

**BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY**

**HEARINGS: DAY 31**

(WEDNESDAY 8 SEPTEMBER 2021)

International Arbitration Centre  
3<sup>rd</sup> floor Ritter House  
Wickhams Cay II  
Road Town, Tortola

**Before:**

**Commissioner Rt Hon Sir Gary Hickinbottom**

Mr Hussein Haeri of Withers LLP (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Mr Richard Rowe of Silk Legal appeared for those members of the House of Assembly who are not members of the Government.

Counsel to the Commission Mr Bilal Rawat also appeared.

Mr Joseph Smith-Abbott gave evidence.

Honourable Vincent O Wheatley gave evidence.

Court Reporter:

MR. DAVID A. KASDAN  
Registered Diplomate Reporter (RDR)  
Certified Realtime Reporter (CRR)  
Worldwide Reporting, LLP  
529 14th Street, S.E.  
Washington, D.C. 20003  
United States of America  
david.kasdan@wwreporting.com

Those present:

Session 1

Mr Hussein Haeri, Withers LLP (attending remotely)

Ms Lauren Peaty, Withers LLP

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 2

Mr Hussein Haeri, Withers LLP (attending remotely)

Ms Lauren Peaty, Withers LLP

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Mr Joseph Smith-Abbott

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 3

Mr Hussein Haeri, Withers LLP (attending remotely)

Ms Lauren Peaty, Withers LLP (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Honourable Vincent O Wheatley

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

P R O C E E D I N G S

Session 1

1  
2  
3 COMMISSIONER HICKINBOTTOM: Good morning, everyone. I  
4 think we're ready to go.

5 Mr Haeri, just before we start with the Witness,  
6 overnight, as you know, we've had a very large document,  
7 purportedly in response to the Auditor General's Report and the  
8 Internal Auditor's Report on the COVID-19 stimulus payments. A  
9 number of matters arising out of it concern me. What I'll do is  
10 I will ask Mr Rawat what concerns him, and then perhaps you can  
11 deal with those concerns.

12 Mr Rawat.

13 MR RAWAT: Thank you, Commissioner.

14 If I can simply before turning to those points, just  
15 for the record, introduce the representation this morning.

16 COMMISSIONER HICKINBOTTOM: Yes, thank you.

17 MR RAWAT: We have on behalf of the Attorney General  
18 and the elected Ministers, Mr Hussein Haeri and Ms Lauren Peaty.  
19 Mr Haeri is attending remotely and Ms Peaty in person. And the  
20 behalf of the remaining Members of the House of Assembly, we  
21 have Mr Richard Rowe attending remotely as well.

22 Commissioner, to turn to the point that you have just  
23 raised, as you noted, last night, the Inquiry received a 34-page  
24 document running to 200 paragraphs, together with 79 annexes  
25 running to 859 pages. The index to that annex is not paginated

1 or to those annexes is not paginated.

2 To give this some context, a couple of days ago, it  
3 was indicated to you that you would be receiving a document  
4 setting out criticisms of the Auditor General, and it was  
5 certainly the impression I got was that that document was being  
6 drafted in response to a protocol that you recently issued  
7 explaining how you wanted participants to deal with potential  
8 criticisms and the making of potential criticisms and, indeed,  
9 how the Inquiry would do so.

10 The reason I gained that impression was also because  
11 when notice was given to you that this document was or  
12 criticisms which will be forthcoming, you made clear that you  
13 wanted them in the format set out in the Protocol. Plainly, the  
14 document that we have received is not in that format. The PDF  
15 of it is headed "Note on farmers and fisheries", but when one  
16 turns to the document itself, it is not entirely clear who it's  
17 directed to. It is headed in the matter of the Territory of the  
18 Virgin Islands Commission of Inquiry 2021 and the Commission of  
19 Inquiry Act, but then it has a further heading which is  
20 "Response of the office the Premier to the evidence of the  
21 reports of the Auditor General and the Internal Auditor  
22 concerning the farmers and fishers and schools and churches  
23 Grants Programmes".

24 So, it is not immediately clear whether this is a  
25 document that is intended for the Commission or whether it is a

1 document that is a response to the reports that were issued by  
2 the Auditor General and the Internal Auditor on which you have  
3 received evidence and heard oral evidence. It may be directed  
4 to both.

5           Second, no notice or proper notice was given that this  
6 was the sort of document that was anticipated. As I said, it  
7 wasn't the impression I got when this point was raised.

8           Third, no permission was sought from you as  
9 Commissioner to put in a document of this size, which taken  
10 together with the annexes runs close to 1,000 pages.

11           Fourth, it's not in the form that you will know,  
12 Commissioner, from other evidence that responses to reports, for  
13 example, of the Auditor General, are drafted in. Those are  
14 conventionally drafted by the Permanent Secretary and are  
15 considerably shorter than the document that has now been  
16 provided to you.

17           The final point I'd make here is that this has been  
18 plainly, I would say, been drafted by counsel, and it raises a  
19 number of questions:

20           Firstly, really, is: What is it? What is it intended  
21 to be? Because it is a mix of legal submissions and factual  
22 statements or evidential statements, and that begs the question  
23 who is going to speak to it? Because what we don't see at the  
24 end unusually is the document signed, so it's not either signed  
25 by someone making it as a witness statement or it's not signed

1 by counsel making it as a legal submission. The provision of  
2 this document and its annexes at this stage raises for me, as  
3 counsel for the Commission, the following concerns:

4           Firstly, it undermines the arguments that you have  
5 received both in correspondence and most recently from Mr Haeri  
6 over the last couple of days, including at the Directions  
7 Hearing that we had on Monday, that the IRU is struggling and  
8 balancing resources. What you have been told is that the IRU  
9 and the Attorney General could not deal with the requests for  
10 information in the form of affidavits in the time that they were  
11 requested and could not deal at all with the issue of redaction.  
12 You'll remember, Commissioner, that your Protocol in your  
13 letters requested that a view be expressed as to redaction of  
14 annexes or an Affidavit, at the time that that Affidavit and  
15 exhibits were produced, and that has never happened. What is  
16 clear from this document is not only that counsel has had  
17 considerable time to draft it but also time to consider its  
18 exhibits.

19           But those exhibits which include--or "annexes" I'll  
20 call them, as they're described--they include Cabinet Papers  
21 must have involved the input of Public Officers. And when one  
22 reads the document itself, it must involve the input of  
23 Ministers.

24           The second concern it raises, therefore, is whether  
25 there has, on the part of the Attorney General or/and the

1 elected Ministers been proper compliance with your request from  
2 disclosure--for disclosure. From the outset of this Commission,  
3 you have repeatedly asked, Commissioner, that all relevant  
4 evidence be provided to you, and we haven't obviously had time  
5 to analyze in any great detail the annexes to this document, but  
6 they may include documents that we have not seen before, and you  
7 have not seen before, and that begs the obvious question: Why,  
8 if it's now being said that these documents are relevant, they  
9 have not been disclosed before.

10           It might be pointed out that it was not until  
11 relatively late before the--we paused at the end of July that  
12 we--you considered evidence on stimulus grants from the Internal  
13 Auditor and the Auditor General, but that was three months ago.  
14 And so, if there was still relevant material that arose from the  
15 evidence that those two Public Officers gave, one would have  
16 expected that some diligence might have been exercised and they  
17 would have been provided to you.

18           The third concern we have--and it goes back to an  
19 issue that has been ventilated on Monday, is redaction. No  
20 indication has been given when this document was supplied to you  
21 and its annexes that any redaction will be sought, but that may  
22 not remain the case, and it may be said that redaction is  
23 necessary. For example, because Cabinet Papers have been  
24 annexed to the document.

25           Now, that will, as we have learned from bitter



1 experience, mean a protracted process. It will mean a  
2 protracted process because there has been a repeated failure, as  
3 I have outlined before, to comply with directions from you as to  
4 how redactions should be sought. There has been a failure to  
5 comply with Protocols that have been issued by you.

6 And the final point I would make on that is that,  
7 taken together, what this document shows is a complete lack of  
8 courtesy to the Commissioner, to produce something of this size,  
9 and this detail, at this relatively late stage in the Inquiry's  
10 proceedings is very difficult to understand.

11 The fourth concern I would raise, in my submission  
12 it's an important one, and that is the question of procedural  
13 fairness. You have made clear, Commissioner, that you place a  
14 high value on procedural fairness and you will strive to ensure  
15 that all witnesses are treated fairly, and we have heard  
16 submissions from participants that those that they represent  
17 must be treated fairly. But, in my submission, those  
18 participants and their lawyers owe a duty to this Commission to  
19 ensure that all witnesses are treated fairly.

20 You heard in June from the Auditor General and the  
21 Internal Auditor. This document contains criticisms of those  
22 two Public Officers. They--their Reports were issued earlier  
23 this year. They gave evidence on it earlier this year, and yet  
24 the response, if this is what it is, to those reports is now  
25 being provided in September, at a time when the expectation is

1 that the Commission is reaching at least its final stages of its  
2 oral hearings.

3           Everything must be done to ensure that these two  
4 Public Officers are not taken by surprise, and it begs the  
5 question, and it's a question that the Attorney General will  
6 have to answer, and that is what assistance is going to be given  
7 to these two Public Officers to deal with a document that is, I  
8 would say--and I'm sure Mr Haeri will correct me if I'm  
9 wrong--has been drafted by counsel. What time will they need to  
10 do so, and to give the material and the matter set out in this  
11 document proper consideration? And if they are given that time,  
12 what impact will it have on the Inquiry's processes?

13           The final point I would like to make, Commissioner,  
14 and I will be asking you to make certain directions, but I will  
15 come back to that perhaps once you've heard from Mr Haeri, is  
16 this: Is there more to come? Is the IRU or the Attorney  
17 General keeping to themselves or herself the right to, at a time  
18 of their choosing, deliver to you voluminous documents and  
19 voluminous submissions or a mix of submissions and evidence,  
20 without notice and on any topic they choose? Because, if that  
21 is their intent, then they must do so in the knowledge that it  
22 will be enormously disruptive to the progress of this  
23 Commission.

24           Other than that, there is nothing I wish to say at the  
25 moment.

1 COMMISSIONER HICKINBOTTOM: Thank you very much,  
2 Mr Rawat.

3 Mr Haeri, can we break this down a bit into parts.  
4 Can you first explain what this is, what this document  
5 is?

6 MR HAERI: Thank you, Commissioner.

7 It is a document that addresses the farmers, fishers,  
8 churches, and schools programme, the evidence that was adduced  
9 on it, as well as relating, as was mentioned, to the Auditor  
10 General, the Internal Audit function as well, and it's a  
11 background context, fuller picture on it that's been given.

12 COMMISSIONER HICKINBOTTOM: Okay. Could we focus on  
13 my question. Firstly, to whom is it directed? Is this a  
14 response to the Auditor General and Internal Auditor? Is it a  
15 submission to the Inquiry? Is it evidence to the Inquiry? What  
16 is it?

17 MR HAERI: Yes. I think the point was anticipated, is  
18 it for the Commission in response to the Reports and directed to  
19 both? I think that's the answer.

20 COMMISSIONER HICKINBOTTOM: Sorry, you put it in the  
21 form of a question. What is it? It's a submission.

22 MR HAERI: It is a submission.

23 COMMISSIONER HICKINBOTTOM: Right.

24 MR HAERI: It's a submission for the Commission, and  
25 it's in response to the reports.

1           COMMISSIONER HICKINBOTTOM: Okay. Who drafted this  
2 submission? There is no signature on it. It's a submission.

3           MR HAERI: Well, it is on behalf of--it's on behalf of  
4 the Ministry of Finance.

5           COMMISSIONER HICKINBOTTOM: Well, it says that it's on  
6 behalf of the Premier's Office.

7           MR HAERI: Yes.

8           COMMISSIONER HICKINBOTTOM: Does that help?

9           MR HAERI: Yes, that's right. It is.

10          COMMISSIONER HICKINBOTTOM: (drop in audio) on behalf  
11 of the Premier's Office, but it's a submission. By whom?

12          MR HAERI: It's a submission on their behalf. Do you  
13 mean whether the lawyers have been involved in assisting with  
14 the preparation of this document? Is that the question?

15          COMMISSIONER HICKINBOTTOM: Who drafted it? Normally,  
16 a response to such reports--we know from the evidence, normally  
17 the response is drafted by the Permanent Secretary. Has this  
18 been drafted by the Permanent Secretary?

19          MR HAERI: It hasn't been drafted exclusively by the  
20 Permanent Secretary, no.

21          COMMISSIONER HICKINBOTTOM: So, whose name should we  
22 regard as the drafter of this document?

23          MR HAERI: Well, it's on behalf of the Premier's  
24 Office. It has involved legal input. I don't think there is  
25 any one individual beyond that that I could sort of say would

1 claim authorship of the document.

2 COMMISSIONER HICKINBOTTOM: So, it's a bit of a  
3 mishmash?

4 MR HAERI: It's a document that--it has had input from  
5 the lawyers.

6 COMMISSIONER HICKINBOTTOM: Okay. It's "had input  
7 from the lawyers."

8 Can we say with certainty that the Premier--because  
9 this is on behalf of the Premier's Office--that the Premier and  
10 the Permanent Secretary agree all the contents of this document  
11 and have nothing to add to it?

12 MR HAERI: I believe that that's--that that's a fair  
13 summary that they agree with the contents of this document.

14 COMMISSIONER HICKINBOTTOM: Mr Haeri, your belief at  
15 the moment is not sufficient. I would like you to e-mail the  
16 COI confirming, in unequivocal terms, that the Premier and the  
17 Permanent Secretary agree to the whole contents of this document  
18 and have nothing to add to it. I say that because the document,  
19 albeit you say it's a submission, contains a good deal of  
20 evidence, and we need to know who is going to answer to that  
21 evidence. Who can we ask questions of in relation to the  
22 evidence? We don't know who to ask questions of in terms of it  
23 being a submission because nobody is putting their hand up to  
24 that.

25 But in terms of the evidence, we will want to question

1 people on that evidence, and so, if that e-mail could please be  
2 sent through today. If that e-mail can't be sent through, then  
3 that certainly is another matter of concern.

4 The document is said to be a response to the two  
5 reports. Has it been sent, as a matter of courtesy, to the  
6 Auditor General and the Internal Auditor?

7 MR HAERI: If you're content for us to send it to  
8 them, we will, of course, do that, as a matter of courtesy.

9 COMMISSIONER HICKINBOTTOM: It's your response to  
10 their Reports. Should they not know about it, just in terms of  
11 common courtesy and fairness?

12 MR HAERI: Absolutely. Very happy to, and now that  
13 you've confirmed as much, we will go ahead and do that.

14 COMMISSIONER HICKINBOTTOM: You didn't need my  
15 confirmation. As a matter of courtesy and as a matter of  
16 fairness to them, they should have been sent a copy. Can you  
17 please confirm that that copy will be sent to them now, and that  
18 they will receive it before midday?

19 MR HAERI: Yes. We will send them a copy.

20 COMMISSIONER HICKINBOTTOM: Thank you very much.

21 MR HAERI: Sure.

22 COMMISSIONER HICKINBOTTOM: Now, have they been put on  
23 notice that this has been prepared? We weren't. That's  
24 discourteous to me, but that's not the highest on my list of  
25 priorities at the moment. Have they been notified that this

1 document is being prepared?

2 MR HAERI: I'm not aware of it.

3 COMMISSIONER HICKINBOTTOM: Do you understand the need  
4 to be fair to all witnesses? These are actually Government  
5 witnesses. These are Government witnesses, and I have to be  
6 procedurally fair to them, and one would have thought that other  
7 arms of Government would want to be fair to them. How can it be  
8 fair when, unbeknown to them you are preparing a response to  
9 their Report which is about 1,000 pages long?

10 MR HAERI: I expect that you may wish to give some  
11 opportunity if you think it's unfair on any points. I'm not  
12 suggesting otherwise.

13 COMMISSIONER HICKINBOTTOM: You're quite right. I'll  
14 make sure that they're dealt with fairly. But didn't the  
15 Attorney General, who has said that procedural fairness and  
16 public interest are at the forefront of her mind? Didn't she  
17 have this in mind when you were preparing this document?

18 MR HAERI: I mean, I don't think that it precludes  
19 procedural fairness that a document has been prepared addressing  
20 certain issues. We are too early in that process, if I might  
21 say, to draw a conclusion that it's procedurally unfair. Notice  
22 can be given, the documents can be shared, and opportunity can  
23 be had to respond.

24 COMMISSIONER HICKINBOTTOM: Did she have in mind the  
25 need to do that when this document was being prepared over the

1 last three months?

2 MR HAERI: I can't speak to a subjective state of  
3 mind, but what I can say is more than content to share the  
4 document with her. No issue at all about that.

5 COMMISSIONER HICKINBOTTOM: Well, if that's something  
6 perhaps you should have had instructions on, but perhaps we can  
7 pass over that to other matters.

8 You must, when you served this last night, have had in  
9 mind that a proper opportunity to respond would be necessary.  
10 What provisions has the Attorney General put in place for that  
11 to happen? How long does she think a response should take?  
12 What provisions has she put in place that enable the Auditor  
13 General and the Internal Auditor to obtain legal advice, if they  
14 so wish? What arrangements have been put in place?

15 MR HAERI: As I say, I think procedural fairness in  
16 this context is something, Commissioner, that you will have your  
17 (drop in audio). As I say, I think we are--

18 COMMISSIONER HICKINBOTTOM: If you can forgive me for  
19 interrupting. You're absolutely right. I will have procedural  
20 fairness well in mind. But the Attorney, in serving this huge  
21 document criticizing the Auditor General and the Internal  
22 Auditor, must have appreciated that a reasonable opportunity to  
23 respond would be necessary. How long does she think that a  
24 reasonable time to respond would be?

25 MR HAERI: Would you like a proposal on that? If you



1 are asking for that, then we can come back to you with a  
2 proposal on it.

3 COMMISSIONER HICKINBOTTOM: Mr Haeri, we haven't got  
4 time for you to come back. I want to know now how long you  
5 think would be a reasonable time for the Auditor General and the  
6 Internal Auditor to look at this 1,000-page document, to  
7 investigate it, and to respond? You've had three months to put  
8 this together without doing them the courtesy of telling them  
9 that it was on its way.

10 MR HAERI: Yes, and we will be happy to send it--send  
11 it to them.

12 COMMISSIONER HICKINBOTTOM: How long?

13 MR HAERI: How long do you think that they should  
14 have?

15 COMMISSIONER HICKINBOTTOM: No, Mr Haeri. I'm asking  
16 you. I will decide how long they will get, but I want some  
17 submissions on how long you think would be a reasonable time to  
18 respond.

19 I should say that we are on the point--we were on the  
20 point of issuing Warning Letters in relation to these matters.

21 MR HAERI: I don't have instructions on how long they  
22 would need, Commissioner.

23 COMMISSIONER HICKINBOTTOM: I'm not asking for  
24 instructions. I'm asking for you, as the Attorney General's  
25 representative, to tell me how long you think would be a

1 reasonable period for a response to this enormous document.

2 MR HAERI: I think you might say something along the  
3 lines of perhaps three weeks.

4 COMMISSIONER HICKINBOTTOM: And that suggestion--I  
5 have been cut off, but is everybody -- can everybody still--my  
6 screen is now a different screen. Is everybody else all right?  
7 I will carry on. Oh, it's come back. It's probably me.

8 Okay. And three weeks to respond to this document,  
9 which has taken you three months to put together, is that  
10 including legal advice? Because, as you said, this has been put  
11 together with the help of the Attorney General's large team.

12 MR HAERI: Well, it's not as though this has taken  
13 three months of work, I think, because one has to bear in mind  
14 that, over the course of these months, we've delivered an  
15 average of about 2.7 Affidavits a week over that period, so  
16 there has been a tremendous amount of work that has gone on with  
17 many other things that have been requested from the Commission,  
18 requests for legal inputs, administrative support, and  
19 assistance, documents as well.

20 So, I think it's not a question of probably just being  
21 a three-month period.

22 Is there a further question on that? Are you asking  
23 do the three weeks include the time period if lawyers were going  
24 to look at it as well? Is that your question?

25 COMMISSIONER HICKINBOTTOM: I'm sorry, Mr Haeri, you

1 haven't dealt with the question at all. It's not a further  
2 question. The question is: The three weeks that you've  
3 proposed, does that include the Auditor General and the Internal  
4 Auditor having legal advice, not having legal advice, seeking  
5 legal advice?

6 I assume that the Attorney, given that she is the  
7 Attorney General for the whole Government, has brought her mind  
8 to bear on this. Or will it take longer than three weeks if  
9 they require legal advice?

10 They're entitled to--

11 (Overlapping speakers.)

12 MR HAERI: I think--I think it would be possible to  
13 revert having had such advice as they may wish within three  
14 weeks, perhaps three to four weeks.

15 COMMISSIONER HICKINBOTTOM: So, you expect them to  
16 work a lot quicker than the IRU.

17 Okay.

18 MR HAERI: Is that a question, Commissioner, or that  
19 was a statement?

20 COMMISSIONER HICKINBOTTOM: That's a statement.  
21 That's a statement, Mr Haeri.

22 MR HAERI: Yes.

23 COMMISSIONER HICKINBOTTOM: In terms of the documents  
24 that are exhibited, there are 79 annexes. Does that include  
25 anything which has not been disclosed to the COI before?

1 MR HAERI: I can't answer that question immediately.  
2 It's possible that it does, and it's possible that it does for  
3 reasons of timing that were (drop in audio) anticipated by  
4 Mr Rawat.

5 I mean, we have been asked to put in, you know, where  
6 we have been asked to put in documents and answers to do that in  
7 full. Many of the Affidavits, as I said, have run into the  
8 thousands of pages of indices as well. So, this is not out of  
9 that order of magnitude compared to many of the Affidavits.

10 COMMISSIONER HICKINBOTTOM: Is your answer to the  
11 question "I don't know"?

12 MR HAERI: That is--that's what I said, yes.

13 COMMISSIONER HICKINBOTTOM: Isn't it a question that  
14 you should have instructions on? You should be able to answer?  
15 Because the next question is, if it does contain such documents,  
16 why have they not been disclosed before? You have known for  
17 three months that this is a topic of interest for the COI. Why  
18 have these documents been withheld?

19 MR HAERI: Well, no documents have been withheld. All  
20 documents that have been sought that are available have been  
21 given, so it's not the case that documents have been withheld.

22 COMMISSIONER HICKINBOTTOM: So, simply knowing that  
23 they are relevant documents and not handing them over, you don't  
24 regard that as withholding documents from the COI? I've made it  
25 very clear that there's an obligation upon Public Officers and

1 upon the BVI Government to release documents to the COI if they  
2 consider them relevant to the issues that we're investigating.  
3 If they're attached to this document, as they are, that one  
4 assumes that you consider that they are relevant to the Terms of  
5 Reference.

6 MR HAERI: Yes. Although when we are dealing with  
7 multiple specific document requests, specific Affidavit  
8 requests, specific requests for legal advice, with very tight,  
9 often unfeasible deadlines, even with extensions, they're also  
10 often unfeasible in the circumstances. Then, of course, we  
11 prioritize those because those are the ones that we are asked to  
12 focus on.

13 So, that is necessarily something that has a  
14 constraint on capacity, on resources in the Virgin Islands at  
15 this time.

16 I mean, we're not dealing with a jurisdiction of  
17 65 million people. We're dealing with a jurisdiction of 30,000  
18 people, a few dozen Ministers and Public Officials who are  
19 shouldering a tremendous amount of work at a time of COVID, at a  
20 time of bereavement, at a time of significant difficulty, trying  
21 to prioritize the Commission of Inquiry while still running the  
22 Territory.

23 So, I think there are some real challenges. It's not  
24 some--it's not the case that we're in a very large jurisdiction,  
25 and I think that's the reality and which is--is the case.

1           COMMISSIONER HICKINBOTTOM: Okay. In respect to  
2 these, I'm sure that Mr Rawat is going to suggest some  
3 directions I make. But, certainly, one direction will be that  
4 you write to the COI today, identifying the documents in the  
5 Annex that have not previously been disclosed, and explaining  
6 why they haven't previously been disclosed, why they have been  
7 withheld.

8           Now, in terms of redaction, I'm going to proceed on  
9 the basis that you do not seek any redactions from any of this  
10 document; is that correct?

11           MR HAERI: Well, we're usually, I think, invited to  
12 indicate by a specific time what redactions we would propose,  
13 both in clear and opaque markings. So, do I understand you to  
14 be saying that that's not what would apply here because I'm--

15           COMMISSIONER HICKINBOTTOM: I asked you if there are  
16 any redactions from this document. This is your document. You  
17 want to rely upon it. You presumably want it to be made public.

18           MR HAERI: Yes.

19           COMMISSIONER HICKINBOTTOM: What I want to know is,  
20 can it be used in public? Not published on the internet, but  
21 used in Hearings.

22           MR HAERI: I understand. We have, obviously, the  
23 two-stage process that's set out in the Rules, and in the first  
24 stage we've given it to you entirely unredacted. Usually, we're  
25 then given an opportunity to indicate whether there are any

1 redactions, and so, we will--in the course of writing to you  
2 today on the documents, we'll also indicate whether there is any  
3 proposed redactions.

4 COMMISSIONER HICKINBOTTOM: Good. If you do that by  
5 the end of today, that's--that's a step forward. Thank you.

6 MR HAERI: I'm happy to do that.

7 COMMISSIONER HICKINBOTTOM: Just before we go and  
8 start looking at some directions, this enormous document will  
9 come today as a complete surprise to the Auditor General and the  
10 Internal Auditor, as it has done to us, because we've only had,  
11 I think, two days' notice of it. But I didn't think it was  
12 going to come in.

13 Are you preparing--are any of your clients, any of the  
14 individuals and institutions and organisations that the Attorney  
15 General is representing, are they preparing more of this work?  
16 Are we to expect more of these documents?

17 We're trying to conduct a series of Hearings here, and  
18 it's really very important that we know.

19 MR HAERI: Well, I can say that at the moment, there  
20 is nothing like this document being prepared. But, of course,  
21 in the context of responding more so on the issue of criticisms  
22 and setting it out in the protocol which you have requested and  
23 which we are working on, as communicated in the course of this  
24 week, we will be referring back to this document as well as to  
25 others. And we've noted that it may be that, in the context of

1 specific subjects you are looking at, there is a need to give a  
2 fuller clarity, background, and context.

3 And I say that also because we have to keep in mind  
4 that this is important, in many cases, to give a complete and  
5 fuller picture than the one that may otherwise be drawn.

6 COMMISSIONER HICKINBOTTOM: You appreciate that, in  
7 the COI, because this is a submission, you require permission to  
8 put it in?

9 MR HAERI: Was that a question again, Commissioner?

10 COMMISSIONER HICKINBOTTOM: It was a question.

11 Do you appreciate, don't you, that you need permission  
12 to put in a submission?

13 MR HAERI: Well, then, you will need to make a  
14 decision on whether this is something that is in or isn't in.

15 COMMISSIONER HICKINBOTTOM: Is the answer to the  
16 question "yes", that you do appreciate that?

17 MR HAERI: I think the answer to that is "yes".

18 COMMISSIONER HICKINBOTTOM: But there has been no  
19 application--as I said, there's been no indication that it's  
20 been on its way.

21 MR HAERI: There has been an indication. It's true,  
22 it was only earlier this week.

23 COMMISSIONER HICKINBOTTOM: There was no indication  
24 that something might be on its way. There is no application.  
25 And in respect of anything else that might be being prepared,



1 there is no application in respect of that either.

2           Okay. Let me just revert now to Mr Rawat to see what  
3 he says about these matters and what he says are--would be  
4 appropriate directions to try and progress this. You will  
5 appreciate--and you will have appreciated last night when you  
6 sent this to us--how disruptive this would be of the hearings in  
7 terms of our preparation.

8           Mr Rawat said that it was discourteous. Of course, it  
9 has been discourteous, but that's nowhere near as important to  
10 the disruption to the hearings, and, more importantly still,  
11 that this has been done in a way--this has been done by the  
12 Attorney General on behalf of the Premier's Office in a way that  
13 makes it extremely difficult for the Auditor General and the  
14 Internal Auditor to respond with a reasonable opportunity and a  
15 proper opportunity to respond to criticisms made of them over  
16 the thousand pages that you've lodged.

17           Mr Rawat.

18           MR HAERI: Commissioner, I might, just in response,  
19 point out that the Auditor General's Report was published on the  
20 COI's website before it was even placed before the House of  
21 Assembly, which is the lawful framework and way in which the  
22 reports ought to have been placed, so, I think that may have  
23 also caused some concern about fairness. And this is a document  
24 which addresses, as I say, in a fuller way, some of the salient  
25 issues which you have considered to be relevant.

1           COMMISSIONER HICKINBOTTOM: Is this the evidence that  
2 was given a couple of months ago by the--the Auditor General  
3 gave substantial evidence on these reports a couple of months  
4 ago, and then, following that, they were put on to the website  
5 because quite a lot of the report had been read out into the  
6 record. Are you referring to that?

7           MR HAERI: I'm referring to that report, as you say,  
8 published--published by the COI before it was laid before the  
9 House of Assembly, as was the usual order of things.

10           COMMISSIONER HICKINBOTTOM: The attorney did not  
11 object to these matters being put, in great depth, to the  
12 Auditor--to the Auditor General during oral evidence. And after  
13 that had been done, it would have been, frankly, futile not to  
14 have published the report so that people could see the basis of  
15 the questions that were being asked. But there is no question  
16 of that being unfair to anybody. We're talking here about  
17 unfairness to two public servants who will inevitably be put in  
18 a very difficult position. I will ensure that they have a fair  
19 opportunity to respond to the criticisms set out in this  
20 enormous document.

21           Mr Rawat, what directions do you suggest I should make  
22 to enable this to be progressed in a sensible way?

23           MR RAWAT: Commissioner, the first direction: I would  
24 ask that a proper index be provided by 4:00 p.m., no later than  
25 4:00 p.m. today, and that's a proper index to the Annexes to the

1 Response. There needs to be an index which has the page  
2 references to the Annex. The reason I ask for that direction  
3 is, given that those criticized are not legally represented, it  
4 will be unfair to expect them, particularly because Mr Haeri  
5 thinks they should be able to deal with these matters within  
6 three weeks, they have to wade through all this material tying  
7 it up to the Responses.

8           The second--well, I was going to ask for a direction  
9 that it be disclosed to the Auditor General and the Internal  
10 Auditor, but Mr Haeri has given the assurance that that will be  
11 done today. Well, you've, in fact, directed that it be done by  
12 12:00 today.

13           COMMISSIONER HICKINBOTTOM: I've directed that this be  
14 sent to these two Public Officers in a form they can access by  
15 12:00 noon today. That is an obligation that falls on the IRU.

16           MR RAWAT: The third direction is that the IRU needs  
17 to indicate what redactions that it's seeking to this document  
18 by 4:00 p.m. today, and to provide a version of the document  
19 with references in opaque and blacked-out forms. The reason I  
20 say that time limit should be set is because, again, of the time  
21 that both Public Officers may need to consider the material.

22           Mr Haeri said--what was said on Monday was that what  
23 you will be receiving is a document making criticisms in the  
24 form that you required in your Protocol. It wasn't that you  
25 would be receiving this. And if that document, as Mr Haeri

1 indicated, is going to make reference to this document as part  
2 of the criticism process, well, then, these officers need to  
3 know which version of the document they are going to have to  
4 address. And if we're going to have--and we cannot, in fairness  
5 to them, have a protracted redaction process, so that's what  
6 will have to be done.

7           The fourth direction I would ask you to do is to  
8 direct that the Attorney General write to you to set out what  
9 support she is willing to give these Public Officers, should  
10 they request it. You cannot direct that they have legal  
11 representation. You cannot direct that they have resources.  
12 But the least you can do is to ask the Attorney General to set  
13 out what she intends to do.

14           The fifth direction that I would invite you to make,  
15 Commissioner, is this: Mr Haeri said, in answer to your  
16 question, that there wasn't more to come, but he caveated that  
17 with the phrase "at the moment". That is not helpful because it  
18 suggests that Mr Haeri, on behalf of the Attorney General, is  
19 reserving his position, and at some later stage--or perhaps not  
20 too late stage--you may receive yet another massive document.  
21 And what I would ask--invite you again to do, Commissioner, is  
22 to direct that the Attorney General write to you in plain terms  
23 setting out whether she intends to serve further documents of  
24 this nature and, if so, whether that will include a disclosure  
25 that has hitherto not been provided to the Inquiry, and then

1 also, whether she intends to ever seek permission to even submit  
2 such documents.

3 Other than that, I wouldn't ask any further  
4 directions.

5 COMMISSIONER HICKINBOTTOM: Yes, Mr Haeri. Five  
6 directions. What do you say in respect of each of those?

7 First: Proper index by 4:00 p.m. today.

8 MR HAERI: Yes, Commissioner, we can produce an index.  
9 I don't know whether 4:00 p.m. today with the Hearing is  
10 realistic. But we can--

11 COMMISSIONER HICKINBOTTOM: What is a realistic time,  
12 Mr Haeri?

13 MR HAERI: I think I would say probably by tomorrow  
14 or, latest, Friday.

15 COMMISSIONER HICKINBOTTOM: These are documents that  
16 have got to go to these two individuals who do not know that  
17 they're on the way, so they can begin thinking about a response.  
18 For you not to be able to put in an index to the Annexes until  
19 Friday is frankly--frankly ludicrous. But certainly--

20 MR HAERI: You may not have--you may not have heard  
21 me. Sorry, Commissioner. I said by tomorrow or, the latest,  
22 Friday, so my first-instance response was by tomorrow.

