

Chapter 2: The Scope of the Commission of Inquiry		
Document	Report Reference	Page
Attorney General's Written Submissions on Paragraph 1 of the Terms of Reference (6 October 2021)	Paragraph 2.5 footnote 2	1 – 3
Attorney General's Written Submissions in Respect of the Definition of Corruption, Abuse of Office or Other Serious Dishonesty (7 June 2021)	Paragraph 2.15 footnote 12	4 – 14
Silk Legal's Written Submissions in Respect to Definitions (12 July 2021)	Paragraph 2.15 footnote 12	15 – 24
Written Submissions: Letter Withers BVI to COI (8 September 2021)	Paragraph 2.19 footnote 20	25 – 26
Hon Marlon Penn Position Statement (17 May 2021)	Paragraph 2.28 footnote 22	See Chapter 1
Governor Position Statement (undated)	Paragraph 2.29 footnote 23	See Chapter 1
Elected Ministers Position Statement (1 June 2021)	Paragraph 2.30 footnote 25	See Chapter 1
Cabinet Memorandum No 173/2021: Bill entitled Integrity in Public Life Act 2021 (16 March 2021)	Paragraph 2.30 footnote 26	27 – 43

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

SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL
ON THE APPROACH TO PARA 1 OF THE TERMS OF
REFERENCE AND THE STANDARD OF PROOF

INTRODUCTION

1. By a letter dated 27 September 2021, from Mr King, solicitor to the Commission of Inquiry, to the Attorney General, the Commissioner requested written submissions on the proper approach to establishing whether there is information within paragraph 1 of the Commissioner's Terms of Reference. Paragraph 1 requires him:

"...to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years".

2. In respect of the phrase "*corruption, abuse of office or other serious dishonesty*", the Attorney General relies upon the written submissions already provided to the Commission, dated 7 June 2021 on the 'Definition of Corruption, Abuse of Office or Other Serious Dishonesty' ("**Definition Submissions**").
3. The submissions which follow address the question posed by the Commission in respect of the approach to establishing whether there is such information, whether any standard of proof applies and if so, what that standard is.

THE PROPER APPROACH AND STANDARD OF PROOF

4. The approach to the evidence is a matter for the Commissioner. As the Commissioner has often emphasised, it is for him to consider questions such as relevance.
5. All three forms of relevant conduct "*corruption, abuse of office or other serious dishonesty*" involve, at the very least, an intentional and grave departure from the standards of behaviour to be expected of someone in public office and the conduct involved in the first two must have been of a kind recognisable as criminal conduct (Definition Submissions, in particular at paragraph 37).

6. However, it is recognised that paragraph 1 only requires the Commissioner to establish “whether there is information” that such conduct “*may have taken place*”. The Commissioner’s terms of reference differ from those of some public inquiries such as the Al-Sweady Inquiry, in which Sir Thayne Forbes considered that he was required to make “*appropriate findings of fact*” about specific allegations: see Report of the Al-Sweady Inquiry, Vol 1 (HC 818-1, HMSO 2014, pp 5-6, paragraphs 1.9 and 1.10-1.14 & 1.17-1.18 **[AB/8-9]** and p.34 paragraph 1.160 **[AB/11]**).
7. However, on the question whether information exists, it is submitted that the Commissioner must indeed apply some standard of proof. Paragraph 1 does not specify whether the Commissioner should be *sure* that information exists or may reach conclusions as to its existence on the balance of *probabilities*. The same may be said of any background or peripheral facts about which the Commissioner feels it would be useful to reach conclusions.
8. Therefore, as to that standard, the Attorney-General, makes the following submissions:
 - 8.1. In context, the term “*information*” means evidence of facts.
 - 8.2. In finding that such facts exist, it may be appropriate for the Commissioner to apply the “*flexible and variable*” approach to the standard of proof, used in previous English Inquiries (see the discussion by Sir Thayne Forbes in the Report of the Al-Sweady Inquiry, Vol 1 (HC 818-1, HMSO 2014, pp 35-36, paragraphs 1.165 to 1.171 **[AB/11-12]**). In this regard, a Commission of Inquiry has a flexibility not afforded to a Court applying the civil standard of proof, which cannot apply a variable or heightened standard of proof in the face of grave allegations (see the observations of Lord Hoffmann in *In re B (Children)* [2008] UKHL 35; [2009] 1 A.C. 11, Lord Hoffmann p.20B-C [12] and p.20H-p21A [13] **[AB/23-24]**).
 - 8.3. Using the flexible and variable approach, the Commissioner may simply indicate the extent to which he is satisfied as to any matter, by use of language in respect of individual issues indicating whether he is “*sure*” (indicating application of the criminal standard of proof) or finds in respect of a particular proposition that “*it is likely*” or the Commissioner “*is satisfied*” (indicating application of the civil standard).
 - 8.4. Further it is submitted that, as a matter of common sense, the Commissioner will wish to have regard to inherent probabilities (see the cases in the ‘second category’ discussed by Lord Hoffmann in *In re B (Children)* [2008] UKHL 35; [2009] 1 A.C. 11, Lord Hoffmann pp 19D-20A [10]-[11] **[AB/22-23]**) and Lord Hoffman’s conclusions at p.21C-E [21] **[AB/24]**). In general, the more inherently unlikely the particular fact, the more cogent the evidence will need to be for any positive findings to be made about it (Report of the Al-Sweady Inquiry, Vol 1 (HC 818-1, HMSO 2014, pp 36-37, paragraph 1.172 **[AB/12-13]**).

9. Thereafter, the facts the Commissioner finds to exist need only lead to the conclusion that relevant behaviour *may* have taken place. It is submitted the Commissioner, on the facts he has found to exist, must conclude that it is at least a *real possibility* that the relevant Paragraph 1 conduct has taken place.

6.10.2021

The Rt Hon Sir GEOFFREY COX QC

EDWARD RISSO-GILL

Counsel for the Attorney General

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

SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL
IN RESPECT OF THE DEFINITION OF CORRUPTION, ABUSE
OF OFFICE OR OTHER SERIOUS DISHONESTY

1. In a letter dated 19 May 2021 from Mr King, solicitor to the Commission of Inquiry, to the Attorney General, Mr King referred to the COI's terms of reference as including at paragraph 1, requiring the Commissioner "*to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years*".
2. Mr King asked for submissions on the definition of the following terms "*corruption*" "*abuse of office*" and "*serious dishonesty*".

PRELIMINARY OBSERVATIONS

3. Statements made with respect to the terms of reference suggest that all three terms, in this context, should be construed as referring to criminality. The Commissioner's Opening Statement of 22 January 2021 included clarification of paragraph 1 of his terms of reference, to the effect that it was not his role to ascertain guilt of crimes or serious dishonesty, but made it clear that if he found "*some possible substance*" he could make recommendations "*for example in terms of whether criminal proceedings might be brought against any individuals*".
4. We will deal with each of the terms in turn.

CORRUPTION

Summary of Submissions

5. There are several offences of corruption provided for in the Virgin Islands Criminal Code ("**the Criminal Code**") (**tab 1**). In many instances those provisions were amendments made to implement the UN Convention Against Corruption ("**the UN Convention**") (**tab 3**), ratification of which was extended to the Virgin Islands on 12 October 2006, by Depositary Notification C.N.848.2006 TREATIES 35 of the United Kingdom of Great Britain and Northern Ireland. A common thread through many of the criminal offences of corruption, is that they involve a public servant breaching

the trust conferred upon them or departing from the standards the public are entitled to expect of them, including good faith, impartiality and trustworthiness, combined with the receipt of some gift or advantage or “*gratification*”.

6. The law of corruption has also, historically, centred upon various offences of bribery. Again, in essence, bribery consists of improper actions combined with some form of benefit, advantage, or “*gratification*”. The common law offence of bribery is, in the Virgin Islands, supplemented by specific provisions of the Criminal Code.
7. However, it is submitted that another of the principal means by which the common law deals with corruption in respect of public servants is by way of the criminal offence of misconduct in a public office, a common law offence which applies in the Virgin Islands.
8. Corruption for the purposes of the COI will encompass activity covered by all these offences, including the offences of corruption provided for in the Virgin Islands.

