session 2017–2019 The UK’s Response to Hurricanes in its Overseas Territories**] and *The UK’s Response to Hurricanes in its Overseas Territories – Government Response ¶7* [**Annex 15: House of Commons Foreign Affairs Committee Ninth Report of Session 2017–19, The UK’s Response to Hurricanes in its Overseas Territories – Government Response to the Committee’s Fifth Report of Session 2017–19**].
11. The exclusion of Virgin Islanders from effective democratic participation in, and the lack of accountability to them or to the legislature for, critical parts of their own government is profoundly inimical to good governance.
12. First, there is no means by which decisions, not obviously unlawful, of Governors, on instructions from the Secretary of State or otherwise, can be challenged or improved by democratic scrutiny.
13. Secondly, it is not only the courts that are responsible in a democracy for upholding the rule of law. Since even unlawful decisions often may not, for pragmatic reasons, be challenged in the courts, public scrutiny by the legislature can underpin observance of the rule of law in the Virgin Islands.

14. Thirdly, the existence of an undemocratic executive authority means that, while it holds the power to affect the Government's political fortunes, it does not need to respond in a timely way or at all to democratic pressures and interests, while the elected arm of the Government does. Nor is the Governor bound by the principle of collective Cabinet responsibility, which he chairs but of which he is not a member. Such a situation possesses an inherent risk of friction and distrust.
15. Finally, the very fact that a substantial portion of executive power is exercised by the Governor and his Office, while being democratically unaccountable in the Virgin Islands, helps to prevent them from developing the capacity for free, self-governing political institutions that could lead to their self-determination.
16. It is for those reasons that, in the view of the Ministers, the compass of the police and executive powers exercisable by the Governor under section 60 of the Constitution should be narrowly confined to those matters that are demonstrably necessary to the discharge of the Governor's special responsibilities.
17. An expansive conception of those powers, and of the role of the Governor in the internal government of the Virgin Islands, is bound to be in tension with the principles of democratic legitimacy, "*effective political democracy*" and accountability, which are inextricably linked with good governance and with the maintenance of human rights and the rule of law. (Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 24 September 2012 at ¶ 5 [**Annex 11: Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels**]).

#### **The Public Service**

18. An important aspect of the Governor's executive responsibilities is the terms, conditions of service, appointments to offices in, and discipline of, the public service, including the skills, training, methods, codes of conduct, practices and procedures and organisation of public officers. In these tasks, pursuant to section 38 of the Constitution [**Annex 7: The Virgin Islands Constitution Order 2007**], he is to be assisted by the Deputy Governor, who is, however, always subject to the Governor's instructions.
19. As the Governor correctly emphasises (at ¶64), therefore, the performance, independence and conduct of public officers is ultimately his responsibility,
 

"unless otherwise agreed between the Governor and the Premier, the department is under the supervision of a Permanent Secretary who is a public officer. Moreover the power specified in section 56 is without prejudice to the Governor's responsibility under section 60 of the Constitution for the terms and conditions of the public service, the role of the Public Service Commission in the making of public appointments and the ultimate responsibility of the Governor for the disciplinary control of public officers and /or their removal from office."
20. Neither the House of Assembly nor an elected minister have the power to initiate alterations of the General Orders, or in the internal organisation and methods of the public service, which have remained essentially unreformed since 1982. The management of the public service and the responsibility for driving public service reform has always exclusively resided with the Governor and his assistant, the Deputy Governor.
21. However, while accepting that the management of the Public Service lies ultimately with him (Letter to the Commission, dated 15 July 2021, referring to paragraph 132 of the Ministers'

Position Statement) [**Annex 50: Letter from the Governor to the Commission**], the Governor states that “*financial support to enable capacity building sits with the Financial Secretary.*”

22. The Commissioner might be intended to infer from this that successive Governors and their Deputy Governors have been denied the financial resources by Ministers to carry out the urgently necessary reforms for which they have been long and eagerly pressing to remedy the chronic state of institutional neglect and decay in which the public service finds itself.
23. If that is the intended inference, no evidence whatsoever is cited to support it, and it would be wholly unjustified.
24. First, the FCDO has consistently pressed the Government to reduce the size, growth, operating costs and wages bill of the public service. No doubt because of that pressure, an external recruitment freeze in the public service was proposed to the Cabinet by the then Governor in 2010, which was implemented until 2012, and a further freeze on external recruitment was proposed to the Cabinet by the former Governor in a Cabinet Paper, dated 28 May 2018 [**Annex 16: Cabinet Paper Memo No. 146 of 2018**], and subsequently adopted. Annual performance increments have not been paid since 2016/17. The former Governor then stated [¶9],

“9.....Accounting Officers would be expected, where possible, to strictly deploy various measures to control the growth of the Service, such as internal advertisements, job merging, job sharing and overall sharing of resources..... Exceptional cases of external recruitment will be presented to the Governor for a decision in accordance to section 92 of The Virgin Islands Constitution Order 2007.”

He continued,

“Cross-Ministry Coordination

11. The Deputy Governor’s Office fully supports the HR Recruitment Strategy to reduce the escalating costs of personal emoluments. This subject has been discussed with Senior Managers, who represent the various Ministries, and it is understood and agreed that such austerity measures should be taken to address the significant implications of increased emoluments.”