23 COMMISSIONER HICKINBOTTOM: Okay. It's going to be  
24 by, let me say, the end of today. There is absolutely no reason  
25 why an index of these documents cannot be prepared within the

1 course of the next 13 hours.

2 Next, I will direct--as you have given an assurance  
3 that you will do--that these documents are sent to the Auditor  
4 General and the Internal Auditor by 12:00 noon today by the  
5 Attorney General in a form that they can readily access. Yes?

6 MR HAERI: Yes.

7 COMMISSIONER HICKINBOTTOM: Next: You have already  
8 agreed, and I'll direct that you give an indication of any  
9 redactions from any part of this document by 4:00 p.m. today in  
10 what can now be described as the "usual form".

11 Fourth: The Attorney General, Mr Rawat suggests,  
12 should be directed to write to me to set out the support she's  
13 willing to give, should either the Auditor General or the  
14 Internal Auditor request it. He didn't set a time. I suggest  
15 that that's done by when, Mr Haeri?

16 MR HAERI: We can do that by tomorrow. If there  
17 weren't so many moving pieces, I would say we'd try and do it by  
18 today.

19 COMMISSIONER HICKINBOTTOM: Let me say by 12:00 noon  
20 tomorrow. That should give you sufficient time, give the  
21 Attorney General sufficient time.

22 These are, of course, Public Officers who are entitled  
23 to look to the Attorney General in this regard.

24 And, finally, it really is a concern that the Auditor  
25 General thought that it was appropriate to send this document

1 in, in the circumstances that she has, and without the notice  
2 either to the COI or, indeed, to those individuals that are  
3 criticized.

4 I've made it very clear the importance of procedural  
5 fairness to all witnesses, particularly Public Officers, and  
6 this makes life extremely difficult for us and for them.

7 And so, I will direct that the Attorney General writes  
8 confirming--writes to the Inquiry confirming that she will not  
9 make any submissions in respect to any matters that fall within  
10 the Terms of Reference, other than matters which arise during  
11 the course of the current Hearings, and/or without permission  
12 from me. And any application for permission must be made,  
13 firstly, in proper form, and secondly, promptly. An application  
14 in respect of this document should have been made, in my view,  
15 probably three months ago, so that as soon as you started to  
16 prepare it, we knew that it was on its way, and we could have  
17 taken steps to ensure that the two objects of the criticism  
18 could be made aware that it was on its way and could prepare  
19 themselves to respond to it in a reasonable and proper way.  
20 They are entitled to that as Public Officers.

21 Any comments upon that, Mr Haeri?

22 MR HAERI: No comments on that.

23 COMMISSIONER HICKINBOTTOM: Anything else, Mr Rawat?

24 MR RAWAT: There is one direction I omitted, and I'm  
25 grateful to those sitting behind me. But you also, in the

1 course of hearing submissions, asked that IRU write today to the  
2 COI identifying these documents contained in the Annexes which  
3 were not previously disclosed providing an explanation as to why  
4 such documents had not been disclosed.

5 COMMISSIONER HICKINBOTTOM: Right. Thank you for that  
6 reminder, Mr Rawat. I've made that direction already, but that  
7 will be added to the Order, and I think this should be prepared  
8 in a formal Order, Mr Rawat.

9 MR RAWAT: Thank you.

10 COMMISSIONER HICKINBOTTOM: So, we will send out a  
11 formal Order, but the Order has been made, and those directions  
12 apply from now, Mr Haeri.

13 Once the Auditor General and the Internal Auditor have  
14 had an opportunity to read this document, then we will  
15 communicate with them, work out how long they need, properly, to  
16 respond to it, and how this will affect the ongoing Hearings  
17 because we will have to change the order of the Hearings and,  
18 indeed, the length of time of some of the Hearings to enable  
19 this--these new submissions to be taken properly into account.

20 Anything else, Mr Haeri?

21 MR HAERI: Yes, Commissioner, just one point, which is  
22 that you said that the three to four weeks I had mentioned in  
23 terms of a reasonable time to respond was longer than the IRU  
24 had taken to deal with requests. As I said, I don't think  
25 that's right. In fact, the time that you typically give the



1 Government to respond to a request is seven days. There have  
2 been extensions. But that is, of course, a much shorter period  
3 than the time frame that I mentioned.

4 COMMISSIONER HICKINBOTTOM: Well, I hear what you say,  
5 Mr Haeri. Others can take their own view on whether three weeks  
6 to respond to this document is a reasonable time. Given the  
7 time that the Premier's Office and the IRU have had to prepare  
8 the document, I need say no more. Thank you very much.

9 Anything else, Mr Rawat?

10 MR RAWAT: No. Thank you, Commissioner.

11 MR ROWE: Commissioner, question from me, please.

12 COMMISSIONER HICKINBOTTOM: Yes.

13 MR ROWE: Commissioner, when the Auditor General and  
14 the Internal Auditor return--

15 (Stenographer clarification.)

16 When they return to give rebuttal evidence, is it  
17 solely Mr Rawat who shall question them or shall they be open to  
18 cross-examination by us or Mr Haeri?

19 COMMISSIONER HICKINBOTTOM: That is dealt with,  
20 Mr Rowe, in the Protocols. How questions can be put is dealt  
21 with in the Protocols, so I will refer you to those.

22 MR ROWE: So, therefore, will we be supplied with her  
23 answers before?

24 COMMISSIONER HICKINBOTTOM: I'm sorry, I didn't  
25 understand the question.

1 MR ROWE: She's going to respond to the submissions  
2 made here before you today. Are her answers going to be in  
3 writing so that we may be able to pose pertinent questions of  
4 her?

5 COMMISSIONER HICKINBOTTOM: We will discuss with the  
6 Auditor General and the Internal Auditor how, properly, we can  
7 give them a reasonable opportunity to respond. I expect that  
8 they will want to respond in writing, and certainly I prefer  
9 that they respond in writing.

10 My primary concern at the moment is to give these two  
11 Public Officers against whom severe criticisms, at great length,  
12 have been made, that they have a proper opportunity to respond.  
13 But otherwise, questions will be put to these two officers, as  
14 they have been to everybody else, in the way described in the  
15 Protocols.

16 MR ROWE: Thank you, Commissioner. I appreciate it.

17 MR HAERI: On the time frame for the response, I  
18 should just note that the Ministers have been given seven days  
19 to respond to their Warning Letters, of which they had no notice  
20 in advance.

21 COMMISSIONER HICKINBOTTOM: How long was the longest  
22 the Warning Letter, Mr Haeri?

23 MR HAERI: Well, Commissioner, they referred also to a  
24 bundle of documents, a very extensive bundle of documents. It's  
25 2,500 megabytes, which underscores the Warning Letters.

1           COMMISSIONER HICKINBOTTOM: I'm sorry. Those are the  
2 documents that they provided to us originally.

3           MR HAERI: Well, I don't think the Ministers  
4 individually provided them, so that's not the way, as you know,  
5 the Government works. The Ministers are not the ones who are  
6 organizing the filing of documents.

7           So, this is something that was obviously given a long  
8 time ago, and no doubt has been worked on by the COI for a very  
9 long time. No notice was given. It is a 2,500-megabyte tome of  
10 documents, a seven-day Warning Letter.

11           COMMISSIONER HICKINBOTTOM: Let me just say this,  
12 Mr Haeri: I'm not sure that this is the--your strongest point  
13 in relation to the position the Attorney General finds herself  
14 today in respect of these issues.

15           Anything else, Mr Rawat?

16           MR RAWAT: Could I just make two short points?

17           The first is in relation to Mr Rowe's point, can I  
18 invite him to look at the COI Rules, and also look at the  
19 Protocol for potential criticisms. Both of those rules--the  
20 Rules and the Protocol have been drafted to ensure that those  
21 who may be subject to criticism have proper notice of them, and  
22 that's why there are Rules that govern the way questions can be  
23 put in the COI, which are in accordance with the modern approach  
24 to inquiries, in any event. So, that will put him in a better  
25 position, help him to understand how he could approach questions

1 or criticisms to any Witness.

2 COMMISSIONER HICKINBOTTOM: Thank you.

3 MR ROWE: If I may, Commissioner, is it then that you  
4 have abandoned the Salmon Rules and you're taking the approach,  
5 I will humbly submit, that is contrary to the law set out here?

6 COMMISSIONER HICKINBOTTOM: Mr Rowe, we can't have  
7 this. We have been round the Salmon Rules a number of times.  
8 We've had a Hearing on it, and we've settled on the approach to  
9 Warning Letters that I'm going to adopt. From recollection,  
10 it's an approach which you agreed. But in any event, it's the  
11 approach we're going to adopt, that I'm going to adopt.

12 What we cannot do is to go back and have another legal  
13 debate upon what you call the "Salmon Rules". That's been done  
14 on the basis of written submissions, oral submission, under an  
15 approach which I have made clear.

16 MR ROWE: May I state, sir, that to have an inquiry  
17 where the only one capable of asking questions in person is  
18 Mr Rawat, is not, on its face, procedurally fair. That runs  
19 contrary to every principle of natural justice.

20 But you have ruled, and we will accord with your  
21 ruling.

22 COMMISSIONER HICKINBOTTOM: And indeed, given reasons  
23 why that approach is perfectly proper and is perfectly in  
24 accordance with procedural fairness, and it also gives those who  
25 are criticized an appropriate opportunity to raise any responses

1 to any criticisms that are put.

2 Now, Mr Rawat, you had a second point?

3 MR RAWAT: It's just--and it's more just for the  
4 Transcript. Mr Haeri referred to the Warning Letters. The  
5 Warning Letters do not refer to the entirety of the bundle.  
6 They refer to the specific document, that they draw the  
7 recipient to the Warning Letter to those particular documents.  
8 It's not the case, although Mr Haeri enjoys telling us that the  
9 bundle is 2,500 megabytes, the size, that the Witness have to  
10 refer to every single document in that bundle.

11 MR HAERI: That would make it procedurally less  
12 though, with respect, because it means that additional documents  
13 were referred in the context of addressing the Warnings Letters  
14 which were not appended at the time, as you say.

15 MR RAWAT: With respect, Mr Haeri, you've now  
16 undermined your own point because you intend, in the criticisms  
17 that you're going to make of the Auditor General and Internal  
18 Auditor General, to refer to a document which you've just  
19 produced which includes documents that you have yet to disclose  
20 to the Inquiry.

21 COMMISSIONER HICKINBOTTOM: Mr Haeri, this is--it  
22 seems to me the point you made is for a number of reasons, no  
23 doubt including those made by Mr Rawat. But I have indicated  
24 how I propose to deal with this--these unhappy circumstances  
25 that have arisen because of the way in which the Attorney

1 General has approached these matters.

2 Now, is there anything else before we hear the  
3 Witness, Mr Rawat?

4 MR RAWAT: No, Commissioner. I won't ask you to rise  
5 because the Witness is here.

6 COMMISSIONER HICKINBOTTOM: I know the Witness is  
7 here, and we must apologize to him. We have been going an hour.  
8 I suggest we have a five-minute break. That will give the  
9 Stenographer a break, and we'll start with the witness.

10 MR RAWAT: We'll bring the Witness in, in that time.

11 COMMISSIONER HICKINBOTTOM: We will have a five-minute  
12 break to do that. Thank you.

13 (Recess.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Session 2

COMMISSIONER HICKINBOTTOM: Thank you very much, and thank you for waiting as well.

Good. We are ready to resume. I've already apologized to the Witness for keeping him waiting but do so again. Thank you very much for waiting.

Mr Rawat.

MR RAWAT: Thank you, Commissioner.

Our first witness of today is Mr Joseph Smith-Abbott.

BY MR RAWAT:

Q. Mr Smith-Abbott, thank you for coming to give evidence this morning and also can I join with the Commissioner's apology for keeping you waiting.

I understand that you would like to affirm before giving your evidence?

A. That is the case.

Q. You should have the words of the affirmation in front of you. There is no need to stand, but could you read those words out now, please.

A. Sure.

I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

COMMISSIONER HICKINBOTTOM: Thank you very much.

BY MR RAWAT:

1 Q. And could you, for the record, confirm your full name,  
2 please?

3 A. Joseph Smith-Abbott.

4 Q. And is your professional address, Postal Warehouse,  
5 Third Floor, Road Town, Tortola?

6 A. That is correct.

7 Q. You will see, Mr Smith-Abbott, that in front of you  
8 there are a number of files. They're just to your left there.  
9 We will be looking at some of the documents in those bundles in  
10 due course, though possibly lucky for all of us not all of them.

11 Can I, before we get into some more detail, just  
12 remind you of this. Could you keep your voice up, please. The  
13 microphone that you see in front of you doesn't amplify, and  
14 it's very important that the Stenographer, who is linking in  
15 remotely, can hear both you and I. So, if we both try and keep  
16 our voices up and also try to avoid speaking across each other  
17 it will make things easier for the Transcript.

18 REALTIME STENOGRAPHER: And could we have the Witness  
19 pull the microphone closer to him, please. Thank you very much.

20 BY MR RAWAT

21 Q. Now, your present role is Acting Permanent Secretary  
22 in the Ministry of Natural Resources, Labour and Immigration; is  
23 that right?

24 A. That is correct.

25 Q. And you have served in that role since the 17th of May



1 of this year?

2 A. That is also correct.

3 Q. Could you give the Commissioner an outline of your  
4 career in Public Service leading up to your appointment as  
5 Acting Permanent Secretary?

6 A. I joined the Public Service actually as a Deputy  
7 Secretary--Deputy Director and Science Coordinator of the  
8 National Parks Trust of the Virgin Islands. It was then known  
9 as the BVI National Parks Trust. I served in that role for  
10 three years until December 1999 when I was appointed The  
11 Director of National Parks Trust. I then served since then  
12 until May 2014 as The Director, and I then moved into the  
13 Ministry proper as the Deputy Secretary, and since then I've  
14 served in that capacity until now on the 17th of May.

15 Q. I see.

16 And I've put this to other Public Officers who either  
17 have the role of Acting Permanent Secretary or Permanent  
18 Secretary, and that is what is--what does the role of Permanent  
19 Secretary involve?

20 A. The Permanent Secretary--the Office of the Permanent  
21 Secretary provides Policy Guidance to the Minister proper, as  
22 well as the fact that he or she will serve as the administrative  
23 head of the Ministry and supervised directly a number of heads of  
24 departments who will obviously be defined by the incoming  
25 Government.

1 Q. So, your job as Public Officer is to apply the Policy  
2 of the incoming Government. Would a fair summary of the role of  
3 Permanent Secretary be that it is your job to supervise the  
4 Ministry but obviously under the direction and control of the  
5 Minister?

6 A. That is correct.

7 Q. Now, just to give your evidence some context, the  
8 Commission is calling you today because we need your assistance  
9 in relation to the Statutory Boards that fall under the  
10 Ministry. I'm going to, as we go along, just refer to it as the  
11 "Ministry" rather than the Ministry of Natural Resources, Labour  
12 and Immigration. There are matters that we need to put to you,  
13 but we need to put them to you because you are the current  
14 Permanent Secretary.

15 A. Yes.

16 Q. Now, you've assisted the Commissioner by making three  
17 Affidavits in relation to what we've called "Statutory Boards".  
18 If you pick up Part 1 of the bundles.

19 Now, in total, Mr Smith-Abbott, you've made three  
20 Affidavits, and we don't need to delve too much into the reason  
21 why, but it was because you had not dealt fully with all the  
22 Statutory Boards that came under the Ministry, and so you did  
23 additional Affidavits. Can I just take you to the first one of  
24 those, it's at page 424, please.

25 You should have the first page of your First

1 Affidavit. If you go, please, to page 441--sorry, 439, please.

2 A. 439?

3 Q. Yes. I want you to confirm your signature there?

4 A. That is my signature.

5 Q. And if we look at page 717. That's the first page of  
6 your Second Affidavit, and if you turn, please, to page 727, can  
7 you confirm that that's your signature?

8 A. That is correct.

9 Q. And now, please turn to page 946. That's your Third  
10 Affidavit. And if you look at the page overleaf--it's a short  
11 Affidavit, but again, please confirm that that's your signature?

12 A. That is correct.

13 Q. Now, having confirmed your signatures, are you content  
14 that those Affidavits should stand as part of your evidence to  
15 the Commissioner?

16 A. Yes, I am.

17 Q. Now, as Permanent Secretary or Acting Permanent  
18 Secretary, you were sent a Warning Letter drawing your attention  
19 to potential criticisms that may be made, and you've helpfully  
20 provided a written response to that Warning Letter. And I just  
21 want to confirm with you that you're content that the  
22 Commissioner should take that written response into account when  
23 considering his Report?

24 A. Yes, I am.

25 Q. Thank you.

1           Can we therefore just turn back to your first  
2 Affidavit at page 424, please.

3           Now, this was the first Affidavit that you provided,  
4 and as you explain at paragraph 2 it was made on behalf of the  
5 Minister, The Honourable Vincent O Wheatley, as a result of a  
6 letter sent directly to him on the 4th June 2021 by the  
7 Commission, and that letter asked for an Affidavit concerning  
8 the Statutory Boards that fell under Mr Wheatley's Ministry.  
9 You provided the Affidavit on the 29th of June 2021.

10           Now, that's very shortly after you took on the post of  
11 Acting Permanent Secretary.

12           Why was it decided that you should be the one to make  
13 the Affidavit?

14           A.    The Affidavit actually required the search of records,  
15 not only held within the Ministry but also within those  
16 departments. So, to the extent to which I was facilitating that  
17 process, it was felt that it would be practical to swear the  
18 Affidavit as submitted.

19           Q.    And in--I mean, can you explain a little bit how did  
20 you come to put the Affidavit together?

21           A.    So, the Affidavit required the information to be  
22 disclosed as to the membership as well as the remuneration, and  
23 that to the extent to which we had to again, consult with, not  
24 only officers within the Ministry proper for those Committees  
25 and Boards that are appointed, again, we consulted with those

1 individuals within and our side, heads of department and  
2 technical officers within the Boards, to gather the information  
3 that is within the Affidavit.

4 Q. So, the Affidavit was put together with the assistance  
5 of other officers within the Ministry?

6 A. That is correct.

7 Q. Was it, though, drafted by you in your own words?

8 A. It was drafted and certainly I would have vetted and  
9 approved everything.

10 Q. I see.

11 So, it was drafted on your behalf?

12 A. Yes, insofar as that--yes. To the extent to which--

13 Q. No criticism intended.

14 A. That's fine.

15 Q. The final version was approved by you?

16 A. Exactly, yes.

17 Q. You clearly would not have signed it if you were not  
18 happy with its contents?

19 A. Correct.

20 Q. Did you in preparing it, though, have a template to  
21 work through?

22 A. The template actually was provided because I believe  
23 that there was a standard format in the presentation of these  
24 Affidavits. So, therefore, to the extent again that that served  
25 as the format, so to speak, we followed it.

1 Q. I see, and who provided you with the template?

2 A. The template was provided by the IRU.

3 Q. And you said that it obviously required the input of  
4 other officers, you then saw the final draft and approved it and  
5 then signed it. Was there any input from the Minister into the  
6 contents of the Affidavit?

7 A. To the extent to which again the information requested  
8 was under membership of the Boards--the remuneration; to the  
9 extent to which criteria, which obviously would have had to have  
10 consulted with the Minister about what criteria may have been  
11 applied--yes, there would have been some dialogue at varying  
12 points.

13 Q. And you signed the Affidavit. But do you know whether  
14 the Minister has read the signed Affidavit?

15 A. I cannot say.

16 Q. Presumably that's the same answer in relation to the  
17 other two Affidavits that you've also provided?

18 A. Yes, I cannot say right now.

19 Q. Can we turn to the detail of this Affidavit.

20 You deal here with two bodies that come under the  
21 Ministry. The first is the National Parks Trust of the Virgin  
22 Islands, which I think you call as the NPTVI, if I may adopt  
23 that acronym, and the second is the BVI Social Security Board.

24 A. That's correct.

25 Q. Now, you explained that they are governed by two

1 separate statutes. If we go to your page 425, you set out there  
2 that it's the National Parks Trust Act of 2006 that governs the  
3 NPTVI, and then in relation to the SSB, the Social Security  
4 Board, it's the--the primary act is the Social Security  
5 Ordinance but that has been amended by subsequent legislation;  
6 that's right, isn't it?

7 A. That's correct.

8 Q. If we take the bodies in turn, if we look, first of  
9 all, at the NPTVI, one of the documents that you exhibit is the  
10 National Parks Trust Act of 2006. If I could take you in the  
11 bundle to page 510, please. What we see at section 5 is that  
12 the Act establishes for the Trust, the National Parks Trust, a  
13 Board, that says "there shall be a Board for the Trust which  
14 shall be the governing body of the Trust, overseeing and guiding  
15 the affairs of the Trust including its financial affairs."

16 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,  
17 Mr Rawat, so soon.

18 Before you get on to the Board, could you just tell us  
19 or confirm what the Board does? My understanding is, as it  
20 were, looks after and promotes what certainly were called  
21 National Parks. In the Territory, they may be called something  
22 else there. Is that the function of this Board?

23 THE WITNESS: Yes, sir. The Board actually provides  
24 oversight and governs the affairs related to the Protected  
25 Areas. There are 21 Protected Areas that's spread across the

1 Territory, and there are quite a number of international  
2 partners that the Board would also be keen to interact with  
3 insofar as they would do so through the Director, and that would  
4 be oversight of projects and financing that would be rendered to  
5 the Trust to advance the work of Protected Areas, whether those  
6 are declared or in areas of ecological sensitivity.

7 COMMISSIONER HICKINBOTTOM: That's very helpful.

8 Thank you very much.

9 I'm sorry, Mr Rawat.

10 BY MR RAWAT:

11 Q. So, that's the section that establishes the Board, and  
12 then if we look overleaf to subsection 5, if you look at  
13 subsection (4), first of all, it refers us to schedule 1 to the  
14 Act and we will look at that in a moment. But what it says is,  
15 "schedule 1 has effect with respect to membership of the Board,  
16 its procedures and other related matters."

17 But then continues, "the Minister may, with the  
18 approval of"--and here it's written as the Executive Council, I  
19 think we should take that as the Cabinet--"by Order vary  
20 schedule 1 from time to time."

21 So, can you just, if you can, help us with this: When  
22 one varies schedule 1, by Order, how is that made?

23 A. Let's take a step back. Schedule 1 actually discloses  
24 the procedure and the criteria effectively for the consideration  
25 of any Member, and it certainly then would prescribe what types



1 of representation ought to be had in respect to the Members  
2 themselves.

3           So, therefore, the variation of that schedule in the  
4 context of the appointment process is the--is actually looking  
5 at what types of vacancies become available periodically from  
6 time to time, and then it will allow for the Minister, by Order,  
7 to add Members by effectively varying or amending/adding Members  
8 as the need arise to that particular schedule, and there will  
9 be, of course, a disclosure as to who those Members are as such.

10           Q. We may come back to that if we look at schedule 1, but  
11 as I understand your answer, what the Minister can do, under  
12 section 5(5) is vary the membership of the Board by adding  
13 people and taking people away?

14           A. That's correct.

15           Q. But when the Act refers to an Order, and it  
16 capitalizes the word "Order", is there a physical Order where  
17 that's written down?

18           A. Typically, then that decision, once the decision is  
19 taken, it would be Gazetted, and that is the Order.

20           Q. I see.

21                   And so, that's the Order of the Minister?

22           A. Correct.

23           Q. And has it happened, in your experience, with the  
24 National Parks Trust that Ministers have varied schedule 1 by  
25 Order?

1           A.    Very much so.

2           Q.    Let's look at schedule 1 and what it says.  You will  
3 see that in bundle at 552.

4                    COMMISSIONER HICKINBOTTOM:  Is this schedule the  
5 current schedule?  If the schedule is varied from time to time,  
6 you may not know or you may know.

7                    THE WITNESS:  So, the question is whether--

8                    COMMISSIONER HICKINBOTTOM:  The Schedule can be  
9 altered, can be varied by the Minister?

10                   THE WITNESS:  Schedule actually is not altered because  
11 it is a part of the principal Act.  What gets varied is the  
12 membership, is the disclosed members, once appointed by Cabinet.

13                   COMMISSIONER HICKINBOTTOM:  I understand.  That's  
14 helpful.  Thank you.

15                   THE WITNESS:  Yes.

16                   BY MR RAWAT:

17           Q.    Are you at 552, Mr Smith-Abbott?

18           A.    Yes, I am.

19           Q.    The first page of that is, in fact, paragraph 1 is a  
20 description of what Chairman means, but if we turn to the more  
21 important paragraph, which is 2, and that deals with membership,  
22 and so what it allows a Minister to do is--at 2, direct that  
23 "the Minister shall appoint Members of Board for periods  
24 specified in the instrument of appointment, which shall not  
25 exceed three years."

1           Subparagraph 2 provides that a Member of the Board can  
2 be--is eligible for reappointment.

3           And then what it continues is that "the Board shall,  
4 in addition to the Director, consist of not more than 10 Members  
5 appointed from members of the public, any more or one--any one  
6 or more of whom may represent a non-governmental organisation as  
7 follows", and then it given that it has to be a representative  
8 from not just Tortola but the sister islands, "three  
9 representatives from the business community with interests in  
10 recreational or tourism activity in connection with the  
11 Territory's parks and Protected Areas, including but not limited  
12 to the marine, hotel, restaurant, taxi, travel, fishing and dive  
13 industries", and then "three persons with knowledge of  
14 experience in one or more of the fields of biodiversity  
15 conservation."

16           So, you will have, if you like, community  
17 representatives, business community representative, and I  
18 suppose scientific community representatives?

19           A.    That is correct.

20           Q.    And that will give us 10 people, and the Director  
21 usually sits as an ex officio Member of the Board?

22           A.    He's a Member of the Board.

23           Q.    Is he a voting Member of the Board?

24           A.    Yes.

25           Q.    And what 4 tells us is that "the Minister shall

1 appoint a Chairman of the Board from persons appointed under  
2 subparagraph (3)', so anybody could be a Chairman of the Board;  
3 is that right?

4 A. That is correct.

5 Q. And then the Minister also appoints "a suitable person  
6 to serve as Secretary to the Board."

7 Subparagraph (5) then says that "the Minister, in  
8 making appointments of Members pursuant to subparagraph (3),  
9 shall be satisfied that the person (a), is of a stature in the  
10 community to bring credit to the Trust, and (b), has capacity to  
11 do one or more of the following", and those are "increased  
12 public knowledge, understanding and appreciation of the  
13 importance of Parks and other Protected Areas; (2), attract  
14 financial support for the trust and ensure sound Financial  
15 Management; and (3), provide sound advice, leadership and  
16 direction to the Board in fulfilling the objects and purposes of  
17 this Act."

18 Subparagraph (6) covers resignation.

19 Subparagraph (7) allows the Board to designate a  
20 Member to act as a Vice Chair.

21 And then paragraph 3 then gives the Minister or  
22 directs that "the Minister shall specify the periods of  
23 appointment in such a way that the periods of appointment are of  
24 not more than"--sorry, I'm going to read that all over again.

25 Subparagraph (3) provides that "the Minister shall

1 specify the periods of appointment in such a way that the  
2 periods of appointment of not more than one-third of the Members  
3 shall expire every two years."

4           So, there is a staggered membership, if you like, a  
5 rotating membership. Is that intended to ensure that you retain  
6 your expertise as you go through?

7           A. Right. So, it ensures continuity of knowledge as well  
8 as decision-making to the extent to which those Members will be  
9 staggered.

10           Q. Paragraph 4 provides that the Office of a Member  
11 becomes vacant if the person dies, completes a term of office  
12 and is not reappointed, or (c), is absent from 50 percent of the  
13 regular meetings of the Board in any one calendar year of which  
14 they had reasonable notice; (d), is that they resign; (e) is  
15 that they become mentally incapacitated; (f) they are convicted  
16 of a criminal offense; (g) they become a bankrupt or agents  
17 removed from office by the Minister under Subparagraph (2).

18           And Subparagraph (2) gives the Minister this  
19 discretionary power. "The Minister may at any time remove a  
20 Member from office if the Minister is satisfied that the Member  
21 is no longer suitable to serve as Member of the Board or at the  
22 request of the Board where a Member has been absent from fifty  
23 percent or more of regular meetings of the Board of which the  
24 Member has had notice without leave of the Board."

25           So, reading those out, that is, it would seem,

1 firstly, schedule 1 is where you find the framework for, if you  
2 like, the skills that are required to be a Member of this Board?

3 A. That is correct.

4 Q. And aside from the detail in schedule 1, are there any  
5 other criteria written down--I'm going to put that again. Is  
6 there any other guidance or policy that the Ministry uses when  
7 considering a membership of this Board?

8 THE WITNESS: The Ministry, as I understand it, will  
9 be guided mostly by the Act insofar as it prescribes the type of  
10 representation that we would want to see on the Board, and it  
11 also would define, to the extent of the sections that you have  
12 read, what a fit and proper person would be because you would  
13 find, for instance, references as to stature, as well as the  
14 types of contribution that that person may make. So this--so,  
15 the Ministry, as I understand, would be guided by the Act per  
16 se. The presence of any additional criteria I have not seen.

17 Q. So, you haven't seen any written document that says  
18 this is, when considering appointments or making recommendations  
19 for appointments to this Board, you should have the following  
20 factors in mind?

21 A. I have not seen such documents.

22 Q. So, just so that we're clear, in looking back at  
23 subparagraph (3), will give us the, if you like, the kind of  
24 skill sets or background that you want, of a Member of the  
25 Board, and that may depend on the role that that Member is

1 intended to play, so someone who is a representative from Virgin  
2 Gorda does not necessarily have to be involved in the business  
3 community or the science community. It's because they're a  
4 representative of that island?

5 A. That is correct.

6 Q. And in terms of the "test", if you like, for  
7 determining whether someone is, to use your phrase, a fit and  
8 proper person for membership of this Board, we find that at  
9 subparagraph (5) where, as you've indicated, there is reference  
10 to whether there of a stature in the community to bring credit  
11 to the Trust, and also then there are reference to the capacity  
12 to be able to do and achieve certain objectives.

13 A. Which he would have read, yes.

14 Q. Now, if we go to 555 now, though,  
15 Subparagraph 4--paragraph 4 sets out when the circumstances in  
16 which the Office of a Member becomes vacant, but if we look at  
17 Subparagraph (2) of that provision, which gives the power to  
18 remove, the Minister has to be satisfied that the Member is no  
19 longer suitable to serve as a Member of a Board.

20 Is there any guidance available to a Minister when  
21 assessing the basis on which one could be said to be no longer  
22 suitable to serve as a Member?

23 A. If you're referring to any guidance specifically  
24 outside of the Act, I have not seen such.

25 Q. So, it all comes down back to the Act as the starting

1 point?

2 A. That is correct.

3 Q. Indeed, the endpoint?

4 A. That is correct, yes.

5 Q. If I take you to 425 in your--in the bundle which is  
6 going back to your Affidavit, please. And this is now just to  
7 ask some questions about the process in practical terms. And we  
8 can give it this context, can't we that, having looked at the  
9 Act, it's the Minister that is required to make these  
10 appointments. There isn't any wording in the Act that we looked  
11 at in schedule 1 referring to the need for a Cabinet approval?

12 A. That is correct, yes.

13 Q. So, in terms of the process, the first point you've  
14 made--and this is at your paragraph 8.1, is that: "There is no  
15 requirement to advertise when a position on the NPTVI Board  
16 becomes available."

17 Now, whilst there is no requirement, it's right, isn't  
18 it, that the statute doesn't prohibit either the Board itself or  
19 the Trust or the Ministry from advertising a vacancy?

20 A. Yeah, there is no restriction.

21 Q. You said, and you say this at paragraph 8.1, and you  
22 give a little bit more detail at your page 428, but that  
23 recommendations for those who could fill a vacancy can be made  
24 by Board Members. Can those recommendations come from any  
25 others?



1           A.    If by "others" you mean whom in particular?

2           Q.    Well, I will break it down for you, and I will use an  
3 example.

4                    So, Ms Tasha Bertie, who is also an Acting Permanent  
5 Secretary, gave evidence to the Commissioner yesterday and she  
6 said in relation to the Boards at her Ministry, which is the  
7 Ministry of Health and Social Development, that where vacancies  
8 arise for those Boards, a Desk Officer or Permanent Secretary  
9 can make nominations. Can that occur within your Ministry in  
10 relation to this Board?

11           A.    It could be possible. I cannot immediately say that  
12 it happens but it is possible that they can do so.

13           Q.    Can Members of Government other than the Minister make  
14 recommendations?

15           A.    Nothing would bar them from doing so.

16           Q.    The Minister could also come up with names?

17           A.    As well, yes.

18           Q.    What about a Member of the House of Assembly?

19           A.    Again, I'm not aware, but it is--there is nothing  
20 preventing that as well.

21           Q.    And when you get, as a Ministry, recommendations being  
22 putting forward for a vacancy on this Board, would such an  
23 approach be documented?