Corruption in English Law

9. In England the principal statutory provisions in respect of corruption used to be contained in the Public Bodies Corrupt Practices Act 1889 (“**the 1889 Act**”), the Prevention of Corruption Act 1906 (“**the 1906 Act**”) and the Prevention of Corruption Act 1916 (“**the 1916 Act**”), collectively the Prevention of Corruption Acts (now repealed by the Bribery Act 2010 “**the 2010 Act**”) (**tab 5**): see Law Commission (2008) Reforming Bribery, Law Com No.313, HC 928, London TSO p.5/2.2. The 1889 and 1906 Acts used the term “*corruptly*”, without defining it: see Law Com No.313, pp 6-8/2.9 & 2.14 (**tab 6**). The 1916 Act provided for a presumption of corruption: see Law Com No.313, p.9/2.18.
10. It is submitted that the following points can be derived from the English authorities, principally those dealing with the Prevention of Corruption Acts, in respect of the meaning of corruption and the words “*corrupt/corruptly*” for the purposes of English criminal law.
 - 10.1. “*Corrupt*” is “*a simple English adjective*” which means “*purposefully doing an act which the law forbids as tending to corrupt*” in the sense anticipated by the offence in question: see *Godden-Wood* [2001] EWCA Crim 1586 (**tab 10**); [2001] Criminal Law Review 810, (in the context of a charge of conspiracy to corrupt) per Mance LJ at [1], [3], [49] (citing the judge’s direction) and [55] (approving it). In other words, if the offence involved bribery of voters, the act must tend to corrupt voters.
 - 10.2. “*Corruptly*” within the meaning of the Prevention of Corruption Acts did not mean “*dishonestly*”: see *R v Cooper & Slade* (1858) 6 HL Cas 746 (**tab 9**), Willes J at p. 773, as noted in Law Com No.313, p.11/2.33.

- 10.3. The tendency to corrupt involves suborning the target of a gift or advantage to “*disregard his duty*”: see *Kensington International Ltd v Republic of Congo (formerly People’s Republic of Congo) (Vitol Services Ltd, Third Party)* [2008] 1 W.L.R. 1144 (**tab 12**), per Moore Bick LJ at [61], cited in *R v J* [2014] 1 W.L.R. 1857 (**tab 11**), per Lord Thomas CJ, p.1865H to 1866A [33]. So, for example, corruption in the 1889 Act included the receipt of money for a past favour and the corruption lay not in showing the favour, but in accepting a reward for doing so. Thus “*for practical purposes... a councillor must not accept a reward for having done something in the course of his public duty*” and the offence caught more than an ordinary bribe, extending to accepting rewards for past favours without any agreement beforehand: see *R v Parker* [1986] 82 2 Cr. App. R. 69 (**tab 14**) per Purchas LJ at pp 72 to 73, approving the directions given the trial judge.

Bribery

11. Bribery and corruption have historically been synonymous. The Law Commission 2008 report which underlay the 2010 Act, was a continuation of a Law Commission “*project on corruption*”: see Law Com No.313, p.12/2.35.
12. Russell on Crime defines bribery as: “*the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity*”: see Russell on Crime 12th ed. (1964) p.381, cited in Law Com No.313, p.5/2.4.
13. The mental element consists in the payer of the bribe (“P”) intending to influence the behaviour of the recipient (“R”) and incline him or her to act “*contrary to the known rules of honesty and integrity*”: see Law Com No.313, p.6/2.8.
14. The 2008 recommendations of the Law Commission and the 2010 Act which emerged from them are based on the concept of “*impropriety*” or “*improper conduct*” and a departure from expected standards of good faith, or impartiality or betrayal of a position of trust on the part of the target of the bribe.
- 14.1. The 2008 recommendations were for two general offences of bribery (the first being concerned with the provider of the advantage “P” the second with the recipient “R”): see Law Com No.313, p.15/3.2.
- 14.2. The essence of the second was that it involved requesting, agreeing to receive, or accepting an advantage, which could come in the form of a reward for improper conduct: see Law Com No.313, p.30/3.79, by reference to clause 1(4) of the draft Bill, (Law Com No.313 p.160). The recommendation was that the offence “*should not be regarded as having taken*

place unless and until R accepts the money as a reward for the impropriety": see Law Com No.313, p.31/3.83 (our emphasis).

- 14.3. The recommendations in respect of wrongfulness in respect of the offence committed by R, by reference to clauses 3(3) to 3(7) of the draft Bill (Law Com No.313 pp 161-162), was as follows: *"the request or agreement to receive or acceptance of the advantage must in itself breach an expectation of the relevant kind, or involve a betrayal of a position of trust. In such cases (usually where R occupies a position of trust) there is no need for a breach or betrayal of the relevant kind separate from the request for, agreement to receive, or acceptance of the advantage"*: see Law Com No.313, p.17/3.9. Further in respect of the *"expectation of propriety* (Clause 1(3)(b) of the draft Bill, Law Com No.313 p.160): *"R must fulfil the basic element in breach of an expectation that he or she would have behaved with propriety. The "expectation" in question is that which would be had, in the circumstances, by a person of moral integrity"*: see Law Com No.313, p.17/3.10.
- 14.4. The Law Commission decided to centre the reformed offence of bribery around *"performing a function or activity "improperly", with respect to the advantage given or offered"*: see Law Com No.313, p.37/3.110 (our emphasis). The 2010 Act adopted the Law Commission's approach, specifying what was involved in a corrupt or improper breach of duty by reference to particular functions or activities, expected to be performed in a particular way, the breach at the heart of the offence being a failure to perform the function or activity in that way, combined with the receipt, promise, request or acceptance of an advantage: see clauses 1, 2, 3(1), (3)-(5) and (6) of the Draft Bill (Law Com No.313 pp 160-162) and sections 1, 2, and sub-sections 3(2)(a), (3)-(5) and 4(1) of the 2010 Act.
- 14.4.1. The first 'expectation' used was that of good faith: see Law Com No.313, p.43/3.144, clauses 1, 2, 3(3) of the draft Bill (Law Com No.313 p.161) and sub-section 3(3) of the 2010 Act.
- 14.4.2. The next was an expectation of impartiality: see Law Com No.313, p.46/3.153 and clause 3(4) of the draft Bill (Law Com No.313 p.162) and sub-section 3(4) of the 2010 Act.
- 14.4.3. Finally, the Law Commission employed the concept of a *"position of trust"* noting that they did not have in mind the legal concept of trust, but *"something that may be found to exist on particular facts, like the "position in which [R] is expected to safeguard, or not to act against, the financial interests of another person"*, by reference to s.4 of the Fraud Act 2006 and that *"A betrayal of a position of trust in this broader sense, is what is capable of amounting to improper conduct for the purposes of bribery"*: see Law Com No.313, p.46/3.156, clause 3(5) of the draft Bill (Law Com No.313 p.162) and sub-section 3(5) of the 2010 Act.

- 14.5. There was strong support for the view that it should be immaterial whether R was aware that the relevant act he or she performed was improper: see Law Com No.313, p.53/3.190. The 2010 Act expressly provides that it does not “*matter whether R knows or believes that the performance of the function or activity is improper*”: see sub-section 2(7).
- 14.6. The question arose whether Public Servants were in a special position, justifying a discrete offence, for which the law in force in 2008 provided (in the 1916 Act): see Law Com No.313, p.57/3.212. In the end it was thought sufficient to provide for the situation of an advantage in circumstances involving breach of a position of trust and to rely on the continued existence of the offence of misconduct in a public office, which it was thought could be applied to the wrongful acceptance of advantages, in breach of a contract involving public office, whether or not there was a betrayal of trust, breach of an expectation of good faith or impartiality: see Law Com No.313, p.58/3.217.