25. There is no doubt that these policies have led to serious difficulties within the public service and Ministers consider a different and more balanced approach is necessary. Therefore, we have approved the payment of the annual performance increments for the years 2016/17 and 2017/18. Further, we have strongly advocated a comprehensive review of pay structures within the whole of the public service (see ¶ 43 & ¶ 44 below).
26. Secondly, no particulars are given as to *any* occasion on which a request to provide financial support for a serious, credible and coherent plan for transformative change in the public service has been declined by the existing or any previous Cabinet.
27. That may be because no proposal for the desperately needed transformation of the public service was forthcoming from successive Governors and Deputy Governors until *late 2017*, when in the aftermath of the hurricanes, an embryonic proposal to examine the transformation of the public service was raised with the Cabinet and approved. Thereafter, the current Deputy Governor has developed the Public Service Transformation Plan, which has been supported by the Government and which prompted the instruction of Public Administration International and their reports, to which the Ministers have previously referred (See Ministers Position Statement-Governance, Annex 11 and paragraphs 46 to 55).
28. Furthermore, the Cabinet has recently approved the purchase and installation of new JD Edwards Accounting software, which will in due course allow for the public service to deploy

modern human resources management tools in the ministries. Those tools will permit the Department of Human Resources to invigilate the maintenance of the personnel records of the ministries and ensure that regular performance appraisals of public officers are carried out. The information necessary for the Department and the Public Service Commission to consider promotion and other decisions affecting public officers will not, as is now the case, only be made available to the Department by the ministry at the time such decisions are to be taken.

29. In addition, the Cabinet has approved the Human Resources Department's proposal to commence a job evaluation and classification exercise, which will lead to the revision of public service pay structures (see [Annex 37: Cabinet Extract Memo No. 10 of 2021, and ¶ 43 & ¶ 44 below]. It is these existing pay structures, which are a central part of the terms and conditions of public officers' employment, that Ministers believe are a significant cause of many of the problems in recruiting to posts in the public service.
30. In his letter to the Commission of 15 July 2021, referring to paragraph 132 of the Ministers' Position Statement the Governor also states that

“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.”
31. Again, with respect, this is a poor excuse for decades of neglect of a critical constitutional responsibility. First, there is no evidence that any adequately conceived and sustained attempt has (at least until very recently) ever been made to “*drive effectiveness and capacity of the public service*”. It could not be for Ministers to initiate the necessary public service reform but for the Governor and his Deputy who are constitutionally responsible.
32. One of the problems with the situation of constitutional responsibility for public service performance and efficiency with the Governor is the lack of democratic accountability and that Ministers do not “own” this issue, which is so important to the practical success of an elected Government.
33. The previous Governor prominently asserted his right exclusively to initiate and drive the proposed change and reorganisation despite their importance to the elected Government. If, as is no doubt the case, active ministerial support is needed, it might have been both more politically skilful and more effective to reinforce that active support by enlisting elected Ministers in a leading role in the process, as Ministers acknowledge the current Governor has now done.
34. Secondly, it is the well understood function of a Public Service efficiently to translate the often very general political objectives and commitments of party manifestos into workable policy options. If the capacity and understanding of the need for detailed policy formulation is not there, ministers will not even be asked the right questions. In its convincing diagnosis of the chronic deficiencies of the Public Service, Public Administration International does not once mention a lack of “clear ministerial policy guidance” as a problem.
35. If there have indeed been attempts in the past to exert on Public Officers “undue political influence on their work”, as to which once again no evidence is cited, it may well be precisely because of the frustration that ministers will have felt when the public service has seemed incapable of effectively implementing their political commitments within a timescale that has remotely reflected political realities. This is an experience which is not unique to the Virgin Islands, but the situation is particularly acute here.
36. If this problem *has* existed, it made it all the more imperative that the Public Service General Orders were long ago replaced by a modern Public Service Code and human resource

management systems (see ¶ 29 above) accompanied by effective mechanisms for redress. This would have required the necessary leadership from successive Governors. Governors cannot on the one hand complain of political interference undermining good governance in the public service and on the other absolve themselves of responsibility for the obvious organisational and other changes that would have helped to remedy the problem.

37. Furthermore, there was nothing to prevent successive Governors from proposing appropriate reforms in areas in which consistent cross-departmental practice would be desirable. For example, if former Governors were unhappy with the lack of a suitable system of appointments to statutory boards and bodies, it is difficult to see why the public service could not properly have been given the task long ago of developing written guidance for Permanent Secretaries in advising the Minister on his statutory responsibilities. No such guidance has ever been proposed or apparently even contemplated.
38. Similarly, the current record-keeping practices and efficiency of public officers in recording reasons for decisions and other functions in the ministries and departments are not matters that lie within the responsibility of Ministers. It is a matter for the Permanent Secretaries and the Governor. It cannot now be plausibly suggested that the manifestly parlous state of this *core function* of the public service, now laid bare by the Inquiry, is something for which Ministers, past or present, are to be held accountable.
39. If, as the Governor insists, he must retain the exclusive responsibility for the management and performance of the public service, he cannot at the same time wash his hands of the inevitable ramification of such a responsibility, which is accountability for serious failings in its management.
40. Yet, again, in his Position Statement, the Governor apparently seeks to do precisely that.
41. For example, at ¶ 115 he observes of the Attorney General's Chambers,