24           A.    There will be informal conversations, I would believe,  
25 to the extent that those names would be presented to the

1 Minister for consideration. Whether there is a formal process  
2 where those names are documented, I have not seen anything to  
3 that effect.

4 Q. And you note in your Affidavit that part of the  
5 process doesn't involve interviewing potential candidates, does  
6 it?

7 A. As it stood, yes.

8 Q. You say "as it stood". Has it changed?

9 A. No, it has not, actually.

10 Q. And you've used the phrase "informal process".

11 Is the position this, that recommendations are made  
12 for a vacancy and it's essentially an internal discussion. It  
13 might involve Board Members submitting names to the Ministry, it  
14 might involve internal discussions within the Ministry, but what  
15 it doesn't involve is an open process where the public, for  
16 example, are invited to put names in or people are invited to  
17 come forward.

18 A. So, if your question is in relation to the National  
19 Parks Trust, yes. There is no such procedural manual to the  
20 extent to which it would prescribe the manner in which  
21 individuals who may have an interest in serving would be  
22 considered, but the Ministry does have examples of a mechanism  
23 similar to what you are referring to in terms of the  
24 documentation of a process leading to the selection of Members.

25 Q. The reason--I want to keep my questions focused on the

1 Board of the National Parks Trust?

2 A. Right.

3 Q. And the reason for that is because the Social Security  
4 Board operates under different statutory mechanisms, and we'll  
5 get on to that in a little while.

6 You say that there are other--well, there are other  
7 mechanisms within the Ministry, but those mechanisms don't apply  
8 to this Board?

9 A. Correct.

10 Q. To what do those mechanisms apply?

11 A. They would have applied, actually, to a Board that was  
12 at the time held by and managed by the Ministry, which would  
13 have been the Climate Change Trust Fund.

14 Q. I see.

15 As we heard evidence from Edward Childs on Monday who  
16 was the Chairman of that Board at one time. And I think as I  
17 understood it, at some point that Board was transferred from  
18 your Ministry to the Premier's Office?

19 A. Right. But if the question then becomes are there  
20 examples of, within the Ministry proper, of a mechanism for  
21 considering Members to a Board in an open manner, transparent  
22 manner, that would--I could point to that.

23 Q. Yes, because the statute that governed that required  
24 that, for example, the vacancy should be advertised?

25 A. That is right.

1 COMMISSIONER HICKINBOTTOM: That's embedded in the  
2 Act.

3 THE WITNESS: That is embedded in the Act, and there  
4 is a whole procedure laid out for the consideration of that  
5 Member in a--by publication, interviews.

6 COMMISSIONER HICKINBOTTOM: And the whole process?

7 THE WITNESS: And the whole process all the way  
8 across.

9 COMMISSIONER HICKINBOTTOM: Yes.

10 THE WITNESS: So, there are examples within the  
11 Ministry that I can say actually would follow what you are--what  
12 you are expressing with respect to that process.

13 COMMISSIONER HICKINBOTTOM: Can I just clarify this:  
14 The process for the Climate Change Trust Fund Board is embedded  
15 in the statute?

16 THE WITNESS: That's very much so.

17 COMMISSIONER HICKINBOTTOM: For most Boards, including  
18 this one, there is not that sort of process. I mean, for  
19 example, Mr Rawat has mentioned publicising vacancies or  
20 advertising vacancies, that's not required by the Act here.  
21 It's not prohibited by the Act, either. But in those  
22 circumstances, these processes haven't been adopted as a matter  
23 of policy by the Ministry in the cases where the Act doesn't  
24 prescribe them. Is that fair?

25 THE WITNESS: What I can say is this--and I can say

1 this because I would have been involved in both processes, both  
2 the genesis of the National Parks Act and the Climate Change  
3 Trust Fund Act, and it's one of evolution and development. So,  
4 at the time in 2006 and the period leading up to 2006, we were  
5 actually looking at a very set of unique conditions that looked  
6 to improve the governance of the Board, as well as the overall  
7 governance and oversight of National Parks. And there were some  
8 drivers for that process to lead up at that time to the  
9 definition of the sections of the Act with respect to the Board.  
10 There were concerns about the governance of National Parks and  
11 the representation and ensuring that there was, for instance,  
12 scientific--scientific representations, so to speak.

13 So along that evolution, you have now the Climate  
14 Change Trust Fund, and I believe that there would have been  
15 references to the fact that as a Body that would seek to have  
16 financing from International--

17 COMMISSIONER HICKINBOTTOM: Exactly.

18 THE WITNESS: International bodies, that there would  
19 be another level of scrutiny, another level of autonomy, so to  
20 speak.

21 COMMISSIONER HICKINBOTTOM: So, certainly that was  
22 particularly important because of the international funding?

23 THE WITNESS: Correct.

24 So--so, the drivers there would have been--and again,  
25 it's an evolutionary process, it's a developmental process, so

1 that to the extent to which we built on the principles of the  
2 2006 Act to then add another layer of review, so to speak, the  
3 opening of the membership to a much wider community of  
4 individuals, would have been aware of the opportunities, would  
5 have defined, for instance, the types of expertise that would  
6 have been sought and you would have wanted to have secured  
7 within that Board, and then there would be a technical layer of  
8 review.

9           So, all of the applications supported by the CVs and  
10 the sort would also be disclosed, and they will be looked at in  
11 this case by the Climate Change Committee.

12           COMMISSIONER HICKINBOTTOM: Oh, yes, yes.

13           THE WITNESS: So, the Climate Change Committee, which  
14 is actually embedded in the Act. We would do some  
15 short-listing, so to speak. Beyond that, then those  
16 recommendations would move forward as per the Act.

17           So, there is experience in the Ministry proper, and  
18 Cabinet would have been minded to adopted those principles over  
19 time. Whether there is a much larger policy question as to  
20 whether this should be applied to other Boards, I cannot say. I  
21 mean, obviously, I would not have been responsible for that  
22 determination. But what I can say is that there is experience  
23 in the continuum of the governance arrangements with respect to  
24 the Boards, and I can say that because I would have been both on  
25 the executive side, and now where I sit, I can say so as well,

1 on the policy side of the question, so to speak. But this  
2 process would have been undertaken over a 15-year period.

3 And these processes, they do take time, so there will  
4 be this length of--this windowing in time in the overall  
5 arrangements.

6 COMMISSIONER HICKINBOTTOM: That sort of explains the  
7 difference between the statutes?

8 THE WITNESS: Yes, very much so.

9 There were differences in the drivers for those, but I  
10 think that the overall driver was the review of governance,  
11 Board governance, and ensuring that there were provisions for  
12 that to take place.

13 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.

14 THE WITNESS: Sure.

15 BY MR RAWAT:

16 Q. Thank you. To just sort of wrap this up and just  
17 fairly and shortly to summarise it, is the process in relation  
18 to the NPTVI Board, that nominations are made essentially as  
19 part of an internal informal process. Once you have a set of  
20 names, those persons then approached and asked if they wished to  
21 become involved. And if they say "yes", then you would ask them  
22 to send in their CVs?

23 A. That is correct.

24 Q. And so, without being critical, that process gives you  
25 a small pool of people because you're not expanding it through

1 advertising and going out to the public, but you collect a small  
2 pool of names, and that pool of names could reduce little more,  
3 if people don't want to serve when approached.

4 A. That is correct.

5 Q. Now, the statute mandates an appointment process which  
6 actually doesn't involve Cabinet, but as I understand it, and we  
7 see this, I think, at page 426 of your--it's actually better  
8 done at 430 of your Affidavit, please, Mr Smith-Abbott. You say  
9 there that it's the practice of the Ministry to submit a Cabinet  
10 Paper along with a number of supporting documents.

11 And so, just for the Commissioner, just clarify that  
12 process. If you've got to a point where a Minister is ready to  
13 make appointments and could make appointments under the Act, is  
14 an alternative taken that a paper is drafted and then the  
15 Minister takes that to Cabinet?

16 A. That is correct.

17 So, effectively the requirements as for the practice,  
18 I should say, the practice would be that we would, of course,  
19 make a reference to this Schedule, as you've defined it,  
20 Schedule No. 1. That will be attached to the paper along with  
21 any recommendations that would have been received. The signed  
22 declarations of willingness to continue to serve, if those  
23 individuals are seeking reappointment. And then, of course,  
24 that will also be supported by a signed written letter of  
25 interest of that prospective Member in addition to CVs. And, of



1 course, the paper will be supported by the comments of the  
2 Attorney General as well as the Financial Secretary, which is  
3 the normal practice when considering Cabinet Papers.

4 Q. If you could turn, please, to page 436. This is part  
5 of a table that is included within your Affidavit, and you've  
6 set out in relation to both Boards that the membership--it  
7 answers a number of questions.

8 I just wanted to summarise what I hope I understand to  
9 be the current position in relation to the NPTVI Board, and we  
10 start on 436 with Mr Samuel.

11 Now, I'm going to take you out of the numbers because  
12 you are--you would be a different--because you're a Government  
13 Public Officer. You're there not under the schedule 1 process;  
14 is that right?

15 A. That is correct.

16 Q. So, what we have is, I think, eight Members appointed  
17 on the 29th of November for periods of between two years and  
18 three years; is that right? It goes over to page 435, if we  
19 read up.

20 A. Correct, yes. It starts on 435 with some of the  
21 Members who would have been staggered.

22 Q. Yes.

23 And the reason it has to be staggered is because of  
24 the Act?

25 A. Yes.

1 Q. We looked at them--

2 A. And the retention of knowledge of the affairs and  
3 management of the Trust.

4 Q. Aside from yourself, you would have then nine Members,  
5 a mix of reappointments and first appointments; is that right?

6 A. That is correct.

7 Q. And we see that, if we're looking at this, the  
8 persons, and correct me if I've misread the table, but those  
9 persons who have given the three years, if you look at page 435,  
10 the last two Members recorded, Ms Hamm and Ms Jarecki, they were  
11 first appointments; is that right?

12 A. That is correct.

13 Q. And then when we go on to the next page, Mr. Blok and  
14 Ms Georges and then Mr Samuel, are the other three people who  
15 are given three years rather than two, and they're all first  
16 appointments as well?

17 A. That is correct.

18 Q. So, it seems that the extended period of time or the  
19 maximum period of time was only given to first appointments to  
20 the Board in November 2019.

21 Do you know what the reason was for that?

22 A. I cannot say that I know the specific choices. I  
23 think the--in terms of the appointment period, but in general  
24 terms, those first appointments you will want actually for those  
25 individuals to have the ability to stagger so that their first

1 appointments would mean that any Member who would have been  
2 appointed for two years would--and who may not have been  
3 eligible for reappointment, any of those Members having a first  
4 appointment over the three-year period would still remain on the  
5 Board and will provide any new Members, additional Members, who  
6 may have been replaced with the common knowledge and  
7 understanding of what the affairs of the Trust would have been  
8 up to that point.

9 Q. Thank you.

10 Could you turn, please, now to 438 in the bundle.  
11 Just to finish up a couple of points in relation to this Board.  
12 You dealt with Declarations of Interests and in relation to the  
13 NPTVI Board, you direct the Commissioner in your Affidavit to  
14 the Operations Manual that is produced by that Board. We will  
15 see the particular page that you direct us to.

16 At page 624, the manual starts at 624, at which page,  
17 when you provided your exhibits they were internally paginated  
18 and this is your page 188. And the reason I just want to check  
19 something with you is because in your Affidavit you actually--it  
20 must be a typographical error but you refer to page 184, and the  
21 manual starts at page 188, so I just want to take you to  
22 page 651, if I may.

23 What's described as Tab 14 is headed "Conflicts of  
24 Interest". And what that what you had in mind when you were  
25 referring, Mr Smith-Abbott, to Declarations of Interests?

1 A. That is correct.

2 Q. And if we, just for the record, also--if we look at  
3 660.

4 A. Is this not in the Report? 667?

5 Q. 660, please.

6 A. Oh, 660. Okay.

7 Q. Again, just to put it on the record, there is as part  
8 of the manual an NPT policy on Conflict of Interest, isn't  
9 there?

10 A. That is correct.

11 Q. And would that be something that you would also want  
12 to be cross referred to you Affidavit at paragraph 24?

13 A. That is correct, yes, it can be.

14 Q. Thank you. Now, we don't need to turn it over, but  
15 that page you also deal with performance assessment, and you  
16 make the points that within that Operations Manual, there is a  
17 self-assessment process for the Board, and we see that at  
18 page 654. Which is given in the Operations Manual as Tab 16.  
19 So, paragraph 4 of 654 deals with Board self-assessment and says  
20 all Boards need to go--undergo a self-assessment on a regular  
21 basis, and this assessment relates to the collective performance  
22 of the Board, and then it sets out main areas for assessment.

23 My question was going to be--I mean, if the Board is  
24 doing this internal process of self-assessment, what happens to  
25 the output of that self-assessment?

1           A.    It guides and would help the Board in its affairs in  
2 understanding how efficient and how much the degree to which  
3 it's supporting the management of the Trust. The output of that  
4 process wouldn't necessarily go beyond the confines of the  
5 Board.

6           Q.    So, it doesn't go back to the Ministry?

7           A.    Not to my knowledge.

8           Q.    And I think the point that is made there is that it's  
9 not about individual performance but collective performance of  
10 the Board?

11          A.    That is correct.

12          Q.    Thank you.

13                Let's take a look now, please, at the Social Security  
14 Board. If you go to page 448.

15                448 is part of the Social Security Ordinance, and it's  
16 the section which establishes the Board, so it establishes the  
17 Board to be called the "Social Security Board" in which the  
18 Social Security Fund will be vested, and which shall, subject to  
19 the provisions of this Ordinance, be responsible for  
20 administering the Funds.

21                And it then says that "the provisions of the schedule  
22 shall apply in respect of the constituting of the Board and its  
23 proceedings." We will see that schedule at 475.

24                Now, this is the schedule as it was amended by  
25 legislation in 2005. And Commissioner, for your note, that 2005

1 legislation has also been exhibited by Mr Smith-Abbott, and it's  
2 at page 478 in the bundle.

3 But I think more importantly, perhaps, the more  
4 important amendment, which you do highlight in your Affidavit,  
5 Mr Smith-Abbott, was made in 2014 by the--a moment--by the--I  
6 think it's Social Security Amendment Act of 2014.

7 A. 488, I believe.

8 Q. Pardon?

9 A. 488.

10 Q. Yes, it starts at 488 and the change that I think you  
11 draw our attention to is at 498, which is that the--whereas the  
12 schedule limits the Board to seven persons, and that amendment  
13 may increase the number to nine persons.

14 And also added that it shall--the Board shall consist  
15 of nine persons appointed by the Minister with the approval of  
16 the Cabinet. So, it's introduced a process by which Cabinet  
17 also is involved in the approval process; is that right?

18 A. That is correct.

19 COMMISSIONER HICKINBOTTOM: And again, just for my  
20 information, because it is very useful in terms of the Protected  
21 Areas, in terms of what the Social Security Board does or what  
22 the Act sets up--you will put this more precisely and elegantly  
23 than I, but it sets up scheme whereby there is a fund which is  
24 funded, I think, from different sources, but there is a fund  
25 which it manages, and then, on application, provides a variety

1 of benefits, including pensions. Is that a fair, very short  
2 summary?

3 A. That is--that is the case, yes.

4 COMMISSIONER HICKINBOTTOM: And such the Board, as it  
5 were, is the overarching body, and the management goes  
6 underneath?

7 THE WITNESS: Correct. So, the Board would provide  
8 oversight, Policy Guidance, and of course, because of the  
9 presence of the Fund, there are also Committees prescribed in  
10 the Act that will require some oversight of the investment fund,  
11 yes, as well, which is a critical function of the Board and the  
12 types of expertise, obviously, that would be required to oversee  
13 that as well.

14 COMMISSIONER HICKINBOTTOM: And then in terms of where  
15 the money comes from for the Fund, contributions, is that the  
16 main source of funds?

17 THE WITNESS: So, as I understand it, and I have to  
18 say that I have not worked as closely with this Board, but a  
19 layperson's view is that, yes, there would be a combination of  
20 sources that would fund the Fund. That would include  
21 contributions plus the proceeds of investments. So, that's  
22 broadly speaking, a combination of revenue into the Fund.

23 COMMISSIONER HICKINBOTTOM: Yes, that's helpful.

24 Thank you. Yes.

25 BY MR RAWAT:

1 Q. Thank you. If we stick to 498, please,  
2 Mr Smith-Abbott, what it tells us, firstly, is that the Board is  
3 going to consist of nine persons, one of whom shall be the  
4 Director or, in his absence, his Deputy.

5 Three shall represent Government, one of whom shall be  
6 the Chief Medical Officer, two shall represent employers, and  
7 two shall represent employed persons.

8 So, in terms of where vacancies could arise, it will  
9 be in relation of two representatives of government, two  
10 representatives of employers, and two representatives of  
11 employees.

12 A. Three representatives of Government--

13 Q. Three representatives.

14 A. --including the Chief Medical Officer.

15 Q. Yeah.

16 But in terms of--

17 A. But otherwise, yes.

18 Q. --those who you need to find because the Chief Medical  
19 Officer is automatically on the Board?

20 A. Correct, yes.

21 Q. As is the Director?

22 A. Correct, yes.

23 Q. So, it's the others where the vacancies will arise?

24 A. There would be six vacancies that would arise.

25 COMMISSIONER HICKINBOTTOM: And I think over the page.



1 THE WITNESS: And one private helper practitioner, so  
2 that will be the seventh.

3 BY MR RAWAT:

4 Q. Right. So, my math fails me again. If we go back to  
5 page 475, just look at the procedure because I think again in  
6 relation to this Board, the Social Security Board, you say in  
7 your Affidavit, and correct me if I've misunderstood you, but  
8 that the process in terms of appointments is really to be found  
9 in the schedule to the Act?

10 A. In that schedule that we just--

11 Q. We were just looking at.

12 A. Yes, indeed.

13 Q. And just to complete then what the schedule says,  
14 going back to 475 and the parts of it were amended by the 2014  
15 Amending Act, you have at 2, that "the Members representing  
16 employers shall be appointed after consultation with such  
17 association or employers or such bodies or--such persons or  
18 bodies as appear to the Minister likely to produce  
19 representation for employees generally throughout the  
20 Territory."

21 3 says that "the Members representing employed persons  
22 shall be appointed after consultation with such persons or  
23 bodies as appear to the Minister to be representative of  
24 employees throughout the Territory."

25 4(1) says that "the Minister shall, with the

1 concurrence of the leader of the Opposition, designate two  
2 representative Members of the Board to each Chairman and Deputy  
3 Chairman."

4 And (2) says that if the Minister and the leader of  
5 the Opposition cannot reach agreement, then the matter goes to  
6 what is now Cabinet, whose decision shall be final.

7 (5) limits the period that any Member, representative  
8 Member can serve on the Board as being up to three years but  
9 they are eligible for reappointment.

10 And then what at (6) is said is "a Member of the Board  
11 may at any time by notice in writing address to the Minister,  
12 resign his office, and if a Member becomes in the opinion of the  
13 Minister unfit to continue in office or incapable of performing  
14 his own duties, the Minister shall in such manner as he thinks  
15 fit declare the Office of the Member vacant."

16 So, breaking all of those down, the Minister has to  
17 take a number of steps before he or she can put names to Cabinet  
18 for approval.

19 Firstly, the Minister has to undertake a consultation  
20 process with associations or employers or persons or bodies that  
21 appear to him or her likely to produce representations for  
22 employers. How is that consultation process undertaken?

23 A. I cannot say how that process has been undertaken as  
24 I've not found written evidence to that effect as to how that  
25 consultation would have taken place.

1           As I would have said earlier, the common practice  
2 would have been that there would have been informal  
3 conversations with any myriad of interests, stakeholders, that  
4 perhaps may lead to the selection of individuals for the office,  
5 or for the membership and to a Board, but again I cannot say  
6 with certainty that this consultations would have taken place.

7           Q.    And are you in the same position in relation to 3,  
8 which deals with the need for consultation or Minister to  
9 consult when finding representatives of employees?

10          A.    Yes, I would be an equal position. I cannot say  
11 whether that would have taken place.

12          Q.    And these are somewhat different from the informal  
13 discussions that we were speaking of in relation to the Trust  
14 Board, because there we were speaking really of--in terms of it  
15 going outside the Ministry; it would go no further than Board  
16 Members. The dis--here, that the Minister is mandated to go out  
17 and consult with other bodies, with external bodies, but you  
18 haven't seen any record of such consultation.

19          A.    No, I've not.

20                So, to the extent to which the National Parks Trust  
21 Act would limit that consultation, so to speak, and now this  
22 speaks to a much broader degree of consultation; yes, that  
23 becomes a significant difference between the two acts.

24          Q.    Yeah. And what we've got to recognise, of course, is  
25 that because here we are looking at statutory bodies, each body

1 has its own statute that sets out how it should operate, how it  
2 should be constituted.

3 A. That is correct, yes.

4 Q. If we look at 4, though, what the Minister is also  
5 required to do is designate two representative Members of the  
6 Board to be Chairman and Deputy Chairman, and that's with the  
7 agreement of the leadership of the Opposition.

8 How again--have you got--have you seen any evidence of  
9 how that consultation process is undertaken?

10 A. I have not seen any evidence.

11 Q. If I take you to 6, then, please, it's--leave aside  
12 the part of the provision that deals with resignation, but the  
13 Minister has a power to remove someone from office--or from the  
14 Board, and it's entirely--it's a matter for the opinion of the  
15 Minister. A Minister can do so if he or she considers that  
16 person to be unfit to continue in office or incapable of  
17 performing his duties.

18 Have you--or is there any guidance within the Ministry  
19 as to--to assist a Minister in determining whether or not a  
20 person is unfit to continue in office or incapable of performing  
21 his duties?

22 A. I--I have not seen criteria to that effect.

23 Q. So, again, the Minister would then be reliant on any  
24 information that might be in the Act.

25 A. That is correct.

1 Q. Now, one matter which I didn't take you to is at  
2 page 427, if could ask for your help with this, Mr Smith-Abbott.  
3 If you go to 427 which is part of your thing, and we turn to  
4 426, you'll see the context, because at 426, your paragraph 11,  
5 you're dealing with appointment criteria, and the first part  
6 that you then set, and we've looked at this, the criteria in  
7 relation to the Trust Board, the Parks Trust Board.

8 Then, in relation to the SSB, you set out at section  
9 44 of the Interpretation Act, and you've set it out here within  
10 the Body of your Affidavit, so I won't need to take you to it.

11 But for your note, Commissioner, if you need it, in  
12 the bundle, it's the Interpretation Act again, exhibited  
13 helpfully by Mr Smith-Abbott, is at page 581.

14 COMMISSIONER HICKINBOTTOM: Thank you.

15 BY MR RAWAT:

16 Q. But I just wanted to ask, can you just--I mean, this  
17 is again in relation to appointments, but can you explain how  
18 this provision operates in relation to the Social Security  
19 Board?

20 A. So, the former reference that you made with respect to  
21 NPTVI, we would have already gone through that process. We have  
22 already described what the Act specifies by way of the types of  
23 representation and expertise.

24 The--as this Act does not have such criteria  
25 prescribed in the Act, and to the extent to which written

1 guidelines criteria, as you've pointed out, have not been able  
2 to come to that has already been stated. So, effectively, that  
3 section of the Interpretation Act which confers the power on any  
4 authority or person empowered by the enactment or the--or to  
5 appoint or designate a person to be a Member of a statutory body  
6 or to perform any other function, that Interpretation Act allows  
7 for the appointment of members--of any member of the public to a  
8 statutory body.

9 Q. But looking at it again and going back to the  
10 Schedule, what the Minister is required to do--and I--again,  
11 it's the approval of Cabinet that is then needed, this is when  
12 we're looking at appointments--what the Minister has to do is  
13 put forward the--a private health practitioner, two people  
14 representing Government, two people representing employers, and  
15 two people representing employed persons.

16 A. That is correct.

17 Q. So, there has to be, would you accept, a proper sort  
18 of basis to be able to say this person can legitimately  
19 represent employed persons?

20 A. Yes. The Act, in that sense, will prescribe the types  
21 of representation that must be ensured for the proper management  
22 and oversight of that Board, so the Act and the Amendment, as  
23 amended, would do so.

24 Q. I mean, keeping it simple, the private health  
25 practitioner is straightforward.

1 A. Yes.

2 Q. The Representative from Government is relatively  
3 straightforward. It's going to be a Public Officer and,  
4 ideally, a Public Officer with experience or expertise in the  
5 areas with which the Board will be concerned.

6 A. That is correct.

7 Q. But what you would need, for example, if someone is  
8 representing employed persons is the employee representative  
9 should ideally be an employee.

10 A. Yes.

11 Q. Whereas, by contrast, the employer representative  
12 should ideally be an employer.

13 A. That is correct.

14 COMMISSIONER HICKINBOTTOM: I'm sorry, I may have  
15 misunderstood this, Mr Smith-Abbott.

16 You weren't saying that, under section 44 of the  
17 Interpretation Act, whatever the mother act says. The Authority  
18 or person empowered to make the appointment to a board can  
19 appoint anybody he or she likes.

20 THE WITNESS: If the--of course, the principal Act and  
21 the Amendment would override.

22 COMMISSIONER HICKINBOTTOM: Yes.

23 THE WITNESS: Yes, because it would prescribe in very  
24 distinct ways who should be on that Board.

25 COMMISSIONER HICKINBOTTOM: But exclusive ways. I

1 mean, for example--

2 THE WITNESS: Yes.

3 COMMISSIONER HICKINBOTTOM: --if the appointment has  
4 to be a medical practitioner, the appointer can't appoint  
5 somebody who's not a medical practitioner.

6 THE WITNESS: That is correct, yes.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 THE WITNESS: So, I'm certainly not saying anything to  
9 the contrary.

10 COMMISSIONER HICKINBOTTOM: So, where does section 44  
11 come in, do you say? For example, on the SSB.

12 THE WITNESS: On the SSB?

13 There are--there is the notion of an employer and an  
14 employee, which is a very vast category of persons. So, to the  
15 extent to which you will want to define the--at least some  
16 process or some overarching authority for the--just--as has been  
17 stated already, the criteria, the guidelines are not necessarily  
18 described nor defined in written guidance, so you still have to  
19 revert to something of this nature.

20 COMMISSIONER HICKINBOTTOM: But I'm not quite sure how  
21 this helps. If the--if you're looking for an employee, I  
22 appreciate the definition of "employee" may be a difficult one,  
23 but as long as the per--the individual falls within that  
24 definition, that's what they must do, isn't it?

25 THE WITNESS: Yes.



1           COMMISSIONER HICKINBOTTOM:  Would the Interpretation  
2 Act help?

3           THE WITNESS:  Just in the overall framework for  
4 appointment of persons to avoid.  It does not necessarily  
5 super--I am not suggesting in any way that it would supersede  
6 the criteria guidance.

7           COMMISSIONER HICKINBOTTOM:  No, you can't derogate  
8 from that--

9           THE WITNESS:  No, you cannot derogate, yes.

10          COMMISSIONER HICKINBOTTOM:  --from those requirements.

11          THE WITNESS:  I agree, yes.

12          COMMISSIONER HICKINBOTTOM:  All this says is that it's  
13 a power in the Appointor to appoint or designate a person by  
14 name, Mr Smith or whatever, or direct a person to the time being  
15 holding such office is specified in the directions to be such a  
16 Member of one such function.  So, instead of Mr Smith it could  
17 be the Permanent Secretary.

18          THE WITNESS:  Yes, it can be.

19          COMMISSIONER HICKINBOTTOM:  And that's all this does,  
20 which is fine, but I don't see how that affects the requirements  
21 of the Act at all.

22          THE WITNESS:  It provides context.  It does not, as  
23 you pointed out, does not derogate or in any way--

24          COMMISSIONER HICKINBOTTOM:  No, I mean--so this may  
25 not be a good example, but the--where there's a medical

1 practitioner required, it would be open to the Appointor to say,  
2 well, I'm going to appoint Dr X or I'm going to appoint, I don't  
3 know, you know, the head of a particular department in a  
4 particular hospital or something. That's what this--that's what  
5 the Interpretation Act allows, which is--

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: --to say, fine, it  
8 gives--it does give you--it, as you say, it does give you some  
9 context.

10 THE WITNESS: Yes, it does.

11 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.  
12 Yes.

13 MR RAWAT: Thank you.

14 BY MR RAWAT:

15 Q. If I just quickly take you to page 428, please. And  
16 this is the section in your Affidavit, Mr Smith, where you deal  
17 with the issue of good character or fitness of a candidate, and  
18 we've heard from other witnesses about the "fit and proper  
19 person" test.

20 Now we're focusing on the SSB at this point. You see  
21 in that section--it's at the bottom of the page--where you speak  
22 of the Amendment to the Act, and you say: "This process may  
23 take into account recommendations from employers and employees  
24 as well as the Minister and other stakeholders".

25 Are you referring there the consultation process that

1 we looked at in relation to finding employed persons,  
2 representatives and employer representatives?

3 A. That is correct, yes.

4 Q. Which is the one that you don't--you weren't able to  
5 locate any written evidence about that process.

6 A. That's correct.

7 Well, in practical terms, it is the informal process  
8 that we've already made ref--what I've made reference to.

9 Q. If you go over to 429, please. Again, this is--you  
10 were asked about the process involves a consideration of  
11 convictions, and you have--we're looking again just at the SSB,  
12 but you set out there that the legislation doesn't speak to  
13 convictions, but you then point to section 7(1) which directs  
14 that the Cabinet shall appoint a fit and proper person to be  
15 Director of the Board on such terms and conditions that are  
16 considered appropriate, and you then set out the rest of that  
17 provision, and you point out that there's a similar provision  
18 for the Deputy Director of the Board in section 9.

19 Now, what you say at the bottom, and this is the point  
20 I need to clarify. You say that: To the extent that the  
21 Director and Deputy Director have to be fit and proper, it may  
22 be possible to surmise the same consideration of being fit and  
23 proper should apply to all Members of the Board and the staff.

24 So, is your position that whilst the Legislation  
25 doesn't specifically refer to either convictions as in current

1 convictions or spent convictions, one can expand--one can, first  
2 of all, read into the need for a director to be a fit and proper  
3 person, but that person shouldn't have a conviction of any sort?

4 A. So that the Legislation is clear as to what a "fit and  
5 proper person" is in the context of the Executive, it does not  
6 do the same--it does not have the same effect with respect to  
7 the Board, but the people who are overseeing the Executive ought  
8 to be of equal character.

9 Q. I see.

10 But bringing it down to the practical--and I  
11 appreciate you may tell me I'm putting an entirely hypothetical  
12 position to you because it would be hard to envisage a director  
13 of the board who has a conviction of any sort, but you would say  
14 that the "fit and proper person" test for the Director would  
15 exclude anybody--if properly applied--would exclude anybody with  
16 a conviction of any sort.

17 A. I could say that that would be reasonable.

18 COMMISSIONER HICKINBOTTOM: I mean, that's a fair  
19 answer, Mr Smith-Abbott. I mean, it depends what the--it  
20 depends what--

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: --it depends what the  
23 conviction is, and I know that we're looking at one particular  
24 Board here, the SSB, but it depends what the Board is too. So,  
25 obviously if the individual has committed an indictable offense,

1 that may rule him out altogether. If he's committed some  
2 motoring infringement, that may not. I'm not saying it  
3 wouldn't, but it may not.

4 THE WITNESS: Yes.

5 The application of an absolute test that if you ever  
6 have been convicted for even a minor offense, traffic offense,  
7 should exclude you from ever serving as the--as the Director of  
8 a statutory board, I will want to believe that there is some  
9 reason to be applied.

10 COMMISSIONER HICKINBOTTOM: Yes. I mean, it's  
11 something to be taken into account in assessing whether you're  
12 fit and proper, but it may not be--

13 THE WITNESS: It may not necessarily be the grounds  
14 for--

15 COMMISSIONER HICKINBOTTOM: It may not be in itself--

16 THE WITNESS: --to serve in that capacity.

17 COMMISSIONER HICKINBOTTOM: Correct, yes.

18 THE WITNESS: Yes.

19 COMMISSIONER HICKINBOTTOM: Correct. I think that's  
20 probably right, yes.

21 BY MR RAWAT:

22 Q. But I think your point is that, whatever the test is,  
23 it should be--on a reasonable basis it should be transferable to  
24 the Members of the Board.

25 A. Yes.

1 Q. So that the executive is not held to a higher standard  
2 than the members of--

3 A. And the oversight, the one--the ones entrusted to  
4 oversee.

5 Q. Thank you.

6 Could I just quickly go--take you to page 430, and  
7 there you're dealing with the approach in terms of the  
8 submission to Cabinet, and you explain in relation to the SSB,  
9 and this is at your 15, that a paper is submitted along with  
10 various documents.

11 Now, is it in relation to the SSB you-- is it the same  
12 practice adopted that you will obtain CVs just before you have  
13 to put them through, put that individual through to Cabinet?