Misconduct in a Public Office

15. The elements of this offence have now been settled: see *Attorney-General's Reference (No.3 of 2003)* [2005] Q.B. 73 (**tab 7**), cited at Law Com No.313, p.179/Appendix C.3 (1)-(4)); see also *R v Norman* [2016] EWCA Crim 1564 (**tab 13**) and *R v Chapman* [2015] EWCA [2015] EWCA Crim 539; [2015] QB 883 (**tab 8**) Lord Thomas CJ at p.891A [17]). They are as follows:
 - 15.1. a public officer acting as such (*AG's Ref (No.3 of 2003)* Pill LJ, p.90D [54]);
 - 15.2. wilfully neglecting to perform his or her duty and/or wilfully misconducting himself or herself (*AG's Ref (No.3 of 2003)* Pill LJ, p.90E [55]);
 - 15.3. to such a degree as to amount to abuse of the public's trust in the office holder (*AG's Ref (No.3 of 2003)* Pill LJ, p.90F-G [56]);
 - 15.4. without reasonable excuse or justification (*AG's Ref (No.3 of 2003)* Pill LJ, p.91E-F [60]).
16. The mental element, wilfulness, means the defendant's acts must be deliberate, rather than accidental, and the public officer must know, intend or be subjectively reckless as regards the existence of the duty and the conduct neglecting it: see Law Com No.313, p.179/Appendix C.4, it is necessary that the Office Holder at least (see *Attorney-General's Reference (No.3 of 2003)*, Headnote at p.73G-H) (**tab 7**):
 - 16.1. was aware of the duty to act in a particular way or was subjectively reckless, including awareness of or reckless indifference as to the existence of that duty: see *AG's Ref (No.3 of 2003)* per Pill LJ, p.83H [30];

- 16.2. was subjectively reckless (in the sense referred to above) as to his conduct, both as to its legality and its consequences: see *AG's Ref (No.3 of 2003)* per Pill LJ, p.83H [30].
17. Foresight of the consequences of the misconduct is unnecessary: see Law Com No.313, p.179/Appendix C.4.
18. However, in respect of the third element of the offence, "*the threshold of abuse of trust is a high one, such that a mistake, however serious, will be insufficient*" see Law Com No.313, p.179/Appendix C.4. It involves conduct falling "*so far below acceptable standards as to amount to an abuse of the public's trust in the office holder*" so that "*a mistake even a serious one will not suffice*": see *AG's Ref (No.3 of 2003)* Pill LJ, p.90F-G [56]. This can be broken down as follows:
- 18.1. The misconduct must be worthy of condemnation and punishment and must be judged as having the effect of harming the public interest: see *Chapman* per Lord Thomas CJ, p.895B-D, [34] (cited in *Norman* p.9 [44]).
- 18.2. What is required is more than a breach of duty, neglect of duty or breach of trust: see *Chapman* per Lord Thomas CJ, p.894 E-F [31].
- 18.3. As to the harm to the public interest, it was necessary to focus on whether the necessary threshold, of conduct so serious that it amounted to an abuse of the public's trust in the office holder, had been reached: see *Chapman* per Lord Thomas CJ, p.893F-G [32]. There are two elements to this.
- 18.3.1. First, it is necessary to emphasise that the threshold is a high one: see *Chapman*, per Lord Thomas CJ, p.895F [35].
- 18.3.2. Secondly, the behaviour of the defendant, considered objectively, must have the effect of harming the public interest: see *Chapman* per Lord Thomas CJ, p.895C-D [34] (cited in *Norman* p.9 [44]). Without such a finding, even though there may have been a breach or indeed an abuse of trust by the office holder, there would be no criminal offence: see *Chapman* per Lord Thomas CJ, p.895G-H [36] (cited in *Norman* p.9 [44]).
19. In one sense, misconduct in a public office was observed by the Law Commission to be narrower than the scope of the recommendations in respect of bribery, in that it applied only to the public sector. On the other hand, the misconduct in question could be broader in scope: see Law Com No.313, p.180/Appendix C.5.

20. Corruption probably also includes the sale of public offices. It is an offence at common law to buy or sell offices of a public nature: see Law Com No.313, p.180/Appendix C.8.
21. Electoral bribery is another widely recognised form of corruption: see Law Com No.313, p.182/Appendix C.16.
22. Finally, the Law Commission in 2008 considered how the new general definition of bribery under the 2010 Act might apply to three types of payment: (1) facilitation payments; (2) commission payments; and (3) corporate hospitality: see Law Com No.313, p.190/Appendix D.1. It is submitted that such areas activity would only fall within the scope of 'Corruption' for current purposes insofar as they are covered by provisions of the criminal law of the Virgin Islands.

Offences of Corruption in the Virgin Islands

23. It is not possible in this short note to describe all the offences provided for in respect of corruption in the Virgin Islands.
24. We therefore attempt only a brief summary of those to be found in Part IV of the Criminal Code, looking more closely at one example, a previous iteration of which has been the subject of appellate consideration both here and subsequently before the Judicial Committee of the Privy Council.
25. Part IV of the Criminal Code provides for Offences Against the Administration of the Lawful Authority. They include the following:
 - 25.1. Offences involving bribery of public officials, which principally concern the accepting, obtaining, giving or offering "*gratification*" for doing or abstaining from doing acts, or altering the manner of performance of acts in the "*execution of*" the public official's "*functions or duties*" (sections 80 and 81), inserted by amendment in 2006 to implement Article 15 of the UN Convention: see Virgin Islands Criminal Code (Amendment) Act 2006 (Act No.8 of 2006) (**tab 2**);
 - 25.2. An offence involving a public official using his office for a gratification for himself (section 83), inserted by amendment in 2006 to implement Article 19 of the UN Convention;
 - 25.3. Offences involving bribery of a public official to influence the decision of a public body, focusing on the giving or agreeing to give or offer a gratification for taking particular steps (voting, delaying, hindering) in respect of the decisions or performance of a public body of which the public official is a member, director or employee (section 84), inserted by amendment in 2006 to implement Article 15 of the UN Convention;

- 25.4. Offences of trading in influence, consisting of the provision or acceptance of gratification to cause a public official or other person to use their influence to obtain benefits from public bodies (section 87), inserted by amendment in 2006 to implement Article 15 of the UN Convention;
- 25.5. Particular offences in respect of bribery for procuring contracts (section 89), inserted by amendment in 2006 to implement Article 15 of the UN Convention;
- 25.6. An offence concerning conflicts of interests, where public officials vote or take part in the proceedings of a public body in respect of undertakings in which the public official or his or her relative or associate has an interest (section 90), inserted by amendment in 2006 to implement Articles 5.3 and 7.4 of the UN Convention;
- 25.7. The receiving of gifts by a public official for a corrupt purpose, where a public official solicits, accepts or obtains gratification from a person concerned in a proceeding or business transacted by him or her, or having “*a connection with his or her functions*” or those of the public official’s subordinates or superior (section 92), inserted by amendment in 2006 to implement Articles 5.3 and 7.4 of the UN Convention;
- 25.8. Fraud and breach of trust by public officials (section 93), inserted by amendment in 2006 to implement Articles 5.3 and 7.4 of the UN Convention;
- 25.9. Illicit enrichment of a public official, involving a presumption that where a public official fails to give a satisfactory explanation of a significant increase in assets not explicable by the public official’s lawful income, the increase is deemed to be illicit enrichment (section 94), included by amendment in 2006 to implement Article 20 of the UN Convention;
- 25.10. An offence consisting of a public official charged with judicial or administrative duties respecting property of a special character, or a special duty “*respecting the carrying on of any manufacture, trade or business of a special character*” who having “*acquired or holding, directly or indirectly, a private interest in such property, manufacture, trade or business*” proceeds to discharge duties with respect to that “*property, manufacture, trade, or business*” (section 96), as amended in 2006.
- 25.11. Abuse of Office (section 98), as amended in 2006, to which we return below.
26. The majority of these offences involve a “*gratification*”, which is defined in sub-section 79(1)(a) as follows:
- “gratification (a) means a gift, reward, discount, premium or other pecuniary or non-pecuniary advantage, other than lawful remuneration; and
(b) includes—

- (i) a loan, fee or commission consisting of money or of any valuable security or of other property or interest in property of any description;
- (ii) the offer of an office, employment or other contract;
- (iii) the payment, release or discharge of a loan, obligation or other liability;
- (iv) the payment of inadequate consideration for property, an interest in property, goods or services;
- (v) an overpayment for property, an interest in property, goods or services; and (vi) the offer or promise, whether conditional or unconditional, of anything mentioned in paragraph (a) or subparagraphs (i) to (v)".