"Current rates of pay for lawyers in the DPP's office and the Attorney General's office also appear to fall short of what is required to attract sufficiently qualified candidates to fill current vacancies."
42. However, the Attorney General has informed Ministers (who have every interest in ensuring that competent and timely advice, which directly and acutely affects their ability to make progress with the work of their ministries, is available to them) that the problem is long standing and that she has made repeated requests to the Department of Human Resources to permit higher rates of remuneration. She was told by the Department that it was not practicable, within the current pay structure of the service, to award higher rates to legal officers in her Chambers. In other words, the increase in the levels of remuneration for legally qualified personnel would require a complex re-evaluation of the pay structure throughout the service.
43. The Department of Human Resources only submitted a paper to the Cabinet for approval for the commencement of the necessary process of public service job evaluation and classification on 6<sup>th</sup> January 2021, and approval was given by the Cabinet on 7<sup>th</sup> January 2021 [**Annex 37: Cabinet Extract Memo No. 10 of 2021**]. In the meantime, given the severity and urgency of the problem, in July 2021, the Deputy Governor commenced a separate review of the salaries of legal officers.
44. These are welcome developments but Ministers are bound to point out that the Department of Human Resources and, all matters connected with the terms and conditions of public officers such as pay structures fall under the direction and control of the Governor, assisted by the Deputy Governor. The Department is a critical instrument of the Governor's discharge of his

executive responsibilities for the public service, under section 60(1) (d) of the Constitution (set out at ¶ 7 above).

45. Similarly, at ¶ 115, the Governor observes,

“A further major challenge affecting both the RVIPF and the office of the DPP is that of resources, both for recruitment to fill vacant slots and for training. The outgoing Commissioner of Police in his 2020 report noted that the RVIPF regular allocated budget falls far below the reasonable cost required to maintain the competencies and highly skilled requirements and demands in investigating crime and bringing offenders to justice. The RVIPF currently has 67 roles unfilled, approximately one fifth of the total workforce. Funding for vital repairs and maintenance of police vessels is also needed.”

46. At ¶68, the Governor states,

“The independence of the DPP and of the Commissioner of Police in their decision making are strengths in the system of good governance. But the effective functioning of their offices is dependent on adequate financial resources being provided for their work, which decision lies with the Minister of Finance and Cabinet, subject to the extraordinary power of the Governor under section 103 of the Constitution to order payments out of the Consolidated Fund.”

47. Yet, Ministers are unaware of any request by the outgoing Commissioner of Police for additional resources for recruitment that they have declined. Indeed, during the last budgetary discussions, the outgoing Commissioner of Police was specifically asked what sum he needed to finance the police and his wishes were followed.

48. The problems with recruitment, which have existed in the police force for many years, are not a lack of willingness to allocate the necessary public expenditure. They reside in established pay structures not keeping up with need and expectation, low morale, a damaged reputation, and a lack of candidates wishing to take up the role. There has also been a lack of succession planning for retirements and inevitable departures. These matters lie under the superintendence of the Governor. If money was the sole solution, successive Governors have had available to them the power under section 103 of the Constitution to direct the expenditure needed [**Annex 7: The Virgin Islands Constitution Order 2007**, section 103].

49. However, as we have observed above, no practical instrument of public accountability for the conduct of these responsibilities has existed under the Constitution. The Ministers consider it will be important evidence of the Commission’s independence in its examination of the governance of the Virgin Islands that, where warranted, *accountability* for failings by successive Governors, and those who instruct them, is impartially and fairly reflected in its report.

#### **Lines of authority in the public service**

50. Ministers do not doubt there is much to improve but it would be implausible if a Governor, and those who appoint and instruct him, were to pretend the UK is a neutral or impartial actor in the governance of the Virgin Islands or that it can be wholly extricated from and absolved of responsibility for its failings.

51. That the UK’s perceived interests are paramount in the FCDO’s interactions with the Virgin Islands or that those interests are sometimes pursued at the expense of the interests of the Virgin Islands may not be surprising but it should at least be acknowledged. Of the offer of the Loan Guarantee, to assist the Virgin Islands at a time of great vulnerability in its recovery from the catastrophe of the 2017 Hurricanes, the Governor states

“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 the 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.”

52. The Ministers note that the Virgin Islands have not received grant in aid from the UK since 1978. However, as Ministers have observed, in seeking to mitigate the risk of the UK’s contingent liability, which is a clear policy imperative for both the proposed Loan Guarantee arrangements and the Protocols for Effective Financial Management (PEFM), the FCDO has attached broad conditions and demands regarding the conduct of the economic policy of the Virgin Islands (such as the disposal of assets in public ownership and the requirement to hold 25% of its annual recurrent expenditure in unallocated liquid funds) that encroach not only on their financial freedom of manoeuvre but also upon their legitimate aspiration to govern and make important political and economic choices for themselves
53. The Governor presents this as a choice for the Virgin Islands Government, but in a relationship of such unequal bargaining power, that choice may often not appear a real one. This is so particularly when, as in the case of the Loan Guarantee, the FCDO has informed the Government, if it rejects the Loan Guarantee, it will not look favourably under the PEFM on any alternative borrowing and when it was accompanied by intense and unusual pressure from the Governor, who went so far as to place the papers for signature before the Premier immediately upon swearing him in.
54. Therefore, the Ministers feel that they are bound to exercise vigilance in championing the rights, prerogatives and interests of the Virgin Islands and its elected Government, which is not, and is not to be treated as if it were, an arm of UK local government.
55. At ¶64 and ¶65, the Governor asserts, without particulars, that confidence in the public service has been eroded because political ministers have made “*perceived attempts*” to exert undue political interference on the work of public officers and created uncertainty over lines of authority *inter alia* by insisting that interaction by the Governor’s Office with their ministries should be carried out through the Premier’s Office. This is a highly lopsided perspective and illustrates the problem to which we have previously adverted in the Position Statement.
56. Section 56(5) of the Constitution [**Annex 7: The Virgin Islands Constitution Order 2007**] assigns the constitutional responsibility for the administration, direction and control of a department of government to the Minister, including directing the implementation of government policy. “*Subject to that control and direction*”, the department is to be under the supervision of a permanent secretary who is to be a public officer.
57. A Minister, therefore, has both a legitimate interest in, and a right to be consulted on, the suitability and performance of senior public officers in his ministry or department. He is entitled to express his opinion both to his permanent secretary and to the Deputy Governor on such matters. This is not to be construed as “*undue political interference*”, but it does require good leadership of the public service to manage possible tensions together with modern systems of training and management.
58. The Ministers fully accept that the Governor, pursuant to section 56(7) of the Constitution, has the right to request official papers “*from a Minister*” or seek from him any official information or advice available to that Minister with respect to a matter for which that Minister is responsible. It is, or should be, a normal and basic courtesy to the Minister, however, to address such a request *to him* or his private office so that he is aware of the request. Furthermore, it is a