14 A. So, what I have--what I have seen in the evidence as  
15 we've collected the responses is that the practice appears to be  
16 the same. So, the practice that would have applied to, say, the  
17 National Parks Trust--"NPTVI", as you have termed it--with  
18 respect to the section of the Legislation, the signed  
19 Declarations, all the way down to the submission of CVs and the  
20 comments on that paper, it would follow a similar procedure in  
21 collating.

22 I cannot say at what point those CVs would have been  
23 collected because I cannot attest to the stage at which they--in  
24 this particular Board, they would have been collected, but in  
25 practice it is a similar standard.

1 Q. I see.

2 So, again to summarise it and try to do so fairly, and  
3 stop me if I'm not, but essentially there's an informal process  
4 which is--during which the consultation process will take place.  
5 The individuals identified will then be approached and asked if  
6 they wished to serve. You will then collect CVs, and then the  
7 paper will be drafted for submission to Cabinet.

8 A. Yes.

9 And in addition to that, as I have expressed before,  
10 there has been some evolution in the thinking and practice of  
11 the manner in which boards are considered--the membership of  
12 boards are considered if, again, you take the model of the  
13 Climate Change Trust Fund. Now, as a measured opinion, whether  
14 that--you will want to replicate that across other boards within  
15 the Ministry is something to certainly contemplate and consider  
16 very strongly. But we do have a very strong precedence, and we  
17 can't send to the Ministry at least that particular practice, as  
18 I would have described earlier in testimony, of the oversight of  
19 that person, and a technical review, the policy review prior to  
20 the recommendation to the Minister is something that we have  
21 experience within the Ministry.

22 So, yes, I will clearly state that the evolution in  
23 Board governance and thinking can certainly include the practice  
24 that we've already exercised within the Ministry. So NPTVI, SSB  
25 can potentially garner some benefit from that experience; and,

1 to the extent to which--as a matter of fact, in the current  
2 environment in which we are operating, there is a vacancy for  
3 the chairmanship of the SSB, and we intend to very clearly apply  
4 that practice that we've already exercised, again, in earlier  
5 Board management recruitment processes related to the Board  
6 management process.

7 And so, you will see, for instance, in the public  
8 domain references to the fact that the--for the next Chair of  
9 the SSB. And again, because we've already had experience in the  
10 management of that process, we can certainly garner some  
11 experience and apply those lessons to this particular process.

12 Q. So, what you can comfortably say is that, within your  
13 Ministry, there is expertise of the two strands of approach  
14 adopted, if we call it "the more informal" strand that's been  
15 used with the NPTVI Board, but also the more formal process that  
16 was envisaged with the Climate Change Trust Fund Board.

17 A. So, if you look at the trajectory starting with NPTVI  
18 2006, SSB 2014, SSB 2021, there's evolution and development in  
19 thinking about what constitutes an appropriate Governance  
20 Framework for the selection, the consideration of Board Members.

21 So, yes, I can comfortably state that we can garner,  
22 and it so happens that where I sit, I would have been privy to  
23 those two earlier iterations, so I can say that very comfortably  
24 and very clearly that the 2006 process, at the time I was a  
25 director, the 2014 process, I was within the Ministry. I was a



1 culmination of--it was nearing the culmination of the adoption  
2 of the Act, of the Climate Change Trust Fund Act in 2015,  
3 '14-'15, and now looking at a way forward. Yes, I can  
4 comfortably state that we can garner ideas and benefit from the  
5 understanding of what the evolution in governance of boards may  
6 be.

7 Q. And, I mean, I know the Climate Change Trust Fund  
8 Board was--that body was moved to another Ministry, but before  
9 that happened, within your Ministry, there was experience of  
10 taking that process through.

11 A. Yes.

12 Q. Advertising, recruiting, presenting--

13 A. Yes.

14 Q. --looking at résumés or whatever, assessing by  
15 identifiable criteria, and so--and that knowledge hasn't left  
16 the Ministry.

17 A. No. No, it has not.

18 COMMISSIONER HICKINBOTTOM: So, that process, it's an  
19 evolution of the structures, the statutory structures, for the  
20 appointment to these boards, but that process, you would say, I  
21 guess, is rigorous because the Act requires quite a  
22 sophisticated process. It's open. I mean, in fact, it's very  
23 open. I think the process requires the publication of  
24 applicants.

25 THE WITNESS: Yes. There's the disclosure. There's a

1 portion of the Act that requires the disclosure of those  
2 individuals who have expressed an interest.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 THE WITNESS: So, we would of, for instance, used our  
5 website, the Government's website, the Ministry's website, to  
6 describe the individuals who would have stated an interest, and  
7 they would provide at least the public with a notion of such--of  
8 the individuals.

9 COMMISSIONER HICKINBOTTOM: So, it's rigorous, open,  
10 and transparent, and all of that helps with regard to the  
11 autonomy of the Statutory Board, which, in terms of that Board,  
12 for the reasons we've touched on, was particularly important.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: Because of the  
15 international funding element.

16 THE WITNESS: Correct, yes.

17 COMMISSIONER HICKINBOTTOM: That's helpful. Thank you  
18 very much.

19 Yes.

20 BY MR RAWAT:

21 Q. If I take you to 438 now, please.

22 Now, it's the section now in relation to the SSB on  
23 Declarations of Interests, and you point again to the SSB's  
24 operating manual, Operating Policy and Procedures. I'm going to  
25 say that again.

1           You, at paragraph 24 of your Affidavit, in relation to  
2 the SSB, you refer, under the heading "Declarations of  
3 Interests" to the SSB Operating Policy and Procedures for new  
4 Board Members. We see that at 670, which is the relevant page.

5           Just to be clear--and I appreciate that it's--this is  
6 the Board's manual, the SSB's manual, but to your knowledge,  
7 does the SSB actually have a code of ethics or guidance on  
8 Declarations of Interests?

9           A. I cannot say. I would have to confer with the  
10 management of SSB.

11          Q. Okay. Take you back to 439, please.

12           This is again about monitoring and assessment, and  
13 we've gone through the approach adopted by the NPTVI Board. Now  
14 turning to the SSB, you say there that "The Board's Operating  
15 Policy and Procedures Manual does not speak to performance  
16 evaluation regime; however, the Ministry, with the Board,  
17 intends to establish a mechanism for such".

18           Why is this a matter for the Ministry at all?

19           A. The Ministry is responsible through the--well, the  
20 Minister, as has been pointed out, is responsible for the  
21 appointment of those Members to the Board. So, therefore, this  
22 is something--and drawing to the experience that I made  
23 reference to even early in the--earlier iterations of the  
24 review--of Board governance, NPTVI in particular, that was done  
25 collaboratively. It was not necessarily that the Board went

1 away and did that. There was consultation at that time.

2 Now, whether the outcomes--so going back to an earlier  
3 statement, whether the outputs of that assessment would have  
4 made it into the Ministry, at least I what can say was that  
5 there was consultation, and some degree of dialogue just in the  
6 overall framework for performance monitoring.

7 So again, drawing from that experience, you can say  
8 that at least the performance monitoring of such a critical  
9 Board such as the SSB that really is holding in trust the fund  
10 and the management of that fund, that this would--we've agreed  
11 in principle that this is something that could be done  
12 collaboratively.

13 Q. I mean--and you can answer that in relation to both of  
14 these two boards, I mean, they are autonomous of the Ministry,  
15 are they not?

16 A. Yes, they are.

17 Q. Thank you.

18 We finished with that bundle now. Can I take you just  
19 to the Part 3 bundle, please.

20 Now, that's--

21 I'm going to show you some documents that I recognise  
22 you will not have seen as Permanent Secretary because they  
23 are--some of them are Ministry memos, and so they would be  
24 accessible to you, but others are Cabinet Minutes, but I want to  
25 do that just so that we have the kind of context of the

1 questions to follow.

2           Could I ask you to turn up, please, page 3189.

3           A.    3189.

4           Q.    Yes, please.

5           This is a ministry memo. I think it's under the name  
6 of your predecessor, Dr Potter, but we can see at page 3194 that  
7 the final draft is--carries the name of The Honourable Wheatley,  
8 and is dated the 12th of May 2020. That's at page 3194.

9           If you just--if you can, help the Commissioner just  
10 with how would a memorandum like this be put together. What is  
11 the process?

12          A.    So, the memorandum, which is actually a Cabinet  
13 memorandum, would effectively be entered into the appropriate  
14 software that is employed for that purpose, managing the Cabinet  
15 papers, and the--you would see there are references, for  
16 instance, to appendices, and those appendices will likely be  
17 those documents that you would have made reference in your--at  
18 least in your review with me, of course, of the types of  
19 supporting documents that would form part of this Cabinet paper,  
20 CVs or letters of interest, et cetera. So, those would be  
21 appendices.

22          There will be a reference in particular to the  
23 Sections of the Act and the Members that are being appointed.

24          So, in the section 1, for instance, of this particular  
25 Cabinet paper, reference would be made to the Members to be

1 appointed by the Minister with the approval of the Cabinet.

2 Then there will be a subsequent expression in the  
3 background information of this paper of the term and where are  
4 we along that term of the particular Members that are being  
5 considered at the time.

6 So, there are references in this Cabinet paper to the  
7 terms being expired and those dates are expressed.

8 There will be also an expression in this Cabinet paper  
9 as to who the Members are and the types of representation, the  
10 categories of representation. And there is a statement, a clear  
11 statement, of the individuals who are--who have agreed to serve  
12 on the Board, disclosing the names of those individuals, and  
13 what categories are being filled by the appointment.

14 There is also a subsequent disclosure of the types of  
15 experiences that those individuals would bring to the Board  
16 based on what they've done in the community.

17 And then there will be an expression of the purpose of  
18 the paper. So the purpose of the paper is actually to appoint  
19 Members to the Social Security Board in this case to allow for  
20 the work of the Board to progress. It would make references, of  
21 course, to any financial legal implications. And then, of  
22 course, it would conclude by seeking a particular decision with  
23 respect to, what the Minister and his power to appoint, the  
24 Terms of Appointment and who those individuals are that are  
25 being recommended for appointment by Cabinet, ratified by

1 Cabinet, and the degree to which they are representing the  
2 various interests as disclosed in the Act.

3 Q. Now, the--it carries at the top Dr Potter's name.  
4 Does that mean that Dr Potter would have drafted the entirety of  
5 the document?

6 A. The authorship of a paper typically is limited to that  
7 individual, but there may be instances where other officers may  
8 need to also make contributions to those papers. But I have to  
9 assume that, as the author of the paper, she may have carried  
10 the better part of it, but I can't say that.

11 Q. But I mean, it's not--again not a criticism. There  
12 may be papers where is there is need for input from other  
13 officers within the Ministry?

14 A. Yes, very much so. Yes, very much so.

15 Q. In fact, your Affidavit might be a paramount example  
16 of that.

17 A. Well, the better part of it is, yes.

18 Q. But just focus on 3192 because the sections are  
19 Financial Implications and Legal Implications. In terms of  
20 practices within the Ministry, what input--or would you get any  
21 input from others in terms of financial implications or legal  
22 implications?

23 A. Well, the first thing to bear in mind with respect to  
24 financial implications are those that bear on Government proper,  
25 so the financial implications are not necessarily those on, say,

1 the SSB. So, they're not taken into consideration, and, as a  
2 matter of fact, the next clause would describe that very  
3 clearly, that the BVI Social Security Board is responsible for  
4 the payment of stipends to the Members of its Board. So, that  
5 would not necessarily be something that is financial that  
6 Government proper is responsible for.

7 Q. Does that input, though, come from the Ministry of  
8 Finance or--

9 A. That is from the Ministry of Finance.

10 Q. Right. And what about legal implications element?

11 A. Beg your pardon?

12 Q. What about the legal implications element?

13 A. The legal implications are actually the Attorney  
14 General's Chambers.

15 Q. So, is the process, just using this as an example, but  
16 keeping it general, and let's--you have to draft the paper for  
17 Cabinet. You would do the--first, you would do the draft,  
18 possibly with input from colleagues. It then goes to the  
19 Ministry of Finance and to the Attorney General for them to  
20 input, to the Attorney General Chambers for them to input?

21 A. That's correct.

22 Q. And that would be under the heading "financial  
23 implications and legal implications"?

24 A. That's correct.

25 Q. And when you receive the input from those two, from



1 the AG and from the Ministry of Finance, do you ever amend it or  
2 do you take it as read?

3 A. Well, no Ministry can amend the section. It is not  
4 available for amendment. That is the advice as provided by each  
5 of those entities and the individuals in that office or their  
6 delegates.

7 Q. I see.

8 And then, when it's ready and complete, does the final  
9 draft go then to the Minister for approval?

10 A. The--it depends. There's a section on cross-Ministry  
11 consultation. So, there may be instances, for instance, in a  
12 Cabinet paper, where other Ministries may want to weigh in, or  
13 need to weigh into the matter. In this particular case, because  
14 it was a Board appointment within the confines of the Act, there  
15 is--the nature of this paper did not require cross-Ministry  
16 coordination, which means that the other Ministries would have  
17 not necessarily been assigned the paper to weigh into the  
18 matter.

19 Q. And keeping it to that circumstance, is it effectively  
20 for the Minister, the Minister who has the final word on the  
21 content of the paper?

22 A. Yes. It is the Minister's paper.

23 Q. Yes.

24 And it is the Minister that has to take that paper to  
25 Cabinet?

1           A.    That is correct.

2           Q.    Thank you.

3                    Just focusing on some detail in relation to this,  
4 though, if I take you back to 3189, we're now in May 2020, and  
5 the position is that that paper is proposing the appointment of  
6 a number of individuals.  But at Paragraph 2, it says: "The  
7 membership of the Board expires in the last quarter except for,"  
8 and then it names essentially three people:  The Chairman, whose  
9 term was due to expire; and the Chief Medical Officer; and the  
10 Director, who sit under different conditions.  And so, you only  
11 had one appointed Member, if you like, still on the Board.  The  
12 others were no longer there.

13                   What it says at 3, then, is it identifies six people  
14 who are willing to sit on the Board, but does that mean that,  
15 between 2000 and--or the end of 2019 and the drafting of this  
16 paper, that the Board wasn't actually active?

17           A.    I cannot say to the degree to which the Board may or  
18 may not have been active.  I don't know that.

19           Q.    I mean, what it does appear, at least, is that the  
20 Board did not have its full--did not have a full complement of  
21 its membership?

22           A.    Yes.

23           Q.    It literally just had three people sitting on it?

24           A.    Yes.

25           Q.    At least until sometime in May, from the end of 2019

1 to sometime in May 2020?

2 A. Yes.

3 A review of the paper as written, as well as making  
4 reference to the section that you quoted of Section 2, when the  
5 terms expired, that's the only...

6 Q. And looking at the paper, what it doesn't do--I mean,  
7 you've pointed out, for example, taking it from Paragraph 4  
8 onward, there are summaries, if you like, of the background and  
9 qualifications of the individuals being proposed. But what  
10 there isn't in the paper is anything about the process that has  
11 been reached to get to these names, is there?

12 A. No.

13 Q. And there is no--nothing really that records the basis  
14 on which they were assessed as suitable individuals for the  
15 Board?

16 A. No. The paper is absent of that.

17 Q. If I could ask you now to just to turn to 3187. This  
18 will be something, Mr Smith-Abbott, that you would not have  
19 seen, but it's, again, just so that you have the chronology in  
20 mind. So, that paper, which is 143 of 2020, we can see from the  
21 document I've taken you to, which is the Cabinet Meeting Number  
22 41 of 2020, is when The Honourable Wheatley takes the paper to  
23 Cabinet. And I'll just take you, please, to 55. You see there  
24 that the Ministry of Transportation Works and Utilities declared  
25 that he will not participate in discussions of the captioned

1 paper due to close family ties.

2 Now, the--I'm not going to ask you a question about  
3 that specific detail, but just again about approach in relation  
4 to--and keeping it specifically to the six names that we were  
5 looking at in the paper, what inquiries into potential conflicts  
6 of interest are made before you submit the Cabinet paper?

7 A. I cannot speak to what inquiries would have taken  
8 place with respect to this paper.

9 The general broad practice, again, of informally  
10 understanding the potential Members or potential candidates for  
11 membership, may have something of that nature, but again, I  
12 cannot tell you that it's standard or carried out in any way  
13 that I can certainly attest to whether it took place or not.

14 Q. I mean, these appointments were the May 2020  
15 appointments, six individual names. In your preparation for the  
16 Affidavit, and also for your written response, you did not find  
17 any evidence, did you, setting out whether there were inquiries  
18 made about potential conflicts of interest for these named  
19 individuals?

20 A. Right.

21 So, I have already stated that I did not find along  
22 the records any--any evidence of criteria being applied or how  
23 that process was conducted.

24 Q. Again, just turn up 3195 now, please.

25 The Cabinet decided--we see that in the Cabinet

1 record, Cabinet decided to appoint the six individuals that have  
2 been named in the Cabinet paper, and also appointed Ms Patsy  
3 Lake as Deputy Chair, and it then directed that an expedited  
4 extract be issued.

5 Now, just help me with this: What do you see in the  
6 Ministry? Do you see the expedited extract?

7 A. Depending on the subject matter, yes. Some may come  
8 to me, but in my capacity, yes, I will see.

9 Q. Right.

10 And in relation--this is obviously a memorandum that  
11 your Ministry has put before Cabinet. It generates an expedited  
12 extract. In the normal course of events, that should at least  
13 reach you as Permanent Secretary?

14 A. Yes.

15 In my--in my present capacity, yes. In my former  
16 capacity as Deputy Secretary, not all.

17 Q. When you were Deputy Secretary, how do you--how did  
18 you get notified in the usual way about decisions of Cabinet  
19 that may affect your work?

20 A. The Permanent Secretary would notify or he would  
21 inquire. Actually, he would interrogate the staff as to the  
22 status of the paper. But, generally speaking, there is a  
23 dialogue that ensues with respect to the status of these papers.  
24 So, especially if you have an expedited paper and there is a  
25 decision that needs to be effected immediately, yes, that's

1 something that we would be very mindful to keep track of.

2 Q. Thank you.

3 If you turn now to 3197, please.

4 Again, a paper with Dr Potter's name at top of it.  
5 It's dated 16 December 2020, but we see that when The Honourable  
6 Wheatley signs this off, which is at 3200, it gets dated  
7 22nd December 2020. And this concerned the retirement of the  
8 Director of the Social Security Board, who is Ms Antoinette  
9 Skelton, and the appointment of an Acting Director.

10 Now, the--you've set out--and we don't have to go  
11 through it again--how a paper like this would in general be  
12 prepared. And again, I'm right that if there are financial  
13 implications or legal implications, that effectively comes--that  
14 input comes from other Ministries, specifically the Ministry of  
15 Finance and the Attorney General's Chambers; yes?

16 A. Yes.

17 Q. The paragraph that I would like to take you to is  
18 Paragraph 4, where the recommendation is made for Ms Jeanette  
19 Scatliffe Boynes to become the Director for a period of one  
20 year, six months, in the first instance. It said, "while the  
21 process of appointing a new Director takes place," and it  
22 explains again Mrs Boynes's background and the role she's played  
23 as Deputy Director since 1991.

24 What's right, isn't it, the paper doesn't contain any  
25 assessment of the basis for which that recommendation is made?

1           A.    I cannot say that.  I do not see references--well,  
2 there is reference to an Appendix.

3           Q.    There is.  And if I take it in two stages--I will come  
4 back to the Appendix.  But within the body of the paper, because  
5 this ultimately is a recommendation made by the Minister, and if  
6 one takes the sort of informal discussion process, what there  
7 isn't within the body of the paper--never mind the Appendix--but  
8 within the body of this paper, there's no--

9           A.    The body of the paper does not have--

10          Q.    Doesn't record the process?

11          A.    Doesn't record the process.

12          Q.    Or the factors that the Minister took into account in  
13 reaching his view in terms of a recommendation.

14          A.    That is correct.  The cursory review of the paper,  
15 yes.

16          Q.    What we do have--you're right--it is the Appendix, and  
17 it's Appendix A.  The difficulty for the Commission is that that  
18 is an Appendix that we haven't been provided, so it's not  
19 something I can properly put before you, but all we can do is  
20 take it.

21                   And I will put it on the record that there was a  
22 Resolution from Board Members of the Social Security Board,  
23 which was attached to the paper that went to Cabinet.

24          A.    Yes.

25          Q.    The last thing to show you is 3201.  And that's the

1 outcome of the decision, again an expedited extract, and that is  
2 that--and we will see Cabinet noted the Resolution from the  
3 Board Members of the Social Security Board and agreed that  
4 Ms Skelton could proceed on pre-retirement leave, and decided  
5 that Ms Scatliffe Boynes should act as Director for the 18-month  
6 period. So, that's very largely, in greater part, to try and  
7 get some factual context for the next topic that we're going to  
8 deal with.

9 MR RAWAT: But Commissioner, I note the time. I  
10 think, from my note, I have three other matters to deal with,  
11 with Mr Smith-Abbott, which will take a little time, so I wonder  
12 if we could--

13 COMMISSIONER HICKINBOTTOM: How little, Mr Rawat? I'm  
14 thinking about the Minister as the next witness, and if we can--

15 MR RAWAT: I would say about 45 minutes.

16 COMMISSIONER HICKINBOTTOM: So, if we were to  
17 recommence at quarter to 2:00, the Minister needn't come until  
18 what? Quarter to three? Half past two?

19 MR RAWAT: I would say a quarter to three.

20 COMMISSIONER HICKINBOTTOM: Quarter to three?

21 MR RAWAT: Yes.

22 COMMISSIONER HICKINBOTTOM: Well, let's try and get  
23 that message through to him because that may save him some time.

24 But we will break now, Mr Smith-Abbott, and resume at  
25 quarter to two; yes? Thank you very much.



1 (Recess at 12:54 p.m., resuming at 1:52 p.m.)

2 COMMISSIONER HICKINBOTTOM: Good. We are ready to  
3 resume, I think.

4 Mr Rawat.

5 MR RAWAT: Thank you, Commissioner.

6 REALTIME STENOGRAPHER: Your microphone is not on.

7 MR RAWAT: I'm sorry, Mr. Kasdan.

8 BY MR RAWAT:

9 Q. I will start again. Mr Smith-Abbott, thank you for  
10 returning.

11 Can I ask you just to look at the written response to  
12 the Warning Letter that you provided. You should have a copy  
13 there.

14 If I put it into context, you were sent a letter  
15 identifying potential criticisms that may be made arising from  
16 the evidence, and I stress that these are criticisms or  
17 potential criticisms of which the Commissioner has not reached  
18 either a provisional or concluded view, but in fairness to you,  
19 it was important that they be raised so that you can provide an  
20 answer. You have done that by way of a written response, and I  
21 would like to take you through some of that detail now.

22 What I should also explain, is that these are not  
23 directed at you personally. They're directed at the Acting  
24 Permanent Secretary of the Ministry for Natural Resources,  
25 Labour and Immigration, if that makes sense.

1           Now, if we look at the way that the written response  
2 has been set out, what it does is set out, first of all, the  
3 criticism in the evidence and then it puts a response in bold.

4           How did you come to prepare this written response?

5           A.    So, given the fact that we were already well on our  
6 way to establishing the responses within the Affidavit, me  
7 having some direct involvement in that process and all I'm  
8 saying, and having received the potential criticism, I undertook  
9 to look at, again, a thorough review of the record to ensure,  
10 first and foremost, that, indeed, there were no standards as  
11 described in the Letter of Criticism, and those would include,  
12 of course, benchmarks and criteria, guidelines effectively for  
13 the process.

14           So, effectively, if you were to take the totality of  
15 the criticism under number one, it speaks effectively to some of  
16 the issues that were highlighted in my earlier testimony, and  
17 this would include, for instance, the absence of established  
18 guidelines or criteria, written criteria, within the Ministry.

19           So, what I have done in my response effectively is to  
20 draw on my experience, again as expressed earlier in the day,  
21 with respect to my involvement and experience with the selection  
22 of Members of Boards, and this would be over the course of  
23 several successive governments over several years.

24           And I would have already expressed earlier in the day  
25 as well the fact that the Body of law, but in particular the

1 Boards that under consideration, both the Social Security Board  
2 as well as the National Parks Trust Board, that some of these  
3 benchmarks, some of the criteria that's established in the  
4 Letter of Criticism would not have been the subject of written  
5 guidance, but would have been effectively informal process of  
6 interviews, of due diligence, so to speak.

7           So, we would rely on the pool of individuals, as I  
8 expressed, either within the community or in some of the venues,  
9 some of the mechanisms already expressed, conversations with  
10 Board Members, et cetera, conversations with--and former  
11 conversations that the Ministry officers would have had, and  
12 then to also have informal conversations perhaps with those who  
13 may have been identified or who may have shown some interest.

14           Q. Can I just stop you there. If I take you just back,  
15 though, I mean, before we get into the detail, and what you've  
16 said is you provide very helpful context, particularly to the  
17 responses drafted. My question was more directed to the words  
18 that were used in the response and who put it together.

19           A. Oh, I did.

20           Q. You did it?

21           A. Yes.

22           Q. So, it's all in your language?

23           A. Yes--well, with some assistance, but yes.

24           Q. Where did the assistance come from?

25           A. Again, we are supported through this process, through

1 the IRU, so--and certainly that is something that we rely--come  
2 to rely on because these are complex matters.

3 Q. I see.

4 So, was some of the language provided to you by the  
5 IRU and then you decided whether or not to adopt it?

6 A. If by that you mean whether they actually wrote the  
7 entire response? No. I would have had a hand in it as well.

8 Q. But they also had a hand in writing the response?

9 A. Yes.

10 Q. I don't want any mystery about it. The reason I asked  
11 is that because some of the wording that you have used appears  
12 in the written response of Ms Tasha Bertie, which was provided  
13 and which we went through yesterday, and she's obviously Acting  
14 Permanent Secretary for an entirely different Ministry, so  
15 that's why I wanted to understand how you came to put this  
16 together?

17 A. We were supported.

18 Q. But I accept that--I mean, I think your position would  
19 be that you would not have sent this in had you not approved it,  
20 at least?

21 A. So, the process actually leading up to this particular  
22 response, so I would have given a context for the manner again  
23 which provided evidence against which is that the informal  
24 conversations would have been held.

25 Each of these Ministries, for the most part, served a

1 similar process up to this point, in terms of just the  
2 conversations, the dialogue, with people inside and outside of  
3 Ministries, so you will not find an alternate process unless  
4 described, which I've actually made reference, as stated earlier  
5 in the day.

6 Q. I'm not going to--having asked questions of Ms Bertie,  
7 I'm not going to dispute that--I mean, her evidence was  
8 indicative of a similar process to that which you've described.  
9 The point I was just making is that the actual wording that you  
10 use is word for word the same as the wording she used. But  
11 let's move on because I think what I would like to do is just  
12 focus it down a little bit because the point we've got to make  
13 clear, of course, is that the first criticism that you've  
14 already referred to is directed towards the appointment of  
15 Members of the Social Security Board in May 2020, so that's the  
16 first thing.

17 Now, what the criticism says is that it appears from  
18 the documents that had been disclosed, and then it sets out a  
19 number of matters.

20 Now, you'll appreciate, Mr Smith-Abbott, the  
21 Commission can only put forward criticisms that are based on  
22 documents that are provided to it, but if we go through those  
23 matters, I think we can hopefully take it shortly because given  
24 the evidence that you've said--and I'll come back to your  
25 response because it's important that we allow you to put that on

1 the record. But firstly, it's right, isn't it, that outside of  
2 the Act, there isn't a separate competency profile for a Member  
3 of the Social Security Board?

4 A. That is correct.

5 Q. It's right that none of the Board positions are  
6 advertised?

7 A. That is correct.

8 Q. It's right that there wasn't an independent or  
9 transparent process by which a suitable pool of candidates are  
10 identified?

11 A. That is correct.

12 Q. There is no--there is no independent transparent  
13 process by which proposed candidates are selected?

14 A. That is correct.

15 Q. None of the candidates were interviewed at any stage  
16 prior to appointment?

17 A. Not to my knowledge.

18 Q. Now, 6--and I will read it out--is "no due diligence  
19 was carried out in respect of any the proposed appointees."

20 Now, I will pause there, but let me read 7 as well  
21 because 7 is a compendium of what we have just gone through, the  
22 majority of which you have agreed, and what's said is that it  
23 follows that "no effort was made to identify and select the most  
24 suitable and qualified candidates for membership of the Social  
25 Security Board." The criticism is aimed at the process. And I

1 think if we look at your response--

2 A. So, I think--I think what need to be brought out here,  
3 and perhaps it's a perceptual question, I guess, for the  
4 Commission to consider, is whether the absence of the written  
5 guidelines, as you've described, absolutely negate the process  
6 that we do conduct. We have been appointing boards for decades,  
7 and the absence of that criteria, I take note that, given the  
8 structure of the way that the criticisms have been placed, one  
9 will follow that, number 7, that no effort was made to identify  
10 and select the most suitable and qualified candidates.

11 But I really do not believe, in all honesty that, over  
12 the decades of appointing Members to various Boards, that it  
13 would be a fair statement to say that no effort was made to  
14 identify and select. Some thought is given--a lot of thought is  
15 given, I would say, to the notion of who are the people who  
16 should serve on these Boards? We look very critically at the  
17 contribution that those individuals make within society, their  
18 participation in civil society, their stature within the  
19 community, what contributions, what educational background,  
20 depending on the type of Boards.

21 And we have to differentiate what types of Boards we  
22 are also talking about. The technical boards, which speak to,  
23 of course, say, for instance, Survey Board, which is a licensing  
24 board, and then those that are making determinations of varying  
25 types.

1           So, I think that it's a question really that bears  
2 some thought because I would certainly not want to leave anyone  
3 with the impression that because 1 through 6 of the potential  
4 criticism has been affirmed that it follows that no effort was  
5 made.

6           COMMISSIONER HICKINBOTTOM: Can I just go back to 7.  
7 What 7 says is it follows that no effort was made to identify  
8 and select the most suitable and qualified candidates to a  
9 membership of the Social Security Board.

10           Now, given that there was no advertisement and so on,  
11 which necessarily will exclude some people, because they won't  
12 know that the posts are available, how can we say that an effort  
13 was made to identify and select the most suitable and the most  
14 qualified candidates for membership? There may be candidates  
15 out there about whom you know nothing.

16           THE WITNESS: Yes.

17           If one affirms that you have an open and transparent  
18 process, so I go back to some of the earlier evidence given, at  
19 least today with respect to the evolution of Boards, and how  
20 those standards have evolved to meet the needs of the day, and I  
21 obviously would have made reference in particular to the  
22 presence of the Climate Change Trust Fund, so that's for me the  
23 benchmark of the type of process that forms the basis of this  
24 criticism, to the extent to which if an individual is so minded  
25 to apply, and he or she feels that they are the most suitable



1 candidate, no one is going to come forward and work on the basis  
2 that there's someone better than them. They obviously have an  
3 interest in doing this.

4           So the Ministry, as a whole, if you look at the  
5 totality of all the Boards that have been managed, the Ministry  
6 does have this experience. If you're looking at the specific  
7 question of number 1, 1 through 6, and the application or the  
8 absence of, say, a statute or a procedure, like an evolved or  
9 developed version of what has become again the Trust Fund, and  
10 we look at that and say, okay, fine, this is what we want to  
11 promote moving forward, and that will be certainly looked at.

12           But to the point of being the most qualified, no, I  
13 cannot certify that they are the most qualified because we would  
14 not necessarily know the full scope and range.

15           So, I'm looking at the specific clause that starts  
16 with "it follows that no effort was made." Now, the most  
17 suitable and qualified candidates, qualifications aside, which  
18 is another issue because we could look at qualifications, and we  
19 have looked at CVs, the most suitable, I accept that, in the  
20 absence of the process that you've outlined, you may not  
21 necessarily have that particular outcome.

22           COMMISSIONER HICKINBOTTOM: Because the benefit of the  
23 Climate Change Trust Fund Board, which you were involved in and  
24 which we have looked at, is that it's designed to get the most  
25 suitable and qualified candidates into the appointments. That's

1 the whole point of having this really quite sophisticated  
2 process.

3 THE WITNESS: Yes.

4 And that simply allows the Ministry to compile a list  
5 of suitable and qualified candidates for consideration by the  
6 Minister, and depending on the statute Cabinet. That decision  
7 would still remain with the Minister, of course but the  
8 technical work--the technical work of actually compiling the  
9 proposal to ensure that the Cabinet Paper is supported by an  
10 open and transparent process, 1 through 6 of the criticism,  
11 although not necessarily applicable in this particular case  
12 because these benchmarks are--like I said, the benchmarks that  
13 I'm alluding to in terms of all of these items that formed the  
14 basis of this criteria, they would have not been applied  
15 universally across various Statutory Boards.

16 COMMISSIONER HICKINBOTTOM: No, but they could have  
17 been. They weren't.

18 THE WITNESS: Again, I think that the  
19 Commission--Commissioner, you need to appreciate the fact that,  
20 as a developmental and evolutionary process--and I will go back  
21 to some of the processes that I have been personally involved  
22 with, so I will relate two anecdotes.

23 The first is that if you look at the question of why  
24 did we end up strengthening in 2006 the Board governance  
25 arrangements and to ensure that there were specific items

1 described. I made an earlier reference to the drivers that led  
2 to that.