27. Section 96 of the Criminal Code, which provides for an offence where a public officer exercises powers in respect of a matter in which he has a private interest, has been considered by the appellate courts. The object is plainly to penalise public servants who discharge public duties when subject to a private interest of their own in relation to the subject matter of their public duties: see *Wheatley v The Commissioner of Police of the British Virgin Islands* [2006] UKPC 24 (**tab 15**), per Lord Bingham of Cornhill at [5], dealing with the previous iteration of section 96 (section 82 of the old Criminal Code).
28. It is apparent, that as with the law of corruption in England, which we have traced above, the law of the Virgin Islands contains the common thread of, in the words of the UN Convention Against Corruption an "*undue advantage*" (see for example Chapter III, Articles 15, 16, 18, 19 and 21), referred to here as a "*gratification*".
29. It is respectfully submitted that corruption, for the purposes of the COI, would encompass the criminal offences described here.
30. Further, Public Officers in the Virgin Islands are subject to orders and regulations, notably the P the General Orders for the Public Service of the British Virgin Islands 1971 (revised 1982), ("**the General Orders**") (**tab 4**), whose effect, in the context of conflicts of interest has been referred to by the Judicial Committee of the Privy Council.
 - 30.1. They forbid the officer from engaging in private activity which might conflict with his official duties and responsibilities, or which might place him or give the appearance of placing him in a position to use his official position for his private benefit: see as described in *Wheatley v The Commissioner of Police of the British Virgin Islands* [2006] UKPC 24 (**tab 15**), per Lord Bingham of Cornhill at [2] and Order 36(c).
 - 30.2. They oblige an officer who has formed the opinion that any private activity in which he is engaged or in which he had a private pecuniary interest, was likely to offend against this prohibition in Order 3.6(c) of the General Orders, to declare it fully to the Governor and either discontinue the activity or divest himself of the interest or undertake not to pursue the activity save on conditions laid down by the Governor: see Order 3.6 (d) as described in *Wheatley v The Commissioner of Police of the British Virgin Islands* [2006] UKPC 24, per Lord Bingham of Cornhill at [2].

- 30.3. The General Orders also require the disclosure of interests within 30 days after appointment (Order 3.6(e)) prohibit work on public boards without Government sanction (Order 3.8(1)) and prohibit the receipt of valuable presents (Order 3.18).
31. Breach of the General Orders is dealt with by disciplinary action pursuant to Order 1.6 and 3.27. We submit that such breaches would only come within the definition of corruption for the purposes of the COI, if they also gave rise to a criminal offence, of the sort we have summarised above.

SERIOUS DISHONESTY

32. The notion of dishonesty has been clearly and authoritatively defined in the British Virgin Islands. The test for dishonesty in the criminal law of the Virgin Islands is that set out in *R v Ghosh* [1982] QB 1053. It involves assessing whether the behaviour of a defendant was dishonest according to the standard of reasonable and honest persons and then whether the defendant realized that what was being done was, by those standards, dishonest: see *Wheatley v The Commissioner of Police of the British Virgin Islands* Magisterial Criminals Appeals 1 & 2 of 2002 (12 January 2004) (**tab 16**) per Saunders JA p.15 at [40], upheld by the Judicial Committee of the Privy Council [2006] UKPC 24, per Lord Bingham of Cornhill at [9] and [11].
33. In our submission, 'serious' dishonesty in the context of the COI, should be construed as meaning criminal dishonesty.

ABUSE OF OFFICE

34. It is submitted that this will plainly encompass the offence of misconduct in a public office.
35. Section 98 of the Criminal Code also provides as follows:
- “(1) A public official who, in abuse of the authority of his or her office, does or directs to be done any arbitrary act prejudicial to the rights of another, commits an offence....
(2) If the act referred to in subsection (1) is done or directed to be done for the purposes of gain, the public official commits an offence....”
36. Accordingly, section 98 may operate to cover abuse of office which does not qualify as misconduct in a public office (for example for the reasons given in sub-paragraph 18.3.2 above).

CONCLUSIONS

37. All three forms of the relevant conduct, *corruption, abuse of office or other serious dishonesty* strongly suggest at least the need for an intentional and grave departure from the standards of behaviour to be expected of someone in public office, worthy of condemnation and punishment and (whether an express ingredient or not) calculated to injure the public interest by undermining public

trust in that office. The use of the phrase, "*or other serious dishonesty*" may well imply that each of the previous two forms of conduct were also envisaged to involve serious dishonesty but even if not, the conduct must have been of a kind to be recognisable as *criminal* conduct in one of the ways set out above.

7 June 2021

The Rt Hon Sir GEOFFREY COX QC

HUSSEIN HAERI



Richard G. Rowe & Daniel Fligelstone Davies

July 12th, 2021

Mr. Steven Chandler
Secretary
BVI Commission of Inquiry
Room RB 1.11, 22 Whitehall
London SW1A 2EG
United Kingdom

Dear Mr. Chandler:

Dear Mr. Chandler:

Re: Submissions on the terms “Corruption”, “Abuse of Office” and “Serious Dishonesty”

1. Further to the request by the Commission of Inquiry (“COI”) please see below for our submissions for the definitions of “Corruption”, “Abuse of Office” and “Serious Dishonesty”.

Factual Background

2. The request for submissions on this point was arose out of the terms of reference, and specifically the term: *“to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years”*. It is of little doubt that the report will contain recommendations for charges to be laid, if there are findings that corruption, abuse of office or serious dishonesty within the context of BVI law has taken place. Therefore, the terms aforesaid must be defined with reference to criminality.

The Issues

3. The issues, which will be dealt with in turn are as follows:
 - a. What is meant by “corruption” within the context of BVI law?
 - b. What is meant by “abuse of office” within the context of BVI law?
 - c. What is meant by “serious dishonesty” within the context of BVI law?

30 DeCastro Street, Road Town, Tortola, British Virgin Islands
(284) 340 9569

w: www.lawbvi.com e: info@lawbvi.com



Richard G. Rowe & Daniel Fligelstone Davies

The Law and Discussion

4. We concur with the submissions of the learned Sir Geoffery Cox, we add however the following.
5. From the outset, it is perhaps prudent to point out that corruption, abuse of office and serious dishonesty are not dissimilar to the dark triad of psychology, in that like psychopathy, narcissism and Machiavellian personality types, they all have overlapping traits/elements. For example, it is hard to imagine many instances of corruption and abuse of office which do not also include an element of serious dishonesty. Equally, many acts of corruption include elements of abuse of office.
6. Before getting to the substance of the matter, a bit of information concerning the BVI's legal system with respect to criminal law, along with tidbits that relate to the mentioned terms above.
7. The starting point is to be found in the Eastern Caribbean Supreme Court Act Cap. 80 section 10 which provides:
"The jurisdiction of the High Court in all criminal proceedings shall be exercised in accordance with the Criminal Procedure Act and any other law in force, in the Virgin Islands".
Therefore, any that corruption, abuse of office or serious dishonesty must be defined along the lines of offences contained in legislation in the BVI as opposed to England.
8. In relation to common law offences, if there is a provision in the Criminal Code which sufficiently covers said offence, the common law offence is deemed to be abolished:
"360 (1) Where an act or omission constitutes an offence under this Code and also under common law, proceedings in respect of that offence shall be brought under the relevant provision of this Code and not under common law, and the common law



Richard G. Rowe & Daniel Fligelstone Davies

offence in such case shall in respect of its application to the Territory, be deemed to have been abolished”

9. The general framework for offences relating corruption, abuse of office and serious dishonesty can be found in three pieces of legislation, firstly and primarily there is the Criminal Code, secondly, the Register of Interests Act, thirdly, the Internal Audit Act 2011.

10. Although this point does not fall strictly within the ambit of the issues, it should be noted that the United Kingdom extended the United Nations Convention Against Corruption to the BVI in 2006. It is therefore open to the COI to assess whether or not the systems in place to combat corruption are at the standard required by the mentioned convention. Additionally, and with respect to unexplained wealth orders, the Criminal Code provides a means of investigating assets of public officials which are suspected to have been obtained illicitly. This is to be found at section 94 of the said code and it reads:

“94 (1) The Commissioner of Police, or a member of the Police Force of or above the rank of Inspector authorised by the Commissioner of Police in writing, may, subject to an order issued on an ex parte application to the High Court, investigate a public official where there are reasonable grounds to suspect that there has been a significant increase in the assets of the public official that the public official cannot reasonably explain in relation to his or her lawful income or assets.

(2) Where a public official fails to give a satisfactory explanation for the significant increase in his or her assets to the person conducting an investigation under subsection (1), the significant increase in his or her assets shall be deemed to be illicit enrichment for the purposes of this section and the public official commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 7 years or to a fine not exceeding



Richard G. Rowe & Daniel Fligelstone Davies

\$50,000 or 3 times the value of the significant increase, whichever is higher, or both.