legal condition of the Governor's request that he should inform the Premier of it. It has been the experience of Ministers that neither the courtesy nor the duty has always been observed and that direct contact has been made by the Governor's Office, sometimes with quite junior officials, to demand information or action of which the Minister and the Premier are unaware.

59. In addition, the Governor suggests (§ 65) that the Ministers' insistence that his Office should interact with ministries through the Premier's Office "*cuts across*" his power, pursuant to section 60(8) of the Constitution [**Annex 7: The Virgin Islands Constitution Order 2007**], to direct any person or authority in the exercise of a function where he determines that function "*would involve or affect*" any matter for which the Governor is responsible under section 60(1) [**Annex 7: The Virgin Islands Constitution Order 2007**]. However, that power may only be exercised "*after consultation with the Premier*". Once again, it has been the experience of Ministers that the Governor's Office has issued directions to officials in the ministries and departments without observing that condition.
60. As the Ministers have previously sought to highlight, the former Governor adopted an expansive interpretation of his section 60 responsibilities with which the Cabinet did not always agree.
61. For example, he argued that the Government's measures to contain and combat the Covid-19 pandemic should be led by him and by the Department of Disaster Management in accordance with the provisions of the Disaster Management Act. However, there are unequivocal and long-standing statutory provisions that assign responsibility and powers to manage serious outbreaks of disease to the Minister of Health [**Annex 20: Minutes, Cabinet Meeting No. 13 of 2020**]. The Cabinet resisted the Governor's interpretation, and the matter was eventually resolved in favour of the Ministry.
62. Furthermore, as we have maintained in our Position Statement, both the FCDO and the Governor's Office have evinced a lack of respect for the equal and modern partnership and the constitutional right of the Virgin Islands to self-government, which has ostensibly been the policy of successive UK Governments. This pattern of behaviour, regrettably, continues.
63. In 2016, the UK launched a 'Blue Belt Programme' which was a voluntary programme from which the UK's Overseas Territories ("OTs") could seek support for marine protection and sustainable management of the marine environment [**Annex 12: Blue Belt Programme - Annual Update Financial Year 2017/2018**]. In 2019, there were discussions between the Virgin Islands and UK Governments on the territory's potential participation in the programme [**Annex 18: Annex: Emails regarding the Blue Belt Symposium**]. However, no agreement was reached, and the Virgin Islands did not join.
64. Nevertheless, on 3 April 2021, the FCDO issued a press release announcing, "*the world's first network of underwater camera rigs is being rolled out across the British Overseas Territories*", including the Virgin Islands, "*as part of the UK Government Blue Belt programme*" [**Annex 39: UK Government webpage, 'Fish eye lenses: UK launches world's largest ocean monitoring system to protect wildlife and biodiversity'**]. The Governor also issued a statement on Twitter that the Virgin Islands would be part of the Blue Belt Programme [**Annex 40: Governor Statement on Twitter regarding the Blue Belt Programme**]. Despite correction by the Department of Agriculture and Fisheries, neither the press release nor the Governor's tweet has been withdrawn or amended.
65. More substantially, the UK acceded to the International Convention for the Conservation of Atlantic Tunas ("ICCAT") in 1995 [**Annex 3: UK Accession to the International Convention for the Conservation of Atlantic Tunas (ICCAT)**]. In 1998, following the European Community (now the European Union)'s accession to ICCAT, the UK became part of the European Community's delegation and the Virgin Islands, Bermuda, the Turks and Caicos Islands and the Territory of Saint Helena, Ascension and Tristan da Cunha formed a separate

delegation to ICCAT [**Annex 4: ICCAT Report for biennial period 1998-99 – Part II (1999) Volume 1, pp. 58-59**]. These four Territories had a separate catch limit for albacore tuna up to a threshold of 200 tonnes per annum which they could allocate among themselves (and which was not subject to any other quota restriction) [**Annex 13: Recommendation by ICCAT on a multi-annual conservation and management programme for North Atlantic albacore, para. 9**].