3 Well, in actuality, there was a major review of the  
4 Trust at that time because it was going to accept a gift, and  
5 that gift was conditional on a very robust--well, at that  
6 particular time, a robust framework for accepting that gift.

7 So, what we did actually at that time was we looked  
8 very carefully at what at the time would have been good practice  
9 by way of legislation of our National Parks and Protected Areas  
10 systems. We looked at Government arrangements across the  
11 Commonwealth. And we looked very critically at ensuring that  
12 the provisions of the Act matched the need to have a process by  
13 which we would be able to monitor and evaluate and report  
14 against the performance of that gift. So, that was the one  
15 driver.

16 COMMISSIONER HICKINBOTTOM: Just to pause there, the  
17 two examples you have given so far of good governance coming  
18 into this, 2006 and the Climate Change Trust Fund Act, they have  
19 been driven. One was driven by the gift, one was driven by the  
20 need to bring in international funding. Good governance does  
21 not have to be driven by a particular trigger, does it? It  
22 should be the aim of Public Administration to have good  
23 governance.

24 THE WITNESS: Yes.

25 And I think that if we accept that point, what we can

1 offer, if you may, is a good example or examples--I wouldn't  
2 necessarily go to say as far as good or bad--but examples of  
3 drivers, I think that first and foremost there's a recognition,  
4 and especially with respect to the 2014 Climate Change Trust  
5 Fund. We have benchmarked that against standards that were  
6 promulgated by the Green Climate Fund in particular. We were  
7 looking at that time as to potential mechanisms for attracting  
8 other types of donors into the Territory to assist with climate  
9 resilience building activity. So, you could suggest that the  
10 driver was external, but that was certainly not the case.

11           The case was that we were entrusted in ensuring that  
12 we steward, we were able to be good stewards of the resources,  
13 and that those resources, once granted to us, were shepherded,  
14 if I may, in a responsible manner.

15           So, a lot of the drivers, really and truly--I will  
16 also disclose the fact that that was part of a much broader  
17 regional project, it was a European Union's Global Climate  
18 Change Alliance programme of activities across OECs Member  
19 States, so other Member States were also engaged in similar  
20 types of activities, building climate resilience or whatever the  
21 case may be, so I don't want to leave the impression that  
22 everything was externally driven. To the extent to which we  
23 recognized that we needed to support climate resilience building  
24 activities within a robust framework of transparency and  
25 accountability, that that Governance Framework really and truly

1 was driven by us. It was not driven by the need to have  
2 internal--international presence driving us to that.

3 COMMISSIONER HICKINBOTTOM: But the requirement for  
4 good governance in that scheme was recognized in any event?

5 THE WITNESS: Well, certainly it was recognized within  
6 the Ministry that we needed to do that in order to be above  
7 reproach.

8 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.

9 BY MR RAWAT:

10 Q. And taking it back to item 1, I think the point we've  
11 reached, Mr Smith-Abbott, is you don't dispute 1 to 6. It's 7  
12 that you would take issue with and particularly the suggestion  
13 that no effort was made. Because I think when we turn to your  
14 response on the other side, what you point to then is this, the  
15 informal processes, and in here it's described as informal means  
16 that have been in place and have been used for a significant  
17 period of time to identify candidates, and select candidates for  
18 Boards.

19 A. That's correct, yes.

20 Q. Now, I don't think I need to read it out because I  
21 think you have given evidence about this, and it will be on the  
22 Transcript, so I won't read it out, but am I right in this: The  
23 criticism is directed towards May 2020 and recruitment to the  
24 Social Security Board. You explained that for the purpose of  
25 doing this, you conducted another review, in effect, of all of

1 the material rather than you didn't just depend on the work that  
2 had gone into the Affidavit.

3 But you didn't come up with any--any evidence in  
4 relation to how the May 2020 recruitment process was undertaken;  
5 is that right?

6 A. Right, because again, as expressed earlier, I cannot  
7 find any--I could not find any written evidence as to the points  
8 that were made with respect to that particular process. And to  
9 the extent to which--to the extent to which we would have  
10 searched through the records to see what would have been  
11 available, we were not able to find anything along the lines of  
12 what your criticism describes.

13 Q. If we move on to 2, again, it's in relation to the May  
14 2020 appointments and Social Security Board, and it's drawn as a  
15 potential criticism from the documents that have been disclosed,  
16 but it puts the criticism there is no compliance procedures in  
17 the Cabinet Handbook, in particular it points out that no  
18 conflict checks were carried out on potential appointees, and  
19 secondly, that some of the appointees appear to be relatives of  
20 Cabinet Members but these relationships were not described in  
21 the Cabinet Papers, and on at least one occasion, the relevant  
22 Cabinet Member did not excuse himself when the nomination was  
23 being considered.

24 And to take that in two parts because your response is  
25 that all efforts were made in the selection process to avoid any

1 potential conflicts in the persons selected for these roles.

2 Now, earlier you said that you hadn't found written  
3 evidence of--as to whether when this was being considered  
4 conflicts--were taken into account when the Minister was going  
5 through the process, so what's the basis for you to say all  
6 efforts are made in the selection process?

7 A. Well, I think first and foremost the efforts again, in  
8 the absence of a written record, it becomes difficult to  
9 substantiate this beyond what I can reasonably say at this  
10 particular point. So, therefore, the process that we have  
11 undertaken takes into account the fact that individuals are  
12 identified by multiple sources, or may be identified by multiple  
13 sources, and these individuals are typically known to us in  
14 terms of relations. This is a close-knit small community, so to  
15 the extent to which the selection process would take into  
16 account that--and I think that one of the documents that you  
17 would have exposed at this particular time, which I would not  
18 have been privy to, where there is a recusal of a particular  
19 Minister where he did disclose the relation, I can't speak to  
20 that because obviously I would not have been in that setting.

21 And again, this is the first time that I'm seeing this  
22 particular piece of information, but to the extent to which at  
23 least these conflicts are known, however you characterize them,  
24 within the scope of the informal process as we've termed it,  
25 they're known. They're known. At least certainly to those who

1 have to consider that.

2 Now, at least there is that understanding. So, in  
3 terms of effort in the selection process to avoid, I think there  
4 is a question of disclosure and there is a question of whether,  
5 for instance, we would know that an individual is related to  
6 another person perhaps making a determination.

7 So, that, to me, appears to be what is in place, but  
8 again it's informal, and it's not necessarily codified to the  
9 extent of only those instruments within, say, the operations of  
10 those boards once appointed because, as you would have pointed  
11 out earlier, and certainly was a matter of record in the bundle  
12 provided, that the Operations Manuals would make distinct  
13 references to the need to disclose whether a Member, in both  
14 NPTVI and SSB, would have an interest in any matter ahead of the  
15 Board, and it would be incumbent on them to recuse themselves.  
16 But that is at the other side of the equation, not preselection.

17 So, I cannot, beyond those efforts that formed the  
18 basis of an informal decision-breaking process.

19 Q. What that helps with is that it's demonstrating that  
20 the concept of Conflict of Interest is one which everyone is  
21 aware, but what you cannot do is respond directly to the  
22 approach adopted for the May 2020 appointments. What you can do  
23 and what you are doing is speaking from your general experience  
24 of what we've termed the "informal process".

25 A. Yes.



1 Q. And you quite rightly and fairly point out that I've  
2 shown you documents to which you would not routinely be privy,  
3 for example, a Cabinet Minute. But taking it back to the  
4 point at which you would, as a Public Officer involved in the  
5 Ministry being involved, you would be privy to information  
6 during the course of the informal process, and you would be  
7 privy to, if it was--if it was allocated to you, to what goes  
8 into the Cabinet Paper.

9 A. Yes. The Office of the Permanent Secretary would be  
10 privy to that information, yes.

11 Q. Yes.

12 A. Um-hmm.

13 Q. It's putting you into the position--  
14 (Overlapping speakers.)

15 REALTIME STENOGRAPHER: I'm sorry, there is  
16 overlapping. Can you try it again, please.

17 MR RAWAT: Yes, of course.

18 BY MR RAWAT

19 Q. What I was suggesting to Mr Smith-Abbott what that my  
20 questions are intended to put him hypothetically into the  
21 informal process, in which case, what I would suggest is that as  
22 part of that process, then he would become aware of Conflicts of  
23 Interest.

24 A. Yes. So the Office of the Permanent Secretary can  
25 become privy to potential conflicts.

1 Q. But all you can do is say, well, and that's all your  
2 answer goes to is your general experience, what you cannot tell  
3 the Commissioner is what happened in May 2020?

4 A. No, I cannot, obviously, make reference to that.

5 COMMISSIONER HICKINBOTTOM: Can you tell me, is this  
6 fair, and tell me if it's not fair, but my understanding of your  
7 evidence is that there's no evidence at all of what conflict  
8 checks were made, but given the informal process, any conflicts  
9 would likely be known to those involved in the process because  
10 this is a small and tight community; is that fair?

11 THE WITNESS: Yes, that's fair.

12 COMMISSIONER HICKINBOTTOM: Thank you.

13 BY MR RAWAT:

14 Q. Criticism 3 is directed towards the appointment of  
15 Mrs Scatliffe Boynes. And I should say for the record that it  
16 is not a potential criticism directed at Mrs Boynes herself.  
17 It's actually about the process of appointing someone as Acting  
18 Director.

19 Now, the point that is made is that again on the  
20 papers that have been provided to the Commission, that there  
21 wasn't a formal process. There isn't a documented evidence to  
22 show the process that went through that allowed someone to be  
23 put forward to Cabinet to be recommended as the Acting Director  
24 of the Social Security Fund. And secondly, there was no  
25 consideration of Conflicts of Interest.

1           Now, you have explained, and you've put this--and if I  
2 summarized your response, and please add it if you think I have  
3 missed out detail--what you say is, firstly, it's two points,  
4 isn't it? One, you rely upon the experience of Mrs Scatliffe  
5 Boynes, so you properly point out the fact she's been Deputy  
6 Director for a considerable number of years, and you point to  
7 her background in terms of experience and educational  
8 background. What you also say, though, is that there was an  
9 interview process which meant that other candidates were  
10 involved.

11           Now, remember that I showed--we referred to, when we  
12 were looking at the Cabinet--an appendix which was a  
13 recommendation from the Board. Now, that appendix hasn't been  
14 disclosed to the Commission, neither has any details about the  
15 interview process, so where did that information come from?

16           A. It would have primarily come from the Board itself.

17           Q. So, did you consult with the Board for this?

18           A. Yes, I did.

19           Q. And prior to that, did you know that there had been an  
20 interview process?

21           A. Prior to this point? No. I would not have known  
22 that.

23           Q. Right.

24           And as far as--we've looked at the documents--did you  
25 find any written evidence that showed that that interview

1 process went into the formulation of the Cabinet Paper that was  
2 put forward?

3 A. No, I have not found it.

4 Q. One point that is made is--and its relation to the  
5 fact that--and I've read it out--the Cabinet Minister Member did  
6 not excuse himself when the nomination was being considered.  
7 That's the point that's made both to the 6 May 2020  
8 appointments, and the appointments of Mrs Scatliffe Boynes. And  
9 the reference there is--what the response is is that the  
10 reference to a Cabinet Minister not excusing himself is not  
11 particularised.

12 What exactly did you want to have particularised?

13 A. Well, I think that, if the Commission is concerned  
14 about individual--they only respond, I think, to specific  
15 references of instances of conflict. So, if Minister X is  
16 related to Person Y, we would want to understand that that is  
17 what we are addressing as opposed to just simply inferring that  
18 there is a concern in terms of the--there is a potential  
19 conflict between two entities that just simply have not been  
20 disclosed to us. So, that made it somewhat difficult to react  
21 to this particular criticism because both sets of criticisms we  
22 have to almost infer who are we actually referring to  
23 specifically.

24 So, that's what becomes a challenge when responding to  
25 this set of criticisms.

1 Q. Now, to give that context, what the Warning Letter did  
2 do was to direct the recipients, as it does in all of them, to  
3 particular documents that support the criticism. That's the job  
4 of the Warning Letter.

5 Now, in this case, you pointed to the example where,  
6 in this context, a Minister did recuse himself. We saw that in  
7 the documentation. Now, this is dealing with the alternative  
8 situation where a Minister doesn't recuse himself.

9 Now, taking that back to the process where the  
10 Ministry would be involved, is it fair--or would you accept as  
11 fair--that what the Ministry needs to know is the nature of  
12 these relationships when it's considering who to put forward?

13 A. So, what I can say is that this is something that has  
14 been flagged through this process; and, as I've now made  
15 reference in earlier evidence, that it becomes yet another  
16 criterion for consideration in terms of the consideration of who  
17 you may want to advance into--to the level of recommendation to  
18 the Minister and Cabinet.

19 So, if you were to reverse-engineer this process  
20 against the benchmark that I've used, which is the Trust Fund,  
21 does it mean that I have to, for instance, in a standard form,  
22 that I would create for the purposes of ensuring that I have  
23 basic biographic data on the individual, would I insert a  
24 question that basically states: "Do you have any potential  
25 Conflict of Interest with any Member of the House of Assembly?"

1 For argument's sake, this is hypothetical. That question then  
2 can be disclosed and then followed up without necessarily having  
3 to disclose the relation in a form.

4 It then presupposes that there is an interview process  
5 by which if there is a disclosure of a potential Conflict of  
6 Interest, which would then be driven by that individual who is  
7 making that application. So, therefore, you can probe further  
8 as a result of that.

9 So, I take the point that against the benchmarks  
10 because I take each of these criticisms almost as a  
11 benchmark--Commissioner, you would have made reference to  
12 governance--governance arrangements--you could take those and  
13 construct a process that builds along the evolution of Board  
14 governance, if you may, elements to protect everyone from the  
15 appearance of impropriety or conflict or whatever the case may  
16 be, by just simply constructing targeted questions and  
17 standardising the procedures, so to speak, across the Ministry.  
18 I can only say what can happen within the Ministry.

19 And as earlier stated, there is evidence, and there is  
20 a process that we can--and the evidence would be the Climate  
21 Change Trust Fund Act in this case. I'm not even referring to  
22 the volume of paper that would have been generated through the  
23 process of considering various candidates for that particular  
24 Board.

25 But you can--you can insert clauses and questions that

1 allow you to probe and disclose so that there is no appearance  
2 of any conflict or that if there are potential conflicts, that  
3 the decision-makers would be minded to consider those along with  
4 all the other disclosed documents that would form part of, say,  
5 a Cabinet Paper that would go ahead considering this matter.

6 Q. But that's the point, isn't it? The point is that  
7 it's to have the Audit trail. It's to have a process that  
8 prevents anything being abused or the appearance of something  
9 being abused. So, it may be that if you identify to a Minister  
10 that there is a potential Conflict of Interest, the Minister may  
11 take the view that that doesn't help the considerations, and he  
12 or she is still going to nominate that person to Cabinet.  
13 Cabinet could, armed with the same information, take a different  
14 view.

15 But the position that you're in with the informal  
16 process is that there is no such Audit trail. One doesn't know  
17 in relation to the May 2020 appointments whether Conflicts of  
18 Interest, such as family relationships, were flagged up at the  
19 point at which recommendations were being made, and at the point  
20 at which the Cabinet Paper was being drafted?

21 A. Yes. So, if the question arises from the point that  
22 May 2020 there is no Audit trail, I cannot speak to that. What  
23 I can speak to is the experiences as described, and the ability  
24 to build on practice already embedded within the Ministry that  
25 can afford for a very simple question to be inserted into any

1 potential forms or any documentation along that Audit trail, if  
2 you may.

3 I cannot say, obviously, and I cannot sit here and  
4 suggest what Cabinet would be minded to do with that  
5 information. I think what my role would be in that process is  
6 to ensure that we have a robust, defensible, transparent, and  
7 accountable process. And if the disclosure of interests before  
8 the recommendation because all we will be doing at that stage is  
9 recommending candidates according to either statute or these  
10 guidelines that we are likely to develop, and building it, like  
11 I said, on the experiences that we would have had. It would  
12 be--it will be relatively--it would be another step along the  
13 evolution of governance arrangements and how you go about  
14 putting those together to ensure that the public is satisfied  
15 ultimately that the process is open, transparent, defensible,  
16 robust, and accountable.

17 Q. Thank you. And I've got no further questions on the  
18 responses that you've given.

19 Can we just turn to your Second Affidavit, please.  
20 So, we're going back to the first bundle.

21 A. So, we're finished with this one?

22 Q. Yes. Thank you.

23 Page 717, please.

24 This Second Affidavit deals with two further Boards,  
25 the Immigration Board and the Surveyors Board. You've already



1 referred to the Surveyors Board.

2 I think that is a Board, is it in abeyance?

3 A. Yes, currently, I believe, yes, we have to appoint new  
4 Members.

5 Q. I won't be asking you any questions about that. Can I  
6 just focus on the Immigration Board, and hopefully take it quite  
7 shortly. If we go to 720, you set out there under the heading  
8 "Criteria for Assigning Roles in the Board", and you've set out  
9 section 13 of the Immigration Passport Act which establishes the  
10 Board of Immigration. Can I just--have you set out there the  
11 law as it currently stands?

12 A. To my best knowledge.

13 MR RAWAT: Commissioner, I won't need to go through  
14 this, but again for your note, the statute itself is at 748.

15 COMMISSIONER HICKINBOTTOM: Thank you.

16 MR RAWAT: And that's helpfully exhibited to  
17 Mr Smith-Abbott's exhibit.

18 BY MR RAWAT:

19 Q. Mr Smith-Abbott, I'm going to try and take it shortly.

20 Am I right in saying this, that again in relation to  
21 the Immigration Board, there is--this is another example of the  
22 informal process, and so what happens here is that candidates  
23 for membership of the Board are identified through that informal  
24 process, they are then contacted and their CVs requested. That  
25 feeds into a Cabinet Paper which then goes before Cabinet.

1 Cabinet then approves, and once Cabinet has approved, then the  
2 Governor can appoint.

3 A. That's correct.

4 Q. Would that be a fair summary of it?

5 A. That is a fair assessment.

6 Q. Thank you.

7 Now, if I take you just to 4.7 on our page 721, under  
8 the question that was asked of you of how for this Statutory  
9 Board good character and/or a fit and proper person is assessed,  
10 you observed that: "The Legislation offers no comment to the  
11 character or fitness of members."

12 So, from your work in producing this Affidavit, have  
13 you been able to ascertain what criteria are applied?

14 A. No.

15 Q. Is there any written guidance or Policy Guidance  
16 within the Ministry to say when we're considering membership of  
17 the Board of Immigration, this is the approach we adopt to  
18 character?

19 A. I have not found any.

20 Q. You may not be able to answer this for reasons that  
21 will be obvious, but is there any guidance, as far as you're  
22 aware, given to Cabinet when they're considering approving a  
23 membership of the Board of Immigration?

24 A. I wouldn't be aware of that, no.

25 Q. If you go to 273, please. You will see that this is,

1 again, a table that you helpfully prepared setting out the  
2 compositions and roles of the Boards. And at 723 we see, I  
3 think the current membership of the Board of Immigration. And  
4 you can see that, obviously, Mr Penn is on the Board as an ex  
5 officio Member, but if we take the first--everybody apart from  
6 Mrs Vanterpool-Nibbs, they were all appointed on the 1st of May  
7 2021 for a period of two years. And I think this is one  
8 of--this is an Act where again, it can be for up to three years.

9 Mrs Vanterpool-Nibbs was appointed on the 1st of  
10 September for one year nine months.

11 Do you happen to know why she wasn't given at least  
12 two years?

13 A. I wouldn't be able to say, however, if--just a cursory  
14 view of the dates of appointment against the term, which is two  
15 years, we may be able to infer that the term will expire  
16 simultaneously with everyone else on the Board.

17 Q. I see.

18 So, then the entire Board would come up for  
19 reappointment at the same time?

20 A. I would believe so, but I cannot say that with  
21 definitive--definitive nature, but the math will likely bear the  
22 fact that the entire Board except for Mr Penn who is ex officio,  
23 will likely expire at the same time.

24 Q. Thank you.

25 COMMISSIONER HICKINBOTTOM: I think mathematically

1 that's not quite right.

2 THE WITNESS: Well, I'm not sure. I'm doing this on  
3 the fly.

4 COMMISSIONER HICKINBOTTOM: No, no, no, so am I, and  
5 my math may not be right, and it may not matter, but I'm sure it  
6 won't matter, but oddly it may be a month's difference, but  
7 there we are. And as I say, my math may not be right either.

8 BY MR RAWAT:

9 Q. If I could just ask you now because you very helpfully  
10 have given some evidence about the Climate Change Trust Fund Act  
11 and the way that operates as a benchmarking system. It would  
12 appear from the evidence you've been able to give that you were  
13 involved in setting--developing the Act and then setting up the  
14 Board; is that right?

15 A. That is correct.

16 Q. Now, you may not be aware--I think, if I can take you  
17 back to part 3, please, the bundle part 3. It's page 3140.

18 The--I think the--obviously the--at one point in time  
19 the Climate Change Trust Fund Board was--came under the umbrella  
20 of your Ministry, and then it was subsequently transferred to  
21 the Premier's Office. The Commissioner heard evidence from  
22 Edward Childs who is listed on the page that we see as the  
23 Chairman of that Board, and he explained that, on the 5th of  
24 April, he had received a letter from the Premier inviting him to  
25 resign. He responded to the Premier on behalf of the other

1 members of the Board and himself on the 17th of April, inviting  
2 the Premier to have--meet them, and they received no response.  
3 But what then followed--and if you want to see, it's actually at  
4 page 3139--Cabinet on the 24th of April 2019 revoked the  
5 membership of that Board so that everyone was no longer able to  
6 be part of it.

7           The evidence that we've heard from Mr Childs--and we  
8 took him through this--and if you go to 3158, you will see  
9 it--this is part of the Act itself, which is the Virgin Islands  
10 Climate Change Trust Fund Act 2015, and section 16 sets out the  
11 different bases on which a Minister, with the approval of  
12 Cabinet, can revoke the appointment of a Member of the Board.

13           You will, no doubt, Mr Smith, have--given your  
14 experience, be familiar with all of this, but it was Mr Childs's  
15 evidence to the Commissioner on Monday that none of those were  
16 reasons that given for his revocation or, as far as he's aware,  
17 the revocation of any other Member of the Board.

18           Now, bear in mind that the Board was transferred from  
19 your Ministry to the Premier's Office, but prior to that  
20 transfer, were you privy to any discussions about revoking the  
21 membership of this Board?

22           A.    Was I privy to?

23           Q.    Yes.

24                   (Overlapping speakers.)

25           Q.    Were you involved in any discussions?

1 A. Generally.

2 Q. What do you mean by "generally"?

3 A. Generally speaking, the fact that this was all within  
4 the context of the stated policy that Government promoted at the  
5 time to replace and look at boards holistically.

6 Q. Can you elaborate on that a little bit more? What did  
7 you understand the stated policy to be?

8 A. The stated policy was that the Government was, at that  
9 particular time, contemplating the review of our Board  
10 composition holistically, and our Board in particular, so this  
11 would have fallen in line with that.

12 Q. And so, when you say "at that particular time", are we  
13 talking when the current administration--

14 A. That is correct.

15 Q. --came into Government?

16 A. That is correct.

17 Q. And holistically. So you were privy to or aware of  
18 discussions, and let's take the--this Board as an example, which  
19 were focused on the possibility of removing all Members of the  
20 Board.

21 A. It was within the context of, of course, a much  
22 broader discussion, but yes.

23 Q. So that all other boards would also be reviewed in the  
24 same way.

25 A. Correct.

1 Q. Subsequent to the transfer to the Premier's Office,  
2 were you still privy--involved in or privy to discussions about  
3 the same topic?

4 A. Not at that stage.

5 Q. So, once it left the Ministry, you would not, for  
6 example, have been copied into e-mails.

7 A. No.

8 Q. Prior, though, to--and having regard, we are looking  
9 at 3158, and section 16--prior to that transfer to the Premier's  
10 Office, were you asked to advise at all on ways in which the  
11 Climate Change Trust Fund Board could be revoked?

12 A. The discussion primarily again in the context of  
13 16(2) (1) and 17, I guess, both are related to each other.  
14 Again, there are general conversations about how each of the  
15 individual boards under the various Ministries would have been  
16 addressed. Beyond just a general overall statement, each board  
17 whether--each Ministry would have had to address itself to  
18 implementing the overall policy given to us.

19 COMMISSIONER HICKINBOTTOM: I'm sorry, I just want to  
20 make sure I got that clear.

21 So, each Ministry, obviously including yours, would  
22 have to address the boards under its umbrella.

23 THE WITNESS: Correct.

24 COMMISSIONER HICKINBOTTOM: In the light of the  
25 policy, the policy of the new administration, to remove and

1 replace the boards.

2 THE WITNESS: That's correct, yes.

3 COMMISSIONER HICKINBOTTOM: Thank you.

4 BY MR RAWAT:

5 Q. And so, did you have to consider that in relation to  
6 the boards that we have been taking you through today?

7 A. Only the National Parks Board because the other boards  
8 at that stage, I would have worked directly with the Board,  
9 National Parks Board, so that would have been the one board I  
10 would have been minded to address.

11 Q. But--I appreciate you were a Deputy Secretary at that  
12 point and hadn't been moved up the chain of command--but were  
13 you involved in wider Ministry discussions about what could be  
14 done about the boards under your umbrella?

15 A. No, not to that extent.

16 Q. So, it was just the National Parks Trust Board that  
17 you were involved with.

18 A. Yes.

19 Q. I see.

20 I've told you what happened to the Trust Fund Board.  
21 Were you--after the transfer to the Premier's Office of this  
22 Board, were you aware of what--the steps that were taken to  
23 revoke the Board?

24 A. Not directly, no. I mean--again, once the Board was  
25 moved, that then became the portfolio of a different Ministry.



1 Q. Could I just take you, please, to 3178 in that bundle.

2 This is a memorandum, and we can see at the top it's  
3 headed ExcoTrack. That's the system on which you load up--

4 A. That's the software used for Cabinet papers.

5 Q. Yeah. I think the Cabinet Secretary has explained it  
6 to us.

7 Now, it says the 3rd of May, so it is a paper  
8 generated by the Premier's Office after the revocation of the  
9 Climate Change Trust Fund Board, and it sets out the detail.  
10 But if I just take you to 7, please, on 3180, under  
11 "Purpose"--and it's paragraph 9 that I'd like to draw your  
12 attention to--it's a proposal to amend section 16 subclause 2,  
13 which you--we were just looking at and which sets out the  
14 reasons from which you can revoke--to amend that clause, to give  
15 Cabinet discretionary powers to revoke the appointment of any  
16 member of the Board of Trustees.

17 Now, in May 2019 or subsequent to that date, did you  
18 become aware that that was in the pipeline?

19 A. I know that there were some discussions about the  
20 possibility of amending the Act, and let me put this in context.  
21 The Climate Change Trust--the committee, I should say, is a body  
22 that is co-chaired between the two Ministries. So, the  
23 Premier's Office's has inherently and always been a part of that  
24 framework because it is a broader developmental issue; it's not  
25 just simply an environmental issue.

1           So, to the extent to which the portfolio shifted over  
2 to that Ministry--and yet, there would be some general dialogue,  
3 yes, I mean, there would have been some awareness of the  
4 insertion of a clause that would give some ability to effect the  
5 Policy guidance or the Policy statement that would have been  
6 made at the time.

7           COMMISSIONER HICKINBOTTOM: And if I can just put this  
8 into chronological context, as well, to be fair to you because  
9 you were not involved at this stage because the Board had been  
10 transferred to the Premier's Office. But if you go back to  
11 page 3142--or 3140, probably, this is a paper again prepared by  
12 the Premier's Office but for an earlier Cabinet Meeting on the  
13 23rd of April, whereas the one we've been looking at was the 3rd  
14 of May, so it was a week before.

15           And if you go to paragraph 7--

16           THE WITNESS: Of the same 3140?

17           COMMISSIONER HICKINBOTTOM: Yes, on 3142--

18           THE WITNESS: Yeah.

19           COMMISSIONER HICKINBOTTOM: --paragraph 7, because  
20 this sets out the policy that described to remove all of the  
21 Members. The legal implications, it says in paragraph 7, is at  
22 section 16(2) of the Act, the Climate Change Fund--the Trust  
23 Fund Act provide the grounds for removal of a Member of the  
24 Board, correct? These grounds include satisfaction of the  
25 Minister with the approval of Cabinet that that Member is X, Y,

1 and Z, and then it ends in paragraph 8. It therefore appears  
2 through this section that justifiable reasons have to be  
3 provided for the removal of the Members of the Board. And that  
4 then seems to have generated--

5 THE WITNESS: And that would have been the considered  
6 view of the Attorney General's Chambers.

7 COMMISSIONER HICKINBOTTOM: Then generates the  
8 requirement for the change in the Act that was brought forward  
9 in this memorandum.

10 THE WITNESS: Understood.

11 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

12 Mr Rawat.

13 BY MR RAWAT:

14 Q. Also, again, just to give it full context, we've  
15 looked at the paper in relation to the Amendment. If you go to  
16 3181, please, Mr Smith-Abbott, as part of that paper, the--under  
17 "legal implications" at 12, it says: The Attorney General's  
18 comment is at Appendix A. And if we turn to 3183, this is a  
19 memorandum from the Attorney General dated the 9th of May, and  
20 under the heading "Advice"--and this is--the subject is the  
21 Virgin Islands Climate Change Trust Fund Act 2015--the Attorney  
22 General records: "I would strongly advise against the amendment  
23 of the Climate Change Trust Fund Act (the Act) by way of  
24 substituting 'the removal of Members of the Trust Corporation at  
25 the discretion of the Minister and the Cabinet' for the

1 elaborate basis for removal of the Members contained in the  
2 section 16 of the Act. No reason has been advanced for the  
3 proposed amendment."

4 I'm going to pause there. That's the topic that we've  
5 been discussing, but was that something you became aware of?  
6 You say you were aware that there were changes--

7 A. Not of this particularly. Not of the--

8 Q. Not of the Attorney General's position.

9 A. No.

10 Q. Can I just ask you one more thing, though? We've  
11 obviously been talking about the Climate Change Trust Fund Board  
12 which originally sat under your Ministry. You've referred to  
13 the Climate Change Committee. Could you just give a little bit  
14 detail about--that obviously sits one rung up above the Board,  
15 but what was the purpose of that Committee and which Ministries  
16 were involved in it?

17 A. Well, first and foremost, there's a recognition that  
18 climate change is not, as I mentioned, a single thematic subject  
19 matter at all. It straddles the various sectors, the various  
20 segments of society. It impacts critical infrastructure, our  
21 ability to have human settlements, it has impacts on  
22 biodiversity as well as the wellness and well-being health-wise.

23 So, against that backdrop of the fact that climate  
24 resilience effectively is one that requires a multi-sector  
25 approach, the Committee lent support from various Ministries and

1 departments. So the committee actually is across-Ministerial in  
2 the sense of inter-departmental body that would provide, for  
3 instance, advice and technical support for implementation of  
4 actions to increase resilience to the impacts of climate change.

5 The Committee had been established prior to the Act,  
6 the Trust Funds Act, and, as I made reference earlier, it was  
7 co-chaired by the--two Ministries--by the Premier's Office and  
8 the Ministry of Natural Resources and Labour; at the time, we  
9 did not have Immigration. So, at the time it was just the two  
10 Ministries who would then be responsible for calling meetings,  
11 proposed--technical proposals for financing. I made reference,  
12 for instance, to the fact that parts of some actions that are  
13 now the basis of what we're looking at, were funded in part by  
14 the--by individuals or institutions--European Union,  
15 primarily--for projects, and those were overseen by technical  
16 officers, according to their level of expertise.

17 So like, for instance, you would have a project in  
18 Cane Garden Bay that improved the coastal defences along it. It  
19 was a major segment of a road; and the technical oversight of  
20 that--and the oversight, although the Ministry set as the  
21 national focal point for climate change matters, the  
22 implementation really and truly was devolve at the technical  
23 level. And you will see examples of this according to whatever  
24 the area would be.

25 So, effectively the Climate Change Committee was

1 enshrined in law through the Trust Fund to provide a layer of  
2 technical support in the implementation of the climate change  
3 policy. The climate change policy was formulated in 2010, and  
4 it was subsequently revised.

5           To the extent to which that instrument articulated,  
6 for instance, what the approach for climate resilience building  
7 activities for the Territory across various sectors, the  
8 implementing entity would have been the Climate Change  
9 Committee, and that Committee would be responsible for not only  
10 identifying priority areas for consideration and how we go about  
11 adapting to change, but then also be responsible, to a large  
12 measure, as to how those actions would be undertaken in the real  
13 sense.

14           So, to the point of the fund now--or the Board, it  
15 provided support in the aspects of what are those priority areas  
16 that the fund itself will be minded to support. So, for  
17 instance, I made reference to the policy. So the policy perhaps  
18 would look, for argument's sake, at the need to improve our  
19 coastal defences beyond the pilot project in the Cane Garden  
20 Bay.