(3) Where a court is satisfied in proceedings for an offence under subsection (2), having regard to the closeness of the relationship of the accused to any other person and to other relevant circumstances, that there is reason to believe that the other person—

(a) is, or was holding assets in trust for, or otherwise on behalf of the accused;

*(b) acquired the assets as a gift or loan without adequate consideration.”
consideration from the accused.*

11. For the purpose of expedience see below for a table of the offences (and consequences) which relate to each of the terms:

	Corruption	Abuse of Office	Serious Dishonesty
Legislation	Sections	Sections	Sections
Criminal Code	80, 81, 83, 84, 85, 87(5), 88, 91, 92	83, 84, 87(5), 88, 90, 93, 96, 98	90, 93, 97, 99
Register of Interests Act			6(5), 7(d), 10
Internal Audit Act			23

Table of Basic Descriptions for the Offences contained in the Criminal Code

80	This provision relates to a public official soliciting, accepting or otherwise obtaining a bribe (monetary or otherwise) for doing something or refusing to do something, in the course of his duties or interfering in the duties of another official. (This includes actions
-----------	--



Richard G. Rowe & Daniel Fligelstone Davies

	aimed at expediting, delaying, hindering, voting/abstaining, taking/not taking certain courses of action.
81	This provision makes it illegal for a private individual to bribe a public official for the reasons stated in 80 above.
83	This makes it illegal for a public official to use his/her office to obtain gratification. Where a public official makes a decision or takes part in the making of a decision or takes a certain course of action with respect to any matter that either the public official (or relative/associate) has a direct/indirect interest in or has given advice on, there is a rebuttable presumption that the public official has used his or her office to obtain gratification. This will not apply where the public official holds his/her office as a representative of a body that owns shares in that public body and is acting in said body's interest.
84	This relates to a person bribing or offering a bribe to a public official in consideration of that official voting (or abstaining) on a particular thing in a particular way and/or in relation to that public official carrying out or not carrying out a particular act and/or aiding in the obtaining or preventing the issuance of a contract or benefit to another. These actions must be taken in relation to a public body of which the public official is a part.
85	This deals with bribing of or by a foreign official in relation to the conduct and operation of a private business.
87(5)	This provision criminalizes a public official from directly or indirectly receiving or soliciting a gratification for the purpose of exerting influence in order to obtain a contract, employment or some other benefit for another.
88	This section makes it illegal for a public official to directly/indirectly accept or otherwise receive a gratification for either him/herself or



Richard G. Rowe & Daniel Fligelstone Davies

	another, where that gratification is received on the basis of a belief held by the giver (whether by direct inducement or otherwise), that the public official did an act or omitted to do an act that he or she was empowered to do.
89	This section relates to bribing of officials and accepting bribes where the bribe is aimed at having the official using their influence to assist or outright assisting another (including the person bribing) in obtaining a contract with a public body
90	This is expressly a conflict of interest provision. It has two parts, the first of which mandates that a public official that holds or who's relative or associate holds an interest in a company, partnership or other undertaking (trade licence) where the interest exceeds 10% on an equity basis, with which the public proposes to deal, declare such an interest in writing. The second part requires that the public official to not vote or participate in any proceedings regarding any decision of that public body with respect to the interest mentioned in the first part (whether that interest is held directly or indirectly). The defence in relation to an interest held by a relative, is that the public official did not know of the interests held by said relative.
91	This criminalizes a person offering or giving a gift to an employee, member, or director of a public body while that person has some form of business or dealings with that particular public body.
92	This to a public official who directly/indirectly solicits, obtains or accepts a gratification from a person (or a person that the public official knows to be connected to that person) who has, is, or is likely to have an interest in a proceeding or a transaction or a transaction that is about to occur which relates to the public official's duties/responsibilities or his/her subordinates.



Richard G. Rowe & Daniel Fligelstone Davies

93	This section criminalizes frauds and breaches of trust by public officials. Such fraud or breach of trust (this refers to a fiduciary duty) must affect the public.
96	This is a conflict of interest provision which makes it an offence for a public official who has responsibilities for property of a “special character” to obtain or hold an interest in that property while discharging their duties.
97	Public officials knowingly make false and material statements or returns which relate to the payment or delivery of goods to him/herself or any other person
98	This is the use of a public official of their authority to do or direct that an arbitrary and prejudicial act be done to another.
99	This provision criminalizes a public official making a certificate that he/she knows to be false or contain a material falsehood.

Table of Register of Interests Provisions relating to Serious Dishonesty

6(5)	A person other than a member of the House of Assembly knowingly or recklessly providing false details, which are material.
5(4), 7(d) and 8(3)	These provisions relate to a situation where a member of the House of Assembly has provided a willfully false or materially misleading declaration and the penalties that the House of Assembly may impose on that House of Assembly member.
10	This provision relates to a member of the House of Assembly challenging the veracity of another such member’s declaration and the consequence of a finding against the member’s whose declaration is being challenged.

12. Section 23 of the Internal Audit Act makes offences for the following:

30 DeCastro Street, Road Town, Tortola, British Virgin Islands
(284) 340 9569
w: www.lawbvi.com e: info@lawbvi.com



Richard G. Rowe & Daniel Fligelstone Davies

“(a) without legitimate excuse, fails to provide any information within his or her knowledge which is relevant to an audit being carried out by the Director or an auditor;

(b) without legitimate excuse, fails to provide information required by the Director or an auditor or in any way intentionally prohibits the provision of such information;

(c) deliberately provides inaccurate information or evidence; or

(d) by any means, impedes the Director or any person involved.”

13. For the purposes of the Criminal Code, it is critical to define some terms:

- a. relative is defined as the immediate family and grandparents of the public official. Immediate family includes child of the marriage, although not necessarily directly related/adopted by the public official. The term child also includes persons that are not necessarily of the marriage, but are treated as such by the public official.
- b. An associate is someone with which the public official has a business dealings with (including employer-employee relationships and certain trustee relationships).
- c. Gratification includes monetary and non-monetary advantages.

Corruption

14. Corruption is generally accepted as a public official obtaining a benefit (pecuniary or otherwise) from another in consideration for using their office/status to do a particular thing, influence decisions, vote etc in a particular way.

15. The acts which are generally considered to be corruption are those relating to bribery, and undeclared conflicts of interest, in which an advantage is obtained in relation to such interests. Apart from section 90 of the Criminal Code, these offences generally



Richard G. Rowe & Daniel Fligelstone Davies

require specific intent, meaning that recklessness, even at a high degree would not suffice to prove any of the other offences.

16. Indeed, one would be hard pressed to believe one recklessly received a thing of value, in consideration for doing or abstaining from doing a certain thing. With respect to section 90, particularly as it relates to the public official's own interests, if it can be proved that the official knew that they had a certain interest but did not declare it, then it is likely that they have committed an offence. This in particular would be an instance of corruption which was also, counts as serious dishonesty and abuse of office.
17. Broadly, corruption as it relates to the crimes under the Criminal code requires two or more parties, and thus is a crime of collusion.

Abuse of Office

18. These offences relate to using one's office to make arbitrary decisions which negatively affects the rights and/or legitimate expectations of another or others generally. It is submitted that it also includes breach of trust, however, this breach must actually affect the public. An offence of breach of trust, includes gross negligence, recklessness, misfeasance and malfeasance with respect to one's fiduciary duties. It could be argued that the offence of misconduct in public office seems to be caught with in the scope of this provision.

Serious Dishonesty

19. These offences relate to making false statements, certifications and impeding investigations by the Internal Audit Department. It will also encapsulate fraud.
20. Interestingly, there seems to be no offence relating to impeding the work of the Auditor General.



Richard G. Rowe & Daniel Fligelstone Davies

Yours sincerely,



Daniel Fligelstone Davies

Our ref: nzo/ln78034/0007/nzo

withers ^{BVI}

Little Denmark PO Box 145
Road Town, Tortola VG1110
British Virgin Islands
t: +1 284 494 4949
www.withersworldwide.com

08 September 2021

Mr Andrew King
Senior Solicitor
BVI Commission of Inquiry
Room RB 1.11
22 Whitehall, London
SW1A 2EG

By email: Andrew.king@bvi.public-inquiry.uk

Dear Mr King

BVI Commission of Inquiry ('COI') – Terms of Reference, Paragraph 1 – 'Paragraph 1'

We write further to the submissions made on the Attorney General's behalf in advance on 7 June 2021, the hearing on 13 July 2021, our letter dated 5 September 2021 and the hearing on 6 September 2021.

At the request of the Commissioner, this letter deals with the following proposition that we understand him to have advanced:

If, in the exercise of a statutory power, a public officer knowingly considers any private interest or anything but the public interest, his conduct must fall into Paragraph 1.

While it is accepted that in many cases, such a situation would be very likely to be Paragraph 1 conduct, particularly where the public officer is solely motivated by private advantage, the proposition, in the absolute terms in which it is expressed, is not accepted.

The case-law shows that a breach of duty must be *so serious*, as in all the circumstances, including such factors as its consequences and its motive, to amount to an abuse of public trust in his office and/or to be worthy of criminal punishment. The judgment as to whether a breach of duty reaches that threshold is fact-sensitive.

The statutory condition usually prescribed is that the Minister must appoint a fit and proper person. If the person appointed is objectively fit and proper, and the Minister has an honest belief that he or she *is* fit and proper, the fact that the Minister *also* allowed himself to be influenced by a personal relationship would not necessarily be sufficient *by itself* to render his action a criminal offence.

direct: +1 284 494 4949
e-mail: niki.olympitis@withersworldwide.com

LN78034/0007-EU-34638300/1

Withers LLP is a limited liability partnership registered in England and Wales with registered number OC301149 and is authorised and regulated by the Solicitors Regulation Authority with registered number 352314. A full list of members' names and professional qualifications may be inspected at our registered office, 20 Old Bailey, London EC4M 7AN.

LN78034/0007-EU-34814053/1

Withersworldwide
London Cambridge Geneva Milan Paris
Hong Kong Singapore Tokyo British Virgin Islands
New York Boston Copenhagen New Haven
San Francisco Los Angeles Buenos Aires Sao Paulo

Plainly, the acceptance of a bribe would carry the conduct over the threshold, as would clear evidence that his sole or main purpose or motive was to benefit a close relative regardless of suitability, such as that he had secretly and deliberately manipulated the process of selection to exclude others equally well qualified, or refused to consider them, with a view to securing that person the position.

The Attorney General does not consider that oral submissions on this issue would be necessary.

Yours faithfully

A black rectangular box redacting the signature of the Attorney General.

Withers BVI

cc. Hon. Dawn J Smith, Attorney General

Bill Entitled, Integrity in Public Life Act, 2021

Signed

· 16 March 2021 · PO · File: PO/L2/036 · Mrs. Elvia Smith-Maduro

· Memo No. 173/2021 · Extract No. REx/173/2021 (/decisions/641)

Background Information

1) The need for Integrity legislation was championed by the current Premier and Minister of Finance. It is noted that when he was the appointed Leader of the Opposition that he also championed this cause. During his speech at the 30th June, 2017 Territory Day ceremony, he told the gathering, "The implementation of such legislation will create a victorious BVI because it would promote transparency." Now as the leader of this current Administration, the Premier is committed to bring forward this important piece of legislation, as his Government, pledged to place the people of the Virgin Islands first as well as its full commitment to integrity, the rule of law, transparency, accountability, stability, democratic principles, prosperity for the Virgin Islands, and to safeguard the rights of all who call the Virgin Islands home and ensure that those rights are fully respected and protected.

2) The Government also committed to put measures in place whereby elected members uphold our cherished institutions to the highest level and restrain from abusing their powers. This commitment was reinforced in the Speech from the Throne that was read in the House of Assembly on 14th November, 2019, by His Excellency The Governor, indicating that Integrity in Public Life legislation and other anti-corruption initiatives were on the 2020 Legislative Agenda.

3) Due to the emergence of the COVID-19 global pandemic in March 2020, Government's priorities were forced to be shifted towards mitigating the spread of the disease in the Territory and managing the social and economic impacts on the population. Circumstances hindered the legislature's ability to have regular sessions and thus impacted the implementation of the legislative agenda.

4) At the 2020 Speech from the Throne delivered by the Governor before the House of Assembly on 5th November, 2020, it was reiterated that the Government recognises that strengthening Governance remains important for having a stable economy. It was indicated that the Integrity in Public Life Bill remains a priority on the legislative agenda and that this legislation would promote and enhance ethical conduct standards by consolidating laws relating to the prevention of corruption and the award, monitoring, and investigating government contracts and prescribed licences.

5) On 13th December, 2020, Cabinet reviewed and noted the first draft Integrity in Public Life Act, 2020 via Cabinet Memo 505/2020, a copy of the Cabinet Memo is attached as **Appendix I**. As per items C and D, the draft Act was circulated to the Deputy Governor via email dated 19th January, 2021, and by email to various other stakeholders dated 19th January, 2021. A copy of the responses received are attached as **Appendix II** for members perusal.

6) The Integrity in Public Life Act seeks to establish an Integrity Commission which would assist in achieving the Government's objectives to promote good governance, to enhance ethical conduct of public officials and to strengthen the prevention and detection of corrupt acts by persons in public life.

7) The Bill consists of seven (7) parts. Part I (clauses 1 - 3) provides for preliminary matters. The preliminary provisions provide for the short title and commencement of the Act, as well as define various terms used throughout the Act. It also provide for the Act to apply to every person in public life.

8) Part II (clauses 4 - 13) provides for the establishment of the Integrity Commission. It provides for the functions of the Commission and the appointment of the members, their term of appointment and removal from office. This part also provides for the Governor to remove a member after consultation with the Premier and the Leader of the Opposition and on the recommendation of the Disciplinary Tribunal.

9) Members of the Integrity Commission shall be appointed to hold office for a period not exceeding five (5) years and shall be eligible for re-appointment.

10) The Commission shall comprise of five (5) persons as follows:

- i. a Chairperson who is a retired judge or an attorney at law of at least 15 years standing, and who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States;
- ii. two (2) persons nominated by the Premier;
- iii. one (1) person nominated by the Leader of Opposition; and
- iv. one (1) person nominated by Christian Council.

11) The appointment of the members of the Commission shall be made by the Governor. The Chairperson shall be appointed by the Governor after consultation with the Premier and the Leader of the Opposition. A person appointed to the Commission shall be a person of high integrity, capable of exercising competence, diligence, sound judgment and impartiality in fulfilling his or her duties pursuant to the Act.

12) The following persons are disqualified from being appointed a member of the Integrity Commission:

- i. is a person in public life or is otherwise exercising a public function;
- ii. has, at any time during the three (3) years preceding the date of appointment, been a person in public life or otherwise exercised a public function;
- iii. has, at any time during the five (5) years immediately preceding the date of appointment, held office in a political party; or

- iv. would otherwise be disqualified, in accordance with the Constitution, to be a member of the House of Assembly;
- v. has been convicted of an offence within or outside the Virgin Islands;
- vi. is an undischarged bankrupt or has compounded with his or her creditors;
- vii. is not a Belonger; or
- viii. has been certified by a medical practitioner to be of unsound mind.

13) The functions of the Integrity Commission shall be:

- i. to receive and investigate complaints regarding any breaches or non-compliance with the provisions of this Act;
- ii. without prejudice to the provisions of any other enactment, conduct an investigation into any act of corruption under this Act referred to it by any person;
- iii. to make recommendations and to advise public bodies of any changes in practices and procedures which, in the opinion of the Commission, will reduce the likelihood or the occurrence of acts of corruption;
- iv. to conduct educational programmes and training relating to the role of the Commission in promoting ethical conduct; and
- v. to perform such other functions or exercise such powers as may be conferred, on it under this Act or any other enactment.

14) Part III (clauses 14 - 20) provides for powers of investigation. The Commission would have the power to inquire into complaints that a person in public life may have breached the Act including committing an act of corruption.

The Commission would be empowered to enter premises occupied or used by a public authority, and search for documents, inspect documents and take copies of documents. In the performance of its function to inquire into complaints, the Commission would have the power to summons and examine witnesses, administer oaths and affidavits, compel the production of documents etc. Where the Commission finds that there is a breach of a provision of this Act, the Commission would be required to refer the matter to the DPP and forward a report of its findings to the Governor. This part would also prohibit a person who is not suspected of committing an offence from objecting to the supply of information and documents on the grounds that it might tend to incriminate him or her. It would be an offence to obstruct an investigation under this Act.

15) Part IV (clauses 21 - 25) provide for conduct in public life. It provides for a person in public life to observe the code of conduct specified in Schedule 3 and for the Governor to prescribe a code of conduct with respect to public officers. This part also requires persons in public life to be fair and impartial, to maintain public confidence in their integrity, to avoid conflicts of interest, to refrain from using their office and information obtained by virtue of their office for private gain, and to refuse gifts that are connected with the performance of their duties.

16) Part V (clauses 26 - 28) provides for the acts which would constitute Acts of corruption under the Act, including:

- soliciting or accepting, whether directly or indirectly, any article or money or other benefit, or advantage for doing any act or omitting to do any act in the performance of his or her functions as a public official;
- offering directly or indirectly, to a public official any article, money or other benefit or advantage for doing any act or omitting to do any act in the performance of the public official's duties; and
- knowingly or recklessly allowing one's private interest to conflict with his or her public duties or improperly influencing his or her conduct in the

performance of his or her duties as a public official.

17) This Part would be in addition to the existing laws and without prejudice to the powers conferred upon a relevant disciplinary authority under the Constitution.

18) Part VI (clauses 29 - 32) would provide for financial provisions. This part would provide for the funds of the Commission and for proper accounts and other records of all income and expenditure of the Commission to be kept. The Commission would be required to submit to the Minister of Finance an annual report on its activities for each year, and a copy of the report together with the Auditor's Report shall be laid before the House of Assembly.

19) Part VII (clauses 28 - 39) provides for miscellaneous matters. A member of the House of Assembly would be required to disclose any interest in debates and questions that the Member may have in relation to any matter being debated or any question the Member intends to ask at a sitting of the House of Assembly. It would also provide for protection of witnesses, granting immunity from suit for actions done in good faith in the execution of duties, the forfeiture of property unlawfully acquired by a person in public life, and for the making of regulations which would be subject to a negative resolution of the House of Assembly.

20) The full details of the draft Act are contained in the Integrity in Public Life Act, 2021 attached as **Appendix III**.

Purpose

21) The purpose of the Cabinet Paper is for Cabinet to review and approve the Integrity in Public Life Act (2021) and decide that the Bill be submitted to the House of Assembly for approval at its next convenient Sitting.

Cross-Ministry Consultation

22) The paper was circulated for cross-ministry consultation. Members are to also note comments of the Director of Human Resources at **Appendix IV**.

Permanent Secretary, Natural Resources, Labour and Immigration stated:

23) The Ministry of Natural Resources, Labour and Immigration continues to give its support to the Integrity in Public Life Act which seeks to establish an Integrity Commission. The establishment of a Commission to look into and regulate the conduct of persons exercising public functions, to promote and strengthen measures for the prevention, detection and investigation of acts of corruption is an important aspect of good governance. We trust that with the comments from various sectors of the community, the legislation will be fine-tuned accordingly. It is important to promote the integrity of public officials and institutions.

Acting Permanent Secretary, Ministry of Health and Social Development stated:

24) The Ministry of Health and Social Development views this proposed legislation as a step in the right direction to further strengthen the good governance legislative framework in this Territory. Adding such an important layer to the documents used to guide the public service will help to strengthen the public's confidence in the services offered by the Government and in all public officials including those of Statutory Bodies. Transparency and accountability will not just be buzz words, but would rather be fully engrained in the foundation of the public service. This is certainly welcomed.

Permanent Secretary, Transportation, Works and Utilities stated:

25) The Ministry of Transportation, Works and Utilities concurs with the decision sought and trust that this matter is dealt with expeditiously. As the territory continues to contemplate the matter of self-determination, it is prudent that we put in place those measures that will assist us in determining our own economic, political and social development. This bill adds yet another critical piece of legislation to the territory's legal framework; it places us in a position to hold

ourselves accountable to each other with the hope that those still to come will find us faithful to the ideals we have set in place. That said, Cabinet may wish to consider adding to the bill the proviso that persons serving on the committee must sit out for a period not less than three years before being reappointed; this keeps the membership fresh. Also, it wasn't quite clear, to me, who nominates the chairman.

Permanent Secretary, Education, Culture, Youth Affairs, Fisheries and Agriculture stated:

26) The Ministry of Education, Culture, Youth Affairs, Fisheries and Agriculture supports the decision sought as the Territory continues to make strides in strengthening its good governance framework.

27) As Cabinet Papers are historical documents, it is important that the historical context of a matter of such significance be properly established in the Background Information. The Government's records will reflect that attempts were made since the early 1990s to introduce Integrity Legislation in the Territory. The significance of this milestone would therefore be better appreciated when highlighting the various steps taken in the past to get to the present. Most recently, the Integrity in Public Life legislation was among the good governance measures being championed by the Deputy Governor's Office and for which extensive research was conducted as part of the public service transformation programme.

28) I have noted that the National Bank of the Virgin Islands provided extensive feedback on the draft Bill, having done a comprehensive overview of the Act. There is no indication whether this or other feedback was considered in advancing this version of the draft Bill.

29) As one considers the current economic climate, there is a need for a comprehensive approach to be taken with respect to providing staffing to support the good governance institutions in the Territory. An approach similar to the Cayman Islands where there is a central Secretariat to support the various

good governance offices is required. It is not sustainable to try to provide separate support staff for each of these agencies (Registrar of Interests, Complaints Commissioner, Contractor General, Integrity Commission, Human Rights Commission - when established).

30) The limited time provided for review of this Paper and Bill did not allow for sufficient time to thoroughly review the provisions of the legislation. I am not sure whether it is included under one of the current parts, but when compared to similar legislations in the region, there appears to be one glaring omission, that of the Part of the Act that addresses Financial Disclosure.

31) On an administrative note, removal of the word, "to" in a, c, d, and e in Section 5 will ensure a proper flow with the introductory clause.

Permanent Secretary, Deputy Governor's Office stated:

32) The subject of Integrity in Public Life was advanced as part of the Good Governance Transformation agenda led by the Office of the Deputy Governor in response to the Governor's constitutional responsibilities, as outlined in Section 60 (1) of the Virgin Islands Constitution Order, 2007. This section indicates the Governor's responsibilities for the terms and conditions for service of persons holding or acting in public offices, without prejudice to Section 92.

33) The timeline presented below provides a chronology of the advancement of the Bill to date.

Date	Action
18th October, 2019	Integrity in Public Life Policy was uploaded to ExcoTrack on 18th October, 2019
7th November, 2019	Integrity in Public Life Policy was approved by Cabinet in Memo No. 378 of 2019

28th November, 2019	Office of the Deputy Governor instructed the Attorney General's Chambers, based on Cabinet's instructions in Memo No. 378 of 2019, to draft the legislation
15th June, 2020	Draft Legislation was received
2nd July, 2020	Memo sent to Attorney General's Chambers requesting that the draft is amended to be more in line with the approved policy
31st July, 2020	Revised Bill was received from the Attorney General's Chambers
18th September, 2020	Meeting was held with stakeholders to discuss the revised bill. It was agreed that two pieces of legislation will be drafted. The Register of Interests Act will be amended to include stronger accountability sanctions and extend its reach to all public officers and the draft Integrity in Public Life Bill will be further amended to incorporate a monitoring component through the establishment of an Integrity Commission
4th November, 2020	The amendment to the Bills were received
6th November, 2020	The draft bills were shared with stakeholders for comments (Permanent Secretary, Premier's Office, Director of Public Prosecutions, Director of Human Resources and Registrar of Interests)
24th November, 2020	Registrar of Interests requested a meeting to discuss her proposed amendments
1st December, 2020	<p>Meeting with the Registrar was held and the following decisions were agreed upon:</p> <ul style="list-style-type: none"> • Repeal the Register of Interests Act with a new act that enables the Registrar of Interests to have enforcement powers • Amend the draft Integrity in Public Life Bill to allow the Integrity Commission to serve as an advisory body to the Registrar of Interests while the Registrar will serve as the decision making body. <p>Note: A revised Role Profile for the Register of Interest was drafted and is presently with the Director of Human Resources.</p>

3rd December, 2020	An official memo was sent to the Attorney General's Chambers outlining the decisions agreed to above.
18th December, 2020	Cabinet Memo No. 505 of 2020 rescinded the decision taken in Cabinet Memo No. 378/2019 at the meeting of 9th November, 2019, where the Deputy Governor was deemed to be given the sole lead on this matter. Cabinet decided that the Deputy Governor and the Premier's Office will work in collaboration on this matter with the Premier's Office as the lead seeing that the scope is wider than Public Officers
22nd March, 2021	His Excellency the Governor wrote to the Attorney General to share his comments on the Bill presented by the Premier
31st March, 2021	The Attorney General responded to the Governor's letter by memo

34) On Thursday, 1st March, 2021 we received notification via ExcoTrack to provide comments on the Bill entitled, Integrity in Public Life. Our comments on this version of the Bill are outlined below. Also attached, as Table 1 is stakeholder feedback and an indication as to whether the points were addressed or not addressed.

1. The principle underlying the draft Bill is good and can represent a critical advancement in our good governance transformation agenda.
2. It is recommended that the content of the Bill be thoroughly reviewed and then discussed between the Governor and Premier before further advancement. This is important because of the Governor's responsibility for terms and conditions of Public Officers as laid out in section 60 of the Virgin Islands Constitution Order, 2007.
3. The independence of the Commission can be challenged if it is answerable to a Minister. It is recommended that the Commission's independence be aligned with best practice in fellow Territories, including the Turks and Caicos Islands and Cayman Islands;

4. The Bill needs to cover all persons in public life regardless of rank including Police, Fire Her Majesty's Customs and Immigration Officers.
5. Declared persons for political parties cannot be considered someone in public life as is listed in the schedule.
6. We wish to explore the possibility of the Bill speaking to accountable actions of members of the public who also knowing the law, willfully attempt to bribe and conduct acts of favour involving public officers.]
7. To ensure appropriate independence, the Secretary should also be appointed/hired and not be a public officer.
8. The Bill cannot be presented in its current form unless the Register of Interests Act is amended to allow the declarations of interests to be seen by the Integrity Commission and overall spell out how the Commission will interact with the Registrar. The Registrar of Interests Act will also need to be amended to allow for the expansion of other persons in public life. The Register of Interests Act might also need to be repealed to enable the Registrar to have enforcement powers, through sanctions, to ensure persons in public life comply with their declaration requirements. Section 34(1) should be amended to reflect the powers of a Commission of Inquiry to require production of information by the Integrity Commission.
9. The Bill attempts to cover persons in statutory bodies. While this intent is supported, some of the agencies are corporations and their specific legislation will have to be amended to allow for their actions to be monitored by the Commission.
10. Part V that speaks to corruption should have the offenses spelt out. If not in this Bill, then the Criminal Code will need to be augmented as this Bill is being advanced. The Section of Corruption needs to be cross-referenced with

Criminal Code 1994, as amended. The sections which deal with bribery, breach of trust by public officers and officials

11. Referral of Matters should not be given to Cabinet as there should be no appearance of the potential of influence over any matter. If the matter is criminal, it should be sent to the Director of Public Prosecutions only, or a report maintained by the Commission.
12. Section 18 (a) is vague regarding the Commission's options of accountability and needs to be tightened.
13. Part V, Section 27 needs further clarity to indicate when the Commission will interact with the work of other Bodies such as the PSC JLSC, etc.
14. Part VII, Section 33 needs to be checked against the criminal statute of limitations on criminal offenses. Therefore the prescription period for prosecutions should be aligned with wider criminal law
15. Corruption needs to be specifically defined in the interpretation section and must coincide with the Criminal Code Amendment No. 8 of 2006
16. The powers of investigation needs to be clearly defined to ensure that the proposed commission cannot investigate or interfere with any criminal investigation or prosecution being carried out by the DPP in accordance with his/her constitutional responsibilities
17. What makes a fit and proper investigation? The Bill does not define this
18. There is a strong policy case for declarations of interests by Ministers and Members of the House of Assembly to be made public in line with best practice in order jurisdictions, including the UK. The provision also needs to be amended to take account of the Commission of Inquiry Act and the recent Register of Interests legislative amendment.

19. The application of the Act to Heads of Diplomatic Missions, with the consequent requirement of declarations of interests, would be incompatible with the provisions of the Vienna Convention on Diplomatic Relations and therefore cannot be covered by this Bill.
 20. The proposed application of the legislation to the Governor is inappropriate. The Governor is a UK public servant and is subject to, and answerable to, the UK Civil Service Code and Diplomatic Service Regulations. This should also be contrast with the Governor's role and responsibility in the Territory as laid out in the Constitution.
- 35) In addition to the points raised above regarding suggested changes to the Integrity in Public Life Bill, please find below proposed amendments to the to the Register of Interests Bill, which must be addressed before the Integrity in Public Life Bill is finalised.
1. Replace the select committee with the Integrity Commission
 2. Under Schedule 4 of the Registrar of Interests Act, the section regarding members of boards should be made clear to include employees of Statutory agencies, commissions, etc.
 3. Declarations should be made when officers are employed and annually at a fixed date, preferably January; therefore any reference to 30 days should be removed from the legislation
 4. Under Schedule 1(12), the information referenced in the note should be removed
 5. Sections 8, 9, 10, 11 and 14 should be removed
 6. The Director of Human Resources' comments dated 12th November, 2020, that were shared with the Attorney General's Chambers should be considered

when amending the legislation. Those comments are attached as Appendix IV.

Financial Implications

36) The Bill represents the Territory's commitment to strengthening governance, which remains important for having a stable economy. When passed, the Bill will also strengthen the prevention and detection of corrupt acts by persons in public life in the Territory. The legislation is in keeping with actions being taken with responsible governments world over. Public integrity (including corruption perception) is one of the indicators against which a country is assessed by various monetary policy institutions and bodies. For example, economists point to a direct correlation between a CPI rating and long-term economic growth; lenders may also consider this when assessing their risk of extending credit facilities to governments.

37) The paper noted that there are "No budgetary implications associated with the decision sought." However, the Bill requires the establishment of the Commission as a statutory body which will not be revenue-generating in nature. The Commission will therefore have the usual budgetary requirements associated with staffing, rental of office space, and other operating costs. The Bill did not speak to whether the Board is a non-paying or a paying Board in the form of a stipend. If the latter is conclusive, clause(s) relating to remuneration of the Commissioners are to be inserted into the Bill.

38) It is advisable that the establishment of this and future offices should be supported by a policy document in advance of the legislation being drafted. Such a document would indicate basic resources required for the proper operation of the entity.

39) If the Bill is assented to and comes into force before the end of the 2021 calendar year, a Schedule of Additional Provision would have to be sought and the source of funding be identified from prioritisation of existing projects or programmes or from savings.

Legal Implications

40) The Cabinet paper has been reviewed and, in principle, the Decision Sought is in order for a favourable consideration by members, save that it is recommended that the Decision Sought be amended to direct that the Attorney General's Chambers have a final opportunity to specifically review the Bill herein before same is advanced to the House of Assembly to ensure its adherence to the other laws of the Virgin Islands.

41) And I So Advise.

Budget

42) No budgetary implications associated with the decision sought.

Communication Strategy

43) Premier will make an official statement regarding Cabinet's decision.

Conclusion

44) Members are invited to concur with the decision sought.

Decision Sought

Cabinet is invited to:

- a. review and approve the Bill entitled, Integrity in Public Life Act, 2021 (the “Bill”) (**attached at Appendix III**), which seeks to establish an Integrity Commission which would assist in achieving the Government’s objectives to promote good governance, to enhance ethical conduct of public officials, and to strengthen the prevention and detection of corrupt acts by persons in public life;
- b. decide that the Premier's Office instruct the Attorney General's Chambers to review the Bill to ensure its adherence to the other laws of the Virgin Islands before being submitted to the House of Assembly for approval at its next convenient Sitting; and
- c. decide that an expedited extract be issued to allow the decision of Cabinet to be acted upon before the confirmation of the Minutes.

Recipients: Financial Secretary, MOF; Permanent Secretary, ODG; Permanent Secretary, MECAFSYA; Permanent Secretary, MNRLI; Attorney General, AGC; Permanent Secretary, MTWU; Deputy Secretary, MHSD;

Hon. Andrew A. Fahie
Premier
07 April 2021