66. Following the UK's withdrawal from the European Union, the UK deposited a further instrument of adherence to ICCAT in respect of both the metropolitan UK and its OTs, which became effective on 21 October 2020 [**Annex 36: UK Instrument of adherence to ICCAT**]. The effect of this was that there would be one delegation and both the UK and its OTs would be allocated one catch limit for albacore tuna of 434.04 tonnes per annum [**Annex 46: ICCAT Circular No. 4088 of 2021**].
67. In depositing a further instrument of adherence to ICCAT in respect of both the metropolitan UK and its OTs in October 2020 and agreeing to this new catch limit, which in effect reduced the OTs' previous threshold for albacore tuna, the UK Government acted in a manner that may have ensured its interests but that was not in the interests of the Virgin Islands. This is despite the UK's assurances that it would:

"seek to ensure that any change in the share of quota available to the UK as a consequence of its withdrawal from the EU does not prejudice the fishing opportunities available to the Overseas Territories. The UK Government will seek to ensure that the Overseas Territories retain the share of quota that they currently receive in ICCAT."  
[**Annex 38: Final draft of Memorandum of Understanding between the UK Government and the British Overseas Territories relating to ICCAT, para. 8**]
68. The UK Department for Environment, Food and Rural Affairs ("DEFRA") proposed to the Department of Agriculture and Fisheries an allocation of 10 tonnes as the catch limit for the Virgin Islands in respect of albacore tuna [**Annex 48: Email from Jess Keedy to Carolyn Stouff-Igwe and Theodore James**]. No agreement was reached. Even although discussions on the division of the quota were not completed, on 28 June 2021, the Governor's Office wrote to officials at the Virgin Islands Department of Agriculture and Fisheries stating that:

"If we do not hear from yourselves by the 30th June, I will inform DEFRA that the proposed allocation [of ten tonnes] is acceptable." [**Annex 47: Email from Paul Eason to Abbi Christopher**]
69. Such a statement by the Governor's Office is inconsistent with section 56(5) of the Constitution. Fishing policy is for the Minister and the Cabinet to decide. It was not, in any circumstances, for the Governor to agree to the allocation nor should such a communication have been made to officials without informing the Minister or the Premier or raising the issue in Cabinet.
70. Notwithstanding that it knew that the Virgin Islands had not agreed to the allocation for the Territory, on 12 July 2021, DEFRA wrote to the Ministry to inform it that the UK Government had allocated the 10 tonnes catch limit to the Virgin Islands [**Annex 49: Letter from DEFRA to Director of Agriculture and Fisheries, Government of the Virgin Islands**].
71. While the Government understands that the UK Government may consider its allocation of catch limits to be "fair", the unilateral allocation of the Virgin Islands' catch limit for albacore tuna is inconsistent with a "*partnership ...based on consultation and mutual understanding*". It is also incompatible with the UK Government's responsibility to respect the Virgin Islands' autonomy and self-government and to act in the Territory's best interests.

72. The elected Government has a legitimate interest in preserving fishing opportunities for its fishing industry and to allow for expansion and promotion of the fishing sector in the Virgin Islands. It has the mandate and responsibility to determine the Virgin Islands' fishing policy. Since 2015, the Government has been developing a strategy to promote the territory's fishing industry as the third pillar of the Virgin Islands economy.
73. The reduction from a possible 200 tonnes, to be negotiated with the other relevant Territories, to a fixed quota of 10 tonnes for the development of its tuna fishing industry is not in the interests of the Virgin Islands.
74. In the elected Government's view, seen cumulatively, these steps taken by the UK Government demonstrate a continuing carelessness on the part of the UK Government and the Governor's Office for the rights of the democratically elected institutions of the Virgin Islands.
75. Therefore, Ministers have adopted the practical expedient of insisting that interaction between the Governor's Office and their Ministries on matters of policy, or where the Governor may invoke section 60(8) of the Constitution, should, *in the first instance*, be through the Premier's Office. By that means, the Ministers can ensure they are aware of the interaction and agreed that the matter is a proper exercise of the Governor's constitutional powers and that, as the Constitution intends, the Premier is informed or consulted. This would not otherwise have been necessary.
76. In the Ministers' view it is these political and constitutional tensions that have contributed to uncertainty in the public service, which is caught in the middle of them. The tensions caused by the UK Government's policy to impose a public register of beneficial ownership on the Virgin Islands in the context of the Sanctions and Anti-Money Laundering Act 2018, the conditions of the loan guarantee offered by the UK, and by the Government's strained relationship with the former Governor have already been addressed in the Position Statement (at paragraphs 11 to 39), and Supplementary Note.
77. The Ministers note that the international legitimacy of its authority over the Virgin Islands is conditional on the UK's observance of its obligations in international law and Article 73 of the Charter of the United Nations [**Annex 1: Charter of the United Nations Article 73**]. The current situation can *only* be justified on the premise that it is no more than a step on the road towards self-determination and greater self-government.

#### **Chairing the Cabinet**

78. The Ministers observe that the exchange of correspondence, exhibited at Annex C to the Governor's letter of 15 July 2021 [**Annex 50: Letter from Governor to the Commission**], clarifying the scope of section 49 of the Constitution [**Annex 7: The Virgin Islands Constitution Order 2007**] only applies to an *acting governor*, appointed and sworn in under s.37(1) & (2) [**Annex 7: The Virgin Islands Constitution Order 2007**], and that they have not suggested anything to the contrary in the Position Statement. An acting Governor fully occupies the office of Governor for the time being and is not subject to the instructions of any other person save the Secretary of State as provided by the Constitution.
79. However, for absences of shorter duration, the Governor has invariably purported pursuant to section 39 [**Annex 7: The Virgin Islands Constitution Order 2007**] to delegate the duty to preside over the Cabinet to the Deputy Governor as his "*deputy*", who is bound to comply with the Governor's instructions. In the Ministers' view, this is manifestly unconstitutional.
80. The very fact that the Governor has purported to *delegate* the function of chairing the Cabinet to a *deputy* illustrates that he remains the Governor, retains his power and authority, and must

be “absent” for the purposes of section 49 [**Annex 7: The Virgin Islands Constitution Order 2007**]. There cannot be two Governors. Section 49 contains no such qualification as appears in section 37(4) that the Governor shall not be regarded as “absent” if there is a subsisting appointment of a deputy under section 39. Yet, if section 2(3) always operated to allow a deputy to fill the place of the Governor, that provision would not have been needed [**Annex 7: The Virgin Islands Constitution Order 2007**].

81. The Ministers do not accept, therefore, that the Constitution plausibly permits the Cabinet to be chaired by his deputy or that the general provision of section 2(3) [**Annex 7: The Virgin Islands Constitution Order 2007**], which is an interpretative tool, and if it is applicable, applies only unless otherwise provided or required by the context, can override the specific and mandatory terms of section 49, which precisely determine who chairs the Cabinet when the Governor (or acting Governor) is absent.
82. In the context of Cabinet discussions, there are good reasons of principle why this should be so. The nature of the Cabinet, as a deliberative body that shapes and decides Government policy throughout the years of its elected term, requires the Chairman to be familiar with the continuity of its discussions and to steer and guide those discussions accordingly. The Cabinet’s agenda is set by the Governor and the Premier, assisted by the Cabinet Secretary (section 49(4)). The Premier is, therefore, the logical and natural person to assume the chairmanship of the Cabinet during the short absences of the Governor. Furthermore, the free and candid discussions characteristic of Cabinet government are inherently inappropriate for the participation of a deputy under instructions and without the constitutional authority to offer his own views. Attendance at Cabinet meetings cannot be delegated [**Annex 10: The Cabinet Manual - A Guide to Laws, Conventions and Rules on the Operation of Government**, at ¶ 4.37].
83. The intention, then shared by both Governments (as Susan Dickenson’s note confirms), in so providing for when the Governor or acting Governor was absent for short periods, was no doubt to foster a close working relationship between the occupants of the two offices at the summit of the Virgin Islands Government, and to serve the purpose of encouraging and promoting the capacity of Virgin Islanders for self-government.
84. By denying the important effect of this constitutional provision, the Governor and the FCDO frustrate that objective, which is closely in line with the UK’s international law responsibilities, a timely reminder of which has been given at the meeting, held between 14 and 25 June 2021, by the United Nations Special Committee on Decolonization, which adopted the following statements in its draft declaration, at 2. 3. and 4. [**Annex 46: UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial countries and Peoples – Draft Resolution**],

“...in the process of decolonization of the British Virgin Islands, there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognised under the relevant human rights conventions;

.....that it is ultimately for the people of the British Virgin Islands to determine freely their future political status in accordance with the relevant provisions of the Charter, the Declaration and the relevant resolutions of the General Assembly, and in that connection calls upon the administering Power, in cooperation with the territorial Government and appropriate bodies of the United Nations system, to develop political education programmes for the Territory in order to foster an awareness among the people of their right to self-determination in conformity with the legitimate political status options, based on the principles clearly defined in Assembly resolution 1541 (XV) and other relevant resolutions and decisions;

Recalls the 2007 Constitution of the British Virgin Islands and stresses the importance of continued discussions on constitutional matters, to accord greater responsibility to the territorial Government for the effective implementation of the Constitution and increased levels of education relating to constitutional matters.”

### **Cabinet Papers**

85. The Ministers note the present Governor’s comments on his experience but observe that Cabinet Papers submitted by the Governor’s Group are also frequently late.
86. Rule 4.12 of the Cabinet Handbook [**Annex 9: Cabinet Handbook, Section 4.12**] provides for exemption from the “Two-Day Rule” in cases where it is necessary to do so but approval is required from the Cabinet Steering Group (the Governor, the Premier and the Cabinet Secretary) by request to the Cabinet Secretary. In this connection, Ministers must have satisfied themselves that a genuine case exists for this course of action. Exemptions to the “Two-Day Rule” should be sought only in cases where not to do so will result in disruption or delays in implementation of a Ministry’s business.
87. For the period 19 March 2019 to 24 June 2021, the Cabinet considered and approved 1,189 Papers, of which 923 (77.6%) Papers were presented with at least two working days’ notice, and 266 (22.4%) were permitted to be presented with less than two days’ notice. The Governor’s Office and the Deputy Governor’s Office submitted 102 Papers to the Cabinet of which 26 Papers or 25.5% of Papers were late [see Analysis at **Annex 51: Report - Cabinet Papers Analysis**].
88. The Ministers observe that this period, of course, covered a time of exceptional emergency and major strain on the public service, which continues with the additional pressures of the Commission of Inquiry.

### **Tender Waivers**

89. The Ministers have already observed that applications to the Cabinet for tender waivers have become an embedded and bad habit of all parts of the Government, including the Governor’s Group (Ministers’ Position Statement-Governance ¶ 43 & 44). The causes include poor planning and policy formulation for the future needs and purposes of the departments, offices and ministries. New procurement legislation is at an advanced stage of preparation [**Annex 43: First Affidavit of Dr. Drexel Glasgow**, at ¶ 131, and **Annex 44: Pages 492-494 of Exhibit DG-1**]. However, as we have previously indicated, to tackle the root causes, major and sustained modernisation of the public service, with long term, genuine and substantive technical support from the UK, as promised in the 2012 White Paper, is required (Ministers’ Position Statement-Governance ¶ 131).
90. As to the EZ Shipping contract, the Ministers observe that the Governor’s comments that there was no cost-benefit analysis of the proposal and that it was not agreed prior to signature either by the National Security Council (“NSC”) or by the Joint Task Force (“JTF”) do not fully reflect the facts. Given the extreme urgency of the situation, the barges were deployed prior to formal execution of the contract. However, both the JTF and the NSC were closely involved in that decision and the NSC certainly approved the contract prior to its signature.
91. The ministers believe the relevant chronology of events to have been as follows.
92. Between 21 and 25 May 2020 a JTF “*Comprehensive Border Security Plan 3 month projection*” and 3 month supporting spreadsheet was prepared and sent to the Ministry of Finance [**Annex 23: National Security Council Memo No. 8 of 2020, and Appendices A–D**].

93. On 24 and 25 May 2020, following exchanges between Mr Frett and the Financial Secretary, copied to Messrs Lettsome and Romney [**Annex 22: Email exchanges between Mr Frett and the Financial Secretary copied to Messrs Lettsome and Romney**], a revised Draft NSC Paper was produced, which included reference to the “*Adoption of a Border Management Systems [sic] and a radar platform at key locations*” (p.2 para.7) [**Annex 23: National Security Council Memo No. 8 of 2020, and Appendices A–D**]. The 3 month projection and supporting spreadsheet were attached as Appendices A and B.
94. On 26 May 2020, the NSC, reviewed the JTF “*Comprehensive Border Security Plan 3 Month Projection*” and asked that it be split into a 3 and 6 month plan [**Annex 24: Email from Cabinet Secretary 'COVID-19 Border Security Plan for the BVI – Memo No.009\_2020' and attached Memo, and Annex 42: COI Hearing Day 7 p.184/19-25**].
95. On 3 July 2020, Cabinet decided the JTF should reconsider the offers by private owners, which included the EZ barge proposal, in time for an NSC meeting due to take place on 7 July 2020 [**Annex 25: Emails re EZ Shipping & Special National Security Council Meeting**].
96. On 7 July 2020, the NSC held a meeting at which they did not then agree to the EZ barges proposal, but decided that it should be further considered, that Customs should look at the EZ pricing and Mr Mathews should look at charter industry options (See **Annex: COI Hearing Day 7**, p.207/20–p.208/5).
97. On 20 July 2020, the JTF produced a further draft of its ‘Border Security Plan Equipment & Resources Costing’, together with a further draft of a 3 and 6 month spreadsheet, prepared in accordance with the NSC’s direction of 26 May 2020, which contained costings for the barges proposal [**Annex 26: Email from Mr Romney to Mr Smith**]. The ‘Border Security Plan Equipment & Resources Costing’ included a cost-benefit analysis in respect of the barges proposal (pp 1-2) which suggested as follows:
- “It may be prudent to utilize this service for one month” (as the cost) “pales in comparison to the cost of the Territory shutting down for a second time if the Coronavirus...is allowed to reach our shores, especially undetected. In addition, this temporary measure would allow the Territory to achieve its goals while working on the permanent measures” (p.2 2<sup>nd</sup> and 4<sup>th</sup> paragraphs).
98. Between 26 May and 22 July 2020, a JTF “*Comprehensive Border Security Plan 3-6 month projection*” was prepared and sent to the Ministry of Finance [**Annex 27: National Security Council Memo No. 11 of 2020 with Appendices I – III**]. This paper also included a cost-benefit analysis of the EZ barges proposal (pp 13-14), together with the suggestion that it may be prudent to use the service for a month and that the cost paled in comparison to that of shutting down the Territory for a second time (p.14 1<sup>st</sup> 2 paragraphs).
99. On 22 July 2020, a Memorandum for the NSC was prepared which invited the NSC to review and accept the “*Comprehensive Border Security Plan: 3-6 Months Projection*” and the 3 and 6 month spreadsheet referred to as the “*Joint Task Force 3-6 Months Comprehensive Border Security Estimates*”, attached as Appendices I and II [**Annex 27: National Security Council Memo No. 11 of 2020 with Appendices I – III**]. Appendix III contained the Comments of the Financial Secretary referring to his “*understanding that the proposed measures as communicated in the COVID-19 Border Security Plan are important for securing the Territory's Border*”. The plan was described as a “*collaborative effort between the primary border law enforcement agencies*” (Memorandum ¶ 8).
100. On 24 July 2020, the NSC reviewed and accepted Appendices I and II (the “*Comprehensive Border Security Plan: 3-6 Months Projection*” and Revision 5 of the 3-6 month spreadsheet) with their suggestions in respect of the EZ Barges [**Annex 28: Expedited Extract Memo No.**

**11 of 2020** at (a) and (b)]. It also “*decided that the immediate priority funding areas to be taken forward by the Ministry of Finance*” included, in respect of the EZ barges proposal, “*at least two 24-hours platforms, in principle, to be negotiated by the JTF in conjunction with the Ministry of Finance following a rapid invitation of proposals for approval by the...NSC*” [**Annex 28: Expedited Extract Memo No. 11 of 2020** at (c) (iv)].

101. There followed a series of urgent communications with various companies by members of the JTF [**Annex 29: Communications with Various Companies**, **Annex 42: 2021.05.20 - COI Hearing Day 7** p.138/6- p.139/4 & p.140/20 – p.142/6, and **Annex 41: COI Hearing Day 5** p.141/4-18]. By 21 August, the EZ proposal had been identified as the only viable option for a temporary barges solution and negotiations by the JTF and the Ministry of Finance had significantly reduced the price for 3 barges to \$14000 a day [compare **Annex 21: EZ Shipping Proposal** and **Annex 30: Letter from EZ Shipping to the Commissioner of Customs**]. On the same day, the Government announced the imposition of a curfew in reaction to an increased threat, including in respect of border security, from Covid-19.
102. On 23 August 2020, after a reported incursion, on 22 August, by illegal entrants at West End, Tortola, the barges were deployed [**Annex 31: Cabinet Paper Memo No. 376 of 2020** at 8)].
103. On 25 September 2020, the NSC recommended an agreement with EZ for the provision of 3 barges for 60 days from 23 August 2020 at a cost of \$840,000 [**Annex 33: Expedited Extract Memo No. 16 of 2020**]. The Memorandum to the NSC [**Annex 32: National Security Council Memo No. 16 of 2020 and appendices**] referred to the unsuitability of the small vessels which had been used earlier in the year to monitor the sea approaches, the independent pricing research that had been undertaken, the need for swift deployment of the barges and their effective operation, including as noted by the Virgin Islands’ international counterparts in the region (at 2., 6., 8.-9. and 11.). The Ministry of Finance said that “*The cost to have this temporary measure put in place while working on a permanent measure, is miniscule to the cost of having to shut down our economy as a result of COVID-19 being allowed to be smuggled onto our shores*” (at 15.). On 7 October, the Cabinet endorsed that decision [**Annex 34: Expedited Extract Memo No. 376 of 2020**].
104. The first agreement with EZ was signed on 14 October 2020, for the provision of 3 barges at a cost of \$840,000, from 23 August 2020 to 22 October 2020 [**Annex 35: Agreement between BVI Government and EZ Shipping** at 3.1 and 5.1 and 1<sup>st</sup> Schedule B1, i (i)].
105. The Ministers believe that the Governor’s comments do not adequately or realistically reflect the nature of the crisis affecting the Territory and the imperative need for immediate measures to strengthen border security and to prevent illegal entry into the Virgin Islands from places of heavy infection (as noted in **Annex 32: National Security Council Memo No. 16 of 2020 and appendices**, at (a), 1., 5., 9., 14. & 15.). Normal procedures could not have been followed in such circumstances. The Ministers note that standard procurement procedures have been routinely suspended in the UK during the pandemic [**Annex 19: Information Note PPN 01/20**].

### **The Register of Interests**

106. The Governor’s defence of his predecessor for requesting information from the Registrar as to the compliance of members of the House of Assembly with the Register of Interests Act (ROIA) is misconceived and appears, at least partly, to amount to the assertion that the Governor’s actions were legitimate because his motives, to uphold good governance and the Constitution, were benign. The legal pretext proffered for that assertion is that he did not request “*details of what had been entered in the Register.*” (letter of 15 July 2021, penultimate paragraph).
107. The former Governor, whom the current Governor appears to emulate in this flimsy apologia, seems simply to have ignored the statutory duty of the Registrar, under section 13 ROIA [**Annex**

**6: Register of Interest Act 2006]**, to which she must subscribe her oath, not to disclose information *relating to* any declaration or matter in the Register *or* that she has acquired in the course of or in relation to her duties or in the exercise of any powers or performance of duties under the Act.

108. It can scarcely be disputed that the Registrar had acquired the information she gave to the Governor in the course of or in relation to her duties. The Governor is, of course, not above the law of the Virgin Islands and it would be ridiculous to contend that he could uphold the rule of law by breaking it.
109. The problem, as we have observed, is that the Governor is not politically and democratically accountable to its legislature or to the public for such acts and their consequences; he is also rarely the subject of challenge in the courts.
110. Indeed, the matter only came to light because of this Inquiry. To have invited the Registrar secretly to act in breach of her oath is a very serious matter indeed. If it were done knowingly, it could surely amount to serious misconduct.
111. The Ministers prefer the view that it was another example of the malaise that we so often encounter, and have attempted to describe in the Position Statement, which is a carelessness towards local rules and institutions, for the observance of which a Governor is not seriously politically accountable, and absent any effective challenge, about which it is all too easy for him to become complacent when he is persuaded that his own motives are good. That is the mindset not of a partnership in mutual respect and understanding but of colonialism.



**Response of the Elected Government to the Position Statement on Governance of His Excellency  
Governor John Rankin CMG**



Hon. Andrew A Fahie  
Premier and Minister of Finance



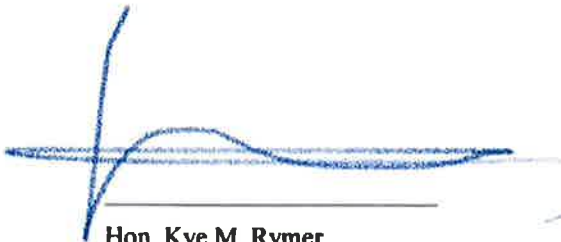
Dr. the Hon. Natalio D. Wheatley  
Deputy Premier and Minister for Education,  
Culture, Youth Affairs, Fisheries and  
Agriculture



Hon. Carvin Malone  
Minister for Health and Social  
Development



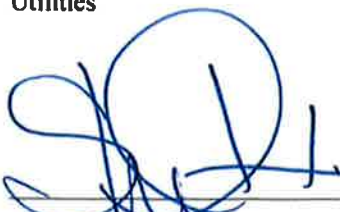
Hon. Vincent O. Wheatley  
Minister for Natural Resources, Labour and  
Immigration



Hon. Kye M. Rymer  
Minister for Transportation, Works and  
Utilities



Hon. Sharie B. de Castro  
Junior Minister for Tourism



Hon. Sheren B. Plax-Charles  
Junior Minister for Trade and Economic  
Development