21           So, we would look at that and apply that best practice  
22 across other areas. Irma exposed some of our vulnerabilities  
23 with respect to coastal defences. So, if we were to use the  
24 example of what happened in Cane Garden Bay with the  
25 strengthening of, I would say, rock harbor against planned

1 activity, which would look at studies which informed design and  
2 present the best solutions available. The technical review of  
3 those proposals would happen at that level. The genesis of  
4 ideas would happen at that level, and then that policy would be  
5 advanced for consideration by those--not only the sectors but  
6 eventually by Cabinet.

7           So, what the fund would do is to take the body of work  
8 that the technicians and policy makers would have agreed to and  
9 then fund those activities based on the identification of local  
10 resources, the environmental levy being one, as well as the--of  
11 any international financing that may be available to the  
12 Territory for implementation along the lines of what we would  
13 have received, for instance, with the OECS, from the OECS  
14 conglomerate. We've received resources from the Organisation  
15 of--Overseas Countries Territories Association. So, there are  
16 multilateral mechanisms available to us to facilitate technical  
17 assistance, capacity-building and, in some instances, financing  
18 of projects under--at the ground level.

19           Q.    Thank you very much.

20           MR RAWAT:  Commissioner, I have reached the end of my  
21 questions.  Can I conclude by, first of all, thanking  
22 Mr Smith-Abbott for coming today and giving evidence but also  
23 very much for the way that he has given his evidence today.

24           COMMISSIONER HICKINBOTTOM:  Yes.

25           Thank you, Mr Smith-Abbott, for the clear way in which

1 you've given your evidence. It's been very helpful. Thank you.

2 THE WITNESS: Thank you, Commissioner.

3 COMMISSIONER HICKINBOTTOM: What I suggest now, Mr  
4 Rawat, is we do have five minutes.

5 MR RAWAT: Yes.

6 COMMISSIONER HICKINBOTTOM: I hope the Minister is  
7 here, and then we'll resume.

8 MR RAWAT: Thank you.

9 COMMISSIONER HICKINBOTTOM: Thank you.

10 (Recess.)



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Session 3

COMMISSIONER HICKINBOTTOM: Thank you. I think we're ready to resume, thank you.

Mr Rawat.

MR RAWAT: Thank you, Commissioner. Our next witness is The Honourable Vincent Wheatley.

BY MR RAWAT:

Q. Honourable Wheatley, thank you for coming back to give further evidence to the Commission. Can I also apologize for I think we've delayed you by a little longer than we intended.

A. That is quite all right.

Q. Unfortunately, you're on lawyers' time now.

Can I also clarify this, you have given evidence already.

A. Twice already.

Q. Yes, and you did that on oath. You're not required to take the oath again.

A. Okay.

REALTIME STENOGRAPHER: I'm sorry, can you pull the microphone closer to you? Yes.

BY MR RAWAT

Q. Minister, I think--

A. Is that better?

REALTIME STENOGRAPHER: Yes, thank you.

COMMISSIONER HICKINBOTTOM: Thank you.

1 BY MR RAWAT

2 Q. Just to explain, Minister, the microphone doesn't  
3 amplify. Our Stenographer is remote, and so both you and I have  
4 to remember to keep our voices up. And the other thing we  
5 should both try and do is not talk across each another, which is  
6 sometimes harder than it seems.

7 You'll see that there are bundles just to the left of  
8 you. One of those is probably the one that we'll spend most  
9 time looking at. But before we do that, can I ask you a  
10 question. I may have asked you this before.

11 A. Certainly.

12 Q. But it's just about your perception of your role as a  
13 Minister.

14 We heard from your Permanent Secretary who explained  
15 that, as a Permanent Secretary--and this is your Acting  
16 Permanent Secretary, but his role is to supervise the Ministry,  
17 but under the direction and control of the Minister. Would you  
18 agree with that proposition?

19 A. Absolutely.

20 Q. And the topic that we've asked you to give further  
21 assistance on is Statutory Boards. Mr Smith-Abbott has  
22 helpfully dealt with those in three Affidavits, and you have  
23 under the umbrella of your Ministry, as we understand it, the  
24 National Parks Trust Virgin Islands Board?

25 A. That is correct.

1 Q. The Social Security Board?

2 A. That is correct.

3 Q. The Immigration Board?

4 A. That is correct.

5 Q. And the Land Survey Board?

6 A. That is correct.

7 Q. But again, as Mr Smith-Abbott confirmed, the last of  
8 those Boards is actually not active at the moment?

9 A. That is correct also.

10 Q. And I think in--once your Government had--your--the  
11 new administration had taken place, there was a reorganising of  
12 portfolios, and so what was the Climate Change Trust Fund Board  
13 was moved from your Ministry to the Premier's Office?

14 A. That is correct.

15 Q. But I haven't--you will please confirm--missed out any  
16 Statutory Boards or bodies that are currently under your  
17 Ministry?

18 A. As far as I recall, you have them all, but can I  
19 answer your question about my role?

20 Q. Of course.

21 A. I see my role in the Ministry as a person who gives  
22 policy direction and vision for the Ministry and the former  
23 Secretary and staff are there under the Government's mandate to  
24 carry out those policies and the vision and direction that we  
25 want to take the Ministry, in a nutshell.

1 Q. Yes.

2 A. And provide guidance and direction.

3 Q. So, you, as Minister, set the Policy?

4 A. And direction.

5 Q. And they have to, within the law--

6 A. Within the law, of course.

7 Q. Implement the Policy?

8 A. Yes, within the law.

9 Q. Yes, but it's for them to put the wheels in motion, if  
10 you like?

11 A. That's the way I see it.

12 Q. But you will give the Policy direction?

13 A. Absolutely.

14 Q. Mr Smith-Abbott, as I said, made three Affidavits in  
15 relation to the Statutory Boards. He explains in the Affidavits  
16 that they're made on your behalf. Have you had an opportunity  
17 to look at those Affidavits?

18 A. Yes, I have. Not in great detail because of the time  
19 frame in which it happened.

20 Q. One of the points that comes across from  
21 Mr Smith-Abbott's evidence in relation--taking it generally in  
22 relation to the Boards--is that there is a process by which you,  
23 as a Minister, will receive and agree recommendations or  
24 nominations for a particular Board, and then that is put  
25 together--and I'm speaking generally here--

1 A. Yes, of course.

2 Q. --into a Cabinet Paper that you as Minister have to  
3 take to Cabinet?

4 A. To Cabinet.

5 Q. Have I said anything that you disagree with?

6 A. No, I agree. One part, some persons do request to be  
7 a part of a Board.

8 Q. Yes. Not wanting to get into the detail.

9 A. Okay.

10 Q. As we understand it from Mr Smith-Abbott and indeed  
11 another Acting Permanent Secretary that gave evidence yesterday,  
12 how each Board is--appointments are made to a Board is dependent  
13 upon the statute?

14 A. At first. They are governed by statutes.

15 Q. And so I was speaking generally, and the point I was  
16 making is that you are pivotal to the process because, as  
17 Minister, you could reject a recommendation put to you by  
18 somebody else. It's up to you ultimately to decide which names  
19 will go to Cabinet.

20 A. That's correct.

21 Q. Now, as Minister, you have been sent a letter which  
22 the Commissioner's Protocol describes as a "Warning Letter"?

23 A. The Salmon Letter?

24 Q. Well, yeah, that is another way of describing it, of  
25 course, yes. But it's a letter that alerts you, as Minister, to

1 potential criticisms that may be made on the evidence that is  
2 before the Commission. What is important, and I've said this to  
3 other witnesses I have taken through Warning Letters, is that  
4 these are just potential criticisms. They do not constitute the  
5 provisional or, indeed, concluded view of the Commission, but as  
6 the Commissioner's Protocol explains, what is important is that  
7 you be alerted to them and you be given an opportunity to  
8 respond to them.

9           And part of giving you that opportunity was to invite  
10 you, Honourable Wheatley, to make a written response, and you  
11 have done that. Can I confirm that you are happy that that  
12 written response should form part of the evidence before the  
13 Commission?

14           A. Absolutely.

15           Q. I'm going to take you through some of it.

16           A. Okay.

17           Q. And ask you a few questions about it, and hopeful that  
18 will give you another opportunity as well to develop some of the  
19 points that you've made.

20           A. Certainly.

21           Q. Before I do that, what I would like to do is just to  
22 try and give it some context so that we see the framework in  
23 which both the criticisms were made and your response.

24           The first document, if you can see Part 3 of the  
25 bundle there, please.

1 COMMISSIONER HICKINBOTTOM: Which page, Mr Rawat?

2 MR RAWAT: 2928, please.

3 COMMISSIONER HICKINBOTTOM: Thank you.

4 BY MR RAWAT:

5 Q. You should have before you, Honourable Wheatley, a  
6 paper from the Premier's Office dated the 19th of March 2019.  
7 Now, I haven't taken you to that paper in order to answer your  
8 questions about specific purpose that it's directed to, which is  
9 concerned, as it's heading says, "Revocation of membership of  
10 Statutory Boards under the Premier's Office."

11 A. Um-hmm.

12 Q. The reason I wanted to show it to you is because it  
13 helpfully, I hope, encapsulates the Policy of your  
14 administration in relation to Statutory Boards.

15 A. Um-hmm.

16 Q. And to give it--to explain, The Honourable Carvin  
17 Malone was giving evidence yesterday, and he was taken to this,  
18 and he confirmed that this was the Policy and was able to give  
19 the Commissioner additional detail, and I hope that you will be  
20 able to do the same.

21 A. Okay.

22 Q. Can I take you to paragraph--it's paragraph 4 on the  
23 next page. I'll try and take it shortly, but can you see at  
24 paragraph 4, I'm going to summarise rather than read it out, but  
25 if you want me to read it out, do ask me.

1 A. You can summarise.

2 Q. I'm sorry? Okay, thank you.

3 What is said is, the point is made that with each new  
4 government administration it becomes current practice for some  
5 or all the Board memberships to be dissolved and new Members  
6 appointed. What's noted then is that the manifesto of the new  
7 government administration calls for innovative, forward, and  
8 progressive ideas, initiatives and actions from each Government  
9 Ministry, Department and agency during this recovery period.  
10 For those initiatives that must be implemented through a  
11 statutory body, the same principles for innovative, forward, and  
12 progressive initiatives and actions will be required.

13 And what's then--the point is made at paragraph 5,  
14 firstly, that the manifesto of the new administration places  
15 heavy emphasis on youth involvement in every aspect of the  
16 development of the Territory. And, therefore, the intention was  
17 to have a youth representative on each Statutory Board and  
18 Committee. And secondly, that recommendations would be  
19 forthcoming for a new policy to amend the membership terms of  
20 each Board so that they not extend beyond the term of the  
21 sitting administration that appointed the Board.

22 So, what it comes to, in summary, is that your  
23 administration or the administration that you are a part of had  
24 a policy that what you wanted to do was to replace the  
25 membership of all the Statutory Boards?



1           A.    Reconstitute, is a word I use.

2                    COMMISSIONER HICKINBOTTOM:  The purpose is actually  
3 set out in paragraph 7.

4                    THE WITNESS:  Yeah.

5                    BY MR RAWAT:

6           Q.    Yes, 2930.

7                    COMMISSIONER HICKINBOTTOM:  This was the Policy--as I  
8 understand it, the Policy was to dissolve current Board  
9 membership and appoint--

10                   THE WITNESS:  So it can be reconstituted.

11                   COMMISSIONER HICKINBOTTOM:  Yes.

12                   THE WITNESS:  Yes.

13                   BY MR RAWAT:

14           Q.    And what specific emphasis is made on is on youth  
15 involvement.

16           A.    Yes.

17           Q.    But then there is this additional element of the  
18 Policy, and that is to amend the membership terms so that the  
19 Board expires with the administration that appoints it.

20           A.    That is correct.

21           Q.    And so, the effect of that policy would be that when  
22 you come in to office, as an administration, you can, to use  
23 your word, "reconstitute" the membership of all Boards?

24           A.    As I am.

25           Q.    And secondly, you can then--that Board will only last

1 as long as your administration.

2 A. That is correct.

3 COMMISSIONER HICKINBOTTOM: I'm sorry. Go ahead,  
4 Mr Rawat.

5 BY MR RAWAT:

6 Q. It was just the reason I told you to pause there was  
7 because, in fact, your voice dropped, Honourable Wheatley, so I  
8 didn't hear what you said, so please just repeat what you said  
9 to me.

10 A. I was saying, when you put the Board, so it expires  
11 with the term of the government, the new government will have  
12 the opportunity--the option to either continue or reconstitute  
13 that Board. It can be very unfortunate sometimes that you have  
14 a new government with an old Board and you don't get to achieve  
15 what you think you would achieve.

16 COMMISSIONER HICKINBOTTOM: Why? I don't quite  
17 understand that.

18 THE WITNESS: Because sometimes, for example, in our  
19 case, we came in with a transformative aggressive agenda, and we  
20 felt the best thing to do is to find persons who align with our  
21 ambitions. Another Member for the Fourth District in the House,  
22 a long-standing Member, 20 years, who lamented of the very same  
23 thing, that he was frustrated trying to do things with an old  
24 Board, so it's something that we're very mindful of.

25 The same way I wouldn't want to be saddled with an old

1 Board. I would want a new government to be saddled with my  
2 Board, my agenda and what I was trying to do when theirs may be  
3 different, so may have been efficient with the Government  
4 processes and agendas. That was the intention of this policy  
5 here. And I fully support it.

6 Q. Well, if I take you to 273--let's go to 2737.

7 A. 737?

8 Q. This is actually a Cabinet Meeting of the 27th of  
9 March 2019. I'm sorry, I will wait for you to turn it up.

10 A. 2737.

11 Q. Yes.

12 And if I turn--ask you to turn, please, to 2739. We  
13 see there when that memorandum that we were just looking at a  
14 moment ago, and you said that you fully support the Policy, that  
15 was--did come before Cabinet, and I went through this in some  
16 detail with Honourable Malone yesterday, and so I perhaps won't  
17 go through it in the same detail with you, but I wanted just to  
18 draw your attention to a couple of paragraphs, which may  
19 illustrate, I think the point that you were making just now that  
20 you fully support the Policy. If we go to 15 on 2740, please,  
21 Honourable Wheatley.

22 A. Um-hmm.

23 Q. The Premier made the point that--and to give context,  
24 what the paper had been brought before Cabinet was related to  
25 the Statutory Boards and the Premier's direction, but as you've

1 explained, as a policy, this was Government-wide rather than  
2 just to the Premier's Statutory Boards. But he stated that his  
3 decision to revoke the membership of the Boards is on the basis  
4 that a new government has assumed office with a new mandate, and  
5 as a result he's decided to reassess the membership of all  
6 Boards in a manner that will allow the mandate given by the  
7 people to be expedited in a transparent and accountable manner.

8 And would a fair point be that that goes to the  
9 point you were making that you would not want to be frustrated  
10 by a Board that did not--

11 (Overlapping speakers.)

12 A. It will also be seen as, well, this here is an act of  
13 political vengeance, with a clear reason why we're trying to do  
14 it. A new government with a new mandate needs to be given the  
15 option to have its own Board to carry out that new mandate.

16 COMMISSIONER HICKINBOTTOM: But do you accept this as  
17 a proposition, other people have, but it's important to put it  
18 to you. These Boards are autonomous?

19 THE WITNESS: Yes.

20 COMMISSIONER HICKINBOTTOM: And they're autonomous  
21 from the Government.

22 THE WITNESS: Well, you still have to choose the  
23 Members for them.

24 COMMISSIONER HICKINBOTTOM: But they're autonomous  
25 from the Government.

1 THE WITNESS: Their functioning, yes.

2 COMMISSIONER HICKINBOTTOM: So, they have to act  
3 autonomously from the Government, but you wanted to put--and  
4 let's put it very colloquially, and I don't mean to be  
5 disrespectful, but you wanted to put your own men and women into  
6 these Boards to pursue your--

7 THE WITNESS: No, I can't agree with that at all  
8 because not all Boards change all Members. If every single  
9 Board changed every single Member, I would support what you're  
10 saying, but that's not the case. We are saying we need to be  
11 given the option to do it. I can't think of any single Board  
12 that changed every single Member. We're saying we want the  
13 option to be able to do it.

14 COMMISSIONER HICKINBOTTOM: So, in particular--in  
15 particular areas, perhaps, you wanted the option to ensure  
16 that--and again, I'm sure that I won't choose the right words  
17 but you can choose the right words, people who will--

18 THE WITNESS: Carry out your mandate.

19 COMMISSIONER HICKINBOTTOM: Carry out your policies.

20 THE WITNESS: Your policies or mandate.

21 COMMISSIONER HICKINBOTTOM: But how does that fit in  
22 with them being autonomous?

23 THE WITNESS: In their functioning. We're talking  
24 about choosing a Board, Constituting a Board. We're not talking  
25 about the function of the Board.

1           Once the Members are chosen, who is to say they will  
2 do what you think they will do? They are autonomous. There are  
3 risks and there are chances you have to take, and you're  
4 absolutely right. There is nothing to say after I have chosen  
5 this Board, that they're going to do what I think I wanted them  
6 to do.

7           COMMISSIONER HICKINBOTTOM: But you're going to choose  
8 them because they're people who you think will do what you want  
9 them to do?

10          THE WITNESS: No. People who have the competence to  
11 do the job.

12          COMMISSIONER HICKINBOTTOM: Well, that's a different  
13 question. That's different from what you said earlier.

14          THE WITNESS: The way you put the question is you said  
15 your man, means anybody who may be a supporter or something like  
16 that, a friend. You want them there where they're qualified to  
17 carry out the mandate or not. I'm not saying that--I'm saying  
18 who can carry out the job? You select the person because  
19 they're competent, their qualifications, know they're there, who  
20 is to say they will do it.

21          COMMISSIONER HICKINBOTTOM: I'm sorry. I just want to  
22 fit that in with what you said earlier. You want people to  
23 carry out your mandate.

24          THE WITNESS: Yes.

25          COMMISSIONER HICKINBOTTOM: So you want people, as I

1 understand your evidence, firstly, who are competent so that  
2 they--

3 THE WITNESS: Um-hmm.

4 COMMISSIONER HICKINBOTTOM: But also people who will  
5 carry out your mandate. That's how they're chosen?

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: Once--and that's one  
8 criterion for choosing them, that they will carry out what you  
9 want them to do. But you say when they have been chosen or on  
10 the Board, whether they do that is a matter for them?

11 THE WITNESS: They're autonomous. They're supposed to  
12 be.

13 COMMISSIONER HICKINBOTTOM: Well, yes, but they have  
14 been chosen on the basis that they will do what you want them to  
15 do?

16 THE WITNESS: Well, that's strong language. You hope.

17 COMMISSIONER HICKINBOTTOM: Right. Okay. That's--I  
18 understand. Thank you.

19 BY MR RAWAT:

20 Q. If you go to page 2741, Honourable Wheatley, you will  
21 see at paragraph 19 that, as part of the discussion--and we're  
22 now in the "action" section, but in support of a Premier  
23 expressing that he would ask for a Cabinet Paper about periods  
24 of appointment being commensurate with the administration's  
25 term--

1           A.    Yes.

2           Q.    --in support of that, the Minister for Education,  
3 Culture, Agriculture, Fisheries, Sports, and Youth Affairs  
4 agrees that Boards should not exceed the tenure of an  
5 administration because it can prove to be challenging.

6                    The Minister said that, despite the possibility of  
7 exposing the Government to certain levels of risk--and I pause  
8 there--the level of risk that I suggest that the Minister for  
9 Education, et cetera, was suggesting is that which was the risk  
10 that someone who was removed might challenge that removal.

11           A.    I'm not--if I may, I can't say what he meant there.  
12 The risk here is because Ministers--I have to make a decision,  
13 there are risks involved. That comes with the Territory. So, I  
14 can't say we mean risk of the mandate or risk of legal action,  
15 and I'm not really sure what he's referring to.

16           Q.    Well, the reason I said that--I put that to you--we  
17 find that at 12, paragraph 12. Minister for Health and Social  
18 Development asked the Attorney General if Board Members had a  
19 legal recourse of being removed, and the Attorney General  
20 responded anyone can go to court whether they have legal  
21 recourse or not.

22                    That was just, again, to give you context. Let me  
23 finish because I think there's a bigger point that I want to  
24 draw to your attention. And this continues: When he weighs the  
25 potential for Boards to interfere with the Government's mandate,



1 as a Member of the Cabinet, he was willing to be exposed to that  
2 risk. He stated that commitment to the current government's  
3 mandate from the people must be paramount because incorrect  
4 actions of the past and/or association with a former party or  
5 administration could have a real impact on how matters  
6 progressed.

7 And that is the underlying point behind this policy,  
8 isn't it, that what you did not want was to end up as Ministers  
9 with Boards that frustrated your mandate?

10 A. I think every Minister would have that concern.

11 Q. Would you--do you--would you associate yourself with  
12 the concern that the Minister for Education has expressed here?

13 A. The risk of being taken to court or the risk of--

14 Q. That what you wanted was commitment to the current  
15 government's mandate must be paramount because incorrect actions  
16 of the past and/or an association with a former party or  
17 administration could have real impact on how matters progressed?

18 A. That potential is there, but remember these Boards are  
19 autonomous. That's--the possibility of that happening is real.  
20 He's expressing his opinion or observation.

21 Q. Is that your opinion as well?

22 A. I share some of it, yes.

23 Q. Well, elaborate, please.

24 A. I just said because the--these Boards are supposed to  
25 be autonomous. You're hoping that the mandate you have is

1 shared by the Board but is a risk it might not be shared the way  
2 you think it's going to be shared.

3 Q. The Policy was designed to reduce that risk?

4 A. As much as possible, to reduce that risk. I think  
5 that's what he was hinting at here, aiming to reduce that risk  
6 as much as possible.

7 What you don't want is you don't want "yes" men  
8 either.

9 Q. We won't worry too much about what the Minister of  
10 Education of thinking.

11 A. I don't really know--

12 (Overlapping speakers.)

13 Q. Your point of view is important.

14 A. I appreciate his concern also.

15 Q. Putting you, Vincent Wheatley--

16 A. Yes. I appreciate the concern.

17 Q. But your concern, you have--you had a concern as a  
18 Member of this administration that you could inherit a Board  
19 that would not fulfill your mandate?

20 A. Yes, the possibility is always there that that could  
21 happen. And there is evidence of it.

22 COMMISSIONER HICKINBOTTOM: This be said, though, in  
23 those circumstances, particularly given the proposal for a  
24 policy that the appointments to Boards are, in terms of time,  
25 limited to the administration.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: That these are overtly  
3 political appointments.

4 Boards are supposed to be autonomous, so they, as it  
5 were, sit outside where things are happening in the elected  
6 Government, they sit there, whatever the--whatever Government  
7 may happen to be in power. That's their autonomy, and their  
8 autonomy is reinforced in various ways to ensure that they are  
9 apolitical.

10 But by choosing people whose commitment to the Policy  
11 agenda of the Government is paramount when selecting Statutory  
12 Board Members, is that not an overtly political act?

13 THE WITNESS: You could say the same of any Public  
14 Officer who works for a Minister.

15 The fact that I'm choosing a Member, it can be  
16 said--but it could be said of any Public Officer who serves in  
17 any Ministry. So, they're supposed to be fully apolitical.  
18 That is the understanding. Though I'm choosing someone, it must  
19 be understood that they must be apolitical. Just like every  
20 single Public Officer.

21 COMMISSIONER HICKINBOTTOM: But someone is not  
22 apolitical if the way they're going to get on to a Board is that  
23 if their commitment to the current Government's mandate is  
24 paramount. That's not an apolitical stance. An apolitical  
25 stance would be--doesn't matter what the Government's policies

1 are--we have our functions under our statute, we have been given  
2 these functions by the House of Assembly, we're autonomous,  
3 we're going to get on with doing those functions.

4 THE WITNESS: In an ideal world I would agree with  
5 you. We don't live in one here.

6 Maybe the whole process of selecting process needs to  
7 be looked at. I won't argue there, but we have to make a  
8 decision, and we have to appoint persons. You don't do it based  
9 on a person's political affiliation. Apparently, we're not  
10 supposed to know. I don't know who these persons are, who they  
11 vote for. They're persons you look at their competence and  
12 their ability to carry out the mandate, not their political  
13 affiliation.

14 The perception could be if you're only choosing  
15 persons. So, what about those Members who you've met on the  
16 Board who you didn't move? Are you going to say that they're  
17 apolitical and the ones you brought on are not, the new Members?  
18 Because this Minister happened to bring on these Members.

19 The first are apolitical but the second set are  
20 political. I don't think that's fair.

21 COMMISSIONER HICKINBOTTOM: There are no sets because,  
22 under this policy, any new administration, not just yours, but  
23 any new administration would remove all Board Members and  
24 replace them with other Board Members until--

25 THE WITNESS: That's a supposition. We understand

1 they're saying they have the option to do it. We're not saying  
2 they will do it, or that it must be done, and you can't assume  
3 that a new administration will change every board member and  
4 maybe in some cases lose institutional knowledge. We're saying  
5 you give them the option to do what they want for whatever  
6 reason. In our context, there is no reason--I don't seek to  
7 change every single Board Member now, but maybe another context  
8 of something it may be the wise thing to do.

9 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

10 THE WITNESS: What this does is it gives us the option  
11 of--another administration the option, and they should see it  
12 fit to do that they have an option. I can't see anyone doing  
13 it, but you never know.

14 COMMISSIONER HICKINBOTTOM: But the purpose of the  
15 Policy, because we've looked at the purpose, is not to  
16 reinvigorate the Boards. The purpose is to revoke the Boards  
17 and replace the Members.

18 THE WITNESS: Where did it say? Well, because the  
19 Board revoke--it didn't say it can't bring persons back on. You  
20 revoke the Board, the Board is reconstituted, and there we go.  
21 You can use some the same Members if you want or all of the same  
22 Members if you want, or you could dissolve the Board and figure  
23 out change if you think about the mandate for the Board and then  
24 reconstitute the Board. It just gives you an option to make  
25 sure you stand the best chance of achieving your mandate.

1 That's what it's supposed to be designed to do.

2 BY MR RAWAT:

3 Q. And how you apply that option to ensure that the Board  
4 is going to achieve your mandate depends on who's on the Board,  
5 so you may not need to change the Board at all?

6 A. There you go.

7 Q. And then you will achieve your mandate.

8 A. That's possible.

9 Q. You may need only change two Members on the Board to  
10 ensure that the Board achieves the mandate.

11 A. The Board stands the best chance of achieving the  
12 mandate.

13 Q. Or you may need to replace the entire Board to ensure  
14 that the Board stands the best chance of achieving your mandate?

15 A. That is correct.

16 COMMISSIONER HICKINBOTTOM: So, by mandate, you mean  
17 your political agenda?

18 THE WITNESS: Yes. Of the Government.

19 COMMISSIONER HICKINBOTTOM: Yes, yes.

20 BY MR RAWAT:

21 Q. Thank you. Can I just now move on slightly to a  
22 different topic, luckily we're staying in the same bundle. If  
23 we go to 3189, please.

24 Honourable Wheatley, I want to show you four sets of  
25 documents. I'm going to take it briefly, because it's really

1 primarily just sort of to orientate you in terms of chronology.  
2 Because I want to then focus on the written response that you've  
3 given to the Warning Letter.

4           So, the first document that we have in front of us is  
5 dated the 11th of May 2020, and it is a memorandum--we looked at  
6 it with Mr Smith-Abbott--which sets out the basis on which it  
7 was going to be recommended that various appointments be made to  
8 the Social Security Board, and so the memorandum is prepared,  
9 and it goes under the heading of Dr Potter, your former  
10 Permanent Secretary, it then sets out on the paragraph 3, which  
11 I think you have in front of you, the various individuals that  
12 were being put forward. It explains, and perhaps you can help  
13 us with this, but the position that had been reached with the  
14 membership of the Social Security Board was that, by the last  
15 quarter of 2019, it only had three people on it. It had the  
16 Chairman, who was--whose term was due to expire by the 6th of  
17 September?

18           A. Yes, that's correct.

19           Q. In then had the Chief Medical Officer and the  
20 Director, both of whom by statute, have to be on it. They're  
21 not people you can appoint or remove.

22           But we then come to May 2020 when you are then taking  
23 to Cabinet six people that you advised Cabinet should approve to  
24 go on the Board.

25           Between the last quarter of 2019 and May 2020, what

1 had happened to the Board?

2 A. I don't think I attended the Boards under my Ministry.

3 Q. I see. When did it come under your--

4 A. I want to think it was April 2020.

5 Q. I see.

6 A. I inherited a Board later.

7 Q. Whether you inherited it, did you inquire into what  
8 state it was in?

9 A. Of course. I had a full briefing package.

10 Q. Right.

11 A. About the whole thing.

12 Q. Do you remember what reason--I mean, because what  
13 you've got is a Board for a good part of a year that appears not  
14 to be active, and the Social Security Board is an important  
15 Board.

16 A. I wouldn't say they were not active.

17 Q. But there was only three people on that Board?

18 A. No, no, I think you're reading that wrong.

19 Q. No, if you go to 2, the membership of the last--of the  
20 Board expired in the last quarter of 2019, except for the  
21 Chairman, whose term will expire 6th of September 2021; Dr Irad  
22 Potter, the Chief Medical Officer, and the Director of the  
23 Board. It then tells you the membership consisted of the  
24 following person, and it lists a number of people. And none of  
25 them by late 2019 were to be on the Board?



1 A. This is when I got the Ministry around that time.

2 Q. But you, therefore, had a three-person Ministry--Board  
3 when you actually needed a nine person--

4 A. No, I inherited a three-person Board, inherited. When  
5 it came to me, I think it was in April 2020, that's what I  
6 meant.

7 Q. I see.

8 A. That's why the appointments are made in May, so I got  
9 in April, May, I got an appointment.

10 Q. But my question was whether the briefing that you  
11 received gave you any understanding of why this Board had been  
12 trundling along with just three Members?

13 A. No, I don't recall. I don't recall getting a reason  
14 for that.

15 COMMISSIONER HICKINBOTTOM: I haven't checked the Act,  
16 but I suspect it's not--

17 MR RAWAT: Yes, I will check it, but I think that's  
18 the reason for the question as well.

19 BY MR RAWAT:

20 Q. In any event, what you put forward was six names, and  
21 Mr Smith-Abbott has taken us through this.

22 What the Act requires you to do as Ministers is to  
23 purport two people to represent Government--it's actually seven  
24 names, sorry, I apologize, but it's two people to represent  
25 Government, two people to represent employers, two people

1 representing employees, and then two people, one person  
2 representing private health practitioners.

3 A. Um-hmm.

4 Q. And so, the paper was put through, if you go to legal  
5 implications on 3192, you see there that--and I think as we  
6 understand it, this is input from the Attorney General's  
7 Chambers.

8 A. Yes, that is correct.

9 Q. The Attorney General says: "I have reviewed the draft  
10 Cabinet Paper." So this is the draft of this paper.

11 A. Um-hmm.

12 Q. "Advise that I have discerned no adverse legal  
13 implications which would arise for the Government if Cabinet  
14 were decide in accordance with the decision sought."

15 And then you have, on 3194, signed that?

16 A. Yes.

17 Q. On the 12th of May. I say signed but we'll call it  
18 "approved"?

19 A. Yes.

20 Q. And then on the 12th of May it becomes your paper.

21 If you go to 3187, please, Honourable Wheatley.

22 A. 3187, um-hmm.

23 Q. We see there, and this is the Cabinet Meeting where  
24 you have taken that paper to Cabinet, and Cabinet then decides,  
25 we see at the bottom of the page, that from the 18th of

1 May 2020, Ms Tasha Bertie, representing Government, Mrs Patsy  
2 Lake representing employees, Mr Dereck Marshall representing  
3 employees, Ms Lyra George representing employees, Dr Mitchell  
4 Penn representing private health practitioners, and Ms Maya  
5 Barry representing Governors, would be appointed to the Board.  
6 And also that Mrs Patsy Lake will be appointed as Deputy  
7 Chairman.

8 A. Um-hmm.

9 Q. So, that was the position that I just wanted to draw  
10 your attention to those two.

11 If you now go to 3195, please.

12 REALTIME STENOGRAPHER: Say the number again, please.

13 MR RAWAT: 3195. Sorry, Mr Kasdan.

14 BY MR RAWAT

15 Q. On the 13th of May, that gives us the date of the  
16 Cabinet Meeting.

17 A. Um-hmm.

18 Q. And we see that the decision is then promulgated on  
19 the 24th of September 2020, so by this time, all of these  
20 appointees have actually taken office because they're active  
21 from the 18th of May 2020. If you now go to 3197, this is to  
22 just draw your attention to a different topic that I wish to  
23 canvass with you. So we've got the appointment of Social  
24 Security Board Members, and now we've got the question of the  
25 retirement of the Director of Social Security Board. So, the

1 circumstances, in summary, were that the current Director,  
2 Ms Antoinette Skelton, had been Director for some time, and she  
3 was due to retire.

4 A. That is correct.

5 Q. So, what your paper did was--and we see that at 3198,  
6 its purpose is purported to say--to ensure continuity of the  
7 Social Security Board given the retirement of the Director, and  
8 that was to recommend Ms Jeanette Scatliffe Boynes as Director  
9 for a period of 18 months?

10 A. Acting Director.

11 Q. Acting Director. Thank you. And that's dated as a  
12 paper the 22nd of December 2020. And we see if we go to 3201,  
13 that the following day you've taken it to Cabinet, and Cabinet  
14 has decided, in accordance with your, if you like, your  
15 recommendation, your paper, and so Mrs Skelton retires, and  
16 she's given a retirement date, and Ms Scatliffe--

17 A. No, sorry. She supplied the retirement date.

18 Q. I'm sorry, I say given because it's a decision of  
19 Cabinet?

20 A. Okay.

21 Q. Let's put that into the record.

22 She was allowed to go on pre-retirement leave  
23 effective the 1st of January 2021 until her actual retirement  
24 date of the 30th of June 2021.

25 A. Yes, correct.

1 Q. And Ms Scatliffe Boynes then begins to act up as  
2 Director, and her period of acting was decided by Cabinet to be  
3 18 months?

4 A. That is correct, sir.

5 Q. Now, that's the background. I would suggest just  
6 keeping that bundle to one side in case we go back to the  
7 documents, but I would like to take you to two things now.  
8 Firstly, is find Part 1 bundle because I would just like you to  
9 just turn up schedule 1 of the Act, the Social Security Act, and  
10 that's at page 475, Honourable Wheatley.

11 Now, as Mr Smith-Abbott explained to us, this part of  
12 the Act is where we find the powers that you have as a Minister  
13 in terms of appointing. But one thing to amend it with, and  
14 that is that paragraph 1 there is the old version--

15 A. Good.

16 Q. You will find the correct one at 498.

17 A. 498? Yes, I want to bring to your attention that this  
18 here was amended in 2014.

19 Q. Yes.

20 A. Yes.

21 Q. So, what you had is that, when you as a Minister, you  
22 appoint--the change is that you don't appoint directly, you  
23 appoint with the approval of Cabinet, and you have to appoint up  
24 to nine people.

25 A. That is correct.

1 Q. Now, some those, two of them, the Director and the  
2 Chief Medical Officer, are automatically on there, but as we've  
3 seen, when we're looking at the Cabinet Papers, there are some  
4 seven people that you, as Minister, have to find and put forward  
5 to Cabinet. That's assuming a situation where you have to find  
6 all seven at the same time.

7 Now, keeping that one to one side, let's look now at  
8 the Warning Letter, please. Now, have you got your written  
9 response, Honourable Wheatley?

10 A. I do.

11 Q. That's helpful. Because what the written response  
12 usefully does is that it reproduces the potential criticism and  
13 the citations of evidence that are relied on, and then it sets  
14 out your response to it.

15 Now, before we get into the detail of the written  
16 response, did you draft it yourself?

17 A. Yes, I did.

18 Q. Did you have any assistance in drafting it?

19 A. Yeah, the IRU.

20 Q. The reason I ask and without introducing any mystery  
21 to it, is that, if we look at the first response, for example,  
22 the wording "during successive Governments over many years, it  
23 has not been the practice in the Virgin Islands Government," et  
24 cetera, is wording that appears in other warning responses, and  
25 so I just wanted to understand how you came to write this?

1           A.    That's a general sentiment of the Government. We all  
2 share this.

3           Q.    I appreciate that it's a sentiment of the Government,  
4 and you may all may of one mind.

5           A.    Yes.

6           Q.    But it's usual for people to use exactly the same  
7 words even when they are of one mind. It's all about the choice  
8 of words that you used in your response. How did you come to  
9 choose those words and that language?

10          A.    While discussions--but I can't say for sure exactly  
11 what somebody assumed. I can only take your word for it.

12          Q.    I'm sorry, your voice is dropping a little bit?

13          A.    I'm saying I take your word for it because as you've  
14 seen it before.

15          Q.    I'm happy to show you some examples. It's a small  
16 point. It's the same wording as appears in Mr Smith-Abbott's  
17 written response to the Commissioner.

18          A.    I didn't see his.

19          Q.    Well, given that he had prepared Affidavits on your  
20 behalf--

21          A.    Yeah, but this comes from the Attorney General, I  
22 guess.

23          Q.    Because the text that you've put in your response to  
24 number one is exactly the same text as appears in  
25 Mr Smith-Abbott's response.

1 A. Is it the same question?

2 Q. Yes.

3 A. Well, again the same answer.

4 Q. Well?

5 COMMISSIONER HICKINBOTTOM: Not necessarily, from two  
6 different people.

7 THE WITNESS: He asked if we worked together, the  
8 answer is no. I didn't work with him, but I'm sure the AG  
9 Chambers would have vetted these to make sure the language is--

10 COMMISSIONER HICKINBOTTOM: The same?

11 THE WITNESS: Or close to the same. Because we're  
12 answering the same questions. He can't say one thing and I say  
13 another, or whatever.

14 If you're talking about the Government's Statutory  
15 Boards, it can't bring every single Member in to answers the  
16 same question, if it's supposed to be a standardised thing.

17 BY MR RAWAT:

18 Q. Just help me through the process. You got the Warning  
19 Letter?

20 A. Yes, I drafted it.

21 (Overlapping speakers.)

22 REALTIME STENOGRAPHER: I'm sorry, there's too much  
23 overlap. Could you start again, please?

24 BY MR RAWAT

25 Q. We will start again, and for the record, if you give



1 me a moment, Honourable Wheatley, and then I will allow you to  
2 speak, but I just wanted you to take me through the process in  
3 which you prepared your written response.

4 A. Um-hmm.

5 Q. So take it from you received the Warning Letter, what  
6 did you do next?

7 A. I drafted my responses, and I sent them off to the  
8 Attorney General.

9 Q. And then what happened then?

10 A. And they were sent back. Due to my language they are  
11 going to put it in legalese, so to speak, legal language. My  
12 responses would not look exactly like this but the essence of  
13 what I said will be captured and then done like this.

14 Q. And then was it for you to approve?

15 A. I have to then approve it, yes, as a direct capture in  
16 legal language what you're trying to say.

17 Q. Okay. Can I give you--take you through the criticism,  
18 please.

19 A. Um-hmm.

20 Q. What I will try and do is to summarise at least when  
21 we get to point 1, there may be some questions I may ask  
22 additionally. What I want to do above-board is to make sure  
23 that you are treated fairly, Honourable Wheatley, and to ensure  
24 that we have your response clearly. The reason I say I can  
25 summarize is because, firstly, you've accepted that this written

1 response can become part of the evidence, but also because of  
2 the evidence of Mr Smith-Abbott, and the fact that your response  
3 there is his word for word.

4           So, if I take you to the first criticism which relates  
5 to the Social Security Board, and those appointments in May 2020  
6 that we were looking at a few moments ago, the criticism makes  
7 clear--the potential criticism, I should say--is that it is  
8 based on the documents that have been provided to the COI.

9           A.     (Witness nods.)

10          Q.     And Mr Smith-Abbott agreed with all of the  
11 propositions at 1 to 6. He agreed that in relation to those  
12 appointments or if he agreed in relation to those appointments,  
13 there is no evidence of a competency profile. He agreed that  
14 none of them had been advertised. He agreed that there was no  
15 independent or transparent process by which a suitable pool of  
16 candidates had been identified. He agreed that there was no  
17 independent or transparent process by which proposed candidates  
18 were selected. He agreed that none of the candidates had been  
19 interviewed at any stage prior to appointment, and that no due  
20 diligence had been carried out.

21               Where he didn't agree was that with the proposition  
22 that no effort was made to identify and select. What was put to  
23 him by the Commissioner was that the question was directed to  
24 his selecting the most suitable and qualified candidates for  
25 membership.

1           Now, the context that Mr Smith-Abbott gave was that in  
2 his response, what he was referring to was not the specifics of  
3 May 2020 for which he could find having done two reviews, one  
4 where he was preparing his Affidavit and one when he was  
5 preparing his written response. He could find no evidence of  
6 the process in May 2020. And so when he was speaking as you  
7 have done of an informal process--

8           A.    Yeah.

9           Q.    --he was speaking of the general process that occurs  
10 in his experience within Ministries.

11          A.    That is correct.

12          Q.    Is that also what you're saying?

13          A.    Yes. There is no structural thing that the way you  
14 have it laid out here. I'm not saying that it didn't happen in  
15 an informal way. But you're asking for evidence if I meet  
16 someone in a corridor and are them a few questions, it can be  
17 considered an interview. There will be no evidence I had a  
18 conversation.

19                And based on there, and plus, number two, these things  
20 were never practiced before, for whatever reason. We can go  
21 through them one by one, if you wish.

22          Q.    Yeah--no, you're saying that the practice has never  
23 been to have, for example, advertised posts or competency  
24 profiles?

25          A.    Exactly. It's never been the practice.

1 Q. The--now, again, correct me if I'm wrong, but this is  
2 your first time in Government, isn't it?

3 A. As a Minister--as elected person, yes.

4 Q. Yes. And, therefore, as a Minister.

5 A. Yes.

6 Q. So, where did you get the information, given that you  
7 have no experience prior to 2019 being in Government? Where did  
8 you get the information there existing this informal process?

9 A. From the persons who had been through before, Board  
10 Members and my other colleagues and so forth. You have to ask  
11 questions, what is the process, how do you do it?

12 I'm not saying I agree with the process I met, but  
13 this is the process I did meet. As a matter of fact, if you  
14 look at the local news today, you will see the Chairman expired  
15 on Monday has been advertised--

16 Q. Mr. Smith--Abbott--

17 A. --first time it's ever happened because I think it  
18 should be advertised, but it's not a system in place.

19 Q. The remainder of your--of your response focuses on the  
20 Governor, and you make the point that it has always lain within  
21 the responsibility and power of the Governor to instigate a  
22 change in the standard practice of a public office in the advice  
23 given to Ministers on such a subject.

24 A. That's correct.

25 Q. What's the basis on which the Governor could do that?

1 What's the legal basis on which the Governor could do that?

2 A. He's Public Service in the Deputy Governor's Office.  
3 He's over the Public Service, the Governor through the Deputy  
4 Governor, so...

5 Q. So, your view is that the Governor--pause me  
6 there--because the Act gives the responsibility to you, but your  
7 view is that the Governor can come in to you and say,  
8 "Honourable Wheatley, from now on, this is how you're going to  
9 recruit"?

10 A. No, you are missing my point.

11 As a general direction of the service--not  
12 individually, the service--the general direction for the service  
13 going forward is the way the service will behave--Public Service  
14 will be behave from time to time on various things. I can think  
15 of evaluation, things that I do. From now on, each person will  
16 have an evaluation document at the end of the work year to fill  
17 out. And at the year this is what you do. You must have a low  
18 profile by this time. So, they may have made changes before  
19 service-wise, so the Government could have said, "Whenever you  
20 want to, going forward, this is the way the boards and  
21 Government is going to function".

22 Q. So--

23 A. In broad terms.

24 Q. You would welcome the Governor's intervention on this  
25 basis, would you?

1           A.    I'm not sure what the Governor say--it's a  
2 responsibility under the Constitution.

3           Q.    So, it's your view--your view is that the Governor  
4 should come in and essentially mandate how you, as Minister--

5           A.    No.

6           Q.    --should recruit?

7           A.    He can direct the service, how the service is to  
8 function, with the Public Services to function.

9           Q.    The reason I'm pressing you on this for detail,  
10 Honourable Wheatley, is because of the wording you used.

11          A.    Um-hmm.

12          Q.    It has always lain within the responsibility and power  
13 of the Governor to instigate a change in the standard practice  
14 of Public Officers and the advice given to Ministers on such a  
15 subject.

16          A.    Um-hmm.

17          Q.    Now, when we look back at 475 with the, as you  
18 helpfully told us, remembering that the 2014 change--

19          A.    Yes.

20          Q.    --there are certain things you have to do as a  
21 Minister.

22          A.    Absolutely. Yes, I agree.

23          Q.    What--and as I read your words that you've put into  
24 your written response, what you are saying is that the Governor  
25 should and has the responsibility and power to come along to

1 Public Officers in your Ministry and to say, if we look  
2 at--because one of the things you're required to do as Minister  
3 is to consult when you appoint somebody representing employers,  
4 for example.

5 A. Um-hmm.

6 Q. And so, what the Governor can do is direct Public  
7 Officers to advise you that this consultation has to be done in  
8 a particular way.

9 A. He can. As a matter of fact, they choose--the  
10 Governor choose my Permanent Secretary. I don't choose. He has  
11 the constitutional right to do it and direct the Public Service  
12 in the way they are to conduct the public's business.

13 Q. But you're going the Governor to do a much more  
14 specific thing.

15 A. It must be general, a general directive to the  
16 service: "This is the way you will function from this day  
17 forward." All these things must be done. He can do it.

18 Q. I would accept your point that--

19 A. Okay.

20 Q. --in relation to boards. It might be possible to  
21 issue a general edict that all posts should be advertised.

22 A. And they have done that.

23 Q. But--but--with this caveat--and I hope you accept  
24 this--if you look, for example, at the Social Security Board--

25 A. Um-hmm.

1 Q. --that requires you to do specific things. If I were  
2 putting to you the statute for the National Parks Trust of the  
3 Virgin Islands Board, you would be tried do different things--

4 A. That is true.

5 Q. --and so, that's where it might need to become more  
6 specific, mightn't it? That the Governor, as you suggest, has  
7 responsibility and power--would have to give quite specific  
8 directions to the Public Service as to what kind of advice they  
9 should be giving to Ministers in relation to boards.

10 A. Well, in relation to the functioning, not just to  
11 boards, but the general functioning, yes, he can do that. Same  
12 way he chooses my PS for whatever reason. He can choose to say,  
13 "This is the way the services function. All boards under the  
14 Minister will do X, Y and Z."

15 In the absence of that, it then comes to Ministers  
16 alone to make decision, and then you will tell me it makes it  
17 political.

18 Q. Well, I'm not going to tell you that--

19 A. Okay.

20 Q. --but what I'm just trying to understand what you say,  
21 if the ambit of the Governor's power, and it seemed to be he has  
22 an unfettered, as you're saying to the Commissioner, right to  
23 direct how the Public Service advises Ministers.

24 A. Yes, he can. It's his constitutional duty to direct  
25 the Public Service.



1 Q. Now, you--

2 A. Through the Governor's Office.

3 Q. --have said, and you have pointed out that the  
4 informal process you set out--

5 A. I didn't set it out. I follow it.

6 Q. Well, I say you set out in your written response.

7 A. Okay.

8 Q. So, your own words turned, as you put it, into  
9 legalese, but that informal process--the point you just made to  
10 the Commissioner a moment ago is there is no other process?

11 A. No, not to my knowledge. Not as yet.

12 Q. The evidence of Mr Smith-Abbott--and he was able to  
13 give the Commissioner detailed evidence of this from his own  
14 expertise--is that when one looks at the Climate Change Trust  
15 Fund Board, that is--two points he made. That is an example of  
16 a more robust or more rigorous way of recruiting. For example,  
17 the Act that sets up that Board requires that it be advertised.  
18 That's the first point he's made.

19 A. Um-hmm.

20 Q. And he used that as an example of sort of a more  
21 modern benchmark.

22 A. And I like it very much.

23 Q. And the second point that Mr Smith-Abbott made was  
24 that, notwithstanding that that Board has left your embrace and  
25 gone to the Premier's, the expertise as to how to do this--the

1 expertise is how to advertise, how to recruit under a more  
2 modern system--still remains in your Ministry.

3 A. It was shared responsibility for the Climate Change  
4 Trust Fund, the Board. We do have technical knowledge of it, of  
5 the processes that needs to happen.

6 Q. That's not the point I'm trying to put for  
7 Mr Smith-Abbott. The point is that the knowledge about how to  
8 recruit using the mechanism that's set out for that Board was  
9 still there in the Ministry, even when that Board left, so the  
10 question that it creates for you is why didn't you draw on that  
11 expertise when you were recruiting for the Social Security Board  
12 in May 2020?

13 A. Like I said, there was a matter of the Ministry, and  
14 something do plan to do. As a matter of fact, the format I want  
15 to use, it wasn't the Climate Change Trust Fund but the National  
16 Parks Trust. I don't find the Membership is prescriptive enough  
17 for my taste.

18 Q. I'm sorry, for which Board?

19 A. Social Security. The way the Board is constituted, to  
20 me, is not prescriptive enough, and I would like to change that.

21 As a matter of fact, I had already given the directive  
22 to amend this to make it more prescriptive like the National  
23 Parks Trust Board, because I have certain challenges with it the  
24 way it's phrased. If you just say two persons are representing  
25 Government, that doesn't tell me enough of what those persons

1 are to be like; or two persons to be representing employees,  
2 doesn't tell me enough about what a person needs to be .

3           So, I have to go on my own instinct or those around me  
4 to try to best guess those persons--no, it needs to be more  
5 prescriptive like National Parks Trust. This person must be a  
6 marine biologist, this person must be a scientific person.  
7 Specific background information that persons must have to be  
8 able to give the best chance of being successful or to continue  
9 being successful.

10           Firstly, my PS was changed, and I never got a chance  
11 to implement what I had given instructions to do.

12           Q. Well, that's what you intend to do going forward.

13           A. Absolutely.

14           Q. My question was directed to May 2020.

15           A. Yes.

16           Q. In May 2020, when you started thinking about  
17 appointments to the Social Security Board--

18           A. Yeah.

19           Q. --was there anything to prevent you from turning  
20 around to your Public Officers and saying, "Let's do it in a  
21 different way"?

22           A. I understand--given the directive, but at that time  
23 the Board had been functioning for so long, my first priority  
24 was to get the Board functioning. There were some programmes we  
25 had to get moving and need the Board functioning to make certain

1 decisions, so that was not my priority at that time. There were  
2 amendments to have been made which had been made to the Act as  
3 well as to change this in the way the Board was constituted.  
4 That is still to come.

5 Q. Yes.

6 A. And also that we saw when COVID at the time, we were  
7 going through COVID, these factors did come into play.

8 Q. But did you move quickly, then, to get a full Board--

9 A. Yes.

10 Q. --running?

11 A. I think I got--I think I got the Social Security in  
12 April, late April, and May got the Board in place.

13 Q. Well, given that you were moving with speed, how can  
14 you say that you did recruit the most suitable and qualified  
15 candidates for the role?

16 A. We will get to that--are you able to go there now?

17 Q. We're still on 1.

18 A. Okay.

19 Q. One uses that language.

20 A. Okay.

21 Q. If you moved with such speed to get the Board up and  
22 running and having imperative in April and the appointees are  
23 there in May, and you have in mind the Policy that we've  
24 discussed with the Commissioner, how can you say that you had  
25 recruited the most suitable and qualified candidates?

1 A. I haven't said that yet. You are asking me now?

2 Q. Well, go to 701.

3 A. 701?

4 Q. That's the compendious potential criticism that can be  
5 made, Honourable Wheatley.

6 A. Um-hmm. The effort was made.

7 Q. Well, it's the--because of all these steps wasn't  
8 taken, you were not in a position to recruit the most suitable  
9 and qualified candidates, but taking from the evidence you have  
10 given the Commissioner today, given you had to move with speed--

11 A. Um-hmm.

12 Q. --how can you, in any event, say you had recruited the  
13 most suitable and qualified candidates--

14 A. I would say that's confidence based on what they had  
15 done since they had been on the Board. There was no Board for  
16 significant period of time, there is now a Board in place, and  
17 you can see what they have produced since then.

18 And also to say they're the most proper persons--

19 COMMISSIONER HICKINBOTTOM: I'm sorry, there may be a  
20 misunderstanding here.

21 Even if we could use the benefit of hindsight,, which  
22 we can't, what you say suggests that they are suitable and  
23 qualified candidates, but that's not what this points to. This  
24 points to the selection of--

25 THE WITNESS: Process--

1           COMMISSIONER HICKINBOTTOM: The best. The best, not  
2 simply candidates who are suitable and qualified, but the most  
3 suitable and qualified because what you've done by not following  
4 1 to 6 is cut out candidates who may want to apply.

5           THE WITNESS: Unfortunately, life only runs in one  
6 direction, who is not to say they're not the best? Who is to  
7 say there are better than these, not having a formal process in  
8 place to go through?

9           COMMISSIONER HICKINBOTTOM: The point of formal  
10 process is, without having a formal process, we can't say one  
11 way or the other.

12          THE WITNESS: Exactly. You can't say one way or the  
13 other, the best they could have done or found someone else to do  
14 more than this here.

15          COMMISSIONER HICKINBOTTOM: But that's the point of  
16 good governance. With good governance, you can answer that  
17 question.

18          THE WITNESS: And say categorically these are the  
19 best-performing persons or the best persons on paper.

20          COMMISSIONER HICKINBOTTOM: The chances are that this  
21 process will result in the most suitable and qualified  
22 candidates.

23          THE WITNESS: That's all I wish to do.

24          COMMISSIONER HICKINBOTTOM: Thank you.

25          BY MR RAWAT:

1 Q. If we could move on, please, Honourable Wheatley, to  
2 Item 2 in the Warning Letter, in the written response--do you  
3 see that?

4 A. Yes.

5 Q. Now, again, if I summarise it, but it's focused on the  
6 May 2020 appointments to the Social Security Board.

7 A. Um-hmm.

8 Q. And what's said--and again, it's based on the  
9 documents that have been disclosed to the Commission. There was  
10 no compliance with procedures in the Cabinet Handbook, and in  
11 particular no conflict checks were carried out on potential  
12 appointees, and what said is some of the appointees were  
13 relatives of Cabinet Members but these relationships were not  
14 described in the Cabinet papers, and at least one occasion the  
15 relevant Cabinet Member did not excuse himself when the  
16 nomination was being considered. Now, this has to be put into  
17 context.

18 Now, the process we've outlined internally, if you  
19 like, within the Ministry culminates in a paper that you could  
20 take to Cabinet.

21 A. Cabinet.

22 Q. So, if we break it down, what's said at the bottom  
23 here in your response, and so the focus is on, if the process  
24 that was used in May 2020, bring up potential conflicts of  
25 interest?

1           A.    In a community as ours so small, we're so conscious of  
2 potential conflicts or appearance of conflicts, there is no way  
3 you could check that, anything.

4           Q.    What you've answered, Honourable Wheatley, all efforts  
5 are made in the selection process to avoid any potential  
6 conflicts in the persons selected for these roles.

7           A.    Exactly.

8           Q.    Now, Mr Smith-Abbott, having reviewed all available  
9 information for the purpose of his Affidavit and, indeed, for  
10 the purpose of his written response, told the Commissioner that  
11 he could find no written evidence that had been, or no evidence  
12 there had been reference to conflicts or potential conflicts  
13 during this exercise.

14          A.    I think I misunderstood part of it.

15                    The conflicts there between whom? I was thinking one  
16 to realize you may be referring to something else.

17          Q.    Well--

18          A.    Conflicts between whom?

19          Q.    One has to break it down.

20                    So, you, as Minister, are in an administration, are  
21 tasked with finding seven people to sit on the Social Security  
22 Board.

23          A.    Conflict is with me?

24          Q.    Well, it doesn't necessarily have to be a conflict  
25 with you, does it, Honourable Wheatley? If, for example--and



1 it's a total hypothetical because I don't know, in fact, whether  
2 the Premier has a brother, but if one of the people being  
3 recommended to you, to put in your Cabinet paper, was the  
4 Premier's brother, that would raise or should raise, I would  
5 suggest to you, in your mind, the question of whether there is a  
6 conflict because what you do is to take the paper to Cabinet.

7 A. Um-hmm.

8 Q. And so that's the question.

9 And what it's directed to is, in that process, and you  
10 considered a number of candidates, you put a number of  
11 people--you then decide to put a number of names in your  
12 paper--what Mr Smith-Abbott couldn't reassure the Commissioner  
13 was that there was evidence that conflicts of interest had been  
14 considered during that May 2020 process.

15 So, my question comes for you: On what basis do you  
16 write in relation to May 2020 that all efforts are made in the  
17 selection process to avoid any potential conflicts and the  
18 persons selected for those roles?

19 A. One of the first things you look at, you referenced  
20 it, any family connections which again--or relatives, we say,  
21 again--and it's kind of loosely defined--we do. There is a  
22 board, I think to add a relative, I recused myself from the  
23 meeting.

24 Now that I think--you have to be very careful in a  
25 small community. We can't just really give persons because they

1 happened to be family. They are the best fit for--or person for  
2 that job.

3           Simply because they're family is about the perception  
4 of conflict that we are talking about, and it's very hard not to  
5 be related in some way or the other to anybody in the BVI.  
6 Very, very difficult. We do recuse ourselves if it figure that  
7 that situation may arise, somebody might say that is a  
8 perception of conflict there because that is the Premier's  
9 brother, hmm. That doesn't look right. We do that. If you go  
10 to minute or submissions, you see persons recuse themselves from  
11 Cabinets. The PS would not know that. He's not in Cabinet.  
12 Because the lack of formal process that gets us to Cabinet, he  
13 would not be aware of what happens in Cabinet. It's something  
14 we need to fix; I agree with that.

15           Q. The point I'm taking you at is, before you even reach  
16 Cabinet, it's about how you, as a Minister, decide what names  
17 are going to go into that Cabinet paper.

18           A. Um-hmm.

19           Q. And it--the criticisms are directed towards those  
20 May 2020 appointments, and the information that the Commissioner  
21 has, and the evidence that he's heard today from  
22 Mr Smith-Abbott, is that there is no evidence that can be  
23 disclosed to the Commissioner to show that there were  
24 considerations of conflicts of interest at that time.

25           A. And I can assure you it was taken into consideration

1 between myself and my colleagues and other persons around.

2 Q. When you say "my colleagues", who do you mean?

3 A. The other Ministers in Cabinet. They were discussed,  
4 and I presented we have a conflict here, okay, what does it look  
5 like--

6 COMMISSIONER HICKINBOTTOM: Sorry, again there is a  
7 misunderstanding here.

8 THE WITNESS: I want clarity.

9 COMMISSIONER HICKINBOTTOM: You're talking about  
10 Cabinet. Mr Rawat isn't. Mr Rawat is talking with your  
11 response. Your response is all efforts are made in the  
12 selection process. This is the process--the informal internal  
13 process within the Ministry of which recommendations are put to  
14 you and then through you to Cabinet.

15 THE WITNESS: I assure you--

16 COMMISSIONER HICKINBOTTOM: What Mr Smith-Abbott said  
17 is there is no evidence that that happened in May 2015.

18 THE WITNESS: I'm not saying--he's aware of. His  
19 evidence.

20 COMMISSIONER HICKINBOTTOM: Evidence. He said there  
21 is no evidence.

22 THE WITNESS: I understand that. What we do have a  
23 process where we look at this informally.

24 COMMISSIONER HICKINBOTTOM: How?

25 THE WITNESS: Because we ask each other.

1           COMMISSIONER HICKINBOTTOM: When you say you're asking  
2 each other, who is the "other"?

3           THE WITNESS: The persons in Social Security, the  
4 persons in Public Service, persons in the Ministry.

5           If, for example, if for some reason the Premier had a  
6 brother, and I tell the Ministry, "I'm putting this person on  
7 the Board," they say, "No, no, that person is the Premier's  
8 brother." They would make sure they point it out to me. This  
9 isn't good.

10           As a matter of fact, by the time we choose nine  
11 persons, there are seven persons here, we have gone through 42  
12 persons to get down to seven, those persons are eliminated  
13 because of the appearance of conflict. But by the time we get  
14 seven, we have gone through several persons sometimes with these  
15 boards as a government we have to submit names, we go to the  
16 community and ask persons. If we have seven persons on a board,  
17 and we have nine Members in Government and ask my colleagues  
18 each of you bring seven names, I have 63 names to choose from,  
19 but I only need seven. But it's informally, informal things  
20 that are done.

21           I agree it needs to be more formalized so more  
22 transparent. If there is a judicial review, you could see  
23 exactly how it was done. I agree with that. We will make more  
24 changes to make it more transparent, more comfortable, that you  
25 can actually see the process to move from the informal into the

1 formal realm.

2 COMMISSIONER HICKINBOTTOM: And again, Mr Rawat,  
3 correct me if I'm wrong, but the evidence of Mr Smith-Abbott was  
4 that, in his view, in respect of conflicts, there is no process.  
5 But--

6 THE WITNESS: No formal process.

7 COMMISSIONER HICKINBOTTOM: No formal process.

8 But, he said, it's most likely because it's a small  
9 and tight community that a conflict would be recognized--

10 THE WITNESS: Easily.

11 COMMISSIONER HICKINBOTTOM: --by one of those people  
12 involved in the process. As I understand it, you agree with  
13 that?

14 THE WITNESS: I agree with that, yes.

15 COMMISSIONER HICKINBOTTOM: Thank you.

16 BY MR RAWAT:

17 Q. Just to take that point a little further, if you go to  
18 3187, please, in the bundle, Honourable Wheatley.

19 A. 3187?

20 Q. Yes.

21 Have you it?

22 A. Given me the page, please?

23 Q. 3187.

24 A. Which one? The first one?

25 Q. Yes. I'm switching you between bundles. I apologize.

1           A.    Okay.

2           Q.    That's the Cabinet Meeting Minute that we looked at a  
3 little while ago.

4                    Now, before I turn to that, what you wrote in your  
5 written response, because the point that was made in the  
6 potential criticism was that at least one or at least one  
7 occasion relevant Cabinet Member did not excuse himself when the  
8 nomination was being considered, and what you wrote was the  
9 reference to a Cabinet Minister not recusing himself is not  
10 particularized. You do not understand that any evidence to  
11 suggest that The Honourable Vincent Wheatley ought to have  
12 excused himself.

13                   Why was it important for it to be particularized? Why  
14 did you need it particularize?

15           A.    To know what he's talking about.

16           Q.    I see.

17                   So, even though you're a small and tight community,  
18 you might not appreciate that someone might have a conflict of  
19 interest even amongst the even smaller community that is the  
20 Cabinet?

21           A.    You see, there is conflict and perception of conflict,  
22 and I wasn't sure what you are talking about. You asked you  
23 earlier to make sure I understand what you're saying, and I did  
24 understand what you are saying earlier--thank you, Commissioner,  
25 for clearing it up as to what it caused a conflict between.

1 Q. All right. Well, if we look at 3187, what we see--and  
2 this is when these appointments were being considered--at 55, we  
3 see that the Minister for Transportation, Works and Utilities  
4 declared he would not participate in discussions on your paper  
5 due to close family ties.

6 A. Um-hmm.

7 Q. And he's given evidence to the Commissioner about the  
8 nature of those ties. Were you aware of them?

9 A. Yes.

10 Q. And that's a connection to Mrs Patsy Lake, isn't it?

11 A. Exactly.

12 Q. And so he recused him from it?

13 A. Which is a normal thing to do.

14 Q. Right.

15 If you turn, please, to 2728 in the same bundle.

16 A. Can I clarify what "recuse" means in this case?

17 Q. Yes.

18 A. Completely leaves the room, is no longer even close to  
19 it. He's outside somewhere. We're inside.

20 Q. Yes. That was, I think--you may have been one of the  
21 Ministers, I think when you first came, we canvassed that with  
22 you.

23 A. Okay.

24 Q. About how that Cabinet--that worked under the Cabinet  
25 Handbook, and you were not the only person that explained

1 involved leaving the room.

2 A. Which page are we on now?

3 Q. 2728, please.

4 A. 2728.

5 Q. Now, this is part of the first page of the transcript  
6 of proceedings of the Commission of Inquiry. It's day 6 of  
7 those proceedings on the 18th of May 2021, which I think was at  
8 a time when we were just holding sessions in private, but this  
9 Transcript was published subsequently.

10 Now, you will see from the front of it that The  
11 Honourable Andrew Fahie gave evidence on that day, and I just  
12 want to take you to a little part of that evidence on the next  
13 page, 2733, because what I put to The Honourable Premier is that  
14 one of the people that the Commissioner has taken evidence from  
15 is Patsy Lake, who Mrs Lake said that she was related to you.

16 Can you explain--

17 MR ROWE: Commissioner, the Minister has moved to his  
18 left. He's out of the picture. Thank you.

19 COMMISSIONER HICKINBOTTOM: It's me, Minister, isn't  
20 it? Is it the Minister or--

21 MR RAWAT: Mr Rowe couldn't see the Minister.

22 THE WITNESS: Sorry.

23 COMMISSIONER HICKINBOTTOM: Don't worry. He's still  
24 here.

25 THE WITNESS: Thank you, sir. Sorry about that.



1 BY MR RAWAT:

2 Q. What--yes, I will read that again.

3 So, on day 6, one of the questions I put to the  
4 Honourable Premier was that one of the people the Commissioner  
5 has taken evidence from is Mrs Patsy Lake. Ms Lake said she is  
6 related to you. Can you explain the family connection, please?  
7 And the answer was "my first cousin". And asked then, on which  
8 side, your mother or your mother's side? And the answer was  
9 given, she's my first cousin on my father's side just like how  
10 the Chairman of the PSC is my first cousin on my mother's side,  
11 and I then clarified that the PSC is the Public Services  
12 Commission.

13 Now, that's a family connection that the Premier  
14 revealed to the Commissioner.

15 A. Um-hmm.

16 Q. If we go back to 3187--we will make sure you're back  
17 in shot so Mr Rowe can see you.

18 A. Sorry.

19 Q. But we see there that that family connection--and you  
20 have spoken more than once, Honourable Wheatley, not just a  
21 conflict of interest but the perception of a conflict of  
22 interest. It doesn't seem that on that day, in making a  
23 decision or being party to a decision to appoint Mrs Patsy Lake  
24 to the Social Security Board and indeed to be its Deputy  
25 Chairman, that the Premier felt the need to recuse himself.

1 Were you aware of that family connection?

2 A. I knew they were cousins. I didn't say I can't really  
3 know how far removed.

4 Q. Given that you are vexed about the perception of  
5 conflicts of interest, did you raise it at the time?

6 A. No, I did not.

7 Q. In hindsight, do you think it's something that should  
8 have been taken into account?

9 A. Probably not because cousins don't--we don't count  
10 cousin as close family like that.

11 Q. Even in a close and tight community?

12 A. You mean, family is more what we look at, brothers,  
13 sisters and so forth. That's close family.

14 Q. And mothers-in-law?

15 A. In this case, he chose that. I didn't ask him to do  
16 that. He chose--he chose to do that.

17 Q. That suggests that a lack of clarity about exactly the  
18 extent of family connections--

19 A. Very much so.

20 Q. --that leads to recusal?

21 A. Very much so.

22 At some point we have it, clarity as to what  
23 constitutes a relative, what constitutes family. You heard  
24 before it's not settled as to this, what exactly is it.

25 Q. If you're taking decisions where these vexed questions

1 arise, why aren't you settling them before you take the  
2 decision?

3 A. It's not my predilection. It's predilection to settle  
4 that? The Member knew that what our relationship was he thought  
5 it best to recuse himself. If I had a cousin there, I'm not  
6 going to recuse myself for a cousin either.

7 In my opinion, I didn't think he had to recuse  
8 himself, but he felt to be on the safe side to do it.

9 Q. But you moved us away from the particularity to a  
10 point of principle, Honourable Wheatley.

11 A. Right.

12 Q. What you said is this was a vexed issue, one that  
13 concerns the Cabinet. There needs to be clarity about what kind  
14 of family relationship would leave--

15 (Overlapping speakers.)

16 A. At least as it's defined, yes.

17 Q. And you have a circumstance where a mother-in-law is  
18 judged by one Cabinet Minister to be sufficient for recusal.

19 A. Um-hmm.

20 Q. And you have in the same meeting, not just another  
21 Cabinet Minister but the Premier judging that first a  
22 relationship of first cousins doesn't justify stepping out of  
23 the room.

24 A. I agree. As we discussed many times, it needs to be  
25 clarified because we have other pieces of legislation that

1 speaks to family members, and it's not properly defined. What  
2 is considered "family"? It is not settled.

3 Q. Why can't you--in all the time since February 2019,  
4 why can't you, as a Cabinet, have come to a settled view about  
5 it?

6 A. I do believe the actual AG's advice--I could be wrong,  
7 but I'm sure we asked for advice to settle this conundrum for us  
8 so we are all very clear, what arbitrary is, was it cousin or  
9 mother-in-law or brother and now third cousin--I agree with you  
10 it needs to be standardized what is "relative", what is  
11 "family". We agree on that.

12 Q. But--

13 A. So there is no inconsistency.

14 Q. But doesn't that raise two issues? The first is that  
15 why do you need the AG's advice? Why can't you reach a view as  
16 a group of Ministers who are all successful politicians in  
17 Government leading Ministries? Why can't you sit down in a room  
18 and agree this is the policy that you will apply amongst  
19 yourselves?

20 A. Because it must be in a broader context. We have the  
21 Ministerial Code that is there to try to define. It's a work in  
22 progress, as we speak, trying to define exactly what that is.

23 It's not as easy as it may seem in a bigger country to  
24 define the family for these purposes because what you will find  
25 every family will be disqualified because of certain things

1 because of connection. It's something we have to tread on very  
2 carefully, so we can't necessarily rush to the conclusion as to  
3 what is family and didn't realize, or because of that decision  
4 your brother can't receive a scholarship.

5 So, it's not as simple a decision as it may appear to  
6 be on the surface, but this is something we're dealing with.  
7 That's--

8 Q. With respect, Honourable Wheatley, the size of the  
9 country doesn't determine whether your mother-in-law is your  
10 mother-in-law.

11 A. True.

12 Q. It doesn't determine whether your first cousin is your  
13 first cousin. And the point is, isn't it, that taking account  
14 of all the points you have made about the issues that may arise,  
15 a group of intelligent men such as you are can sit down and  
16 determine how you, yourselves, in good conscience, would  
17 follow--would approach this question, can't you?

18 A. And we're doing just that.

19 COMMISSIONER HICKINBOTTOM: And it's not catastrophic  
20 for the applicant, that all it means is that if you--if there is  
21 a conflict--

22 THE WITNESS: Yes.

23 COMMISSIONER HICKINBOTTOM: --if an individual  
24 declares it and recuses himself or herself, and as it were, the  
25 show then goes on. That's the point, I think.

1 THE WITNESS: Understood.

2 BY MR RAWAT:

3 Q. And the second point is that, until you have had the  
4 AG's advice, until you have settled the issue, the risk is that  
5 you will have arbitrary decisions, won't you?

6 A. The risk is there.

7 Q. Because one day people will say--

8 A. Risk is there.

9 Q. --mother-in-law, don't like her very much, not  
10 recusing myself. On another day, another person will recuse  
11 himself.

12 A. That is the risk.

13 And don't forget the AG in the room also that gives us  
14 advice on these matters, and I'm sure AG was present that day.

15 Q. But what's not recorded is what advice the AG gave in  
16 relation to conflicts; and, under the Cabinet Handbook, the  
17 person you discussed conflicts with is the Premier.

18 A. Yes.

19 Q. Let me move on, please, to number 3, please, which  
20 takes us to the other issue that we looked at.

21 A. Yes.

22 Q. And that is the appointment of the Director, and I've  
23 said this already when we were taking Mr Smith-Abbott through  
24 his potential criticisms or the ones addressed to him as  
25 Permanent Secretary, but I think it is important to make it

1 clear, and that is that the potential criticisms that have been  
2 raised are not about the appointment of Mrs Scatliffe Boynes  
3 herself. It's about process of appointment, so it could be  
4 anybody being appointed as Acting Director.

5 But if--

6 A. Sorry to interrupt, but that's not quite true. In  
7 this specific instance because, until retirement, Ms Antoinette  
8 came into effect in June, the Deputy Director acts as Director.  
9 That is automatic.

10 Q. Yes, but the potential criticism--the point I'm making  
11 is the potential criticisms are directed to the manner in which  
12 an Acting Director was appointed, and it could be anybody  
13 appointed as Acting Director. But let's go through--

14 A. But not for the--not until June. Until June, the  
15 Deputy Director became the Acting Director.

16 Q. Yes, but if we look at what was said--and there is a  
17 typo in this.

18 A. Okay. I was wondering.

19 Q. Yes.

20 What it should say is that the potential criticism  
21 that was raised was that it appears from the evidence that the  
22 appointment--and this is of Ms Scatliffe Boynes--was not subject  
23 to negative resolution, and it's written as the Legislative  
24 Council because that's, of course, the House of Assembly; and  
25 (b), no steps were taken to ascertain whether Mrs--and that

1 should be Scatliffe Boynes was the fit and proper person.

2 Now, your response is that you don't understand the  
3 criticism.

4 A. Because of the mistake.

5 Q. Because of the mistake.

6 A. Yes.

7 Q. But my question then is: Did you actually read the  
8 documents that are cited there?

9 A. Oh, yes.

10 Q. So, those are the two documents that I've taken you  
11 to, which deal with the appointment of Mrs Scatliffe Boynes--

12 A. Which are under the criticism was it didn't have a  
13 negative resolution in the House.

14 Q. Yes.

15 A. But it did. I have copies here, if you want to see  
16 it.

17 Q. That's helpful to know because that is, in fact, one  
18 of the questions I was going to ask.

19 A. Yes.

20 Might I add there were actually two negative  
21 resolutions: One was unnecessary because, until June, the  
22 Deputy Director naturally act as Director, but we still didn't  
23 have resolution in the House. After June, we had to do a second  
24 one to be acting again, and that was done in the House also. I  
25 have both here with me, if you want copies of them.



1 Q. Well, if I can, it will be helpful if you could leave  
2 that with us.

3 A. I certainly will.

4 Q. The point that is made in the criticism is it's on the  
5 papers that it produced to the COI. And, of course, we have  
6 never seen that negative resolution of the House.

7 COMMISSIONER HICKINBOTTOM: Nor was it sent in with  
8 your response.

9 THE WITNESS: I'm not sure who gave you what  
10 information, but I have them here. If you didn't get a copy of  
11 them, I apologize for that. It must have been an oversight of  
12 somebody's part. I have both negative resolutions appointing  
13 her as Acting Deputy Director.

14 COMMISSIONER HICKINBOTTOM: Thank you.

15 THE WITNESS: In the House of Assembly.

16 BY MR RAWAT:

17 Q. The first part of this--

18 MR HAERI: Sorry, Commissioner, if I may add, it is,  
19 addressed indeed in the response.

20 MR RAWAT: Commissioner, Mr Haeri is right that it is  
21 addressed in the response, but the point is that, the potential  
22 point I was making is that the potential criticism was raised on  
23 documents before the COI, and those documents did not include  
24 that.

25 MR HAERI: If it's helpful, it's on page 5, if that's

1 useful.

2 COMMISSIONER HICKINBOTTOM: Page 5 of what?

3 MR HAERI: Of the response, Commissioner.

4 MR RAWAT: Not paginated.

5 COMMISSIONER HICKINBOTTOM: Yes, the response is not  
6 paginated, Mr Haeri.

7 MR HAERI: It's on the fifth page. It's on the fifth  
8 page.

9 MR RAWAT: I'm not disputing that there is reference  
10 to it in the written response. It's just that the actual  
11 resolution hasn't been produced to the COI.

12 MR HAERI: No, thank you, sorry, Bilal, the  
13 Commissioner said it was not in the response, and that is what I  
14 was responding to.

15 COMMISSIONER HICKINBOTTOM: I'm sorry, Mr Haeri, this  
16 is not a constructive conversation, but the point I made was  
17 that the document at which the Minister has was unhelpfully not  
18 included with his response, as I understand it.

19 BY MR RAWAT:

20 Q. The other parts of this is that no steps were taken to  
21 ascertain whether Ms Scatliffe Boynes was a fit and proper  
22 person, and the key focus words to draw your attention to,  
23 Honourable Wheatley, is "no steps were taken" because what the  
24 Act requires you to do or the Act requires at section 7 is that,  
25 it says the Executive Council but now mean the Cabinet, shall

1 appoint a fit and proper person to be the director of a board on  
2 such terms and conditions as considered appropriate.

3 A. Um-hmm.

4 Q. It then goes on to say that the Minister shall before  
5 referring the matter appointing the Director to the Cabinet  
6 consult with the Board. And the point is that, on the materials  
7 that had been provided to the Commissioner--and that includes,  
8 for example, if we look at the Cabinet paper, the Cabinet paper  
9 doesn't set out the process by which you came to the view that  
10 you were going to propose this person to be the Acting Director,  
11 and that's the point, that there is no evidence of what steps  
12 were taken to ascertain that an individual was a fit and proper  
13 person to be the Director. It could be anybody. It could be  
14 John Smith, it could be Vincent Wheatley. It's just that there  
15 is no evidence on the documents that have been put to the COI to  
16 show what steps you took as Minister, and that's the potential  
17 criticism.

18 A. I think I understand what you're saying.

19 The recommendation comes from the Board suggesting to  
20 me or recommending to me this person is fit and proper to act.

21 Q. Just pause there for a moment, Honourable Wheatley,  
22 because it's important we get this on the Transcript. Your  
23 voice dropped a little bit.

24 A. Oh, sorry.

25 Q. Would you mind repeating that process?

1           A.    I was saying that the recommendation comes to me from  
2 the Board recommending someone to act in the absence of a  
3 director. I have the Resolution here from the Board  
4 recommending her to me and then me to Cabinet to allow her to  
5 act for a particular period of time, while they go through the  
6 process of finding a substantive Director.

7                        But to say that she's not a fit and proper person, I  
8 would find that very hard to digest since she had worked at that  
9 area for 30 years of her life and acted as Director on many,  
10 many occasions. It would call into question a lot of things  
11 about the institution.

12           Q.    Well, the point is, I think you're misunderstanding  
13 the potential criticism, with respect, Honourable Wheatley.

14           A.    I'm sorry.

15           Q.    It's not that Mrs Scatliffe Esprit Boynes is--

16           A.    No.

17           Q.    --not a fit and proper person.

18           A.    The process.

19           Q.    It is about the process that you, as Minister--if it's  
20 a criticism of--potential criticism of anybody, it is a  
21 potential criticism of you as the Minister.

22           A.    Understood, understood.

23           Q.    And that is that no steps were taken to ascertain.  
24 And the point is when one looks at the documentation, one cannot  
25 see the steps that you took.

1           Now, you make the point that you have the Resolution--  
2           (Overlapping speakers.)

3           A.    --the Board.

4           Q.    --the recommendation from the Board.  That is a  
5 document, and I checked this this morning and, in fact, asked a  
6 number of people to also check it.  That's a document that has  
7 never been provided to the COI.  I appreciate that you've  
8 brought a copy of it to you, but it's to give you the context in  
9 which this potential criticism is made.

10          A.    Okay.

11          Q.    There's just--up until we see that letter, I can  
12 properly say to you that there's no evidence that you took any  
13 steps to ascertain that the person that you were recommending  
14 was a fit and proper person.

15          A.    Understood.  I heard it was me.

16          Q.    And what other steps did you take other than just  
17 accepting the recommendation of the Board?

18          A.    At this point in time, yes, that's what I would do.  
19 At this point in time accept their recommendation or to act  
20 until they go through their process of, I guess, interviewing  
21 persons and so forth.

22                As a matter of fact, the Board did interview three  
23 persons before sending me a recommendation to choose her.  There  
24 were three formal interviews.  And after interviews and after  
25 evaluating interviews, she was selected by the Board to be the

1 best choice to act as Director.

2 Q. In fairness to you--and then this is--and we can take  
3 this shortly, I hope, at number four, you have set out that  
4 detail about the interview process.

5 A. Yes.

6 Q. But again, just to make it clear, up until we received  
7 your written response, COI had been given no evidence that there  
8 was an interview process. And what's important is that your  
9 Cabinet paper makes no reference to an interview process.

10 A. Understood.

11 Q. So, if one steps back, Honourable Wheatley, from the  
12 sort of detail a little bit, looking at that Cabinet paper,  
13 would you accept that it would benefit from more detail?

14 A. More detail never hurts, really. More detail would  
15 have been more clarity to the situation.

16 Q. Because what you're required to do is you're sort of  
17 the man in the middle, aren't you? All of these--

18 A. I am.

19 Q. All of these recommendations come to you, you make an  
20 assessment, you decide what names go into the Cabinet paper, and  
21 it goes into--before Cabinet, and Cabinet will make a decision  
22 based on the information you choose to put in front of Cabinet  
23 because it's your paper that you decide--

24 A. I would--

25 Q. --the CVs go in--

1 (Overlapping speakers.)

2 A. I will hasten to say this, you know, being a Member of  
3 Cabinet, I've seen many changes of Cabinet papers over the  
4 months, so yes, and it's always been to bring more clarity to a  
5 Cabinet paper. It's an evolving process. So, we never argue  
6 and say more information would not help bring clarity to the  
7 process. It's something we do every single day.

8 Q. But looking at your paper--

9 A. In hindsight--

10 (Overlapping speakers.)

11 Q. --I don't--that it would benefit from some indication  
12 of what factors you took into account when recommending  
13 individuals, wouldn't it?

14 A. I would say "yes".

15 Q. Now, if I just turn to number five, and I hope that  
16 you agree with me that we've gone through one to four now, I  
17 think, that taking all your evidence in the round, we've covered  
18 the points you want to make.

19 Now, no. 5 is again around the May 2020 appointments,  
20 but it says that Mrs Lake, representing employers; Mr Dereck  
21 Marshall, representing employees; and Aylan Georges representing  
22 employees, were appointed to the Social Security Board, but  
23 there is no indication in the papers that the Minister consulted  
24 on the appointments as required by paragraphs 2 and 3 of the  
25 schedule to the ordinance.

1           And your response is that the Attorney General  
2 reviewed the draft Cabinet papers and discerned no adverse legal  
3 implications.

4           We can take .6 as well now because what's pointed out  
5 that Mrs Lake was then, as we've seen, appointed Deputy  
6 Chairman, but there's no indication that the Minister attempted  
7 to agree her appointment with the leader of the Opposition.  
8 This would appear to be a breach of paragraph 4 of the schedule  
9 to the ordinance. And you then again have said the same thing.  
10 The Attorney General reviewed the draft Cabinet papers and did  
11 not so advise or discern any adverse legal implications.

12           Can I take you to page 475. That's in that other  
13 bundle.

14           A.    475?

15           Q.    Yes.

16           Now that tells us, again--and its obligations placed  
17 not on Cabinet but on you as Minister.

18           A.    Um-hmm.

19           Q.    If you look at--this is the schedule at paragraph 2,  
20 you have to consult when identifying employer representatives,  
21 don't you?

22           A.    Um-hmm.

23           Q.    And looking at paragraph 3, you also have to consult  
24 when you're making--identifying employee--sorry, yeah, employee  
25 representatives, those representing employed persons; yes?



1 A. Yes.

2 Q. And then paragraph 4(1) says that you have to, with  
3 the agreement of the leader of the Opposition, designate who  
4 will be Chairman and Deputy Chairman.

5 A. Yes.

6 Q. But those functions fall on your shoulders as the  
7 Minister.

8 A. That is correct.

9 Q. Now...

10 A. It depends on how you--this says--

11 Q. Well--

12 A. If you go to amended schedule, it changes this whole  
13 thing.

14 Q. Well, let's go to 498, then, and we'll see the amended  
15 schedule, and you can explain to the Commissioner how it amends  
16 it. That's the amendment that's introduced in 2014?

17 A. Um-hmm.

18 Q. And it's--Mr Smith-Abbott explained that the big  
19 change was that it expanded the Board to nine persons.

20 A. Yes, but the major change is the last part of the  
21 sentence, where the Minister, with the approval of the Cabinet.

22 If you go to the first schedule, the Minister doesn't  
23 have to consult with Cabinet. That's where he consults with the  
24 Opposition leader. But in the amended schedule, the first thing  
25 the Minister can do is appoint the Board. So, for clarity,

1 already appointed Board in one, and come down in four to ask the  
2 Opposition leader what he thinks. So clearly I think some  
3 things are--it's not congruent.

4 Q. Well, can I--

5 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt.

6 Are you saying that, in your view, as a result of the  
7 amendment, paragraphs 2, 3, and 4 passed away?

8 THE WITNESS: They are moot, if you ask me because,  
9 one, already says the Minister shall appoint, through the  
10 approval of the Cabinet, these nine persons. It does not say  
11 there in consultation with anybody.

12 COMMISSIONER HICKINBOTTOM: All right.

13 Firstly, that's not what your response says.

14 And secondly, did you obtain the Attorney General's  
15 advice on the construction and the requirements of the schedule  
16 as amended?

17 This is completely new, see, to us. What you've just  
18 said is completely new to us. It's not--

19 (Overlapping speakers.)

20 THE WITNESS: (Unclear.)

21 COMMISSIONER HICKINBOTTOM: All it says here is the  
22 Attorney General reviewed the Cabinet papers and discerned no  
23 adverse legalism implications?

24 THE WITNESS: Are you going to ask me what the  
25 Attorney General looked at. I don't know what she looked at.

1 What I'm saying is clarity to what she might have looked at, and  
2 I would agree with that. The Attorney General sits in Cabinet.  
3 This paper came to Cabinet. She looked at it, or he, whoever it  
4 was, and decided there are no adverse legal effects there.

5 COMMISSIONER HICKINBOTTOM: But in--but you have not  
6 consulted...

7 THE WITNESS: Within Cabinet. That's what Cabinet's  
8 for.

9 COMMISSIONER HICKINBOTTOM: In terms of paragraphs 2,  
10 3--

11 THE WITNESS: Oh, we covered that, sorry.

12 COMMISSIONER HICKINBOTTOM: You hadn't consulted  
13 employers or employees, and you hadn't sought the concurrence of  
14 the leader of the Opposition.

15 THE WITNESS: There was no need to account to  
16 paragraph 1--for four, sorry.

17 (Overlapping speakers.)

18 THE WITNESS: No, two and three are two different  
19 things. The challenge I have--well, all of us have at  
20 paragraph 2--is that we don't have those bodies here, like most  
21 other countries, like the labour unions and the hotel and the  
22 construction unions, to consult, so it ends up again being an  
23 informal kind of process. We ask around various persons about,  
24 Okay, do you think this person would a good representative of  
25 this and so forth and so forth? But we don't have those

1 structures in place here.

2 COMMISSIONER HICKINBOTTOM: Let's just--hang on a  
3 minute. This is--these are statutory provisions.

4 THE WITNESS: Um-hmm.

5 COMMISSIONER HICKINBOTTOM: They're mandatory, shall  
6 be appointed after consultation. The mandate--the consultation  
7 is mandatory. You didn't do it.

8 Now, you say you haven't got to do it because you have  
9 construed the amendment in a particular way. What I want to  
10 know is: Are you relying upon any Attorney General's advice?  
11 We haven't seen any. You haven't, in the response to the  
12 Warning Letter, suggested there was any that you--

13 THE WITNESS: Well, I think, Commissioner, you have to  
14 ask her what all she looked at--or he; I'm not sure.

15 COMMISSIONER HICKINBOTTOM: Well, he looked at--

16 THE WITNESS: I said that--

17 (Overlapping speakers.)

18 COMMISSIONER HICKINBOTTOM: You've said what he looked  
19 at.

20 THE WITNESS: There are no legal adverse--

21 COMMISSIONER HICKINBOTTOM: He reviewed the draft  
22 Cabinet papers. The draft Cabinet papers didn't indicate what  
23 you had and hadn't done.

24 THE WITNESS: Understood. But the Attorney General,  
25 as I said, did not discern no le--no adverse legal implications.

1           COMMISSIONER HICKINBOTTOM: Certainly quite a bold  
2 stance that has been taken simply because of this. Two, three,  
3 and four are mandatory.

4           THE WITNESS: Well, I do explain why two is not the  
5 way you think it would happen because you don't have certain  
6 structures in place and those labour unions to consult,  
7 those--or anything like that.

8           COMMISSIONER HICKINBOTTOM: So, you think the  
9 appointments are still valid.

10          THE WITNESS: Yes.

11          COMMISSIONER HICKINBOTTOM: Good. Okay. Thanks.

12          BY MR RAWAT:

13          Q. Honourable Wheatley, the other aspect of this was that  
14 you've relied--and if we need to, we can look at what the  
15 Cabinet paper is that you're relying on. It's at 3197.

16          A. 3197.

17          Q. I'm sorry, I've got that wrong. It's at 3189.

18                 What--this is the paper that deals with the  
19 appointments and also the appointment of Mrs Lake to the Deputy  
20 Chair.

21          A. Um-hmm.

22          Q. And 3192 is the legal implications section where the  
23 Attorney General has written: "As requested, I've reviewed the  
24 draft Cabinet paper and advised that I have discerned no adverse  
25 legal implications which would arise for the Government if

1 Cabinet were to decide in accordance with the decision sought".

2 And do you still rely on that as part of your  
3 response?

4 A. Yes. That's the answer I have here. I was trying to  
5 bring a little clarity to you asking what she might have looked  
6 at. I don't really know.

7 Q. But she tells us what she has looked at.

8 A. Okay.

9 Q. She tells us all that we--

10 A. Okay.

11 Q. --it may not be the Attorney General herself, but  
12 let's call it the Attorney General's Chambers. But what it said  
13 is, "I have reviewed the draft Cabinet paper".

14 Now, where in your draft Cabinet paper do you say that  
15 you have consulted?

16 COMMISSIONER HICKINBOTTOM: It doesn't say that  
17 because the Minister didn't consult.

18 THE WITNESS: I didn't consult what?

19 COMMISSIONER HICKINBOTTOM: My understanding is you  
20 didn't consult employers--

21 THE WITNESS: Oh, sorry--

22 COMMISSIONER HICKINBOTTOM: You didn't in--

23 THE WITNESS: --in a formal--in a formal--in a formal  
24 sense, in a formal sense, no. We just ask around informally.

25 BY MR RAWAT:

1 Q. So, we just--if I--because again, to give you context,  
2 Mr Smith-Abbott has not pro--discovered any evidence to show  
3 that there was any consultation process either with him--in  
4 relation to the employer representatives or the employee  
5 representatives. There's no evidence about discussions between  
6 you and the leader of the Opposition.

7 A. I understand. I appreciate that.

8 Q. The--now, just--so, whether or not there was  
9 consultation comes down to you and what you say to the  
10 Commissioner.

11 A. Um-hmm.

12 Q. Now, what you say to the Commissioner, to be clear, is  
13 that you are required by the Act to consult with such  
14 associations or employers--

15 A. Um-hmm.

16 Q. --of such bodies, persons or bodies, as appeared to  
17 the Minister, to you, likely to produce representation for  
18 employers generally throughout the Territory.

19 A. Um-hmm.

20 Q. Did you do any of that kind of consultation?

21 A. Informally, yes.

22 Q. Well, who did you consult?

23 A. The business community, businesspersons I know. I  
24 know several businesses.

25 Q. So, you went out and spoke to people you knew.

1           A.    Yeah, exactly, in the business community: Who do you  
2 think will be a good person to represent your interests?

3           Q.    And when you were asked in three, you're required to  
4 do the same thing to find employed persons.

5           A.    Same thing.

6           Q.    You went out and found people you knew who were  
7 employed.

8           A.    No.

9                   Well, everyone is employed, so to speak.

10          Q.    Because if we get back--

11          A.    But yes, same thing.

12          Q.    Well, how did you do it? It's a genuine question.

13          A.    Same way. You meet persons, ask them: Who do you  
14 think would be a good person to represent your interests?

15          Q.    If you go back to 3191.

16          A.    3191.

17          Q.    At six--

18          A.    Um-hum.

19          Q.    --as an employee representative--

20          A.    Um-hum.

21          Q.    --you picked Mr Marshall--

22          A.    Uh-huh.

23          Q.    --who is the owner of a construction concern--

24          A.    Um-hmm.

25          Q.    --and was no longer employed by Metro Construction.



1 So, the rest of CV, to summarise there, is about past  
2 employment. But at the time that you were appointing him, he  
3 was, in fact, an employer.

4 A. Um-hmm.

5 Q. At 7, you picked Ms Aylan Georges to represent  
6 employees.

7 A. Um-hmm.

8 Q. She has extensive experience, but her current role was  
9 as the owner of a business. So again, she was more likely to be  
10 an employer rather than an employee.

11 A. Uh-huh.

12 Q. Doesn't that rather show that your consultation might  
13 have been inadequate if you ended up with employers representing  
14 employees?

15 A. No, I don't think a person must be an employee to  
16 understand employee's needs. I don't support that. I can be an  
17 employer and represent employees because I understand what  
18 employees go through, from an unbiased point of view.

19 Q. And you--

20 A. It's done in the profession where the medical  
21 practitioner must be a medical practitioner. So that's a  
22 career. Employer and employee is not a profession. That's a  
23 state of being.

24 Q. So you--do you--

25 A. And that's where==sorry, and that's where as I was

1 saying earlier I like--I would like things to be a little more  
2 prescriptive about who can fill which role, like you were saying  
3 National Parks Trust. For these kinds of things, it's not very  
4 clear that a person representing employers can only be an  
5 employer, and the person representing employees can only be an  
6 employee. It doesn't say that anywhere.

7 COMMISSIONER HICKINBOTTOM: But, in any event,  
8 whatever discussions you had with whoever you had them with, you  
9 didn't think you had to have any such con--have any  
10 consultation.

11 THE WITNESS: I said there is no formal structure  
12 there. I said I did it informally.

13 COMMISSIONER HICKINBOTTOM: No, no.

14 THE WITNESS: Sorry--

15 COMMISSIONER HICKINBOTTOM: No, I've got the informal  
16 point.

17 THE WITNESS: Okay.

18 COMMISSIONER HICKINBOTTOM: But whatever discussions  
19 you had with these people, you didn't consider that you had any  
20 obligation to consult with anybody under paragraphs 2 and 3.

21 THE WITNESS: I didn't not say--I didn't say that at  
22 all. We have to consult to make sure you're reaching the target  
23 you want to reach. I'm saying it wasn't--there's no formal  
24 structure where the documents to fill out that appears to see  
25 what happened.

1           COMMISSIONER HICKINBOTTOM: Well, I'm afraid I am--I'm  
2 confused. I thought you had said that as a result of the change  
3 to the schedule in 2014, the reference to the approval of the  
4 Cabinet, you didn't have any obligations under two, three, or  
5 four.

6           THE WITNESS: No, sorry. Only 4(1), I meant.

7           COMMISSIONER HICKINBOTTOM: 4(1).

8           THE WITNESS: Sorry about that. 4(1) is the one I  
9 didn't see where that made sense.

10          BY MR RAWAT:

11          Q. I see. So--

12          A. Only 4(1).

13          Q. --on your interpretation of the change brought in in  
14 2014, you didn't see that there was an obligation on you to seek  
15 the concurrence of the leader of the Opposition.

16          A. After the persons are already selected by Cabinet.

17          Q. After the person was already selected?

18          A. Yeah. I didn't see where these were made sense to do.

19          Q. So, you understood this Act to require you to speak to  
20 the leader of the Opposition after Cabinet has made the  
21 decision.

22          A. That's the way I interpreted it.

23          Q. I see. And so--

24                 (Overlapping speakers.)

25          A. (Unclear.)

1 Q. --prior to making recommendations to Cabinet, you did  
2 not speak to the leader of the Opposition.

3 A. I didn't say that. I'm sure we had the discussion.

4 Q. Well--

5 A. I can't say.

6 Q. Well--

7 A. But I'm saying the way I interpret this here is I  
8 don't--there was no need to. I'm sure we are--speak these  
9 things all the time--

10 Q. Well--

11 A. --because they had to go to the House, we had to speak  
12 about it.

13 Q. There's a difference, Honourable Wheatley, between  
14 speaking all of the time and fulfilling your statutory (drop in  
15 audio). And we need to--

16 (Overlapping speakers.)

17 A. If you ask me about formal meeting to discuss this,  
18 the answer is no.

19 Q. Any kind of meeting.

20 A. There was no--of course we would have talk--spoken  
21 about it. Yes, we'd have spoken about it.

22 Q. Well, it's--this is going to be a "yes" or "no"  
23 answer, please. Did you fulfill the obligation that is under  
24 4.1 on you as a Minister?

25 A. In a formal sense, no. And there's no written

1 documentation saying, We had this meeting, here are the minutes  
2 of the meetings. In a formal sense, we would have discussed  
3 that.

4 Q. But your understanding of the statute is that it  
5 doesn't--you say your word was that it's moot because--

6 (Overlapping speakers.)

7 A. (Unclear.)

8 Q. --the amended section 1 means that you would only be  
9 required to do it in any event after Cabinet approved it--

10 A. That--

11 Q. --and then what's the point.

12 A. That's the way I saw the amendment. I think that's  
13 had been amended when the change one should also amended four or  
14 put in the one in the consultation with the Opposition leader,  
15 in one. That's how I see that. I--

16 COMMISSIONER HICKINBOTTOM: But you still accept that  
17 you had your obligations under paragraphs 2 and 3 still?

18 THE WITNESS: Yes.

19 COMMISSIONER HICKINBOTTOM: Okay. I misunderstood  
20 that. That's helpful.

21 THE WITNESS: Thank you.

22 I go a little fast sometimes.

23 MR RAWAT: If I could have a moment to check my  
24 notes--

25 THE WITNESS: Yes.

1 MR RAWAT: And then I've literally got one or two  
2 questions. I appreciate Mr. Kasdan's particular patience with  
3 me.

4 (Pause.)

5 MR RAWAT: Commissioner, I think, having looked at the  
6 notes, I don't think I have any further questions.

7 But, Honourable Wheatley, I hope you feel that we've  
8 taken you fairly through your written response, and I'd like to  
9 thank you for the additional evidence that you've given in  
10 relation to that response, but also coming and giving further  
11 evidence, and thank you also for the way in which you've done  
12 so.

13 COMMISSIONER HICKINBOTTOM: Yes. And again, Minister,  
14 can I thank you for your time, which I know is very valuable,  
15 but also the way in which you've given your evidence, which has  
16 been clear and helpful. Thank you very much.

17 THE WITNESS: I'm sure I have been helpful to you in  
18 identifying some weaknesses that can be hopefully addressed in  
19 short order, and I will leave the documents with the officer.

20 COMMISSIONER HICKINBOTTOM: Leave them--leave anything  
21 exactly there, Minister, and we can deal with them.

22 Mr Rawat?

23 MR RAWAT: That concludes the business of the day, and  
24 we will start again at 10:00 tomorrow.

25 COMMISSIONER HICKINBOTTOM: Good. Okay. Thank you

1 very much.

2 (Witness steps down.)

3 (End at 5:01 p.m.)

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in cursive script, reading "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN