

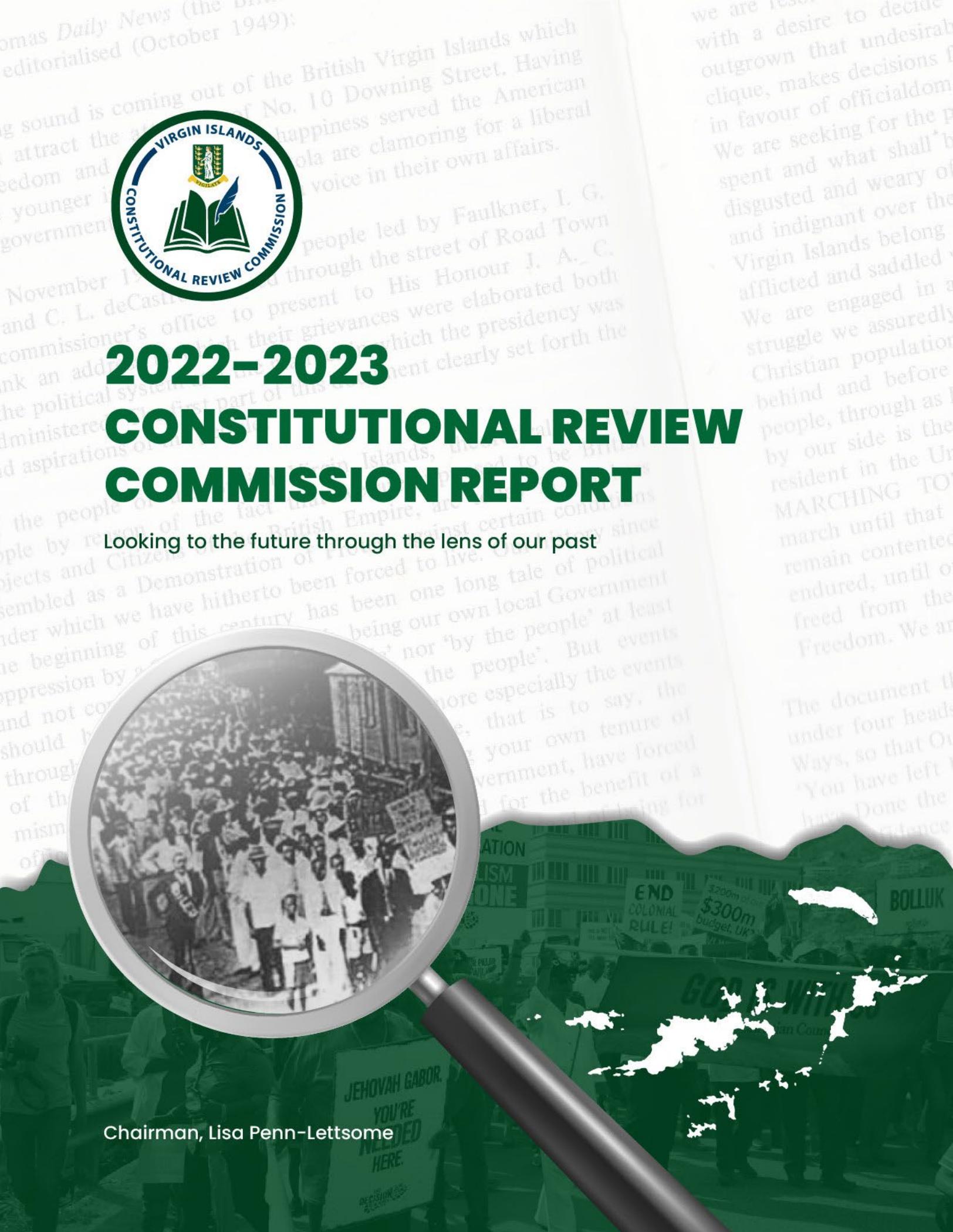


2022-2023 CONSTITUTIONAL REVIEW COMMISSION REPORT

Looking to the future through the lens of our past



Chairman, Lisa Penn-Lettsome



2022-2023

Constitutional Review Commission Report

Looking to the future through the lens of our past

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FROM THE DESK OF THE CHAIRMAN



It has been a distinct honour to serve the people of the Virgin Islands as Chairman of the 2022-23 Constitutional Review Commission. It was a significant civic responsibility at a very constitutionally significant time for the Territory. I speak for all Commissioners when I express my profound hope that readers will find that we pulled out the stops and gave it our all. Given the significant period in the Territory's constitutional development, the aspirations for greater political maturity and, most of all, the wishes of the public for greater constitutional education (as articulated to this Commission during its public consultations), the approach to writing this Report has deliberately been to educate, in addition to making recommendations.

The other feature of our approach was to represent the salient comments from the general public and to make recommendations, one way or the other, based on the research and inquiries we independently undertook.

Much gratitude is owed to all Commissioners. The bonds of service became bonds of friendships.

Deepest appreciation to all those who gave us their support and, in particular, members of the public who came out to our meetings – many individuals attended multiple meetings. Indeed, the exercise was conducted for you. The moniker of our website – www.yourconstitution.vg - was no accident. Most who spoke and wrote to us did so from a place of love for the Territory and care for its future.

For all their hard work, I wish personally to thank the Secretary to the Commission, Mrs. Rosemarie Delaney Smith, Permanent Secretary Carolyn Stout-Igwe, Finance Officer Clayton O'Neal and his assistant Dirkson Maduro.

I wish to extend my appreciation to the Hon. Justice Gerard Farara, K.C., Chairman of the 2005 Constitutional Review Commission, for meeting with us.

I cannot end without special acknowledgement to the Director of the Social Security Board and the Executive Director of the National Health Insurance, Ms. Jeanette Scatliffe Boynes and Mr. Roy Barry respectively. They arranged a private meeting of their employees and Board members with the Commission. Special arrangements were made so that all employees could attend. I mention this as the Commission firmly believes that it sets a gold standard for other employers to follow. What began as an educational engagement ended over two hours later with healthy debate, and a written submission afterwards from a Board member in attendance.

On behalf of my colleagues, it gives me much pride to now submit our Report.



Lisa E. Penn-Lettsome
Chairman

FROM THE DESK OF THE CHAIRMAN



**Educational and
consultative
session with Social
Security Board and
National Health
Insurance**



Figure 1: Public Consultation

LOOKING TO OUR FUTURE THROUGH THE LENS OF THE PAST

Virgin Islands Sloop

The Virgin Islands sloop was the cornerstone of Virgin Islands' rich maritime history. It was designed as a cargo boat with Spartan accommodation for passengers and sailed around the Caribbean from as early as the 18th century. The Virgin Islands Sloop Foundation is dedicated to preserving the legacy of the Virgin Islands sloop. One well-known sloop in the Virgin Islands was 'S/V Perseverance' built by the Tomar brothers in the historic village of Long Look on the island of Tortola. It disappeared in 1932 *en route* to the neighbouring US Virgin Islands. 'Perseverance' was a popular name for vessels in the Caribbean and no doubt reflects the determined spirit of its people to advance steadfastly in pursuit of a passion- whatever it be- whether social, economic, political or constitutional advancement.





PERSEVERANCE

A more modern 'Perseverance' docked at Road Harbour, Tortola. 'Perseverance' was a popular name for boats.

ABBREVIATIONS AND DEFINED TERMS

ABBREVIATION OR TERM	DEFINITION
Cabinet	The Cabinet of the Virgin Islands
Col	Commission of Inquiry
Commission	The Constitutional Review Commission, 2022-23
Commissioners	Members of the Constitutional Review Commission, 2022-23
Constitution	The Virgin Islands Constitution Order, 2007
DPP	Director of Public Prosecutions
Executive	The executive arm of the Government of the Virgin Islands
Governor	Governor of the Virgin Islands
GVI	Government of the Virgin Islands
HoA	House of Assembly of the Virgin Islands
ICCPR	International Covenant on Civil and Political Rights
Legislature	The legislative arm of the Government of the Virgin Islands
Member	A Member of the House of Assembly
Minister	A Minister of Government
OT	Overseas Territory
Premier	Premier of the Virgin Islands
Report	This report
TCI	Turks and Caicos Islands
Territory	Virgin Islands, also Territory of the Virgin Islands
Top Managers	Permanent Secretaries and Heads of Department in the Government of the Virgin Islands
ToR	Term(s) of reference
UK	United Kingdom
US	United States of America
USVI	Virgin Islands of the United States
VI	Virgin Islands

DISCLAIMER

Considerable research has gone into the preparation of this Report which includes references to the laws of many jurisdictions. Wherever possible, the Commission has tried to verify that it was, in fact, referencing the current version of the relevant law. Any errors or omissions are inadvertent.

The contents of this Report are not and are not intended to be an accurate, up-to-date publication or interpretation of the laws of any foreign jurisdiction where such laws are referenced. They are intended merely as examples of possible models that are, or once were, part of the constitutional structures of another jurisdiction that may be considered instructive to the topic under discussion in this Report, and should only be relied upon as such in the context of this Report and for no other purpose. Further, by contributing to this exercise, no individual Commissioner is holding himself or herself out to be a legal practitioner in any such foreign jurisdiction.

1.1 Background

Constitutional advancement for the Virgin Islands (VI) is not novel. The VI has been advancing constitutionally for centuries. A comprehensive paper cataloguing the history of constitutional development was published in the Report of the 2005 Constitutional Review Commission. Given the level of detail, there is no need to repeat the exercise here but, instead, that paper has been updated and republished here in [Appendix 6: History of Constitutional Development \(updated\)](#). For the purposes of its consultations, the members of the public preferred for the Constitutional Review Commission, 2022-23 (the Commission) to consider the watershed events of constitutional advancement to have begun with (a) the Great March of 1949 led by the late Hon. Theodolph Faulkner, (b) the appointment of Howard Reynold Penn to chair a Constitutional Review Committee which subsequently recommended the restoration of the Legislative Council in 1950, and (c) the creation in 1956 of the West Indies Federation which the VI opted not to join, making the VI a Colony with a direct constitutional relationship with the United Kingdom (UK). Since then, the VI has had written constitutions in 1967, 1976 and 2007.

The Cabinet of the Virgin Islands (Cabinet) on 10 June 2020 approved the establishment of a constitutional review commission for the purpose of conducting a full review of the **Virgin Islands Constitution Order, 2007 (U.K.S.I. 2007 No. 1678)** (Constitution).

General terms of reference were approved as follows:

- (i) to re-evaluate the vision of the people of the Virgin Islands, as expressed in the preamble to the Virgin Islands Constitution Order, 2007, and to amend accordingly, if necessary;
- (ii) to evaluate the current Virgin Islands Constitution Order, 2007, and determine whether it is a strategic fit to facilitate the people of the Virgin Islands in achieving the revised vision in (i) above;
- (iii) to identify any gaps in relation to item (ii) above;
- (iv) to make recommendations for constitutional reform, if necessary, based on (i), (ii) and (iii) above; and
- (v) to review the next step towards self-determination for the Territory of the Virgin Islands.

On 28 July 2020 the House of Assembly (HoA) passed Resolution No. 15 of 2020 which approved the establishment and composition of a constitutional review commission for the purpose of conducting a full review of the Constitution with the Terms of Reference (ToR) specified above.

Cabinet on 31 December 2021, reviewed and noted the HoA's Resolution No. 15 of 2020 and approved an 11-member constitutional review commission for a period not to exceed two years with effect from 4 January 2022.

1.2 Impact of the Commission of Inquiry

It is important to stress that the Commission pre-dates the subsequently launched Commission of Inquiry (Col) established in January 2021. Though the latter was not directly related to the former, there was some overlap in timing and subject matters. On 4 April 2022, Sir Gary Hickenbottom submitted the completed Col Report¹ to Governor John Rankin for his consideration. In Recommendation A2 of the report, he recommended that there should be an early and speedy review of the Constitution. He proposed that the review should begin promptly and that the Commission should conclude its work within a year or, if the Governor is persuaded to extend that time, 18 months.

¹ Hickenbottom, Gary. British Virgin Islands Commission of Inquiry Report: Report of the Commissioner the Rt Hon Sir Gary Hickenbottom Presented to His Excellency John James Rankin CMG The Governor of the Virgin Islands. 4 Apr. 2022 (BV1 Col Report).

CHAPTER 1 – ABOUT THE COMMISSION

In the Government of National Unity's Framework for Implementation of the Recommendations of the Commission of Inquiry Report and Other Reforms (Framework), for Recommendation A2, it was agreed that Cabinet should propose revisions to the membership of the Commission by 30 June 2022. Further, its (revised) final membership should be jointly agreed by the Governor and Premier. The terms of reference should consider, among other things:

- how the executive ministerial government can be held to account in the House of Assembly (e.g. by some different structure, number and/or configuration of seats) and/or in other ways;
- whether the current constitutional pillars of governance are sufficient, and in any event how those independent institutions can be effective;
- the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers respectively, when they arise, are to be resolved;
- a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required;
- whether there should be a regime in relation to election expenses in the form of (e.g.) a requirement on election candidates to submit a breakdown of expenses including donations above a specific sum and/or a cap on such expenses;
- whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission; and
- whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties.

The Framework required that the Commission's ToR be developed by 31 July 2022.

1.3 Membership and terms

The members of the Commission comprise persons selected from the main islands of the VI and are drawn from the legal fraternity, academia, business, aviation, and other areas of civil society.

An increase in membership of the Commission from 11 to the following 16 members was approved by Cabinet with effect from 8 July 2022:

[1] Mrs. Lisa Penn-Lettsome, Chairman	[9] Dr. Steve Lennard
[2] Ms. Janice Stoutt, Deputy Chairman	[10] Mr. Coy Levons
[3] Rt. Hon. Sir Charles Michael Dennis Byron	[11] Mrs. Bernadine Louis
[4] Ms. Maya Barry	[12] Dr. Benedicta P. T. Samuels
[5] Mrs. Tanya Cassie-Parker	[13] Mr. Ronnie W. Skelton
[6] Mr. Sendrick Chinnery	[14] Mr. Rajah A. Smith
[7] Ms. Susan V. Demers	[15] Rev. Dr. Melvin A Turnbull
[8] Ms. Noni Georges	[16] Dr. Charles Wheatley, OBE

Terms of reference were expanded to include several bespoke matters suggested in the Col Report.

The Commission held its inaugural meeting on 18 July 2022 and presented the following draft terms of reference to be signed off by the Governor and the Premier:

- A. To re-evaluate the vision of the people of the Virgin Islands, as expressed in the preamble to the Virgin Islands Constitution Order, 2007, and to amend accordingly, if necessary;
- B. To evaluate the current Virgin Islands Constitution Order, 2007, and determine whether it is a strategic fit to facilitate the people of the Virgin Islands in achieving the revised vision in item (A) above;
- C. To identify any gaps in relation to item (B) above;

CHAPTER 1 – ABOUT THE COMMISSION

- D. To make recommendations for Constitutional Reform, if necessary, including but not limited to considering the following:
- (i) how the executive ministerial government can be held to account in the House of Assembly, and how checks and balances and mechanisms for accountability may be employed to militate against abuse of power;
 - (ii) whether the independent institutions enshrined in the Constitution are sufficient and effective to ensure good governance;
 - (iii) the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers, respectively, when they arise, are to be resolved;
 - (iv) a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required;
 - (v) whether there should be a regime in relation to election expenses;
 - (vi) whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission and, if yes, its functions and responsibilities;
 - (vii) whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties.
 - (viii) whether sections 66 and 67 of the Constitution need to be amended to make clearer the circumstances in which a person seeking election to the House of Assembly or a Member of the House who (either personally or through a dba, a partnership or company with which he or she is associated) contracts with the BVI Government needs to declare such an interest, how such a declaration should be made and the consequences of him or her not doing so;
 - (ix) whether sections 66 and 67 of the Constitution need to be amended to also apply to statutory and other public bodies;
 - (x) what should be the proper relationship between Ministers and their departments and whether any amendment to section 56 of the Constitution should be made;
- E. To review the next step towards self-determination for the Territory of the Virgin Islands; and
- F. To consider how best the law enforcement and justice agencies can sit within the constitutional framework.

The timing of the meeting meant that the Commission met the 31 July 2022 deadline in the Framework for Implementation of the Recommendations of the Col Report for the draft terms to be presented.

At its 29 June 2022 meeting, Cabinet decided that a resolution approving the revised composition of the Commission be laid on the table for debate at the next available Sitting of the HoA. The following resolution (inclusive of Terms of Reference) appeared on the HoA's agenda for 21 July 2022 and was debated at its postponed sitting on 21 September 2022:

- RESOLVED that the House of Assembly of the Virgin Islands approves an increase in the composition of the Constitutional Review Commission from eleven (11) to sixteen (16) members and the update and expansion of the Terms of Reference as specified above, for the purpose of conducting a full review of the Virgin Islands Constitution Order, 2007.

Following the debate, the Terms of Reference remained as tabled in the HoA.

1.4 Work of the Commission

Following the Commission's first meeting, more than another 3 months passed before work of the Commission was visible to the public due to delays in getting the Commission sufficiently resourced to carry out its task. The time was used to conduct research, gather resources and write articles for the Commission's website which was intended as a ready educational resource for the public. The site reflects the national colours and is replete with pictures of the

CHAPTER 1 – ABOUT THE COMMISSION

Virgin Islands' past. The pictures were not simply meant as an interesting distraction (though they were, based on the number of queries and compliments received), but deliberately placed in support of our theme to look to our future through the lens of the past. The Territory's political and constitutional advancements over the decades should not be taken for granted.

Shortly after its inaugural meeting, Commissioner Janice Stoutt tendered her resignation for personal reasons. After contributing significantly to the work of the Commission, Commissioners Ronnie Skelton, Coy Levons and Bernadine Louis, tendered their resignations in February 2023, March 2023 and November 2023 respectively. Commissioners Skelton and Levons went on to contest the Territory's general elections in April 2023.

The Consultation Process

- The Commission conducted its work through various fora and media. In general, they consisted of our website www.yourconstitution.vg, town-hall style public meetings, private consultative meetings (there were twice as many of these as there were public meetings and they proved immensely popular), radio and TV interviews, infomercials, secondary school outreach, a meeting with Virgin Islanders residing in the United States Virgin Islands (USVI), and a signature educational and consultative event which was live-streamed and available for re-viewing. A total of 45 public educational and consultative engagements were held and details of these are listed in [Appendix 2 -List of consultative engagements](#). The earlier work of the Commission was highlighted in an [article featured on IDEA ConstitutionNet](#) at the end of 2022.
- In order to encourage greater participation, whilst the media were free to attend public meetings, they were asked not to publish pictures of any member of the public making a comment, nor to ascribe a comment to a particular member of the public. As most public meetings were not live-streamed, it was not unusual for members of the public to attend multiple meetings as persons grew to realise that topics raised were not always the same and the angle of debate was also different.
- In terms of public meetings, the lowest attendance overall was 14 persons (at Capoon's Bay), the highest attendance in the VI was the final public meeting held at the New Testament Church in Baugher's Bay where 60 persons were in attendance, and the highest overall attendance at a public meeting was in St. Thomas, USVI with 65 persons in attendance. In terms of private meetings, there were multiple meetings with a single individual and the largest comprised 76 persons representing all staff of the Social Security and National Health Insurance offices and their Boards - specially acknowledged earlier in this Report (see From the Desk of the Chairman). Our largest outreach was to the 150 Grade 12 students at the Elmore Stoutt High School. Our biggest social media engagement was the second segment of a two-part interview by Mrs. Karia Christopher on her Real Talk show which received over 9,000 views locally and internationally across the media platform. Regardless of the numbers in attendance, the Commission was extremely impressed with the level of participation and attention wherever it went.
- The majority of engagements took place over the three-month period from November 2022 – January 2023. The deadline for receiving submissions was 31 January 2023. A trickle (no more than 10) of submissions were received in the months after that, including up to when the Report was in its final stages, and were all considered. The Commission was therefore open and accessible to all persons within and outside the Territory. This includes arrangements facilitated for meetings, as well as the online platform for submitting comments. Neither was restricted to Belongers or residents. Even so, the overwhelming majority of those attending meetings were Belongers or persons residing in the Territory. There was one private meeting where the group made arrangements for members of the diaspora to participate. In terms of written submissions, it was a similar experience in that the overwhelming majority of persons who submitted comments were Belongers or persons

CHAPTER 1 – ABOUT THE COMMISSION

actually living in the Territory. Beyond these observations, it was not possible to say how many contributors were Belongers or otherwise as participation was unrestricted.

- The Commission received 170 written submissions (most with multiple recommendations) and at least 294 oral submissions. Most submissions commented on multiple issues so that the total number of individual comments is estimated at closer to 1,000. Full statistics can be found [in Appendices 1 – 4](#).

This Report is an attempt to address the ToR in light of submissions received. In all cases, whether sufficient details were provided or not, the Commission conducted thorough research and attempted to distill the issues relevant to proposing a recommendation. That said, the Commission hastens to point out that, in many instances where a suggestion is given less priority by the Commission, it does not necessarily follow that it is not a worthy one. Several suggestions, for example, have not been emphasised because there may be alternative or existing ways of addressing them in legislation rather than in the Constitution. Commissioners were impressed with the passion and vigour with which members of the public made their contributions and are forever indebted to all persons who contributed.

The Commission is now pleased to submit its Report.

CHAPTER 1 – ABOUT THE COMMISSION



Commissioner
Mrs. Lisa E. Penn-Lettsome,
Chairman



Commissioner
The Rt. Hon. Sir Charles Michael
Dennis Byron, Consultant



Commissioner
Ms. Maya Barry



Commissioner
Ms. Noni M. Georges



Commissioner
Dr. Charles Wheatley, OBE



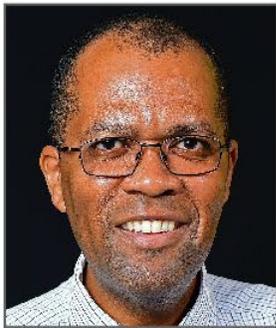
Commissioner
Mrs. Tanya Cassie-Parker



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Mr. Coy Levons



Commissioner
Mrs. Bernadine Louis



Commissioner
Dr. Steve Lennard



Commissioner
Ms. Susan Demers



Commissioner
Rev. Dr. Melvin A. Turnbull



Commissioner
Dr. Benedicata P. T. Samuels



Commissioner
Mr. Ronnie W. Skelton



Commissioner
Mr. Sendrick Chinnery



Commissioner
Mr. Rajah Smith

Secretary
Mrs. Rosemarie Delaney-Smith

Secretary pro-tem
Mrs. Darlene Forbes

CHAPTER 2 - EXECUTIVE SUMMARY

A full discussion on the Commission's work and methodology is set out in Chapter 1-About the Commission.

The topic that drew the highest number of comments from the public was the need for electoral reform with particular emphasis on reviewing the at-large system. The next highest was the deep frustration by members of the public with the lack of involvement in decisions affecting their country. From the Commission's very first engagement and consistently throughout, several of the solutions proposed by the public were rooted in models other than the Westminster/Parliamentary model which has been the inspiration for the VI and most other constitutions throughout the Commonwealth. Concepts such as direct democracy, term limits, recall provisions and direct election of the head of government – all proposed by the public - have emanated out of other models. Given the proximity and exposure of the Caribbean to multiple political cultures, physically, socially and in the media, this is not surprising. In fact, the VI is not the only jurisdiction struggling with the question of whether to continue tinkering with the existing style of government (as was done in the Territory by introducing the at-large system years ago; and as the Cayman Islands did by introducing people-initiated referenda (a form of direct democracy)), or whether some form of hybrid system of governance more appropriate for small jurisdictions should be considered.

Respectfully, although the Commission has recommended some modifications, there are those more significant decisions which the Territory and its people as a whole should discuss and decide on through a fair and inclusive public medium (e.g. a referendum) following an unbiased and politically impartial education initiative. This is why readers will see in a few places that the Commission's recommendation is that certain proposed structural changes be put to the public. However, in several cases, even when the Commission makes such a recommendation, it goes on to propose alternatives. Even then, as responsible stewards, the Commission has had to weigh the pros and cons of other models and to consider the practical realities such as our small population and resource constraints.

In addition, many concerns of the public can actually be addressed using existing institutions and frameworks. One notable example is the view of many people that the HoA is not nearly as active or transparent as it could be in conducting the people's business. The HoA does not use its at-large Members to champion national debates; it does not use its various committees (e.g. select committees);² its other proceedings are not publicised (e.g. Standing Finance Committee,³ and committee stage for reading of Bills); it is not currently implementing the Integrity in Public Life Act, 2021 that it passed; and it continues to be severely under-resourced with no research assistance available to it to assist with briefings prior to debates.

The Commission has therefore had to weigh competing considerations and strive to make practical recommendations rather than theoretical ones which, even if implemented, may be ineffective in the prevailing environment (for example, by delayed implementation, or lack of resources). Against that backdrop, every effort has still been made to consider every comment from the public.

The Report is divided into the following chapters:

Chapter 1 – About the Commission

Chapter 2 – Executive Summary

Chapter 3- Recommendations under the Terms of Reference

Chapter 4- Recommendations on other aspects of the Constitution

Chapter 5- Other Recommendations and Discussions

² The Order Paper for the HoA sitting on 7 September 2023 contains a motion for the Public Accounts Committee to be reconstituted.

³ The report is publicised but not the proceedings.

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Chapter 6 – Summary of Recommendations

Given the breadth and complexity of the Report, the approach taken in the remainder of this Executive Summary will be to give a high-level overview of Chapters 3, 4 and 5. We nonetheless strongly encourage readers to review the substantive discussions in each of those chapters in order to get a full appreciation for the background against which each recommendation has been made.

Chapter 3 - Recommendations under the Terms of Reference

How executive ministerial government can be held to account - checks and balances

This ToR attracted the liveliest interaction with the general public and this is reflected in the number of recommendations. These recommendations can be presented under a few themes – recommendations that promote transparency, recommendations that encourage more active public consultation and participation, and recommendations for legislative reform that would support greater accountability. Straddling all three themes, therefore, is recommendation No. 1 that the Constitution be amended to include a requirement for Standing Orders to give due regard to representative democracy, accountability, transparency and public participation. The Commission also holds the view that, in the spirit of democracy, transparency, good governance and accountability, meetings to discuss government business ought to be on a fixed schedule. By publicising a fixed HoA meeting schedule annually in advance, both Members of the HoA and members of the public would be aware of the agenda and be able to make necessary preparation (e.g. to review draft legislation).

On the subject of transparency, the Report calls for the enactment of Freedom of Information legislation on which the GVI has given its continued commitment, and for a constitutional amendment to include a specific right of persons to access information generated by GVI and its entities. The Report also calls for the Integrity in Public Life Act, 2021 (which establishes the Integrity Commission), and the Contractor General Act, 2021 to be brought into force without further delay.

On the theme of more active consultation, there were some calls from the public to introduce people-initiated referenda – a concept found in Europe and some states within the United States of America (US). However, the Commission considered that there is not yet sufficient experience with people-initiated referenda in the Overseas Territories (OTs) and Commonwealth Caribbean to make an informed assessment of whether the benefits outweigh the disadvantages. Public participation could be secured in other ways, including some of the mechanisms recommended for electoral reform. For example, the Report recommends that the HoA should make greater use of inquiries conducted by parliamentary committees as a useful and important tool to improve the quality of governance and that these hearings should be conducted in public, unless there is some overwhelming consideration for privacy. The resources of the HoA should also be significantly augmented to enable it to more effectively use this as a tool for greater transparency and public consultation. A cultural change in the institution of the Public Service is also required to enable it to better execute its policy-making function which, in turn, is used to inform Cabinet.

Also, and as noted above, the highest recurring theme was for the reform of the at-large system and the related comment that the public wanted to have a more direct involvement in who is to be the Premier of their beloved country. The discussion on this is involved and far-reaching – including with implications for the size of the HoA, the election of other Members of the HoA, the continued existence of Junior Ministers, the number of Ministers, and the need for a boundaries review. The summary that follows is not a substitute for referring to the fuller discussions. That, said, the Report recommends that the Territory should adopt a system of election of the Premier and the Deputy Premier by selecting the holders of these offices from the pool of at-large candidates, rather than through a direct election (the latter being a characteristic of the presidential system which is not supported by the Constitution). The required boundaries review should be commissioned to facilitate the creation of a sixth Minister and, in keeping with the constitutionally prescribed ratios, increase the number of the HoA Members from 13 to 15.

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Subject to such boundaries review, the Commission recommends and increase in either

- (i) the number of seats in the House of Assembly from 13 to at least 15, made up of 9 district seats and 6 at-large seats (an increase of 2); or
- (ii) the number of seats in the House of Assembly from 13 to 15, all at-large;

The Commission is of the view that party politics has no place in the Constitution and therefore recommends that, if the hybrid model (mixture of district and Territorial seats) is adopted, sections 52(1)(a) and (b), (2) and (3) of the Constitution be amended to make it a requirement that the at-large Member who commands majority support in the HoA should be appointed as Premier, regardless of party affiliation, and that the Deputy Premier must similarly be appointed from amongst the Members who were elected at-large. For consistency, section 70(2)(a) in relation to the Leader of the Opposition may need to be revised accordingly.

In the hybrid model, a government should, as far as possible form its Cabinet from amongst at-large Members. This is a feature that the members of the public called for and with which the Commission agrees - although it is not being advocated that it be a mandatory requirement as some flexibility will be needed given the small size of the HoA.

In the hybrid model, at-large Members should concentrate on national issues and raise such matters for debate in the HoA. Their duties and responsibilities should be set out in legislation or in guidance in order to distinguish them from those representatives who hold district seats.

The issue of Junior Ministers posed a challenge for the Commission. If properly executed, the office of a Junior Minister is a good thing. The challenge in small legislatures is that the appointment of Junior Ministers reduces, and in some cases completely removes, the presence of a government backbench to act as a check and balance on government. Therefore, in order to promote an environment that supports clear separation between the Executive and the Legislature and, in light of the recommendation by the Commission that a sixth Minister be introduced, the Commission recommends the abolition of the position of Junior Minister. However, in the event that the Commission's recommendation for introduction of a sixth Minister is not approved, the Commission recommends that there be no increase in the two Junior Ministers at present, but that the role of Junior Ministers be clarified in the Ministerial Code of Conduct.⁴

Terms limits for the office of Premier was another feature not traditionally supported by the Westminster model that the members of the public (not all necessarily in favour) mentioned repeatedly. Persons in favour tended to prefer staggered rather than absolute limits. There is no one-size-fits-all approach to term limits. For example, varying factors are more or less relevant depending, for example, on whether a decision is taken to directly elect the offices of Premier and Deputy Premier, whether the positions of Premier and Deputy Premier are selected from the at-large candidates, or whether the status quo remains. Additionally, the Commission is of the view that the matter of whether to adopt term limits in the future should be put to a referendum. Given the small size of the pool of persons eligible for elected office in the Territory, unless stringent measures for succession planning are implemented, imposing term limits on holders of elected office is likely to do more harm than good. Further, the potential for abuse of power is not tied to length of term in office. Other methods of strengthening accountability and curbing abuse of power can be explored such as those discussed following.

The Commission supports the calls of members of the public for the implementation of recall provisions. The Report therefore recommends that legislation should be enacted to provide a recall mechanism and that section 67(3) of the Constitution be amended to include circumstances where a Member of the HoA has been recalled as an additional ground for vacating his or her seat in the HoA. Other than recall, the Commission supports the following:

⁴ Approved by Cabinet and laid in HoA in 2021.

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- amending section 53(3) of the Constitution to require a Minister to vacate office where he or she has been found to have breached the Code of Conduct set out in Schedule 3 of the Integrity in Public Life Act, 2021;
- considering a similar requirement for an elected Member to vacate his or her seat where he or she has been found to have breached the Code of Conduct set out in Schedule 3 of the Integrity in Public Life Act, 2021; and
- implementing a constitutional requirement that the Premier, in the exercise of his powers and functions, is required to act in the best interest of the Territory.

As a final note on this ToR, the Commission gave considerable thought to whether the implementation of a bicameral legislature is also a mechanism for greater accountability that it could recommend. There were several proponents of an upper house in comments submitted to the Commission. The Commission was of the opinion that the public should be educated and consulted further on this but also that, in the interim, alternative options to bicameralism that could bring the same benefits should be given a chance to work. Some of these were mentioned earlier and include more robust use of HoA select committees, properly resourcing these committees, and making the work of these committees public.

Whether independent institutions are effective

There are several independent institutions established by the Constitution. These include the Auditor General, the Director of Public Prosecutions (DPP), the Complaints Commissioner and the Registrar of Interests. They assist with holding GVI to account and, in order to do so effectively, are meant to be free of political interference in all aspects of their operations. Yet, the reality of existing within the rigid confines of government structure means that, in practice, many of these are subject to government's central budgeting and human resources procedures. This compromises their independence and also causes delay. The primary recommendation under this ToR is therefore for a constitutional amendment stipulating that independent institutions in the Constitution shall enjoy administrative and financial independence.

In order to buttress the above, the DPP, the Auditor General, the Complaints Commissioner, and the Registrar of Interest should also benefit from the Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008 each as an 'Authorised Officer' to whom the Governor may delegate some of the Governor's powers to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices.

The establishment of a human rights commission, one of the constitutional advances secured in 2007, remains unimplemented. The establishment of this commission should cease to be optional. The Commission recommends the mandatory and prompt establishment of the Human Rights Commission.

There was some discussion among Commissioners about the public's perception that the Complaints Commissioner could be more effective if the office had greater powers, particularly enforcement powers. The Commission is therefore of the view that the Complaints Commissioner Act, 2003 should be amended to allow for the Complaints Commissioner to refer certain matters in certain circumstances to the Integrity Commission.

Provision should be made in the Constitution for the establishment of an independent Elections and Boundaries Commission.

Powers that need to be reserved to the Governor and Transfer of reserved powers to devolved GVI

It is helpful to take these two ToRs together as they are complementary.

By way of background, the Governor's reserved power under the Constitution is the power reserved to that office under section 81 of the Constitution to make laws for the Virgin Islands where the legislature fails to do so. However, although not strictly speaking a 'reserved power', there are powers that the Governor has under the Constitution where he can act in his own discretion – which are referred to as discretionary powers. Lastly, there are certain

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special responsibilities which only the Governor has (defence, external affairs, internal security, international relations, the courts, terms and conditions of the public service) but some of which may be devolved to local Government. The Commission acknowledges that there are already mechanisms in place to devolve many of these and that those mechanisms appear to be working well. Such mechanisms include Letters of Entrustment and Regulations dealing with devolution of several powers relating to the public service.

Against that background, the Commission nevertheless thought that it was appropriate to make some further improvements in order to reflect a more modern constitutional relationship between the UK and the VI:

- the Commission agrees with the recommendation received during public consultation that relations with Puerto Rico should be added to the list of external relationships with the VI which would be delegated to local Government under a Letter of Entrustment;
- the ouster of the jurisdiction of the court in section 40(6) of the Constitution should be removed. This was also mentioned in comments to the Commission;
- the Commission is also of the opinion that, in order to reflect a more modern constitutional relationship, there should be a constitutional requirement for the Governor to consult prior to the exercise of his discretionary powers; and
- similarly, section 119 of the Constitution should be followed by a section that stipulates that the UK Secretary of State will make the Premier aware in advance of any draft UK Act intended to apply directly to the VI, or an Order in Council to be made extending any provision of a UK Act to the VI. This would allow the Cabinet to signify its views on the proposed legislation.

The Commission recognises that there may be times when the roles of the Governor may overlap with the responsibilities of a Minister. A recent example of this is during the Covid-19 pandemic where some responsibilities fell to the subject Minister for Health whilst others fell to the Governor under emergency powers and internal security. This was handled very well. However, in some cases, there may be the need for a third party to mediate, as it were. The Report therefore recommends a draft Statement of Partnership which may be followed to avoid such conflict and, if necessary, resolve them outside of the Constitution. Contrary to the suggestion in the Col Report, the Commission did not see it necessary to address this within the written Constitution.

Regime for election expenses

Whenever this ToR came up during public consultation, there was no disagreement nor lengthy discussion around it. The Commission is of the view that the VI has reached a point in its political maturity where the time has come for the establishment of a regime in relation to election expenses. This would make the Territory compliant with international standards as well. However, the regime should be legislated for outside of the Constitution to allow for greater flexibility and updating of such legislation.

Constitutional consideration for statutory boards

Members of the public did not address this topic much. Those who did were more concerned with issues of accountability and timely annual reporting.

The Commission is firmly of the view that statutory boards should not be elevated to inclusion in the Constitution. To do otherwise runs contrary to the corporate governance principles which require board members to assume responsibility for corporate governance. Their role is not dissimilar to that of directors of companies. Board members need to fully understand and competently execute their roles and responsibilities, and be provided with regular training. This is one of the reasons why board members are to be carefully selected. The legislation establishing the statutory board should address reporting issues and these can be enforced by the HoA, for example through the Public Accounts Committee.

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Appointment or election of the Speaker

Whilst a practice has developed in the VI to appoint as Speaker someone who is not an elected Member, the Constitution does allow for the Speaker to be selected from among elected Members. In the circumstances, the Commission does not see merit in amending the Constitution to take away either option. Additionally, appointing the Speaker from among elected Members can deprive the Opposition of a needed vote or voice where the Legislature is already very small.

What the Commission does agree with is that any Speaker must be politically neutral and impartial and that this goes further than in demonstrable behavior in the HoA. As is the case in the UK Parliament, it should be a requirement that the Speaker also actually resigns from any political party affiliation.

Declaration of interests - how made

A person who wishes to hold or continue to hold a seat in the HoA is disqualified from so doing if he or she fails to declare that he or she is a party to or otherwise has an interest in any contract with the Government. The provisions are similar to those found in the constitutions in the Commonwealth Caribbean. The individual may contract with the Government as an individual or through a company or partnership. The Constitution also makes provisions for the possibility of an exemption from a Member vacating his or her seat for failing to strictly adhere to such requirements, if the Member discloses required details of the contract and his or her interest in it. The exemption is in the discretion of the HoA.

In a small jurisdiction as the VI where there may limited (or indeed sole) vendors for goods and services, and where the pool of those willing to hold elected office is small, an appropriately structured exemption is reasonable. Either the Government's access to goods and services could be otherwise reduced or people's choices for electoral candidates may be otherwise reduced.

The various provisions on declaration of interests are fraught with difficulties due to the language, drafting and structure of the provisions. They are therefore open to misinterpretation and/or misunderstanding at times. The Commission therefore agrees that sections 67(7) and 67(9) of the Constitution should be amended to clarify (i) when and how a declaration of an interest in a contract with Government is to be made, and (ii) when an exemption would apply. Extensive re-drafts have been suggested to:

- clarify when a disclosure is made on the basis of the contracting party being an individual;
- clarify when a disclosure is made on the basis of the contracting party being a company, partnership or other entity;
- clarify the details that need to be disclosed in each of the above cases;
- add more specificity to when an exemption would apply, time wise;
- define 'contracts' in such a way that routine contracts for small sums are excluded; and
- define 'contracts' so that contracts with public authorities should also be disclosed.

Declaration of interests and statutory boards

Continuing with the ToR above, the Commission agrees with public sentiments in support of maximum transparency in the conduct of the public's business. This must be the objective that the requirement to disclose contracts seeks to address. As such, the Commission recommends that sections 66(1)(f), 67(3)(e), 67(7), and (67(9) of the Constitution be amended to include express reference to the declaration of contractual interests with statutory boards.

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What should be the proper relationship between ministers and their departments

This ToR attracted a number of helpful comments from the Top Managers⁵ of the Public Service and the Commission is indebted to the many of them who replied. Some of their contributions are acknowledged more specifically later on in the Report.

From a constitutional standpoint, the Commission made only a small observation that it wishes to have addressed. In section 56(5) of the Constitution where reference is made to a Minister being assigned responsibility for the administration of a department, the section states that the Minister shall exercise direction and control over that department. Other Commonwealth constitutions that have similar language all refer instead to “general direction and control”. The Commission is of the view the small amendment should be made for the sake of consistency, particularly as the jurisdiction may be able to benefit from judicial dicta or rulings on the standard version of the phrase.

Many other recommendations were made to address the ToR but these fall outside the Constitution. The Commission was not of the opinion that the Constitution was the relevant place to address the concerns raised, nor did it feel that it was necessary to address them in any other legislation. The challenge posed by this ToR is not at all new. Scholars and public administrators alike have and continue to wrestle with identifying a solution. The Commission considers that, in the meantime, the following would make a difference:

- Updating the Ministerial Code of Conduct to more comprehensively address the conduct of Ministers in their relationship with Public Servants;
- Issuance of a Parliamentary Code;
- Induction and training for new Ministers;
- Mandatory training for new Permanent and Deputy Permanent Secretaries, including the Financial Secretary and Deputy Financial Secretary;
- Amendment to the Public Service Management Code to include a redress procedure where a Permanent Secretary raises concerns about political interference by a Minister;
- Re-activation of the Public Accounts Committee – the mechanism for holding Accounting Officers to account to Parliament; and
- Enhancement of the policy making process to allow the Minister’s goals to be more clearly articulated before papers are taken to Cabinet. The Cabinet Handbook issued in 2009 should be updated to include the use of green papers and white papers, for example.

Next steps towards self-determination

It is very important to introduce this ToR by noting that there was general confusion on the topic when members of the public were engaged. The concept of ‘self-determination’ was often used interchangeably with independence. Therefore, public meetings were used to educate persons fully and fairly. So too it is with the Report. The Report goes into some detail to provide a balanced overview of what self-determination means as well as to provide a timeline of significant related international developments. This informative approach is also in response to requests from several members of the public – both in verbal and written comments – for more education on this topic. The need for much more education was the most repeated comment under this ToR.

The need for greater fiscal responsibility and greater accountability were also noted as a necessary step towards greater self-determination. All good governance institutions should enjoy true independence. Those institutions yet to be set up (such as the Integrity Commission, the Contractor General and the Human Rights Commission) should be made operational without further delay.

⁵ Permanent Secretaries and Heads of Department.

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The Commission acknowledges that greater self-determination must be accompanied by continued reduction in the powers of the Governor. Under the ToRs which deal with the devolution of the Governor's powers, some proposals for further devolution or delegation were raised. These include enhanced constitutional requirements for the Governor to consult the Premier.

Planning is also needed and this includes a population study.

The discussion on this ToR can be closed out how it began- the need for unbiased and full education. There appears to be some confusion amongst some sections of the public that a referendum on the subject is not necessary. It is true that it does not have to be a referendum but international principles on this topic mandate that there must be a means of assessing the wishes of the people as a whole.

Law enforcement and justice agencies

The Col Report proposed that this Commission consider how best the law enforcement agencies can sit within the constitutional framework.

HM Inspectorate of Constabulary and Fire & Rescue Service has been appointed to conduct the review of the law enforcement agencies but the Commission does not have the benefit of its findings and recommendations at this time. The Commission discussed the potential for an enhanced role of the National Security Council but made no recommendation on it pending conclusion of the law enforcement review.

The Col Report also recommended a review of the law enforcement agencies and justice agencies. The correlation between law enforcement and justice agencies is clear. The Commission recommends that the Constitution be amended to provide for judge alone criminal trials by way of legislation.

Chapter 4 - Recommendations on other aspects of the Constitution

The Commission considered many other aspects of the Constitution as the scope of its ToR was wide and persons held firm views on various constitutional matters.

The preamble to the Constitution is considered to be very good and the Commission therefore recommended only a light refresh of it. The Commission considered the Malone report⁶ on Belonger status and is in general agreement with the on-going approach to formulate policies on the matter after a period of public consultation.

The subject of Crown lands was considered and several recommendations made including for legislative changes to support the constitutional provision, including legislation to provide the necessary principles for transparency in the acquisition, management and disposal of Crown lands and ensuring these Crown lands are used for the benefit of the people of the VI, both present and future, as a whole. Further, and noting that the Abendego review on Crown lands did not address the growing challenge of derelict vessels on Crown lands, the Commission is of the opinion that the legislation should also provide for a protocol, consistent with admiralty law, for the disposal of derelict boats on Crown lands including recouping any public funds spent on such disposal.

On the fundamental rights themselves, the Commission considered several issues and additional rights canvassed by the public and offered some improvements. For instance, revised language is recommended to the right to marry that, whilst not changing the legal interpretation of the present wording, uses language that is clearer for persons to understand that the constitutional recognition of marriage continues to be between persons of the opposite sex.

⁶ Malone, Kedrick. Review of Policy and Process for Granting Residency and Belongership. COI Recommendation B.33, Government of the Virgin Islands, 24 July 2023.

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On the freedom of expression and assembly, the law has evolved significantly over the decades to allow some flexibility for certain public officers to take part in political activities in some circumstances and based on their rank. The Commission believes that, whilst no change to the Constitution is needed, some modernisation to the existing public service policy should be considered in the Public Service Management Code.

Many persons called for the right to free secondary education. However, whilst this is not an international constitutional standard, free secondary education is currently provided for in legislation in the VI making the Territory more advanced in this regard than many. The Commission's recommendation is therefore for a constitutional amendment to refer to the progressive realisation of free secondary education. Inclusion of an aspirational right to education for children and persons with special needs is also recommended. In keeping with requests from the public, the Commission also advocates for a constitutional provision for the elderly.

Also raised by members of the public were requests for constitutional protection for the right to fish and farm without a licence, and the right to bodily integrity. However, the Commission is unable to support constitutional consideration in regards to these at this time and encourages readers to review the reasons for the Commission's position in the relevant sections of the Report.

As a rather bespoke exercise, the Commission considered the current situation in the VI where laws are difficult to access, to be unacceptable. What is more, there is a constitutional dimension to this as it directly impacts the essential element of the rule of law and the administration of justice. A new constitutional provision is therefore proposed to set a standard for accessibility of laws in the Territory.

The Commission also considered the question of whether the time is ripe for the expansion and reform of the Cabinet Office to fulfill a greater role that more aligns with similar offices elsewhere. This includes a greater policy coordination function and consideration of whether it should be housing several of the independent institutions and projects. The Commission also discussed some of the challenges that arise under the existing provisions (e.g. who should be chairing Cabinet).

Under the provision that addresses the Pension Fund, the Commission proposed a re-draft that both removes the optional language for the establishment of the Pension Fund and requires transitional legislation. These changes have been driven by the development of case law in the region.

On electoral reform, a constitutional amendment is suggested to require the Premier in exercise of his or her functions under the Constitution, to exercise those functions in the best interests of the Territory. No recommendations were made to reduce the qualification age for the HoA to 18 years, for fixed date elections, for run-off provisions, nor for a five-year election cycle.

Finally, the Commission would like to highlight its recommendation for a constitutional provision to support establishing District Councils. This was a topic raised by the Commission from the commencement of its public consultative session and it was therefore a great disappointment that Cabinet considered the matter and took certain decisions prior to the submission of this Report. The Commission would encourage persons to read the relevant section on this in full as considerable research of local government models around the world was considered. The consensus following that was that a model more bespoke to the VI was needed. The Commission should stress that its proposal may not therefore align in several respects with what the Cabinet has already published. In the end, the Commission encourages members of the public to become fully educated on the subject and advocate for an objective solution that is best for the VI.

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Chapter 5 - Other recommendations and discussions

To conclude this Report, a number of other recommendations were made that, whilst relevant, may not necessarily trigger an amendment to the Constitution itself. A few other discussions were noted for the sake of clarity and completeness.

A population policy and on-going review is so fundamental to the formulation of government's policies that it cannot be over-emphasised. This has also been noted as a mandatory step towards self-determination.

No recommendation has been made to adopt proportional representation. There was no overwhelming desire from the public to venture in that direction and, in any event, the Commission's research led to the conclusion that such a system is not appropriate for small electoral populations. Further education and wider consultation would be needed before such a change is actively considered.

The Report considers some on-going initiatives of the UK Parliament as to how OTs may be better represented. However, the Commission does not consider it appropriate to make a recommendation on this matter but would encourage the public to consider both the pros and cons of this and to review the submissions made from other jurisdictions as part of the evidence of the on-going UK Parliamentary review.

The Commission joins the public in advocating for the return of the Law Reform Commission.

Finally, the Report concludes with a discussion on what was one of the most highly discussed topics during public consultations – the need for on-going education the Constitution. There was a passionate cry for this to continue. The Commission strongly supports on-going education but cautions that such engagement, however it occurs, should be politically neutral, balanced and fair.



Figure 2: Commissioners during the visit of Rt. Hon. Sir Dennis Byron

3.1 Terms of Reference

The Commission's Terms of Reference have already been cited [above](#) but, for the sake of easy reference, are repeated below:

- A. To re-evaluate the vision of the people of the Virgin Islands, as expressed in the preamble to the Virgin Islands Constitution Order, 2007, and to amend accordingly, if necessary;
- B. To evaluate the current Virgin Islands Constitution Order, 2007, and determine whether it is a strategic fit to facilitate the people of the Virgin Islands in achieving the revised vision in item (A) above;
- C. To identify any gaps in relation to item (B) above;
- D. To make recommendations for Constitutional Reform, if necessary, including but not limited to considering the following:
 - (i) how the executive ministerial government can be held to account in the House of Assembly, and how checks and balances and mechanisms for accountability may be employed to militate against abuse of power;
 - (ii) whether the independent institutions enshrined in the Constitution are sufficient and effective to ensure good governance;
 - (iii) the powers that need to be reserved to the Governor, and how issues as to the exercise of devolved and reserved powers, respectively, when they arise, are to be resolved;
 - (iv) a mechanism for the transfer of reserved powers to the devolved BVI Government in the future, without a further change to the Constitution being required;
 - (v) whether there should be a regime in relation to election expenses;
 - (vi) whether statutory boards should be embedded in the Constitution and, if so, whether there should be a Statutory Boards Commission and, if yes, its functions and responsibilities;
 - (vii) whether the Speaker should continue to be a political appointment, or whether he or she, even if elected, should be independent of the political parties;
 - (viii) whether sections 66 and 67 of the Constitution need to be amended to make clearer the circumstances in which a person seeking election to the House of Assembly or a Member of the House who (either personally or through a dba, a partnership or company with which he or she is associated) contracts with the BVI Government needs to declare such an interest, how such a declaration should be made and the consequences of him or her not doing so;
 - (ix) whether sections 66 and 67 of the Constitution need to be amended to also apply to statutory and other public bodies;
 - (x) what should be the proper relationship between Ministers and their departments and whether any amendment to section 56 of the Constitution should be made;
- E. To review the next step towards self-determination for the Territory of the Virgin Islands; and
- F. To consider how best the law enforcement and justice agencies can sit within the constitutional framework.

D(i) - HOW THE EXECUTIVE MINISTERIAL GOVERNMENT CAN BE HELD TO ACCOUNT IN THE HOUSE OF ASSEMBLY, AND HOW CHECKS AND BALANCES AND MECHANISMS FOR ACCOUNTABILITY MAY BE EMPLOYED TO MILITATE AGAINST ABUSE OF POWER

3.2 How Executive Ministerial Government Can Be Held to Account - Checks and Balances

This term of reference attracted lively debate and discussion throughout the Constitutional review exercise. The questions posed (in the ToR) are topical and members of the public were resolute in their suggestions for change and improvement that they put forward. Those topics of discussion are listed and analysed below, with the relevant recommendation or recommendations following each.

3.2.1 Transparency, Accountability and Public Consultation in Legislative Process

One of the most significant concerns raised was the lack of transparency, accountability and public consultation in the development of public policy, and the administrative and legislative processes. Criticisms included lack of dissemination of policy papers (e.g. green papers and white papers) prior to drafting of legislative proposals, passing of bills in one sitting, a lack of publicity of the second reading of Bills at the committee stage, and a lack of transparency of standing finance and public accounts committees. These issues were raised by both members of the public and the HoA.

These issues fall for consideration under this ToR but are also relevant to the [ToR](#) on the next steps towards self-determination and to re-evaluating the vision.

The preamble to the 2007 Constitution recognises that "...the Virgin Islands should be governed based on adherence to well-established democratic principles and institutions." Section 72 on Standing Orders provides that:

Subject to this Constitution, the House of Assembly may make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business, and the passing, entitling and numbering of Bills and the presentation of Bills to the Governor for assent.

The substantive provisions do not mention "good governance", "accountability", "public participation" nor "transparency".

The 2005 Constitutional Review Commission, in its review, was charged with addressing 'measures promoting more open, transparent and accountable government' and 'the promotion of representative and participative government'. The need for more transparent mechanisms was not canvassed in relation to the process of developing legislation but was cited in relation to the process of applying for Belonger and resident status, debates on legislators being liable to vacate their seats, and the functioning of the DPP and various Service Commissions.

In its remarks on 'Constitutional Advancement and the Question of Independence', the 2005 Commission crafted the following statement of intent, which remains fully valid and applicable:

We must seek through this Review, to craft the kind of democratic framework which permits of the highest exercise of authority by the Territory and our representatives over its affairs, necessary for the effective conduct of the business of government in an open, accountable and transparent manner, and subject to appropriate and proportionate checks and balances on the exercise of that power and autonomy in order to ensure good governance and respect for human rights and the rule of law. In other words, there must exist in the Territory a 'culture of accountability' and of 'self-policing', including the fearless and

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dispassionate enforcement of the laws, regulations and conventions which form an integral part of the constitutional and legal fabric of our government and its institutions, and which are so essential to guard and protect citizens from gross mismanagement and abuse of power in public office at all levels.

The Constitute Project, a comprehensive analysis of the world's constitutions, identifies 9 constitutions which include the term 'public participation', 69 which include the term 'transparency', and 223 which include the word "accountable" or "accountability".

Examples include the constitution of Zambia, which prescribes public participation in financial frameworks, development plans (Art. 205) and environmental management (Art. 257). Fiji's constitution requires the facilitation of public participation in legislative and other processes of parliament and its committees providing in Art. 50(2) that 'a person making any regulations or issuing any instrument having the force of law must, so far as practicable, provide reasonable opportunity for public participation in the development and review of the law before it is made'.

The constitution of the Republic of South Africa also contains provisions on 'basic values and principles governing public administration' and provides in s.195 that '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information'. In a number of provisions, various organs of the State are empowered to:

make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

Australia boasts a Legislation Act 2003 which sets out the rules for the legislative process. It stipulates that before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument.

The UK does not have a single piece of legislation prescribing public consultation, but there is a Code of Practice on Consultations which sets out the criteria for when formal consultation should be called and establishes some guidelines on minimum length (usually at least 12 weeks) and process.

Transparency refers to the principle that public institutions should be open, have clear processes and promote access to information about the execution of their functions in order to facilitate public scrutiny and accountability. Similar to 'freedom of information' from public institutions, transparency, accountability and public participation in the legislative and administrative processes provide another tool for 'how the executive ministerial government can be held to account in the House of Assembly, and how checks and balances and mechanisms for accountability may be employed to militate against abuse of power'.

During public consultations, a question was raised about the effectiveness of Standing Finance Committee and the Public Accounts Committee (the latter has not met for some years). One of the reasons these committees are not as effective as they ought to be is because of how late departmental annual reports are prepared and published. A member of the public confidently offered that some such reports have not been prepared for over 10 years. Yet, the relevant departments are allowed to continue incurring significant expenditure without scrutiny or penalty, the member of the public noted. The Commission was otherwise informed that in the past, such delay would have affected the relevant Accounting Officer's salary increments and performance appraisal. Her passionate plea was for the inaction to be addressed in the Constitution. The Commission also received a written submission raising similar concerns for the undue delay on the part of the Ministry of Finance in the completion of Government's annual audited financial statements and similarly queried whether a remedy lies within the walls of the Constitution. Ministers cannot properly report to the HoA and select committees cannot properly scrutinise Government spending if these types of reports are tardy and so the delay has a direct impact on transparency and accountability.

A further observation on the point of transparency is that a review of HoA Order papers over the last 5 years reveals numerous instances where parliamentary timeframes have been collapsed in order to pass legislation in one or two sittings with little or no publication or consultation. For example, the **Retiring Allowances (Legislative Service) (Amendment) Act 2021**, which later became known colloquially as the 'Greedy Bill', "was rushed through the HoA

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in one sitting. No draft was Gazetted as usually happens after a first reading”.⁷ Legislators and others have gone on record urging an end to this practice. However, the problem begins even earlier in the process, as there are very few avenues for public insight into policy development.

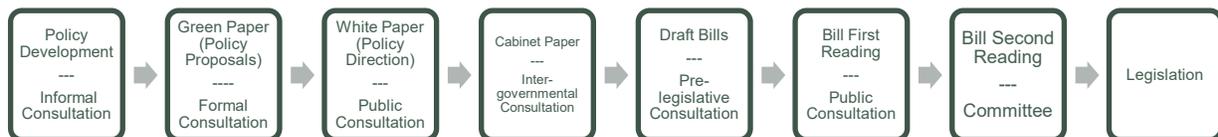
Arguably, the root cause of dissatisfaction with the “legislative product or service” stems from lack of adherence to standard quality control mechanisms such as documented information, policy design and development processes; and performance evaluation and improvement processes. For example, in the ‘green paper’ and ‘white paper’ processes, the ‘green paper’ sets out potential policy options for public review and consultation. The ‘white paper’ sets out the policy direction chosen and the legislative proposals that will be pursued.

The House of Lords in their 2017 Report by the Select Committee on the Constitution acknowledged that ‘public consultation is now an established feature of the legislative process’ and noted that,

There are a number of different stages at which the views of stakeholders and Parliament can be sought by Government:⁸

- Informal discussions with stakeholders throughout the policy development process;
- Formal public consultation on green and white papers;
- Informal consultation with stakeholders during the drafting process; and
- Formal consultation on draft legislation.

A structured policy and legislative development process is ‘necessary for the effective conduct of the business of government in an open, accountable and transparent manner’. Opportunities for consultation could be as follows:



The strong public demand for increased transparency, accountability and public participation in the legislative process weighs in favour of explicitly including these values in the Constitution. A review of other constitutions indicates that this is not without precedent. In addition, the National Sustainable Development Plan, Vision 2036 identifies good governance, accountable government and citizen participation as National Goal #5. This goal proposes that,

...citizen participation in governance processes be a key pillar of the country’s development planning and recognizes that social trust is a key resource to advance inclusive and sustainable development. Under this goal, emphasis will be placed on the pursuit of good governance, deepening democracy, creating a modern, efficient and effective public sector that is guided by the principles of accountability, transparency and trust.⁹

Standing Orders presently govern both the legislative process and the Public Accounts and Standing Finance Committees. One solution may be to insert a requirement for Standing Orders to give ‘due regard to ...accountability, transparency and public involvement’. This should, at a minimum, enable Public Accounts and Standing Finance to be held in public save where there is good cause for privacy. A constitutional requirement to consider transparency,

⁷ “HOA Passes 11 Bills in Two Days - The BVI Beacon,” May 15, 2021. <https://www.bvibeacon.com/hoa-passes-11-bills-in-two-days/>,

⁸ House of Lords Select Committee on the Constitution. “Chapter 3: Consultation and Pre-Legislative Scrutiny in The Legislative Process: Preparing Legislation for Parliament - 4th Report of Session 2017-19 - HL Paper 27,” October 25, 2017. <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2706.htm>.

⁹ Government of the Virgin Islands. “Vision 2036: Building a Sustainable Virgin Islands,” January 2023.

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accountability and participation acknowledges these values and prompts the HoA or Cabinet to consider measures such as improving the functioning of the committee system (see 3.2.13 [House of Assembly inquiries and hearings](#)), implementing a Public Consultation Code or such other guidance on the implementation of Standing Orders as would enable due regard to public consultation, accountability and transparency, while preserving flexibility for urgent or emergency measures when necessary.

To round out public consultation and related policy-making points, policy-making is not simply some mechanical process of inputs and outcomes coordinated by a policy unit and fed into a Cabinet paper to inform Cabinet. Policy-making invariably requires meaningful and preferably human interaction (as opposed to remote opinion-gathering tools such as restrictedly worded referenda) with the public and relevant stakeholders. It requires research. It requires effective communication. It requires a cultural shift in the Public Service. As early as 2000 the report on the National Integrated Development Strategy (NIDS) noted similar concerns regarding planning. When it came to planning, the NIDS report noted that the bureaucratic system is characterised by the lack of a clear separation between the budget allocation and the determination of planning priorities. So, often, priorities were determined by the budget allocation rather than by the outcome of a consultative process. The institutional weakness of the public sector was cited as a significant constraint to effective plan implementation and the need for institutional strengthening of the public sector, with an emphasis on the planning capability, was noted.¹⁰

The conclusion of NIDS remains relevant to this day where it observes that the VI:

must change the way government operates and the nature of its relationship with the people. There must be a renewed emphasis on planning throughout government and the focus must be on the development of a flexible framework of long-range policies and strategies The new planning organisation must be able to manage critical elements of the consultative process It must improve the efficiency of the delivery of public services and must have the resources to effectively network to manage information in a 21st century way to the benefit of the people.¹¹

In addition to bureaucrats, Members of the House of Assembly also hold powerful tools in their hands to assist with ascertaining the views of the public in helping the Government to formulate policy. They can do so through the use of committees where, for example, they can invite the written views of stakeholders, or hear from experts in the field. However, in order to do this, the HoA must be given appropriate levels of financial, physical and human resources. At present, HoA Members have no access to a library nor research assistants.

Recommendation No. 1 Transparency, Accountability and Public Consultation

The Commission therefore recommends that:

- (a) Section 72 of the Constitution should be amended to include a requirement for Standing Orders to give due regard to representative democracy, accountability, transparency and public participation. A drafting proposal follows;
- (b) Where possible all hearings and meetings should be held in public;
- (c) Where there are annual reporting and accounting requirements on Government departments, those timeframes must be strictly adhered to in order to support scrutiny by the HoA;

¹⁰ O'Neal, Otto, The British Virgin Islands National Integrated Development Strategy, 2000, pp 19-20

¹¹ O'Neal, Otto, The British Virgin Islands National Integrated Development Strategy, 2000, p 42

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- (d) Every opportunity for public consultation should be utilised during the legislative process, in particular ensuring the publication of all Bills prior to debate.

Drafting proposal

72 (1) Subject to this Constitution, the House of Assembly may make, amend and revoke Standing Orders, for the regulation and orderly conduct of its own proceedings and the dispatch of business, and the passing, entitling and numbering of Bills and the presentation of Bills to the Governor for assent.

(2) Standing Orders, and the implementation thereof, shall have due regard to representative democracy, accountability, transparency and public participation.

(3) Where pursuant to any enactment of the Legislature reports and accounts are to be provided to the House of Assembly or to a Minister of Government, such reports or accounts shall be made within the timeframes stipulated in such enactment.

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3.2.2 Junior Ministers

A number of comments were submitted in relation to Junior Ministers. There was no common theme amongst them and they varied from increasing the number of Junior Ministers to abolishing them altogether. Concern was also noted that the role of Junior Ministers needs to be defined.

The position of Junior Minister was introduced by the **Virgin Islands Constitution (Amendment) Order 2015**. Section 52A of the Constitution allows for the appointment of no more than two Junior Ministers from among the elected Members of the HoA “to assist in the performance of ministerial functions relating to economic development”. Constitutionally, Junior Ministers are not members of the Cabinet, but for all practical purposes, Junior Ministers are members of the Executive and they are not back benchers. It is the view of the Commission therefore that careful consideration needs to be given to whether (a) the role of Junior Minister is necessary at all, particularly if a sixth Minister¹² is introduced and (b) if the role of Junior Minister is retained, there needs to be more structure, accountability and clarity around the role, particularly in light of concerns raised both by members of the public and previous Junior Ministers themselves.

The Commission is of the opinion that there is a strong case for abolishing the office of Junior Minister altogether, or reducing the number of Junior Ministers, given that:

- (a) there is widespread concern that the current structure of government and, in particular, the size of the Cabinet and the principle of Cabinet collective responsibility, has resulted in a lack of clear separation between the Executive and Legislative arms of government and a weakening of the position of the latter. In a small jurisdiction such as the VI, having Junior Ministers does little to ameliorate these concerns since ministerial appointments of whatever nature tend to take away the availability of legislators to serve as backbenchers and on committees of the HoA – particularly those where Ministers are not eligible for membership; and
- (b) if the VI were to acquire the sixth Minister which is being recommended by the Commission, there is reduced need for Junior Ministers (whose constitutional role is to assist Ministers in the performance of ministerial functions).

Commissioners acknowledge, however, that there are also arguments in favour of retaining Junior Ministers and that Junior Ministers, if properly utilised, could have a positive impact on both succession planning and political experience.

Recommendation No. 2 Junior Ministers

The Commission therefore recommends that:

- (a) The position of Junior Minister should be abolished in order to promote an environment that supports clear separation between the Executive and the Legislature and availability of backbenchers as a necessary check and balance on the Executive, and in light of the recommendation by the Commission that a sixth Minister be introduced;
- (b) In the event that the Commission’s recommendation for introduction of a sixth Minister is not approved, the Commission recommends that:
 - (i) there be no increase in the number of Junior Ministers (i.e. that the maximum number of Junior Ministers that may be appointed be kept at 2); and
 - (ii) the role of Junior Ministers be clarified, but that such clarification of the role of Junior Ministers be included in the Ministerial Code of Conduct (which presently applies to Junior Ministers) and not in the Constitution itself.

¹² See related discussion in this chapter on [Direct election of Premier and revision of at-large system](#).

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3.2.3 Bicameralism

The Commission received proposals from a significant number of persons for the introduction of a bicameral system of government. One of particular note, received from Honourable Julian Fraser (member of the HoA) is appended to this Report ([see Appendix 6](#)). Several contributors made reference to the Senate established as one part of the Parliament of Bermuda, under the Bermuda Constitution Order 1968, as the preferred model to be adopted.

The proposals were based on numerous perceived flaws with the current unicameral system under the **Virgin Islands Constitution Order 2007**. By way of example, contributors cited a lack of accountability to the people by the HoA. Some contributors shared the view that, because too many pieces of legislation were being passed in short periods, the statutes required amendments too soon after they were enacted. In that regard, it was observed that a senate can provide for a more deliberative and enhanced legislative process, limit the opportunity for abuse of power and provide more cogent checks and balances on the functions of the HoA. Other contributors felt that the HoA served as a mere rubber stamp for decisions made in the Cabinet and, as such, another tier of review should be accorded to bills brought before the HoA. Contributors deemed that, given the volume of bills passed within very short periods of time, legislators have very little time to thoroughly scrutinise, analyse, and research the impact of bills being introduced to the HoA.

Bicameralism is a distinguishing feature of the Westminster and other forms of government, consisting of two separate chambers or houses, an upper house and a lower house, with legislative oversight. The governments of a host of Commonwealth jurisdictions have become increasingly reliant on second chambers as venues to introduce and debate legislation.¹³ A number of Anglophone Commonwealth Caribbean constitutions have established bicameral Legislatures as well.¹⁴ With the exception of Bermuda, all the UK OTs have only one House of Parliament. The Senate in Bermuda is referred to as the Legislative Council and comprises 11 members, 5 of whom are appointed from the governing party on the advice of the Premier, 3 of whom are appointed from the opposition on the advice of the Leader of the Opposition and 3 as independents, selected at the sole discretion of the Governor.¹⁵ Members serve 5-year terms.¹⁶

The rationale for advocating for a bicameral system of government is the need to avoid a concentration of power in a single body and the attendant risk of abuse. Bicameralism can also serve as a safeguard against extremism and enhance the chance of better representation and debate on special matters affecting the community. An upper house revises legislation; can delay the advancement of unpopular legislation; and can exercise the power of veto. Senators act as arbiters of checks and balances in the legislative process by contributing to the discourse on technical and specific types of matters, and by lending more mature reflection on a wide range of public issues which come before the Legislature. It is recognised that a senate is generally restricted from debating on money bills.

Opponents of bicameralism point to the heavy financial burden which a second chamber could impose. Also, there is the risk of duplication of functions in reviewing legislation and that the legislative process could be stymied where deadlocks arise.

The Commission also notes that there are alternative options to bicameralism that the Territory can adopt to obtain the benefits which are alleged to accrue from bicameralism (i.e. providing checks and balances on the Executive and the HoA, better means for checking legislation and providing a forum for discussion of important issues). For example,

- (a) Expansion of the HoA: There has been significant population growth and increase in the number of registered voters between 2007 and 2023 which may warrant increased representation. Expansion of the HoA could help to reduce the workload of Members of the HoA and provide them with more time to revise

¹³ E.g. Australia, Canada, India, Malaysia, Pakistan, South Africa

¹⁴ E.g. Barbados, Trinidad & Tobago, Jamaica, Commonwealth of the Bahamas, Belize, Grenada, St. Lucia, Antigua and Barbuda

¹⁵ Section 27, Schedule 2 to the Order of the Constitution of Bermuda, 1968

¹⁶ Section 31, Schedule 2 to the Order of the Constitution of Bermuda, 1968

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legislation thoroughly before enactment. Section 63(2) of the Constitution allows for alteration of the number of elected Members in the HoA, provided that the number of elected Members is not less than 13 (this does not necessarily have to be accompanied by an alteration in the number of electoral districts; there could for example be an increase in the number of at-large Members under section 64(2)(a)). Cabinet would be less able to dominate a larger house (note that under section 47(2) the number of Ministers must not exceed two fifths of the total elected Members of the HoA). In addition, a wider pool of talent would be available for Cabinet;

- (b) Reform and strengthening of the select committee system: The committee system enables bills before the HoA to be considered in detail and amendments to be proposed in a comparatively bipartisan atmosphere. Reports of committees are the primary vehicle for formulating recommendations to the Government. They are also an entry point for citizens' involvement in parliamentary business. Experts can be heard in, or become advisers to, parliamentary committees. Committees can invite interested parties to hearings or invite members of the public to give evidence;
- (c) Increase in technical and administrative resources available to committees and the HoA (e.g. clerks, researchers, lawyers, accountants);
- (d) Improvement of parliamentary procedures; and
- (e) Publicising committee stage meetings: Hearings held by parliamentary committees have the potential to be a vehicle for informing the public on policy issues and the work of the HoA on those issues.

Recommendation No. 3 Bicameralism

The Commission therefore recommends that:

- (a) There should be no change to the Constitution to provide for a bicameral house at this time. Adding an upper chamber, by itself, would not address the underlying issues limiting the effectiveness of the legislature. Recommended actions that should provide the benefits which are *desired* to accrue from bicameralism – i.e. improved quality of debate, greater number of backbencher to Minister votes, increased transparency and accountability include:
 - expansion of the HoA,
 - reform and strengthening of the select committee system,
 - increase in technical and administrative resources available to committees and the HoA, including a dedicated parliamentary research unit to aid in researching issues and preparing members for informed debate,
 - improvement of parliamentary procedures, and
 - publicising of committee stage meetings.
- (b) However, given that the move to bicameralism was a prominent theme in the public consultation process and on the campaign trail in the 2023 General Election, and given that such a move would constitute a fundamental change to the structure of government in the Territory, the Commission further recommends wider education, public consultation and engagement on the issue should be undertaken. If, after consultation, the public consensus is that the Territory would be better served by a bicameral Legislature, the Commission recommends that the members of the upper house be nominated rather than elected.

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3.2.4 Use of Referenda

During public consultations, the issue of entrenching the use of referenda in the Constitution was raised (in relation to same-sex marriages as well as the next steps towards self-determination). Raising this, particularly in light of the already promised referendum on the same-sex marriage demonstrates how deep feelings run on these topics. The Commission felt that a brief discussion of referenda would be helpful.

Entrenched v advisory referenda

The requirement for the use of referenda is entrenched in the written Constitutions of several Commonwealth Caribbean jurisdictions. Such provisions, however, are always in relation to procedural requirements to amend the Constitution itself. Because the Legislature has plenary law-making powers and the Legislature cannot be fettered in its ability to make laws for peace, order and good government, any other requirement for a referendum (even one affecting a constitutional issue)¹⁷ is typically written into a separate piece of legislation and the referendum is advisory in nature – that is, it is non-binding on the Legislature.

Commissioners are of the view that the Territory's **Referendum Act, 2002** is sufficient to allow for advisory referenda to be held within the framework of the plenary law-making powers of the Legislature and therefore make no recommendation with regard to constitutional entrenchment. However, a simple and non-contentious way to address the demands of the public is for the Territory to consider an amendment to its **Referendum Act, 2002** to state expressly that issues related to same-sex marriages and self-determination are deemed matters of national importance and, that way, advisory (i.e. non-binding) referenda will be mandatory on both those issues.

People-initiated referenda

Also raised during public consultations were requests from members of the public for provision to be made in the Constitution for the use of people-initiated referenda. The concept, a feature in several states in the US and in some countries in Europe, is a characteristic of direct democracy (as opposed to representative democracies where voters elect persons to represent them and entrust them with a mandate to legislate responsibly). That said, in addition to referenda discussed above, the concept of people-initiated referenda has been imported into the constitution of the Cayman Islands¹⁸ for matters of national importance that do not contravene its Bill of Rights. The trigger for a successful petition is one signed by at least 25 per cent of persons registered as electors. If assented to by more than 50 per cent of persons registered as electors, such a referendum then becomes binding on the Government and the Legislature.

However, the Commission considers that there is not yet sufficient experience with people-initiated referenda in the OTs and Commonwealth Caribbean to make an informed assessment of whether the benefits outweigh the disadvantages.

Recommendation No. 4 Use of Referenda

The Commission therefore recommends that there should be no amendment to the Constitution to provide for the introduction of people-initiated referenda at this time as there is not yet sufficient experience with people-initiated referenda in the OTs and Commonwealth Caribbean to make an informed assessment of whether the benefits outweigh the disadvantages.

¹⁷ Prime Minister of Belize, and The Attorney General of Belize v Vellow, Dawson and ors [2010] UKPC 7. The Referendum Act 1999 (passed in Belize as an ordinary Act of the Legislature) contained a requirement for a referendum in instances involving a derogation of a fundamental right in the Constitution. After the final appeal before the Privy Council, the requirement was interpreted as not, in fact, imposing a fetter on the legislative process. In other words, the referendum was construed as an advisory referendum and not an entrenched requirement. Noting that the case went all the way to the final court of appeal, the case reinforces the need for clear drafting.

¹⁸ Sections 69 and 70 of the Cayman Islands Constitution Order, 2009

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3.2.5 Freedom of Information

The implementation of freedom of information provisions as a way of addressing transparency was raised during public consultation. The absence of freedom of information legislation was noted by the Commonwealth Parliamentary Association in its report following the Territory's 2023 General Elections.¹⁹

The right to access information has existed in various international conventions and other instruments for several decades. For example, both the **International Covenant on Civil and Political Rights (ICCPR) 1966**²⁰ (which applies to the Territory) and the **Universal Declaration of Human Rights 1948**²¹ refer to persons having a right to 'receive...information...regardless of frontiers...'.

Recommendation 7 of the OECD Council on Open Government recommends "that Adherents develop, adopt and implement open government strategies and initiatives that promote the principles of transparency, integrity, accountability and stakeholder participation in designing and delivering public policies and services, in an open and inclusive manner. To this end, Adherents should:

7. proactively make available clear, complete, timely, reliable and relevant public sector data and information that is free of cost, available in an open and non-proprietary machine-readable format, easy to find, understand, use and reuse, and disseminated through a multi-channel approach, to be prioritised in consultation with stakeholders...."

Freedom of, or access to, information is typically addressed outside the Constitution in dedicated legislation under the moniker 'Freedom of Information Act' or 'Access to Information Act'. An independent office of the Information Commissioner is a feature of such legislation. Honouring its campaign manifesto, the Government in 2021 promised to bring a Freedom of Information Bill to the House of Assembly. At a press conference on 16 August 2022, the Premier gave his assurances that he was still committed to this but that addressing the Col reforms had taken priority.

Recommendation No. 5 Freedom of Information

The Commission therefore recommends that:

- (a) The Territory should enact Freedom of Information legislation – legislation on which the Government has given its continued commitment.
- (b) When a freedom-of-information regime is established, it should fall under the Cabinet Office (see 4.15 [Cabinet and Cabinet Reform](#)).
- (c) The Constitution should be amended to include a specific right of persons to access information generated by organs of the State and its entities, in accordance with legislation. Language to the following effect is recommended:

Drafting Proposal

Freedom of Information

Subject to this Constitution, a law shall provide for a right of access to information held by the public service or by public authorities, for the conditions for the exercise of that right, and for restrictions and exceptions to that right in the interests of international relations, the security of the Virgin Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals.

¹⁹ CPA BIMR Election Observation Mission Final Report, April 2023, p6

²⁰ Article 19

²¹ Article 19

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3.2.6 Term Limits for Premier

Proposals were submitted to the Commission for the introduction of term limits (more so for staggered term limits) for the position of Premier.

In the Caribbean context there are several instances where charismatic and popular party leaders have served for more than 2 terms.²²

Close to 100 countries have imposed term limits on their heads of government, though notably they are more commonly found in countries that have a presidential system. Presidential regimes are perceived as giving the incumbent an excessive advantage when they run for re-election; therefore, term limits are seen as a mechanism to help to even out the playing field for other candidates.

In countries with parliamentary systems, the same idea of avoiding a perpetuation in power applies also to the head of state,²³ so that it is not uncommon for term limits to apply to the head of state, whose powers are mostly ceremonial or representative in nature. A long serving head of state (particularly if directly elected by the people) could, it is felt, lead to a devaluation of the leadership that the Prime Minister assumes in such parliamentary systems. One argument is that the longer the time in office, the stronger could be the temptation for the president or head of state to abandon his or her role and enter into party politics.

Where term limits do exist they tend to come primarily in 2 forms: (a) a limitation on the number of consecutive terms in office and (b) a limitation on the total number of years that an individual can be in office.

The concept of term limits is relatively rare in the Caribbean, although several countries have considered implementing them. For instance, one year prior to the dissolution of the Legislature in 2011, Jamaica in 2010 unsuccessfully introduced legislation to impose a 9-year limit on the office of Prime Minister.²⁴ Also, constitutional reform legislation introduced in Trinidad & Tobago in 2014 included imposing term limits on its Prime Minister but this, too, has not yet come to fruition.²⁵ In 2019, the Government of St Christopher and Nevis attempted, without success, to pass term limits legislation through the Legislature. In a constitutional referendum in Grenada in 2016, a proposal to restrict Prime Ministers from serving more than 3 consecutive terms failed.²⁶

Notably, the Cayman Islands has introduced term limits for the post of Premier (see article 49, Cayman Islands Constitution). No one may be chosen as Premier 'who has held office as Premier during two consecutive parliamentary terms unless at least one parliamentary term has expired since he or she last held that office'. This means that, in effect, a premier cannot serve for more than eight years (assuming that the terms in question each went to the maximum 4 years), and then would have to be out of office for up to four years before serving again.

A summary of commonly cited arguments in favour of and against term limits is set out below.

Arguments in favour of term limits

²² For example:

- Keith Mitchell in Grenada: 3 terms. 1995 – 2008. Re-elected 2013 and served 2 more terms;
- Dr Ralph Gonsalves. St Vincent and the Grenadines. Served 4 consecutive terms as prime minister since 2001;
- Dr Denzil Douglas. St Christopher and Nevis. 4 consecutive terms. 1995 – 2015;
- Eric Williams in Trinidad and Tobago – served for over 2 decades;
- Forbes Burnham in Guyana - served for over 2 decades;
- Vere Bird in Antigua and Barbuda led for 19 years;
- Roosevelt Skerit in Dominica has served 5 consecutive terms since 2004.

²³ E.g. in Trinidad and Tobago, Guyana and Dominica presidents are limited to two five-year terms.

²⁴ Albert R, O'Brien D. The Oxford Handbook of Caribbean Constitutions (2020), p68-69

²⁵ Ibid

²⁶ <https://freedomhouse.org/country/grenada/freedom-world/2022>

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- Longevity in power is perceived as leading to abuse and corruption and to a suppression of challengers both within political parties themselves and in the political system generally. The careers of long serving politicians tend to become very entrenched and they usually amass significant power and influence and lose accountability. To quote Sir Probyn Innis, a former Governor General of St Christopher and Nevis, “[a]fter they’ve done two successive terms they tend to be out of control are more concerned about their legacy; their place in history; and much less concerned about the wishes of the people, (their) party itself, and succession...”
- Term limits are seen as a way to promote accountability, transparency and ethical behavior. Knowing that their term is limited, politicians are more likely to make better decisions. For example, they may be less concerned about opposing proposals simply because they were put forward by another political party.
- Term limits allow for rotation of politicians, new politicians, and therefore encourage fresh perspectives and new ideas. In theory, term limits could limit the influence of career politicians, open the door for persons from a wider cross section of society to become involved in politics and create a more level playing field. This could also boost voter participation.
- Term limits foster succession planning.
- Persons with term limits are generally rated as more effective.

Arguments against term limits

- Term limits could deprive the people of quality, experienced and effective leaders who are already scarce in the Caribbean.
- Term limits require that more time and resources be spent on educating new persons.
- Term limits are viewed as offensive to democracy and the electorate’s right to choose.
- Term limits may lead to a lack of accountability, decrease in transparency and apathy since politicians know their terms are finite. Why respond to constituents’ needs if you are not eligible to be re-elected?
- Term limits may incentivise politicians to focus on short term planning.

The Commission notes that calls for the imposition of term limits for the highest offices in the Territory are not divorced from the wave of discontent apparent in the Territory as it relates to the [first-past-the-post system](#). A frequent complaint from members of the public during the consultative stage of the Commission’s activities was that ‘one district votes in the Premier’ and that the positions of Premier and Deputy Premier should be voted for directly or selected from the at-large candidates (see 3.2.11 [Direct election of the Premier and revision of at-large system](#)). Given the importance of the issue of term limits and the strong popular sentiments around it, a wider degree of consultation is warranted and consideration should be given to putting the matter to a referendum.

Recommendation No. 6 Term limits for Premier

The Commission therefore recommends that:

- (a) The issue of whether to adopt term limits be put to a referendum;
- (b) In the event that a decision is made that the positions of Premier and Deputy Premier be voted for directly, the Commission would recommend that consideration be given to implementing term limits for holding such offices;
- (c) In the event that a decision is made to require selection of the positions of Premier and Deputy Premier from the at-large candidates, the need for term limits would in the opinion of the Commission be less significant; and
- (d) In the event that a decision is made to retain the status quo, given the small size of the pool of persons eligible for elected office in the Territory, unless stringent measures for succession planning are implemented, imposing term limits on holders of elected office is likely to do more harm than good. Further, the potential for abuse of power is not necessarily tied to length of term in office. Other methods of strengthening accountability and curbing abuse of power can be explored, e.g. implementation of powers of recall of elected Ministers ([see 3.2.7](#)). In addition, there are existing constitutional mechanisms which

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can be utilised to remove an ineffective Premier: (a) if he loses his position as party leader, (b) if he loses the confidence of a majority the Members of the HoA he would need to resign or call an election, (c) if he loses his seat or (d) if his party loses a general election.

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3.2.7 Recall Provisions for Elected Officials

Multiple submissions were made to the Commission for the introduction of recall provisions for elected representatives, to provide a mechanism for elected representatives to be removed from office before the expiration of their term. These proposals were made in response to the question of 'how executive ministerial government can be held to account in the House of Assembly, and how checks and balances and mechanisms for accountability may be employed to militate against abuse of power'.

Notably, the submissions made called for recall provisions to be triggered not just for dereliction of duty or poor performance, but also on the grounds of immoral behavior.

The Commission notes that recall mechanisms are comparatively unusual throughout the world and are particularly rare in Westminster style democracies. In 2014, Trinidad and Tobago unsuccessfully brought constitutional reform legislation to its parliament that, amongst other things, proposed a provision allowing constituents to recall a Member after two and a half years of service.²⁷ In jurisdictions that *do* permit recall, there are a wide variety of recall mechanisms used - some allow citizens to initiate a recall petition for any reason and the threshold of votes required to initiate a recall varies widely.²⁸ In some cases, a recall cannot be initiated until a certain time after the last ordinary election.

The Commission notes further that the comments received during the public consultation process indicate that there is a strong desire amongst the residents of the Territory for additional mechanisms for accountability for elected officials to be put in place, amidst growing mistrust by residents of Government and a belief that corruption is increasing and that it will not get better in the future. Recall provisions are seen as a tool to hold elected officials accountable.

The Commission acknowledges that a recall mechanism could potentially give the electorate more control over their representatives and has considered the arguments in support and against implementation of a recall mechanism.

The Commission has further considered the position in the UK and specifically the **Recall of Members of Parliament Act (2015)**²⁹ which was enacted following the parliamentarians' expenses scandal in the run up to the 2010 general election.³⁰ This legislation is in addition to other legislation which disqualifies Members of Parliament who have been sentenced to more than 12 months in prison and detained, from sitting in or seeking election to the House of Commons. It is also in addition to the Members' Code of Conduct which subjects Members of Parliament who breach the Code to the possibility of sanctions, such as suspension and expulsion from the service of the House, and the Standing Orders, which permit suspension of Members from the service of the House for disorderly conduct in the Chamber.

The UK recall provisions are fairly limited and can only be initiated in three circumstances:

- (a) conviction in the UK of any offence and sentenced or ordered to be imprisoned or detained for more than 12 months, after exhaustion of all appeals (note a sentence of over 12 months would disqualify a person from being a Member of Parliament anyway);

²⁷ Albert R, O'Brien D, The Oxford Handbook of Caribbean Constitutions (2020), p69

²⁸ Eg. In the US the conditions vary from state to state, including with regard to the number of voters required to initiate a recall, how long the recall petition remains open, and whether the reasons for recall are restricted or for any reason. Whilst the US President cannot be recalled, there are recall provisions in some states for state and local elected representatives. Only two provinces in Canada currently allow recall, British Columbia and Alberta. Recall provisions in Switzerland operate differently because recall is not typically against an individual but against the canton's parliament itself.

²⁹ <https://bills.parliament.uk/bills/1501>

³⁰ <https://commonslibrary.parliament.uk/research-briefings/sn05089/>

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- (b) suspension from the House of Commons following a report and recommendation from the Committee on Standards for a specified period (at least 10 sitting days or at least 14 days if sitting days are not specified); or
- (c) conviction for an offence under section 10 of the **Parliamentary Standards Act** (making false or misleading parliamentary allowances claims). (Note that the sentence does not have to be a custodial one for this condition.)³¹

In terms of process, a petition is presented for signing over the course of a few weeks. At least 10% of the eligible registered voters (on the day the petition notice is received by the petition officer) need to sign. The seat then becomes vacant and a by-election is required. A recalled parliamentarian can stand as a candidate in the by-election.³²

The Commission further notes that there was a review of the recall process in the UK in 2018 and that recommendations for improvement to the process were made, but to date these have not yet been implemented.

The Commission agrees that recall provisions would be a useful tool for ensuring accountability of publicly elected officials and building trust in the representative system.

Recommendation No. 7 Recall provisions for elected officials

The Commission therefore recommends that:

- (a) Legislation should be enacted to provide a recall mechanism and section 67(3) of the Constitution should be amended to include circumstances where a Member of the HoA has been recalled as an additional ground for vacating his or her seat in the HoA.
- (b) The recall legislation should:
 - (i) define grounds on which a recall mechanism can be triggered (similar to the UK model and including serious breaches of the Code of Conduct prescribed by the **Integrity in Public Life Act 2021** as a ground for recall);
 - (ii) restrict the right of recall to those persons who voted in the election held for the relevant representative and district;
 - (iii) ensure that the threshold for signatures needed to initiate the recall process is sufficiently high so as to make recall the last resort, not the norm; and
 - (iv) establish a 'safe harbour period' after assumption of office before recall mechanisms can be initiated, so as to give elected representatives adequate time to deliver on promises.
- (c) The recall mechanism should be designed with the following considerations:
 - (i) striking a balance between giving elected representatives freedom to perform their jobs and make difficult decisions when necessary and holding them to account when they do not maintain certain standards of conduct;
 - (ii) reducing the risk of instrumentalisation, polarisation and permanent campaigning; and
 - (iii) minimising the risk of inappropriately motivated recalls by ensuring a robust process to verify the authenticity of demands, for example, by empowering a body to assess the validity of the reasons supporting the recall.

³¹ House of Commons, Research Briefing: Recall elections: <https://commonslibrary.parliament.uk/research-briefings/sn05089/>

³² <https://www.legislation.gov.uk/ukpga/2015/25/notes>

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3.2.8 Grounds to remove Ministers (other than recall)

Submissions were made to the Commission for an expansion of the grounds on which the tenure of Ministers of government may be terminated.

The appointment and removal of Ministers is largely within the power and discretion of the Premier. The Governor appoints and removes Ministers on the 'advice' of the Premier.³³ There are however no guidelines on how the Premier should formulate or arrive at such 'advice'. Contrast this with section 50 of the Cayman Islands Constitution (*Functions of the Premier*), which expressly requires the Premier to exercise his functions in accordance with the Constitution and in the best interests of the Cayman Islands:³⁴

- 50.** The Premier shall have such functions as are conferred on him or her by or under this Constitution, and shall exercise those functions in accordance with this Constitution and any other law and in the best interests of the Cayman Islands.

Also, section 34(1)(d) of the Turks and Caicos Islands (TCI) Constitution provides that a Minister must vacate his or her office where the Integrity Commission determines that he or she has breached the Code of Conduct for Persons in Public Life.

The Commission notes that in 2021 GVI adopted legislation to govern integrity in public life, but that to date the Integrity Commission required to ensure proper enforcement of that legislation has not yet been established. Recent events in the Territory and growing public sentiment and concern around the conduct of those who occupy the highest offices in the land underscore the urgent need to bring this legislation into force.

Recommendation No. 8 Grounds to remove Ministers (other than recall)

The Commission therefore recommends that:

- (a) Immediate steps should be taken to establish the Integrity Commission and the mechanisms necessary to ensure the proper working thereof;
- (b) Section 53(3) of the Constitution should be amended to require a Minister to vacate office in circumstances where such Minister has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the **Integrity in Public Life Act, 2021**, noting that the laws and procedures governing the Integrity Commission will ensure that the Minister is afforded due process; and

In addition,

- (c) An express provision should be included in the Constitution to stipulate that the Premier, in the exercise of his powers and functions, is required to act in the best interests of the Territory.

³³ Section 52, Virgin Islands Constitution Order, 2007.

³⁴ Note that s60(6) of the Virgin Islands Constitution Order, 2007 contains a similar requirement but only in regards to matters falling under the Governor's special responsibilities that are delegated to the Premier or to any other Minister, requiring them to perform those matters in a manner that is in the best interests of the Virgin Islands and not prejudicial to the interests of Her Majesty.

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3.2.9 Disqualification for Membership – Convictions or Pending Criminal Matters

Proposals were submitted to the Commission for expansion of the grounds for disqualification from election to public office.³⁵ In particular, they include:

- disqualification on the grounds of conviction, regardless of whether such conviction is spent; and
- disqualification on the grounds of pending criminal matters.

These issues came to the fore in the 2023 General Elections in the Territory, where there were candidates with past convictions as well as pending criminal matters.

The Commission has considered prevailing international standards relating to the exclusion of persons with convictions and pending criminal matters from holding elected office, in particular, the 2018 report of The European Commission for Democracy through Law (Venice Commission) (the Venice Report).

Pending criminal matters

As regards persons who have pending criminal matters, no constitutional provision concerning persons being prosecuted but not convicted exists in the constitutions of the 47 Member States of the Council of Europe. On the contrary, in Australia, a person subject to be sentenced for an offence punishable by imprisonment for one year or longer is disqualified to stand for elections.

The Commission notes the conclusions arrived at by the Venice Commission in the Venice Report (on the basis of the applicable European standards, as developed in particular by the European Court of Human Rights when applying Article 3 of the First Additional Protocol to the European Convention on Human Rights). In particular, in relation to pending criminal convictions, the Commission concurs with the conclusion arrived at in the Venice Report that, “the deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, except for limited and justified exceptions. In practice, exceptions are applied in only a few states under consideration. (In the Venice Commission’s opinion, however, some exceptions could be legitimate and proportionate, for example, for crimes stipulated in the Rome statute of the International Criminal Court)”.

Criminal convictions

There is little consistency with respect to what prevails throughout the world relating to persons with convictions. For example, in the US and Finland, there are no or little restrictions on persons being eligible based on convictions alone. In some countries, offences in general preclude running for elected office. For example:

- Israel - a person who was convicted of committing an offence and sentenced to a term of imprisonment exceeding three months is ineligible to be a candidate for 7 years, unless the Chairman of the Central Electoral Commission determines that in the particular circumstances, the offence for which he or she has been convicted does not imply moral turpitude (Article 6(a) of the Basic Law: The Knesset).
- Peru - a person who has a criminal record cannot be an elected parliamentarian.

In the VI and many other countries, conviction for elections offences renders one ineligible to run for elections.

Most often, ineligibility to be elected also depends on the nature of the sentence pronounced (imprisonment), possibly combined with the nature of the offence. For example, in the UK, persons serving a prison sentence for more than one year cannot be elected for the time of pursuance of the sentence, under the Representation of the People Act (including to devolved assemblies).

³⁵ Sections 66 and 67 of the Virgin Islands Constitution Order, 2007.

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There is also precedent for persons with a conviction for offences involving moral values being barred from standing for elections. For example:

- Denmark - prevents a person from being a candidate to parliament if he or she committed any “act which in the eyes of the public makes him or her unworthy to be a parliamentarian.”³⁶
- Turkey - persons guilty of financial crimes (embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, bankruptcy), or crimes against the State (smuggling, conspiracy in official bidding or purchasing, offences related to the disclosure of state secrets, involvement in acts of terrorism), or incitement and encouragement of such activities, are not eligible for election even if they have been pardoned.³⁷
- Brazil - a Deputy or Senator shall lose his or her office if he or she is criminally convicted by a final and unappealable sentence.³⁸ Further, since 2010, under that country's Lei da Ficha Limpa (in English: Clean Record Act),³⁹ candidates are disqualified from running for public office for 8 years if they have been convicted by a second-level court (even if an appeal is still pending) of a serious crime (eg. homicide, rape and drug trafficking), lost their political positions due to corruption, or resigned to avoid impeachment.
- Canada - the **Parliament of Canada Act** and the **Canada Elections Act** provide for ineligibility criteria. Under section 65 of the **Canada Elections Act**, a person convicted of a corrupt or illegal practice within the previous five years or a person currently serving a prison term cannot be a candidate to parliamentary elections. Section 502 of the **Canada Elections Act** provides a list of offences and clarifies for how long the person is disqualified.
- Uganda - according to Article (83) of the Constitution, a parliamentarian may lose his or her seat “if he or she is found guilty of violation of the Leadership Code of Conduct”.
- Barbados - imprisonment exceeding 6 months, conviction of felony or of an offence involving dishonesty.⁴⁰
- Cayman Islands – section 62(1)(e) of the Constitution – no person shall be qualified to be elected as a member of the Legislative Assembly who is serving or has served a sentence of imprisonment (by whatever name called) exceeding 12 months imposed on him or her by a court in any country or substituted by competent authority for some other sentence imposed on him or her by such a court, or is under such a sentence of imprisonment the execution of which has been suspended, or has been convicted by any court in any country of an offence involving dishonesty.

There is a 2017 Cayman Islands case where it was held that the absolute disqualification from election of persons convicted of an offence of dishonesty provided in section 62(1)(e) of the Cayman Islands Constitution could not be avoided even where a conviction had become spent.⁴¹ In that case it was noted that the policy of the legislation treated rehabilitation and disqualification as distinctly different concepts: the former was intended for the protection of the redeemed offender, the latter for the protection of the wider public interests. The legislation which was the subject of the case (**Rehabilitation of Offenders Law (1998 Revision)**) has since been repealed and replaced by the **Criminal Records (Spent Convictions) Law (2018 Revision)**. However, the principle of the case has apparently been upheld as the new legislation contains an express provision that the expungement provisions “shall not operate to prevent a person from being disqualified to be elected as a Member of the Legislative Assembly pursuant to section 62(1)(e) of Schedule 2 of the **Cayman Islands Constitution Order, 2009** [UKSI 1379 of 2009]”.⁴² The new legislation prohibits the records of certain offences from being expunged,⁴³ expressly requires

³⁶ Constitution of Denmark, Article 30.

³⁷ Constitution of Turkey, Article 76.

³⁸ Section V, Article 55 VI of the Constitution of the Federative Republic of Brazil.

³⁹ Complementary Law no. 135 of 2010, an Act that amended the Conditions of Ineligibility Act (Complementary Law no. 64 of 1990).

⁴⁰ Constitution, Ch. 5, Art. 44.

⁴¹ *Supervisor Of Elections v. Candidate X* [2017 (1) CILR 306].

⁴² Cayman Islands Criminal Records (Spent Convictions) Law (2018 Revision), s 30.

⁴³ *Ibid*, s.12.

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disclosure of expunged criminal records when a person is seeking to be elected as a Member of the Legislative Assembly⁴⁴ and makes failure to make disclosure where required an offence.⁴⁵

In relation to the principle that persons with certain criminal convictions should be disqualified from holding elected office, the Commission agrees with the conclusion arrived at in the Venice Report that:

[i]neligibility to be elected is a restriction of the right to free elections: it must therefore be based on clear norms of law, pursue a legitimate aim and observe the principle of proportionality. It is in the general public interest to avoid an active role of serious offenders in the political decision-making. Proportionality limits in particular the length of the restriction; it requires that such elements as the nature of the offence, its severity and/or the length of the sentence be taken into account...The duration of ineligibility is subject to the principle of proportionality. It is most justified during the execution of the sentence and its admissibility decreases with time. The passing of time determines the possibility for positive change in an individual's attitude which should not be underestimated. In practice, as shown by the overview of the legislation of the Venice Commission member states, lifetime restrictions are provided only in very extreme cases. The Venice Commission considers that long-time sanctions should be limited to very serious crimes – such as crimes against humanity, genocide, terrorism, murder – and crimes in relation with elections, public service or political activity – such as crimes of corruption and serious electoral offences (which go against the democratic nature of elections). Once the statutory disenfranchisement has expired, offenders may again run for elections: it is then up to the voters to decide whether or not they deserve to be elected on account of the past conviction).

In summary, there is precedent both in other OTs (e.g. Cayman Islands) and in international law for persons to be disqualified from holding public office even where convictions have been spent.

Recommendation No. 9 Disqualification for membership – convictions or pending criminal matters

The Commission therefore recommends that:

- (a) There continue to be no restriction on persons with pending criminal matters holding public office.
- (b) There be a comprehensive review of the offences which could, upon conviction, operate to disqualify persons from holding public office, with a view to ascertaining whether the categories of offences are sufficiently wide to protect the interests of the Territory.
- (c) There should be mandatory disclosure of any spent convictions by persons seeking to be elected to the HoA.

⁴⁴*Ibid*, s.33(1)(d),

⁴⁵ *Ibid*, s.34.

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3.2.10 Procedure for a Member to Resign

Proposals were made to the Commission for the procedures contained in section 67(3) of the Constitution, relating to tenure of elected Ministers, to be clarified so as to avoid a repeat of the circumstances that arose in 2019 surrounding the voluntary resignation of the successful candidate for District 4 and in 2021 when the former Premier was removed.

With respect to the purported resignation of the District 4 candidate in 2019, this case centred around section 67(3)(a) of the Constitution and, in particular, whether an elected representative could resign prior to being sworn in as a Member of the HoA and prior to a Speaker having been appointed and, if so, how this could be done given that section 67(3)(a) requires the letter of resignation to be addressed to the Speaker. The Court held that he could not have constitutionally resigned as there was no constitutionally recognised right conferred to him to resign during the interval between a general election and the date on which the HoA convened.⁴⁶ Further, the resignation letter addressed to the Clerk was not the constitutionally recognised and proper manner of resignation prescribed by section 67(3)(a) of the Constitution.

Whilst the Commission agrees that, as pointed out by the learned judge in her judgement, elections and by-elections come at a considerable cost to the taxpayers of the Territory, there is a clear intention in the Constitution to afford elected Members the right to resign. This is in contrast to the position in the UK where Members of Parliament cannot directly resign their seat.⁴⁷ The Commission notes also that there are a number of constitutions which make provision for resignation of elected members in circumstances where either the office of Speaker is vacant, or the Speaker is absent or unable to perform his functions.⁴⁸

With respect to the removal of the former Premier, the Commission refers to the recommendations made in this Report (see 3.2.8 [Grounds to remove Ministers \(other than recall\)](#)) which address vacating of office in circumstances where a Minister has been found by the Integrity Commission to have breached the Code of Conduct.

Recommendation No. 10 Procedure for a member to resign

The Commission therefore recommends that:

To ensure that there is clarity around the timing and procedure for resignation of elected Members of the HoA and further to ensure that the ability of an elected Member to resign is not hindered by the absence of a Speaker:

- (a) Amend Section 67(3)(a) of the Constitution to make it clear that an elected Member is permitted to resign at any time after winning a seat in a general election and to stipulate alternative persons to whom resignation letters can be addressed in the event that no Speaker is in place or the Speaker is absent.

Suggested wording follows:

Drafting proposal

67(3) An elected member of the House of Assembly shall also vacate his or her seat in the House

⁴⁶ Mark Vanterpool v Julian Willock the Speaker of the House of Assembly and the Attorney General as Intervener, Claim No. BVIHCV2019/0087. <https://www.eccourts.org/judgment/mark-vanterpool-v-julian-willock-et-al>.

⁴⁷ A Member who wishes to resign his seat must go the route of being appointed to one of two offices of the Crown: Crown Steward and Bailiff of the Chiltern Hundreds, and the Crown Steward and Bailiff of the Manor of Northstead. This process is described as "taking the Chiltern Hundreds". As holding either office is incompatible with membership of the House, accepting either office leads to the forfeiture of a Member's seat.

⁴⁸ The Attorney General in Mark Vanterpool v Julian Willock the Speaker of the House of Assembly and the Attorney General as Intervener, Claim No. BVIHCV2019/0087 referenced s.122 of the St Lucia Constitution, s103 of the Constitution of St Vincent and the Grenadines, s.35(2) of the Constitution of Mauritius, s37 of the Constitution of the Commonwealth of Australia and sections 25-29 of the Parliament of Canada Act 1965.

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- (a) if, prior to making and subscribing before the House an oath or affirmation of allegiance pursuant to section 73, he or she resigns it by writing under his or her hand addressed to the Clerk of the House, or if, after making and subscribing before the House an oath or affirmation of allegiance pursuant to section 73, he or she resigns it by writing under his or her hand addressed to the Speaker, or to such other person as may be specified in the Standing Orders;...
- (b) Increase the deposit amount required from candidates for election and make such deposit non-refundable if the candidate resigns within 6 months of winning his or her seat.
- (c) Amend s 67(3) of the Constitution to require an elected Member to vacate his or her seat where he or she has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the **Integrity in Public Life Act, 2021**.
- (d) If provisions for recall of elected officials are included in the Constitution as recommended earlier in this Report (see 3.2.7 [Recall provisions for Elected Officials](#)), an additional ground should be inserted in section 67(3) to require an elected Member to vacate his or her seat where he or she has been recalled.

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3.2.11 Direct election of Premier and Revision of At-large System

During the consultation process, there were certain recurring themes which were imparted with a firm and unshakeable resolve that these particular things must be addressed in the next Constitution. Three of these are as follows:

- (a) a clarion call for the electorate to vote directly for who is to be Premier and Deputy Premier;
- (b) the at-large system is not working; and
- (c) a perception of sister-islands being grossly underrepresented.

These three issues overlap and that acknowledgment will underlie the remainder of the discussion herein. However, there is a need first to examine each of these issues briefly to appreciate their convergence.

On the issue of political leadership, there was extremely strong opposition to the Premier being the head of a political party and/or representing a particular local district. Persons expressed a strong desire to vote directly for who is to be the elected Head of Government. Others expressed that, as a minimum, both the Premier and Deputy Premier should be elected from amongst the cadre of at-large candidates citing that these two office holders should not be elected solely on the basis of being victorious at the local district level only. In this regard, there is the recognition that district level votes are not a fair representation of the *vox populi* (popular voice) at the national level.

As one commentator stated, "in my entire life I have only once voted for the Premier",⁴⁹ referring to the selection of an at-large Member of the HoA as Premier at the time. Based on the comments received, there is a belief that direct election will create a more representative system, with a chief executive officer more responsive to the public's wishes and with greater accountability to the voters.

The idea of voting directly for the Premier or Deputy Premier is more characteristic of a presidential-style democracy and will mean parting with the Westminster Parliamentary model in significant ways. The small size of the Territory and its population sometimes means that bespoke solutions are needed. For example, Commissioners heard repeatedly during consultations how the Executive plus the two Junior Ministers actually outnumber the Opposition in the Legislature so that the Westminster model does not provide sufficient checks and balances in the Territory's Legislature. On the other hand, due to the size of the House of Commons in the UK, this statistical challenge does not arise there.

With regard to the at-large system, the highest recurring theme during public consultation, recommendations from the public ran the gamut from amending it or abolishing it, including possibly having one single at-large (territorial) district and abolishing the 9 individual districts. In his blog, Commissioner Dr. Charles Wheatley released the following excerpt from his soon to be published book:

I remind Virgin Islanders that we began our modern political journey with the Territorial [at-large] system in 1950. The electorate did not like this system because they felt too distant from their representatives (no motorable roads, telephone and televisions) who they claimed did not represent the needs of the villages. They agitated for the district system which came into effect in 1954 replacing the Territorial system.⁵⁰

To summarise the essence of some of the comments, the at-large system (introduced in 1994 to run concurrent with the district system) was a pilot project that was meant to be reviewed, but has not yet been the subject of such review. It arose to address over-attention to local districts and under-representation for the Territory as a whole, but the right balance still needs to be struck. Some of the other intended consequences of the at-large system were that at-large Members would provide a base for selecting Ministers, and that they would use their platform to strengthen

⁴⁹ Public meeting at Enis Adams Primary School, Meyers, Tortola.

⁵⁰ Wheatley, OBE, C Dr., Dawn of a new Day: B.V. Islanders Reclaimed their Homeland.

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parliamentary practices including debating issues of national importance.⁵¹ Under the present circumstances, none of this occurs.

The OT of Anguilla first employed the mixed at-large and local district voting method in June 2020, whilst the system in Gibraltar continues to be totally at-large (even if candidates are associated with a particular political philosophy). Gibraltar elects its Legislature on the national level. The Gibraltar Parliament has 17 members, all elected for a four-year term in one constituency with each voter getting to vote for a selection of 10 candidates who form the government. The next highest 7 highest vote getters form the opposition.

On the third issue – underrepresentation of sister islands – members of the public became increasingly receptive in principle to the idea of District Councils. Indeed, local Government for Anegada was one of the recommendations in the Renwick Report⁵² for the island of Anegada. At the Commission’s meetings, persons liked the idea and wanted more details with some still insisting that this concept be coupled with island-representation in the HoA. On a major national issue such as this, it is absolutely appropriate that the public play a part in whatever model is finally agreed on. The second highest recurring theme from the public during public consultation was lack of transparency and public consultation. By way of example, regrettably, the public did not have an opportunity to consider the issue of local government prior to it being announced at a political candidate’s debate in the lead-up to the 2023 General Elections. The Territory was promised a Cabinet paper to come within four weeks approving the formation of District Councils, a fundamental shift in Government’s structure. The Cabinet decision was taken, as promised, on 5 April 2023 and without public consultation – the public consultation apparently to be done *after* Cabinet had already approved the policy.⁵³ As Cabinet papers are “restricted” the Commission is unaware of the details of what model was proposed and the reasoning therefor. In an amended assignment of portfolios under the Premier that was Gazetted on 5 June 2023, the subject of “District Councils” appears, as forecasted in his Press Release.⁵⁴ The sequence of events was not ideal.

The Commission believes that a properly thought-out model of District Councils, on which the public has an opportunity to weigh-in, will go a long way towards alleviating concerns about (a) under representation of sister-islands, (b) addressing hyper-local issues at local level, and (c) freeing up Ministers to deal with and debate national issues.⁵⁵ The Commission therefore recommends the implementation of District Councils and will discuss potential models for further public consideration and debate (see 4.22 [Local Government](#)).

There are three remaining issues that must of necessity form part of this discussion – a repeated recommendation from the public that Ministers be selected from the at-large pool (mentioned above), the need for a sixth Minister, and the need for an electoral boundaries review (there is a symbiotic constitutional relationship between these last two). Pursuant to section 47(2) of the Constitution, the addition of a sixth Minister requires that the number of Ministers and the ratio to the number of Members of the Legislature has to be maintained so that the number of Ministers cannot exceed two-fifths of the total number of elected Members of the HoA. A boundaries review report is required by section 63(2)(a) of the Constitution before the number of legislative seats can be increased. Therefore,

⁵¹ Report on the Territorial (‘At-Large’) Electoral System in the British Virgin Islands by Neville C Duncan, PhD. presented to the Dependent Territories Regional Secretariat, Bridgetown, Barbados, June 26, 1998), p6.

⁵² John Douglas Barrymore Renwick Q.C., Report of the Anegada Lands Commission, February, 1988, p17 & 20.

⁵³ District Councils Programme to Be Established In The VI. Government of the Virgin Islands. <https://bvi.gov.vg/media-centre/district-councils-programme-be-established-vi>.

⁵⁴ Ibid.

⁵⁵ This is also relevant when addressing the Terms of Reference to do with the proper relationship between the Minister and the Ministry. The general recollection of the Public Service Top Managers was that the relationship between Ministers and Permanent Secretaries was noticeably improved during the period when the governing National Democratic Party at the time appointed all its Ministers from at-large portfolios. Ministers who represent districts invariably find themselves torn between the demands of the Ministry on the one hand and the demands of their constituents (who have direct access to them in a small community such as this) on the other.

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any proposal herein that suggests a change to the number of districts is for academic discussion only as it is subject to the report of a constitutionally-mandated boundaries review.

To assist with addressing all of the foregoing issues (modification of the at-large system, voting for Premier and Deputy Premier directly, improved sister-island representation, selecting Ministers from the at-large Members, appointment of a sixth Minister, and a boundaries review), the Commission proposes two models below for consideration and further public debate as necessary. National debate must be encouraged on any significant changes to be made to the current system.

Model 1

The Commission suggests that consideration be given to undertaking the required boundaries review so that a sixth Minister may be appointed. As far as possible, Ministers should be appointed from the successful at-large Members, though the Commission would not recommend it be a firm requirement that all Ministers must be selected from at-large Members. (Insisting on such a position would more likely lead to a coalition Cabinet –particularly where there are already a restricted number of at-large positions.) The sixth Minister will require an increase in the number of seats in the House of Assembly to 15. The number of district seats should remain at 9 but the number of at-large seats should be increased from 4 to 6. This would be in-keeping with recommendations made during the Duncan review⁵⁶ of the at-large system where several persons felt that the number of at-large seats needed to be increased to make the system more effective. Section 52 of the Constitution should be amended to require that the Premier and Deputy Premier must be appointed from 2 of the 6 at-large seats, regardless of political party. Section 52 would then read as follows:

52(1) The Premier shall be appointed by the Governor as follows—

- (a) ~~if a political party gains a majority of the seats of elected members of the House of Assembly~~ the Governor shall appoint as Premier the elected **at-large** member of the House of Assembly recommended by a majority of the elected members of the House ~~who are members of that party;~~
- (b) ~~if no political party gains such a majority or~~ if no recommendation is made under paragraph (a), the Governor, acting in his or her discretion, shall appoint as Premier the elected **at-large** member of the House of Assembly who, in his or her judgement, is best able to command the support of a majority of the elected members of the House.

(2) **Subject to sub-section (3)**, the other Ministers shall be appointed by the Governor in accordance with the advice of the Premier from among the elected members of the House of Assembly.

(3) The Governor, acting in accordance with the advice of the Premier, shall appoint one of the Ministers **elected at-large** as Deputy Premier.

(4) The appointment of a Deputy Premier under subsection (3) may be revoked by the Governor, acting in accordance with the advice of the Premier, but such revocation shall not in itself affect the Minister's tenure of office as a Minister.

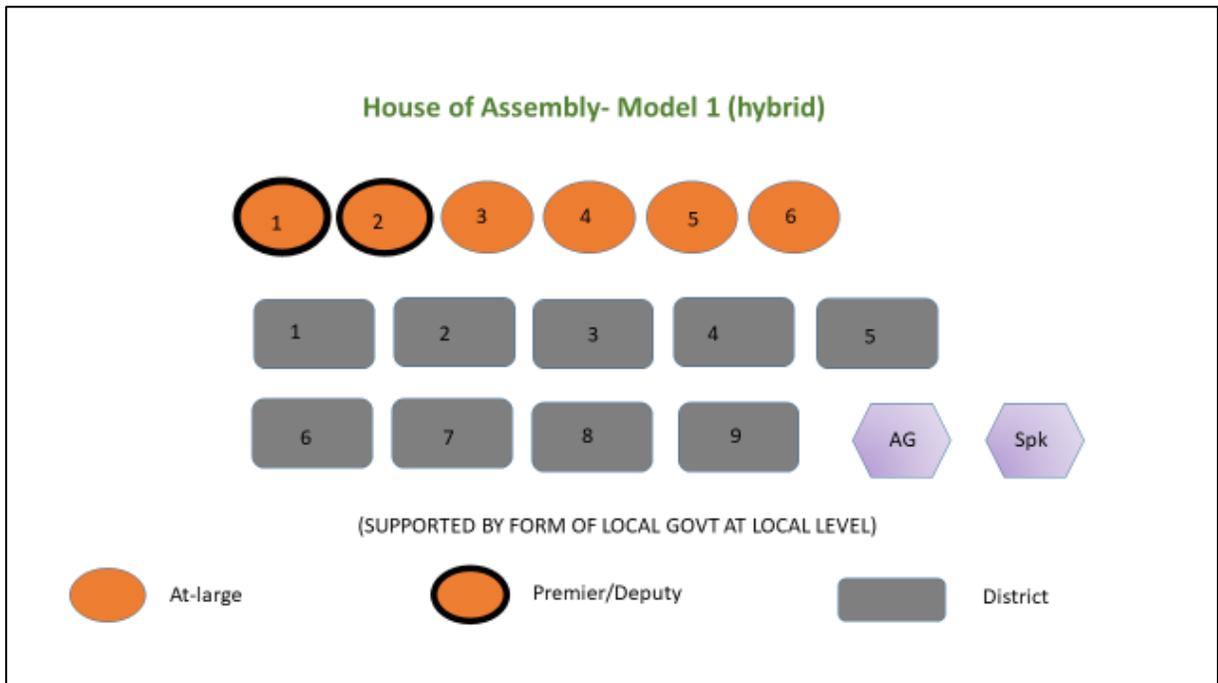
(5) If occasion arises for making an appointment of any Minister between a dissolution of the House of Assembly and the polling in the next following general election, a person who was an elected member of the House immediately before the dissolution may be appointed as if he or she were still a member of the House.

⁵⁶ Report on the Territorial ('At-Large') Electoral System in the British Virgin Islands by Neville C Duncan, PhD. presented to the Dependent Territories Regional Secretariat, Bridgetown, Barbados, June 26, 1998).

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(6) Appointments made under this section shall be made by instrument under the public seal.

Section 70(2)(a) in relation to the appointment of the Leader of the Opposition may then need to be revised accordingly.



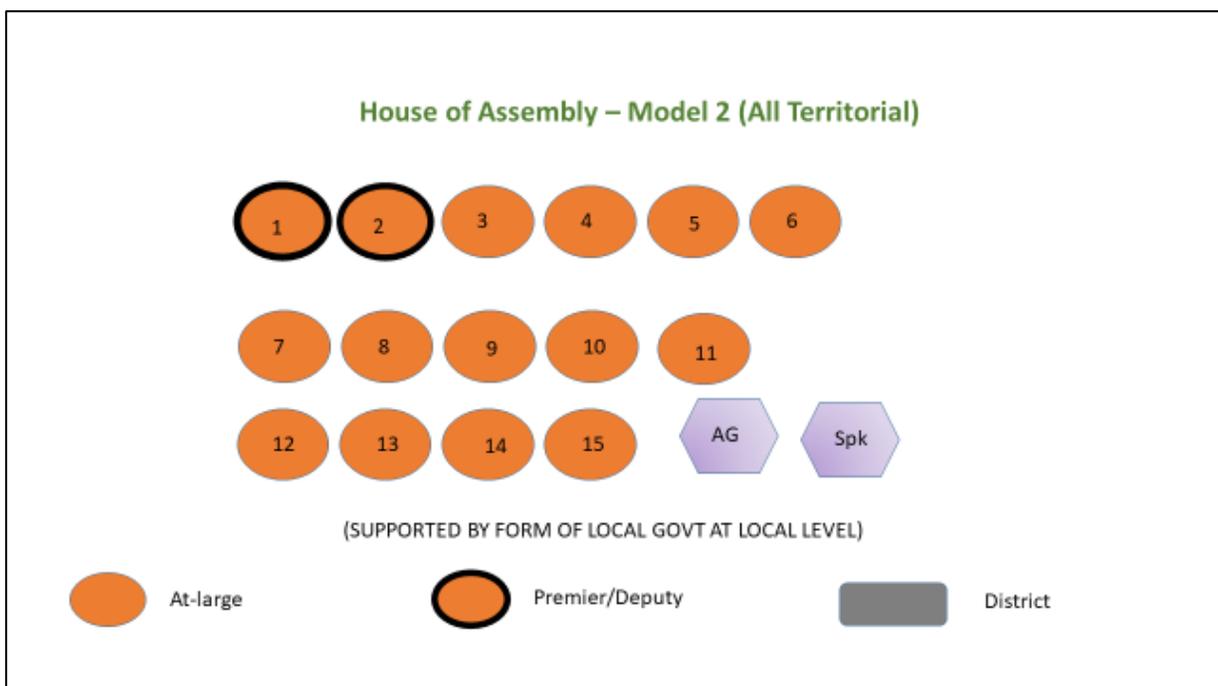
The Commission recommends that the Territory adopt a system of election of the Premier and the Deputy Premier, drawing those candidates from the pool of at-large candidates. This is preferable to a direct election where the ballot would have to state on its face which of the at-large candidates is running for Premier and Deputy Premier. The latter would lead to so significant a break with the Westminster model that it would result in a hybrid between the presidential style of democracy and the Westminster (parliamentary) style that cannot be sustained without other significant constitutional and electoral changes. A negative unintended consequence of direct voting for the Premier and Deputy Premier would, for example, be a high likelihood of successive coalition Governments and Cabinets which may cause delay in the Government getting on with governing. (Readers are referred to the experience of Israel where the attempt at a hybrid system is considered unsuccessful by many.) It may also require separate general elections if those who are unsuccessful at running for Premier or Deputy Premier wish to still have the opportunity to hold a seat in the HoA.

Instead, the Commission's proposal to select the Premier and Deputy Premier from the successful at-large candidates would enable the voters to choose their leaders nationally, while at the same time keeping the largely parliamentary system of government now in effect. When coupled with District Councils, the hyper-local issues can be dealt with in the district. The proposal also allows time to assess whether the modification addresses the concerns of the public, or instead to study further the effects of a hybrid system if that is indeed what persons wish to see.

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Model 2

A second model is one that also has its basis in comments made during public consultations. It is to return to how the Territory voted decades ago – as a single district – so that every candidate will run at-large. The hyper-local issues that the members of the public were concerned about would then be addressed by a form of local government ([discussed further in 4.22 Local Government](#)). Many in the sister islands who grew to like the idea of elected District Councils still insisted on the sister islands being individually represented in the Legislature. Indeed, this was the third step in a tri-partite recommendation in the Renwick Report for Anegada where Mr. Renwick, Q.C. recommended a district lands advisory committee which he envisaged would evolve into a District Council and, eventually, when the population of Anegada grew, a separate representative in the Legislature. Model 2 would dovetail with the Renwick recommendation if the Territory agrees to adopt a model of District Councils where the District Councilors have some form of representation in the Legislature.



Recommendation No. 11 Direct election of the Premier and revision of at-large system

The Commission therefore recommends that:

- (a) The Territory should adopt a system of election of the Premier and the Deputy Premier by selecting the holders of these offices from the pool of at-large candidates, rather than through a direct election. This would enable the voters to choose their leaders, while at the same time keeping the largely parliamentary system of government now in effect;
- (b) An electoral boundaries review be commissioned both to assess and review the electoral boundaries following shifts in the population since the last such exercise and also to pave the way for the future appointment of a sixth Minister;

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- (c) Subject to such boundaries review, either
 - (i) increase the number of seats in the House of Assembly from 13 to at least 15, made up of 9 district seats and 6 at-large seats (an increase of 2), or
 - (ii) increase the number of seats in the House of Assembly from 13 to 15, all at-large;
- (d) In the hybrid model, amend sections 52(1)(a) and (b), (2) and (3) of the Constitution to make it a requirement that the at-large Member who commands majority support in the HoA should be appointed as Premier, regardless of party affiliation, and that the Deputy Premier must similarly be appointed from amongst the Members who were elected at-large. For consistency, section 70(2)(a) in relation to the Leader of the Opposition may need to be revised accordingly;
- (e) In the hybrid model (mixture of district and Territorial seats), a Government should, as far as possible form its Cabinet from amongst at-large Members although it is not being advocated that that be a mandatory requirement;
- (f) In the hybrid model, at-large Members should concentrate on national issues and raise such matters for debate in the HoA. Their duties and responsibilities should be set out in legislation or in guidance in order to distinguish them from those representatives who hold district seats;
- (g) With regards to the issues of voting directly for the Premier and Deputy Premier, a review of whether the Territory should abandon the parliamentary system and implement a presidential system or a hybrid or semi-presidential system should be undertaken if the first recommendation above proves unsatisfactory; and
- (h) With regard to the at-large system the outstanding review of the 'pilot' project should be undertaken.

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3.2.12 Fixed House of Assembly Schedule

The Commission received recommendations from the public that a fixed schedule be introduced for sittings of the HoA. The Commission notes further that past legislators have publicly lamented the inefficiencies and lack of predictability of the current scheduling of sittings of the HoA.

Knowing the timetable well in advance will enable Members of the HoA to plan their time and work more effectively - both in the HoA and in their districts. It will also allow time for greater public awareness of, and education and consultation on matters to be debated in the HoA. Notwithstanding the foregoing, the Commission recognises that calendar dates will necessarily be subject to the progress of the scheduled business of the HoA and that there is a need for some degree of flexibility around scheduling to allow for unexpected events. The implementation of fixed scheduling would not fetter the right of the Speaker to convene special sittings of the House.

Recommendation No. 12 Fixed House of Assembly Schedule

The Commission therefore recommends that in the interest of parliamentary democracy, transparency, good governance and accountability, efforts should be made (through the Standing Orders)⁵⁷ to improve the scheduling of Government business by:

- (a) setting and publishing an annual calendar⁵⁸ setting out when the HoA can be expected to meet;
- (b) allowing Members of the HoA adequate time to review legislation and prepare for sittings;
- (c) providing Members of the HoA and the public with adequate notice of the agenda for a sitting of the HoA; and
- (d) providing Members of the HoA and the public with sufficient advance notice of any changes to the schedule and/or the agenda.

⁵⁷ The Order Paper for the House sitting on 7 September 2023 contains a motion for a Standing Orders Committee to be reconstituted.

⁵⁸ Fixed scheduling does not fetter the right of the Speaker to convene special sittings as the need arises.

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3.2.13 House of Assembly Inquiries and Hearings

Whilst only one member of the public submitted a recommendation that the HoA conduct inquiries/hearings against the backdrop of reform of the Legislature, the Commission notes that a similar recommendation was made with respect to another term of reference (see 3.2.1).

The Commission agrees that inquiries conducted by parliamentary committees can be a useful and important tool to hold executive ministerial government to account and improve the quality of governance in the Territory. Select committees of the House of Assembly⁵⁹ are groups of 5 – 7 members, that are empowered to investigate, examine and report on issues in detail. Committees have the power to summon witnesses, take evidence and publish reports on their findings. The proceedings of committee hearings and the reports published can shed light on the details of particular matters of public interest. The Standing Orders provide for the mandatory appointment of 6 ‘Standing’ Select Committees: the Public Accounts Committee; the Standing Orders Committee; the Services Committee; the Committee of Privileges; the Regulations Committee; and the Register of Interests Committee. The HoA also has power to establish ‘Special’ Select Committees for any other purpose. The inquiry process brings together a range of views on particular topics giving government the currency and backing to respond to national concerns. If performed effectively, with hearings held in public wherever possible and subsequent reports publicly accessible, inquiries can provide oversight of the actions, policies and expenditure of government and lead to greater transparency and accountability of government to the people.

The Standing Orders currently provide for the establishment of Standing Committees ‘as soon as practicable’ after the beginning of each HoA.⁶⁰ However, as a necessary step in strengthening the efficacy of good governance institutions, the Commission recommends that particular committees, such as the Public Accounts Committee and Register of Interests Committee should be placed on a constitutional footing, providing a timeframe for their establishment, and curtailing the capacity to revoke, amend or suspend Standing Orders without good reason. The Commission notes that the constitution of at least one other OT addresses Standing Orders, the ability of the legislature to suspend or revoke them, and the establishment of committees.⁶¹

On a related note, the Commission received a suggestion from a member of the public with respect to implementing direct democracy in parliament, whereby members of the public would be afforded the opportunity to address the HoA directly on matters of concern (similar to the Conference on the Future of Europe, a citizen-led series of debates and discussions that enabled people from across Europe to share their ideas and help shape their common future). The Commission is of the opinion that there are existing mechanisms, such as HoA inquiries/hearings, which can be used to achieve a similar purpose and therefore would recommend that any decision on direct democracy be deferred until the HoA inquiry system has been put to proper use.

Recommendation No. 13 House of Assembly inquiries and hearings

The Commission therefore recommends that:

- (a) The HoA should make greater use of inquiries conducted by Select Committees as a useful and important tool to improve the quality of governance in the Territory;
- (b) Hearings should be conducted in public, unless there is some justifiable reason for privacy; and
- (c) Particular committees, such as the Public Accounts Committee and Register of Interests Committee should be placed on a constitutional footing, providing a timeframe for their establishment, and curtailing the capacity to revoke, amend or suspend Standing Orders without good reason.

⁵⁹ Standing Orders, 1976 (as amended), s. 72(3)

⁶⁰ Ibid, s. 72(2)

⁶¹ Cayman Islands Constitution Order, 2009, s.71

Drafting proposal

Public Accounts Committee

72A.—(1) There shall be a Public Accounts Committee of the House of Assembly chaired by the Leader of the Opposition and appointed by the Speaker from among members who are not Ministers nor Junior Ministers.

(2) The Auditor General shall be the adviser to the Public Accounts Committee.

(3) The Public Accounts Committee shall examine and report to the House of Assembly on reports submitted to it by the Auditor General including any Special Report submitted by the Auditor General, and shall have and exercise such other functions, and shall operate under such procedures, as are prescribed by this Constitution or as may be prescribed by any enactment or by Standing Orders.

(4) The Public Accounts Committee shall be re-elected within ninety days after the House of Assembly first meets following a general election.

The Register of Interests Committee

72B.—(1) There shall be a Register of Interests Committee of the House of Assembly appointed by the Speaker to consider all matters relating to the Register of Interests, and shall have and exercise such other functions, and shall operate under such procedures, as are prescribed by this Constitution or as may be prescribed by any enactment or by Standing Orders

(2) The Register of Interests Committee shall be re-elected within ninety days after the House of Assembly first meets following a general election.

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3.2.14 Direct Voting for Ministers

During the consultation process some members of the public proposed the implementation of a system of direct voting for Ministers of government with dedicated portfolios, or selection of Ministers from an at-large slate. They were of the opinion that, in this way, the Premier would not be able to assign and re-assign ministerial portfolios at whim. The Commission received similar proposals in relation to direct voting for the offices of Premier and Deputy Premier, which have been addressed ([see 3.2.11](#)).

Whilst the Commission understands the sentiment behind the proposal for direct voting for Ministers of government, particularly the desire on the part of the public for more participation in the political process and accountability from those who hold high office, the Commission notes that the concept of direct voting does not align easily with the Westminster model of government. The concerns expressed by the Commission in relation to direct voting for the Premier and Deputy Premier also apply to direct voting for Ministers with dedicated portfolios, in that direct voting could yield unintended consequences, such as an increased likelihood of coalition Governments and cabinets. It is for this reason that one of the recommendations of the Commission is to urge Premiers to, as far as possible, appoint Ministers from the at-large slate, but not go so far as to make this mandatory. The Commission is also mindful that this was one of the reasons noted in the Duncan Report for establishing the at-large districts in the first place.

Recommendation No. 14 Direct voting for Ministers

The Commission therefore recommends that no amendment to the Constitution should be made to implement direct voting for Ministers.

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3.2.15 Increased Number of Ministers

There was a call from some members of the public for an increase in the number of both full and Junior Ministers. This recommendation was also one that was made in the 2005 Report of the Constitutional Review Commission.

Section 47 of the Constitution prescribes a two-fifth's ratio between the number of elected Ministers in the Cabinet and the total number of elected Members in the HoA. The ratio is necessary to ensure that there are sufficient backbenchers in the Legislature to serve as a check and balance on the Cabinet. Therefore, in order for a sixth Minister to be appointed, the number of elected Members in the HoA would need to be increased from 13 to 15. If a sixth Minister is to be introduced, recognising (a) the need for there to be a healthy enough number of backbenchers to keep the Executive in check and (b) the fact that a principal reason for introducing Junior Ministers was to lighten the load of the 'full' Ministers, the Commission does not recommend an increase in the number of Junior Ministers.

Recommendation No. 15 Increased number of ministers

The Commission therefore recommends that steps should be taken to provide for a sixth Minister, commencing with a boundaries review, as mandated by the Constitution. This recommendation is tied to [Recommendation No. 2 on Junior Ministers](#).

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3.2.16 Integrity Commission

On several occasions, members of the public requested the establishment of an Integrity Commission. The Integrity Commission for the VI is, in fact, provided for under the **Integrity in Public Life Act, 2021** which has not yet been brought into force. The Governor has also been advocating for the Integrity Commission.

One view expressed was the profound belief that such a commission would be highly effective in promoting good governance, based on information about other models.⁶²

In addition to investigating corruption, Integrity Commissions typically have some role to play in other matters including:

- receiving declarations of involvement with Government contracts by electoral candidates,
- determining whether a legislator is ineligible to continue to sit in the Legislature,
- maintaining a register of interest,
- receiving declaration of assets,
- reviewing procedures for awarding public contracts;
- auditing whether certain practices and procedures are corrupt, and
- education and promotion.

Because the VI already has other good governance institutions and laws - such as the **Complaints Commissioner Act, 2003**, **Register of Interests Act, 2006** and the **Contractor General Act, 2021**- the Integrity Commission, under the **Integrity in Public Life Act, 2021** at present, is clothed largely with investigative and educational functions.⁶³

Recommendation No. 16 Integrity Commission

The Commission therefore recommends that:

Given the significance of an Integrity Commission to good governance:

- (a) **the Integrity in Public Life Act, 2021**, be brought into force without further delay;
- (b) notwithstanding that legislation has already been enacted to establish an Integrity Commission, the requirement for an Integrity Commission be enshrined in the Constitution by including a new provision along the following lines –

Drafting proposal

The Integrity Commission

There shall be, in and for the Virgin Islands, an Integrity Commission.

Functions of the Integrity Commission

- (1) The Integrity Commission shall have such functions and jurisdictions as may be prescribed by law.
- (2) In the exercise of its functions, the Integrity Commission shall not be subject to the direction or control of any other person or authority.

Standards in public life

- (1) The Legislature shall promote the highest standards in public life by enacting appropriate laws, which include sanctions that may accompany the failure to conform to such standards.

⁶² Legislation establishing an Integrity Commission in TCI in 2008 came into force the following year.

⁶³ See Integrity in Public Life Act, 2021, s5

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- (2) In the exercise of their functions Ministers, members of the House of Assembly and public officers shall uphold and conform to the highest standards in public life, in accordance with the Integrity in Public Life Act 2021 (or any Act amending or replacing it) and any codes of conduct or other laws for the promotion of good governance in force in the Virgin Islands.
- (c) the necessary ancillary change be made to s3(1)(b) so that members of the Integrity Commission are not regarded as persons holding public office;
- (d) the necessary ancillary changes be made to s108(5) on remuneration of certain offices;
- (e) a new section be inserted after section 108 to, amongst other things, give the Integrity Commission a role in recommending appropriate levels of remuneration for the Speaker and elected Members of the House of Assembly and any ensuing amendments be made to the Integrity in Public Life Act, 2021. A draft section 108B follows:

Drafting proposal

Remuneration of Speaker and elected Members of House of Assembly

108B.—(1) There shall be paid to the Speaker and the elected Members of the House of Assembly such remuneration and allowances as may be prescribed by an Act of the Legislature.

- (2) The House of Assembly shall not proceed on any Bill for an Act referred to in subsection (1) unless a report of the Integrity Commission recommending the appropriate levels of such remuneration and allowances has been laid before the Assembly and has been published.
- (3) The remuneration and allowances payable to the Speaker and elected members of the House of Assembly shall be charged on and paid out of the Consolidated Fund.

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3.2.17 Contractor General

The intended objective of the office of Contractor General is to support good governance in the Territory. Although the legislature in the VI has enacted the **Contractor General Act, 2021**, that legislation has not yet been brought into force. The office of the Contractor General would assist greatly with transparency and accountability in the award of Government contracts and also have significant investigative powers.

In summary, the function of the Contractor General is to monitor the award and implementation of Government contracts with a view to ensuring that:

- such contracts are awarded impartially and on merit;
- the circumstances in which such contracts are awarded or terminated do not involve any impropriety or irregularity;
- the implementation of each such contract conforms to the terms thereof; and
- there is no fraud, corruption, mismanagement, waste or abuse in the awarding of contracts (or, if there is suspected to be any such fraud, corruption, mismanagement or waste, to investigate it).

Recommendation No. 17 Contractor General

The Commission therefore recommends that:

- (a) The Contractor General Act, 2021 should be brought into force without further delay;
- (b) Notwithstanding that legislation has already been enacted to establish the Contractor General, the requirement for a Contractor General be enshrined in the Constitution by including a new provision (see drafting proposal below);
- (c) The necessary ancillary change be made to s3(1)(b) so that the Contractor General is not regarded as a person holding public office; and
- (d) The necessary ancillary changes be made to s108(5) on remuneration of certain offices.

Drafting proposal

The Contractor General

There shall be, in and for the Virgin Islands, a Contractor General.

Functions of the Contractor General

- (1) The Contractor General shall have such functions and jurisdiction as may be prescribed by law.
- (2) In the exercise of his or her functions, the Contractor General shall not be subject to the direction or control of any other person or authority.

WHETHER THE INDEPENDENT INSTITUTIONS ENSHRINED IN THE CONSTITUTION ARE SUFFICIENT AND EFFECTIVE TO ENSURE GOOD GOVERNANCE

3.3 Whether Independent Institutions are Effective

This umbrella ToR refers to the independent institutions enshrined in the Constitution, examples of which include the Auditor General, the DPP, and the Complaints Commissioner. The essence of representations which were made to the Commission with respect to some of the independent institutions is captured by the following statement found at the end of one of those contributions-

...we have the right independent institutions. Properly equipped, they would at least have an opportunity to ensure good governance in the Virgin Islands.

The core complaint is that of administrative and financial independence.

Briefly put-

Currently, the arrangements of the independent institutions are characterised by dependence and interdependence with the very mechanisms of the Executive and the Public Service that they are meant to be independent of to ensure good governance....Some institutions may fare better than others, but even when financial resources are made available in the Government's Annual Budget Estimates, the surrounding mechanism for recruitment and procurement are onerous and lengthy.

Although the issue of administrative and financial independence was not raised by all the persons who responded, it was serious enough to consider addressing same in the Constitution. This therefore forms that first topic among those set out below. The remaining sections address some recommended improvements to individual institutions.

In summary, and to address the ToR specifically, the Commission shares the view above that the Constitution provides for the right independent institutions. It is also noted in the Report that there are independent institutions established outside the Constitution (e.g. the Contractor General and the Integrity Commission) which reinforce the oversight role of those established in the Constitution. However, the Commission posits that, in order for all these institutions to be more effective, those that have not yet been set up should be, and they should all be properly resourced and empowered. Their independence should not be eroded (whether in theory or in practice) by their administrative and financial positions being unreasonably subordinated to ill-filling practices and procedures of the very same bodies and persons they oversee.

3.3.1 Administrative and Financial Independence

During the preparation of this Report, Commissioners were made aware multiple times of concerns that the constitutional independence of some independent institutions was, in fact, being eroded by lack of sufficient funding, and other resources. At least one constitution in the region has attempted to address this concern by entrenching in the constitution, a requirement that budgets presented by the various listed independent agencies shall be given first priority calls on the consolidated revenue fund.

In further representation before the Commission, it was clarified that the frustration with the lack of constitutional independence went further than the budget process and, in fact, extended to administrative interference with how those budgets were utilised and accessed in practice. By way of example, assume that the particular institution has a budget item for consultants and needs to engage an expert for a sensitive matter being handled by his or her office, possibly involving a public servant or sitting Member of the HoA. The institution under present arrangements must still comply with certain human resources policies that are cumbersome and inefficient and that may require

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him or her to disclose the nature of the matter to someone, despite its sensitivity, as part of the approval process. This in effect operates to erode the independence of the institution in such circumstances.

On a related point, the Commission wishes to take the opportunity to query why the DPP and other relevant independent institutions (such as the Auditor General, the Complaints Commissioner and the Registrar of Interests) are not listed in regulation 5 of the Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008 as an 'Authorised Officer' to whom the Governor may delegate some of the Governor's powers to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices.⁶⁴

Recommendation No. 18 Administrative and financial independence

The Commission therefore recommends that:

A greater degree of administrative and financial independence would improve the effectiveness of independent institutions. Accordingly,

- (a) Section 108(5) of the Constitution should be redrafted to separate independent institutions that have their own budgets.
- (b) This should be followed by a new but related section stipulating that independent institutions in the Constitution shall enjoy administrative and financial independence.

Drafting proposal

Remuneration of certain officers

108.—(1) There shall be paid to the holders of the offices to which this section applies such salary or other remuneration and such allowances as may be prescribed by or under any law enacted by the Legislature.

(2) The remuneration and allowances payable to the holders of those offices shall be a charge on the Consolidated Fund.

(3) The remuneration prescribed in pursuance of this section in respect of the holder of any such office and his or her other terms of service (other than allowances that are not taken into account in computing, under any law in that respect, any pension payable in respect of his or her service in that office) shall not without the consent of that person be altered to his or her disadvantage after his or her appointment.

(4) Where a person's remuneration or other terms of service depend upon his or her option, the remuneration or terms for which he or she opts shall, for the purpose of subsection (3), be deemed to be more advantageous to that person than any others for which he or she might have opted.

(5) This section applies to the offices of:

- (a) Deputy Governor, Magistrate, Registrar of Interests, Chairman or other member of the Public Service Commission, the Teaching Service Commission, the Judicial and Legal Services Commission, and the Police Service Commission,

⁶⁴ S92 of the Virgin Islands Constitution Order 2007. Rectifying the omission would only be a start. To be more effective, the DPP (and the Attorney General for that matter) would need to be able to exercise some devolved power in respect of professional staff in higher grades than the Commission gathers is currently delegated.

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- (b) Attorney General, Director of Public Prosecutions, Auditor General, Contractor General,* Complaints Commissioner, and Chairman and other members of the Integrity Commission,* and Elections and Boundaries Commission**.

Administration of certain offices

108A

(1) The offices set out in section 108(5)(b) shall enjoy administrative and financial independence and their budgets shall be administered independently in accordance with the law.

(2) Subject to sub-section (1), the authorised budgets presented by the offices referred to in section 108(5)(b) and that of the Supreme Court shall be charged on the Consolidated Fund. The House of Assembly shall guarantee each office sufficient budgetary allocations to allow a timely and efficacious discharge of their competences.

**Legislation passed but not in effect on this as yet.*

*** Proposal to put this in the new Constitution and separate legislation for it would have to follow.*

- (c) It is further recommended that each of the DPP, the Auditor General, the Complaints Commissioner, and the Registrar of Interests be listed in regulation 5 of the Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008 as an 'Authorised Officer' to whom the Governor may delegate some of the Governor's powers to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices.

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3.3.2 Human Rights Commission

One of the most significant advancements in the 2007 Constitution is that it provided, for the first time, a chapter dedicated to the protection of the fundamental rights and freedoms of the individual, which are enshrined and given protection in Chapter 2. Pursuant to section 31 of the Constitution, persons may apply to the High Court for redress, if they consider that any of the protected rights and freedoms, have been or are likely to be violated.

Section 34 of the Constitution further provides that “there may be established, by law, a human rights commission”. To date, no human rights commission has been established, despite the drafting of a Human Rights Commission Bill, the first iteration of which was read in the House of Assembly in March 2014.

Section 34 provides that the Human Rights Commission could have powers, which include:

- (a) investigation of complaints related to breaches of rights and freedoms;
- (b) promoting conciliation with respect to complaints;
- (c) issuing guidance on procedures for dealing with any complaints of breaches of rights and freedoms;
- (d) promoting public education in relation to any international instrument or activity relating to human rights; and
- (e) periodically preparing and submitting reports concerning its activities to the Legislature.

However, the 2007 Constitution did not make the establishment of the Human Rights Commission mandatory and, for reasons unknown, successive Governments appear not to have made it a priority.

In this regard, the VI finds itself as an outlier amongst the OTs in the Caribbean region whose constitutions or other legislation provide specifically for a human rights commission. The Constitutions of the Cayman Islands and the TCI provide, in mandatory terms, for a human rights commission, and in Bermuda it was established, also in mandatory terms by the **Human Rights Act 1981**. Today, those jurisdictions have fully functioning human rights commissions.⁶⁵

During the Commission’s consultation process, many submissions which called for the establishment of the Human Rights Commission were received. A fully functioning Human Rights Commission would serve, among other things, as an independent institution for the protection of good governance by ensuring that Government and other public bodies respect the rights and freedoms guaranteed to individuals by the Constitution. The Commission considers that the work of the Human Rights Commission would complement the work of the High Court in that regard, and also that it could serve as a more accessible and cost-effective mechanism for individuals seeking redress for breaches. Accordingly, the Commission recommends the establishment of a Human Rights Commission and that this be made mandatory. An observation made during public consultations was that such a commission should also be subject to prescribed timeframes within which to deal with complaints.

The Commission is, however, also cognisant of the general discontent with the number of statutory boards, committees and commissions which was voiced during the public consultations. In this vein, the Commission is of the view that an examination may be conducted into whether it would be feasible for the secretariat functions of a human rights commission to be shared with an existing entity, or whether it would be feasible to create a singular entity, which could deal with both maladministration and breaches of rights and freedoms protected by Chapter 2. Such an approach might see the Complaints Commissioner (see 3.3.3 [discussed separately in this Report](#)) and the Human Rights Commission falling as different branches of a singular entity, or alternatively an enlarging of the powers of the Complaints Commissioner also to deal with complaints regarding breaches of the rights and freedoms protected by Chapter 2. The constitution of Montserrat provides for the latter approach.⁶⁶

⁶⁵ The Constitutions of Anguilla and Montserrat do not provide for a human rights commission. However, the Montserrat Constitution Order, 2010 provides for a Complaints Commission, at section 105, which has powers to deal with human rights complaints.

⁶⁶ Section 105, Montserrat Constitution Order, 2010.

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The Commission notes that there are both advantages and disadvantages of each of the abovementioned approaches. One advantage of enlarging the powers of the Complaints Commissioner would be to avoid any issues or challenges to jurisdiction when a complaint has elements of both maladministration and infringement of the rights and/or freedoms protected by Chapter 2. However, Peter Ashman, a human rights consultant to the Montserrat government, opined in 2010 that *“that is not usually the role of an Ombudsman. What an Ombudsman doesn’t usually do, is look at whether the fundamental laws that apply breach international obligations. What an ombudsman does is look to see that civil servants are applying the laws...”*.⁶⁷

Recommendation No. 19 Human Rights Commission

The Commission therefore recommends that:

- (a) The Constitution be amended in section 34(1) to make the establishment of a Human Rights Commission mandatory; and
- (b) The Human Rights Commission should be established, with despatch.

Drafting proposal

Human Rights Commission

34. (1) There shall be established by law a Human Rights Commission in and for the Virgin Islands (in this section referred to as “the commission”).

⁶⁷The Montserrat Reporter Online; [Montserrat behind on Human Rights Commission, but is respectful](#)
Posted on 13 August 2010.

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3.3.3 Complaints Commissioner

The office of the Complaints Commissioner was established in 2009 following mandatory provision for the same in the 2000 amendment to the 1976 Constitution and section 110 of the 2007 Constitution. The duties and functions of the Complaints Commissioner as set out in the **Complaints Commissioner Act, 2003** are to investigate any action taken by a department of Government or a public authority in the exercise of its administrative functions. The Complaints Commissioner is empowered to investigate allegations of maladministration, and to prepare a report containing his or her findings and recommendations.⁶⁸

During the consultation process several members of the public expressed the view that the Complaints Commissioner is not as effective as was intended. All relevant stakeholders appear to agree with this conclusion. Exactly what fix could be presented, however, proved a difficult question to resolve.

Members of the public suggested that the Complaints Commissioner needs more teeth. The Complaints Commissioner herself made a few observations on this, noting that:

- with the Human Rights Commission not being in effect, the Complaints Commissioner receives grievances with human rights aspects to them but the line between what is strictly a human rights matter and a matter for the Complaints Commissioner is not clearly demarcated. (Reference to the Montserrat model was made where, very likely for resource reasons, the Complaints Commissioner has some responsibility for human rights matters); and
- the current process is lengthy and the Complaints Commissioner is not able to make awards (a situation not unique to the VI).

A scan of all 10 annual reports to date on the Complaints Commissioner's website reveals that none highlighted any of these or related challenges, nor any recommendations for legal reform of the Complaints Commissioner Act. The closest was a general update on the establishment of the Human Rights Commission as follows:

In October, 2013 the Government in its legislative agenda in the Throne Speech again promised the introduction of the above Bill as it had done in previous years. As this report is being written in April, the Bill has not been introduced, nor has any public statement been made. In several jurisdictions there is acceptance of a "hybrid" ombudsman dealing with human rights as well as general administrative complaints. The Virgin Islands Constitution enables – but does not require - the establishment of a human rights commission, allowing flexibility as to its composition, duties and powers. The first duty stated is "the receipt and investigation of complaints of breaches or infringements of any right or freedom referred to in this Chapter [of the Constitution]". Given the continued failure to properly staff the Complaints Commission office, it may be well for the authorities to re-visit the present intention of setting up a separate agency and to consider instead vesting the powers of a human rights commission in the Complaints Commissioner for the time being, 'leveraging' the resources already in place.⁶⁹

This idea was touched on in [section 3.3.2 of this Report](#) addressing the Human Rights Commission. Legislation for the Human Rights Commission is still only in the drafting stage and, as one option, there may be an opportunity for an examination to be conducted into whether or not it would be feasible for the secretariat functions of a Human Rights Commission to be shared with an existing entity, or whether it would be feasible to create a singular entity, which could deal with both maladministration and breaches of human rights. That said, one recalls the compelling argument that examining whether there has been a breach of fundamental laws is **not** an appropriate role for the Complaints Commissioner.⁷⁰

⁶⁸ Complaints Commissioner Act, 2003, s. 4, and 12 - 14.

⁶⁹ 5th Annual Report of the Complaints Commissioner, 2013, p8.

⁷⁰ See fn 67.

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Commissioners note that it is not only the Human Rights Commission that has not been established; neither has the Integrity Commission under the **Integrity in Public Life Act, 2021**. In addition to finding some synergy between the Human Rights Commission and the functions of the Complaints Commissioner, it might be equally or more effective to find synergies between the Complaints Commissioner and the Integrity Commission. Matters dealing with malfeasance would, in the view of the Commission, find a more natural home under the Integrity Commission. Therefore, another option is for an amendment to be made to the **Complaints Commissioner Act, 2003** to allow the Complaints Commissioner to refer certain matters to the Integrity Commission.

Recommendation No. 20 Complaints Commissioner

The Commission therefore recommends that there should be no amendment to the Constitution, however, the **Complaints Commissioner Act, 2003** should be amended to allow for the Complaints Commissioner to refer certain matters in certain circumstances (to be decided on) to the Integrity Commission. Those matters would then be subject to the wider powers of the Integrity Commission.

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3.3.4 Elected Attorney General

During the public consultation process the Commission recorded submissions to the effect that the Attorney General should be an elected official, as opposed to being an appointed official. It was not a widely recurring comment, but warrants some discussion as it is a topical issue. For example, Commissioners were made aware at the meeting with Belongers in the USVI that the debate is a live one there. The issue is also currently part of the package of proposed reforms recently put to the UK by the TCI Government.⁷¹

None of the earlier Constitutions of the VI going back to 1967 made provision for the election of an Attorney General. No other UK OT constitution, except for Bermuda, provides for the possibility of having an elected Attorney General.

The Constitution of the VI is the only Constitution of the OTs in the Caribbean region which sets out professional qualifications for the Attorney General in addition to stipulating that the Attorney General should be a Belonger. The constitutional provisions do not suggest that the Attorney General cannot be appointed contractually and, indeed, several have been.

The Attorney General serves as the principal legal adviser to the Government, and in most cases performs his or her role independently. In the case of the VI, the Attorney General:

- is the principal legal adviser to the Government and so enjoys the right of audience in all courts of the land;
- by himself or herself or by officers subordinate to him or her, acts for the Government in instituting or defending civil claims;
- although the Constitution does not expressly say so, has general responsibility for law reform and the drafting of laws;
- sits in the House of Assembly;
- is ex officio a member of Cabinet;
- is a member of the Advisory Committee on the Prerogative of Mercy; and
- is a member of the National Security Council.

The issue of the status of the Attorney General has ramifications mostly for disciplinary measures and removal of the Attorney General.

Also, in the Territory, the Attorney General is deemed to be a “public officer” or the holder of a “public office”. Being a “public officer” entitles the office holder to pension, gratuity and allowances charged against the Consolidated Fund, unless contractual arrangements provide otherwise.

Debate Regarding Election Versus Appointment of the Attorney General

There are subtle variations in the manner in which the Attorney General is appointed within the region and beyond. These have led to debate on the merits or disadvantages of appointing the office-holder as opposed to having the Attorney General accede to office as an elected Member of the Legislature.

In a number of independent Anglophone Caribbean countries, such as Barbados, the Attorney General is a Member of Parliament, but is nominated by the Prime Minister. The procedure is not without its criticisms. One political scientist contends that the Governor General should be the person to select an independent and politically impartial individual who should not be subjected to partisan political influence.⁷² In practice, though, it is unlikely that the

⁷¹ Boyce, Hayden. “Changes to Constitution Proposed.” The Sun, Vol 15 Issue 42, 31 Oct. 2019, <https://suntci.com/changes-to-constitution-proposed-p4679-129.htm>.

⁷² See Devaron Bruce’s article in Barbados Today vehemently arguing against this: “Political Scientist Suggests Prime Minister Should Not Be Handpicking People for Key Roles Including Attorney General.” Barbados Today, 22 April 2023, <https://barbadostoday.bb/2023/04/22/political-scientist-suggests-prime-minister-should-not-be-handpicking-people-for-key-roles-including-attorney-general/>.

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Governor General will act against the wishes of the Prime Minister. The argument is that since the Attorney General (in Barbados) is an elected Member of Parliament, conflicts of interest may arise in the representation of constituents where government action or inaction may conflict with the interests of the Attorney General's constituents, as a Member of Parliament.

Conversely, although the Federation of St Christopher and Nevis is an independent nation, the Attorney General is not a Member of Parliament, but is an individual who is nominated by the Prime Minister.

Some merits of having an elected Attorney General include:

- *Absence of security of tenure:* in jurisdictions where the Attorney General is elected by popular vote, the office holder will be expected to vacate office upon dissolution of the HoA and some persons may prefer this flexibility;
- *Opportunities for broader participation by the electorate:* it can be argued that elections provide the opportunity for more qualifying Virgin Islanders to make a bid for public office.

Some drawbacks to having a politically elected Attorney General include:

- *Methods of nomination:* elected office is open to anyone who satisfies the qualifications for election - the candidate's background and character may not be thoroughly vetted and an individual who may be of questionable integrity may be elected;
- *Lack of public candidate participation:* There might be a lack of interest in taking on the challenge of running for elected office even though there are many legally qualified, competent and experienced persons within the community. As such, there might not be a sufficiently large enough pool of qualified persons interested in facing the rigours of an election campaign.
- *Political influence and partisanship:* For example:
 - although the Attorney General operates under rules of professional conduct, some persons expressed the concern that a politically chosen Attorney General could be influenced by campaign donors and might offer advice favourable to party loyalists;
 - one of the main duties of the Attorney General is to defend, draft and reform law. Arguably, an elected Attorney General could allow political ambitions or ideology to influence the language and timing of new laws. Also, the candidate being appointed may be prone to interpret the law in a way that favours his or her political leanings;
 - in situations where a qualified individual is nominated by the leader of the ruling party, the nomination process may lack transparency. Additionally, the nominee may always be beholden to the leader of the party; and
 - the Attorney General as an elected member of parliament could place greater emphasis on his or her personal agenda above the party's priorities as stated in its manifesto. This practice can create a conflict of agendas as between the office holder's priorities and the party's expectations.

It will be recalled that Bermuda appears to be the only UK OT where, for decades, the Attorney General may be elected by popular vote. However, in constitutional negotiations with other OTs, the UK's stance was that the option of a politically appointed Attorney General was not due for consideration.⁷³

⁷³ Hendry and Dickson, "British Overseas Territories Law" 2nd Ed, 2018, p 139.

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Advantages of having an appointed Attorney General include:

- *Selection process:* The process can be regarded as being fair and transparent. Because the Governor generally acts on the advice of the Judicial and Legal Council, there is greater confidence that the Governor is unlikely to abuse his powers or to use his powers arbitrarily to appoint or remove the Attorney General;
- *Greater sense of duty:* An appointed Attorney General is likely to exhibit a greater sense of responsibility and accountability, since his or her performance will be influenced by professionalism and a desire to accomplish as much as practicable within his or her tenure;
- *Security of tenure:* given the sense of professional duty which an Attorney General should exhibit in the performance of his or her duties, the office holder can expect to remain in the position for an indefinite period, without fear of being removed arbitrarily;
- *Independence:* appointed Attorneys General have the crucial latitude to make independent and sound legal decisions without concerns they will get fired by the entities responsible for their appointment. (In the alternative, an Attorney General is shielded from the actions of local politicians who might try inventive routes to secure the removal of the Attorney General to avoid compliance with legal advice.) Because an appointed Attorney General is less beholden to a party or to any particular individual, he or she is less likely to draft laws to satisfy the dictates of politicians or lobbyists. This independence reduces the chances of corruption and political influence by external forces.

Disadvantages of having an appointed Attorney General include:

- *Potential conflict of interest:* It is the Attorney General's job to advise on the law. Attorneys General are required to advise both the elected government as well as the Governor, so concerns about conflicts of interest may arise when interests diverge.
 - *Distrust of the Attorney General can develop where politicians perceive that the Attorney General is not complying with their agenda;*
 - *The appointment may not reflect the popular will.*

Based on the advantages and disadvantages outlined above, and the many roles that the Territory's Attorney General performs, the Commission is of the view that the Attorney General should be detached from political office and should continue to be a professional civil servant (as opposed to an elected officer) with experience to serve the Government of the day.

Recommendation No. 21 Elected Attorney General

The Commission therefore recommends that there should be no amendment to the Constitution to provide for an elected Attorney General.

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3.3.5 Elections and Boundaries Commission

Several comments were received on the need for an electoral commission. The recommendation was also referred to by the Supervisor of Elections in the **General Elections Report 2019** (carried forward from a similar recommendation in the 2015 report). A comment was also submitted which alluded to the agreement of Members of the HoA to provide for an independent electoral commission.⁷⁴ The Commonwealth Parliamentary Association (CPA) observers made the recommendation for the Territory in 2019 and again in 2023.⁷⁵ The CPA noted that a well-equipped and staffed elections commission could take responsibility for publishing annual voter lists, reviewing district boundaries, recording and responding to complaints and appeals (including a formal reporting process and the publication of decisions), and leading on reforms.⁷⁶

Some members of the public also noted the need for a boundaries review. With this, the Commission agrees. In its 2019 report, the CPA also noted the wide disparity in some cases between the districts due to population changes over the years and highlighted the importance of the vote of one elector to be equal to the vote of another. They cited authority which supports that seats must be evenly distributed among the constituencies.⁷⁷

A comment was submitted which proposed that members of the electoral commission be elected by the general populace by way of general election as is done in some jurisdictions. However, models in the Commonwealth and other OTs reflect an appointment procedure as opposed to an election procedure. Commissioners considered the elections procedure and felt that the cost was a prohibitive factor.

The International Institute for Democracy and Elections Assistance (IDEA) and the Global Commission on Democracy, Elections and Security⁷⁸ have been promoting the importance of independent Electoral Management Boards (EMBs) for several decades. In its 2012 Report, the Global Commission on Democracy, Elections and Security identified EMBs with full independence of action as one of the five major challenges to the conduct of elections with integrity. It has been encouraging countries to establish EMBs or similar authorities. Such a board is legally responsible for some or all of the elements that are essential for the conduct of elections as well as direct democratic instruments such as referenda, citizens initiatives and recall votes if they form part of the legal framework.

Based on the laws of some OTs and other jurisdictions in the Commonwealth Caribbean, the essential elements of such a board's role are:

- direction and supervision of the registration of voters and the conduct of elections
- referenda
- publishing notices of legislators declaration of contracts with Government⁷⁹
- boundaries revision
- other functions as may be prescribed in an Act of the Legislature.

Three broad electoral management models are enshrined in the constitutions of more than 150 countries according to UNDP. They are:

1. The independent model, which is used in countries where elections are organised by an EMB that is institutionally independent and autonomous from the executive branch of government. Some countries with

⁷⁴ Pursuant to recommendation of the CPA BIMR Election Observation Mission Final Report, Virgin Islands, February 2019.

⁷⁵ CPA BIMR Election Observation Mission Final Report, April 2023, and the CPA BIMR Election Observation Mission Report, February 2019.

⁷⁶ CPA BIMR Election Observation Mission Report, February 2019, p6 and 13.

⁷⁷ CPA BIMR Election Observation Mission Report, February 2019, p8.

⁷⁸ Also known as the Kofi Annan Foundation.

⁷⁹ Montserrat Constitution Order, 2010, s.52(3).

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this type of election authority are Canada, St. Lucia, Trinidad and Tobago, and Belize. In other countries like Barbados and Peru, two independent bodies manage elections. One is responsible for the policy decisions relating to the elections process and the other implements the election process.

2. In the second model, known as the government model, the electoral management and elections are organised and managed by the executive branch under a supervisory authority led by a Minister or a Civil Servant. This model exists in the UK, US, Bahamas, Dominica, and the VI.
3. The third is the mixed model. This model actually involves two structures. One structure organizes the elections whilst the second structure providing policy and supervisory oversight. This model is found in France (and former French colonies), Japan and Spain.

The legislative framework of the VI (not enshrined in the Constitution), provides for the Governor to appoint a Supervisor of Elections and other officers who assist the Supervisor of Elections to execute his or her functions as outlined in section 4 of the **Elections Act, Revised Edition Act 2013**. The Office of the Supervisor of Elections, which serves as the operational body as it relates to the electoral process, is a unit under the Office of the Deputy Governor who manages its operational budget.

The constitution of Montserrat provides for an independent elections management model in the form of an Electoral Commission and states that, in the exercise of its functions under the constitution, the Electoral Commission shall not be subject to the direction or control of any person or authority.⁸⁰

Whilst the Commission is loath to recommend adding yet another statutory body to the Territory's existing abundance, because of the importance of this authority in the execution of good governance and the timely need for a boundaries review in the Territory, the Commission is of the view that an Elections and Boundaries Commission should be established.

Recommendation No. 22 Elections and Boundaries Commission

The Commission therefore recommends that an Elections and Boundaries Commission should be established:

- (a) provision should be made in the Constitution for the establishment of an independent Elections and Boundaries Commission. A drafting proposal is set out below. This would need to be supplemented by primary legislation that addresses the other matters not addressed in the Constitution such as funding and staffing;
- (b) in the interest of cost and efficiency, electoral commissioners should be appointed, as opposed to elected;
- (c) the necessary ancillary change should be made to section 3(1)(b) of the Constitution so that members of the Elections and Boundaries Commission are not regarded as persons holding public office; and
- (d) the necessary ancillary change should be made to section 108(5) of the Constitution to include the Chairman and members of the Elections and Boundaries Commission as officers that are paid out of the Consolidated Fund.

Drafting Proposal

Establishment and functions of Elections and Boundaries Commission —

1. There shall be an Elections and Boundaries Commission for the Virgin Islands and the first such Commission shall be appointed as soon as practicable after the date of the commencement of this Constitution.

⁸⁰ Where similar language exists in relation to the office of the Supervisor of Elections, this clause places the Supervisor of Elections in the model of Independent Election Management Boards.

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2. The Elections and Boundaries Commission shall consist of five members as follows—
 - (1) a Chairman with relevant experience, who shall be a Belonger of integrity and high national standing and who has attained the age of 50 years, appointed by the Governor, acting in his or her discretion;
 - (2) a member with relevant experience appointed by the Governor, acting in accordance with the advice of the Premier;
 - (3) a member with relevant experience appointed by the Governor, acting in accordance with the advice of the Leader of the Opposition; and
 - (4) two members with relevant experience (one of whom shall be female) to represent the public interest, one appointed by the Governor acting after consultation with the Chairman of the Judicial and Legal Services Commission, and the other after consultation with such representatives of civil society as the Governor acting in his or her discretion thinks appropriate.

For the purposes of this section, “relevant experience” means a professional qualification at Bachelor’s degree or higher in public administration, law or finance with at least 10 years work experience in one of those areas or in elections, management or governance at a senior level.

3. A person shall not be qualified to be appointed as a member of the Elections and Boundaries Commission if he or she is a Member of the House of Assembly or if he or she holds or is acting in any public office.
4. If any member of the Elections and Boundaries Commission dies or resigns, the Governor shall appoint another person in his or her place in the same manner in which such member was appointed.
5. (1) The Chairman or other member of the Elections and Boundaries Commission shall vacate his or her office—
 - (a) subject to sub-section (2), no later than the expiration of six years from the date of his or her appointment;
 - (b) if any circumstances arise that, if he or she were not a member of the Commission, would cause him or her to be disqualified for appointment as such; or
 - (c) if the Governor, acting in his or her discretion, directs that he or she shall be removed from office for inability to discharge the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section.
- (2) Neither the Chairman nor the other members shall be appointed for a term which shall expire on the same date as the term of another member. A period of at least twelve months should separate the expiration of appointments.
6. A member of the Elections and Boundaries Commission shall be removed from office by the Governor if the question of his or her removal from office has been referred to a Disciplinary Tribunal appointed pursuant to sub-section (7) and the Disciplinary Tribunal has recommended to the Governor that he or she ought to be removed for inability or unwillingness to discharge the functions of his or her office or for misbehavior or other good cause.
7. Where the Governor, after consultation with the Premier and the Leader of the Opposition, considers that the question of removing a member of the Elections and Boundaries Commission ought to be investigated, the Governor shall appoint a disciplinary tribunal which shall consist of three persons including a religious leader, a Judge of the High Court, or an attorney at law of fifteen years standing who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States.
8. The Disciplinary Tribunal shall inquire into the matter and report on the facts thereof to the Governor and recommend to him or her whether the member should be removed from office.
9. The Disciplinary Tribunal shall give the member an opportunity to show cause why he or she should not be removed from office.

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10. Where the question of removing a member has been referred to a Disciplinary Tribunal under this section, the Governor, after consultation with the Premier and the Leader of the Opposition, may suspend the member from the exercise of the functions of his or her office pending the hearing and determination of the matter.
11. A suspension may, at any time, be revoked by the Governor and shall in any case cease to have effect if the Disciplinary Tribunal recommends to the Governor that the member should not be removed.
12. A member of the Elections and Boundaries Commission shall not enter upon the duties of his or her office unless he or she has taken and subscribed the oath of allegiance and office.
13. The Elections and Boundaries Commission may —
 - (a) regulate its own procedure and, with the consent of the Governor, acting in his or her discretion, may confer functions on any public officer or on any authority of the Government for the purpose of the discharge of its functions; and
 - (b) may determine from time to time to invite experts or other persons outside the Commission and knowledgeable in specific areas to attend a meeting or committee of the Commission.
14. The Elections and Boundaries Commission may act notwithstanding any vacancy in its membership (including any vacancy not filled when appointments of members are first made) and its proceedings shall be valid even though some person who was not entitled to do so took part in them; but any decision of the Commission shall require the concurrence of not less than four of its members.
15. The Elections and Boundaries Commission shall—
 - (1) have the functions conferred on it by section [*# for following section on boundaries review*];
 - (2) direct and supervise the conduct of elections and referenda, and the registration of voters in the Virgin Islands, including regulating the management, expenditure and accountability of election campaign financing, and all matters connected therewith in accordance with any law regulating the conduct of elections and referenda; and
 - (3) have such other related functions as may be prescribed by Act of the Legislature.
16. An Act of the Legislature may make further provision, subject to this Constitution, for the functions and procedures of the Elections and Boundaries Commission, and for the protection, privileges and remuneration of members of the Commission.
17. In the exercise of its functions, the Elections and Boundaries Commission shall not be subject to the direction or control of any other person or authority.

Review and alteration of electoral districts —

1. Whenever—
 - (1) the House of Assembly, by resolution; or
 - (2) the Governor, acting after consultation with the Premier and the Leader of the Opposition, so requests, the Elections and Boundaries Commission shall review the boundaries of the electoral districts into which the Virgin Islands is divided and, shall submit a report to the Governor and the House of Assembly containing its recommendations for the establishment of, or any changes in, the boundaries of the electoral districts – or declaring that no changes are required,

provided that the Elections and Boundaries Commission shall, at intervals of not more than ten years, review the boundaries of districts.

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2. In determining its recommendations in relation to more than one electoral district, the Elections and Boundaries Commission shall seek to ensure that electoral districts contain, so far as is reasonably practicable, approximately equal numbers of persons qualified to be registered as electors under the law then in force in the Virgin Islands; but the Commission may depart from this principle to such extent as it considers expedient in order to take into account—
 - (1) the density of population and, in particular, the need to ensure adequate representation of sparsely populated areas;
 - (2) the means of communication;
 - (3) geographical features, physical features and natural boundaries; and
 - (4) the requirement for each electoral district to have as nearly as may be an equal number of persons eligible to vote
3. As soon as may be after the Elections and Boundaries Commission has submitted a report under this section, the Premier shall cause a Bill to be introduced into the House of Assembly for giving effect, whether with or without modifications, to the recommendations contained in the report; and such a Bill—
 - (1) may contain provision for any matters which are incidental to or consequential on its principal provisions; and
 - (2) shall include a provision for the coming into force of the measure (when enacted for the determination of the electoral districts to which it relates) upon the dissolution of the House of Assembly next following its enactment.
4. Where any Bill introduced under this section proposes to give effect to the recommendations of the Elections and Boundaries Commission with modifications, there shall be laid before the House of Assembly at the same time a statement, jointly agreed by the Premier and the Governor, of the reasons for the modifications.

THE POWERS THAT NEED TO BE RESERVED TO THE GOVERNOR, AND HOW ISSUES AS TO THE EXERCISE OF DEVOLVED AND RESERVED POWERS, RESPECTIVELY, WHEN THEY ARISE, ARE TO BE RESOLVED.

3.4 Powers that need to be reserved to the Governor

The constitutional relationship between the UK and OTs increasingly appears to be a ripe topic for discussion in the UK Parliament – whether by way of a debate, Parliamentary questions or interests in various All Party Parliamentary Groups. Although the actual number of MPs who show interest in OT-related topics appears to be a tiny fraction of Parliament's overall membership, it is fair to say that OT issues have been attracting more attention post Brexit. There is a sentiment that Brexit has caused the UK to examine its relationship with its OTs in a new light.

At the same time, but perhaps for different reasons, recent developments in the VI have also caused the people of the VI to examine the Territory's constitutional relationship with the UK in a new light – not to discard it (or not to discard it prematurely) but to modify and modernise it.

Under this ToR, members of the public largely commented on the general desire to see the powers and responsibilities of the Governor scaled back in favour of more sharing arrangements with the Premier and/or requirements for prior consultation with the Premier.

The ToR was one added as a recommendation flowing from the CoI Report. The reference to 'devolved' powers will be taken to refer to:

- (a) areas of the Governor's special responsibilities under section 60 of the Constitution (external affairs, defence, internal security, courts, terms and conditions of the public service) that may be or have been delegated by the Governor to a Minister, and
- (b) areas in which the local Government and Legislature have competence.

For purposes of this discussion, the reference to 'reserved' powers of the Governor will be taken to refer to:

- (a) the power of the Governor under section 81 of the Constitution to declare a Bill or motion passed or carried, respectively, where he considers it urgently necessary, for the purpose of complying with any international obligation applicable to the Virgin Islands (this is the strict meaning of 'reserved power'), and
- (b) constitutional powers granted to the Governor to act in his own discretion.⁸¹

In relation to the delegation of areas of special responsibility, the present language in the Constitution gives the Governor wide power to share special responsibilities with Ministers. Under written directions referred to as a 'Letter of Entrustment' from the UK Government, the Governor must delegate, to the relevant Minister, the conduct of regional external affairs such as matters relating to CARICOM, the OECS and other Caribbean regional organisations or institutions, relations with the USVI, matters relating to tourism, taxation and financial services, and EU matters which directly affect the interests of the VI.

⁸¹ E.g. Section 44 (power to summon the committee on the Prerogative of Mercy); s.101 (power to grant and withhold pensions); s.103(b) (power to withdraw from the consolidated fund).

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A specific comment on this topic from a member of the public suggested the need to add the relationship with Puerto Rico to the list of matters delegated by Letter of Entrustment. Section 60(4)(c) would then read:

60(4) ... the Governor shall, by directions in writing, delegate to the Premier or to any other Minister designated by the Governor on the advice of the Premier, ... responsibility for the conduct of external affairs as they relate to any matters that fall under the portfolios of Ministers, including—

(a) ...

(c) the relationship between the Virgin Islands, the United States Virgin Islands and Puerto Rico in matters of mutual interest....

No other concern was brought to the attention of the Commission that the Letter of Entrustment arrangement is not working well. There is also built into that mechanism a procedure to appeal to the Secretary of State.⁸²

However, there were discussions at the Col hearings where Ministers highlighted areas where there are conflicts between their subject areas (devolved or independent) and an aspect of special responsibility under the Governor. It is easy to see how such subject conflicts can occur in practice. Disaster management is topical. A Minister has responsibility for environmental health but the Governor has responsibility for internal security. Who leads? A Minister has responsibility for ports, but the Governor has responsibility for defence. Who leads? Is this a matter for constitutional resolution or rather a political and/or administrative one? During the Covid-19 pandemic, the Minister with responsibility for Health and the Governor (external relations and internal security) appeared to have co-managed the pandemic quite well. The Col Commissioner suggested that this Commission consider the possibility of the implementation of a process whereby such disputes can be resolved by way of adjudication or through some form of mediation.⁸³

Commissioners do not share the view that a dispute resolution mechanism should be included in the Constitution. However, the Commission recognises that disputes will from time to time arise, in inter-governmental relations where, as shown above, policy areas and subject portfolios overlap. Dispute resolution mechanisms considered included those involving the judiciary. The Commission believes that this would be awkward to implement, and certainly unnecessary for relatively minor matters. Throughout the Constitution, reference is sometimes made to referring matters to the Secretary of State. However, Commissioners feel that, if that office were utilised here, there would be the appearance of an unfair advantage to the Governor and so mechanisms will need to address that. Commissioners therefore recommend a **Statement of Partnership** along the lines following – a type of gentleman's agreement that would set out briefly the basic principles and guidance to be followed by the Governor and a Minister to avert and resolve disputes. Inspiration for this idea is drawn from section A3 of the Memorandum of Understanding between the UK and its devolved administrations.

Statement of Partnership between the Governor and Premier (by himself or on behalf of another Minister) (the Parties)

The Parties acknowledge that there may at times be differences between them as to subject lead when policy overlaps with Ministerial or Gubernatorial portfolios, as the case may be, that require a degree of sharing by both Parties. The following principles should be followed so as to avert and manage such conflicts when they arise, if they cannot be otherwise amicably resolved satisfactorily between the Parties.

⁸² Virgin Islands Constitution Order, 2007, s.60(7).

⁸³ BVI Col Report para. 13.129-130.

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These principles are not intended to circumvent nor replace protocols and procedures set out in the Constitution or other law. They simply recognise a simple and efficient procedure to facilitate an agreement in what should be rare cases of dispute.

1. Timely and effective communication is the foundation to minimising conflict.
2. As far as possible, negotiations should be conducted discreetly or confidentially to avoid inflaming a tense situation.
3. Each party should verify that the facts on which he or she is relying are correct.
4. Meaningful efforts should be used to resolve conflict on an administrative or working level, including, where appropriate, seeking the opinion of the Attorney General.
5. If no agreement is concluded at this point, a Party (i.e. the Governor or the Premier (in his own right or on behalf of another Minister) should formally request an audience with the Secretary of State and both parties at the same time.
6. Each Party should provide the Secretary of State and the other Party with a confidential brief outline of the facts on which it relies as well as at least two possible options for a satisfactory outcome.
7. The Secretary of State should at all times act independently and fairly in weighing the information provided to him and the Attorney General of the Territory (who should also be presented with copies of the short briefings from each Party) should be present during such meetings.
8. After reviewing the briefings, the Secretary of State should convene a meeting to hear each Party orally (in person, by phone or virtually), with the Attorney General and subject Minister (if other than the Premier) in observance.
9. The Secretary of State shall thereafter propose a solution for the Parties to agree, or make a decision himself.
10. The Parties should immediately agree on a media communique.

The Commissioners so recommend.

Turning to reserved powers, throughout the Constitution, there are examples of where there is reserved to the Governor authority to exercise a power without the need to consult or otherwise refer to any other person. In other words, the Governor is clothed with authority in such cases to act in his or her own discretion.

One such power, the Governor's reserve legislative power under section 81 of the Constitution, drew heavy criticism during the consultation process. At the core of the issue is a dual-pronged dilemma of (a) the Governor being able to declare that such laws shall have effect as if they had been passed or carried in the HoA in certain cases coupled with (b) a provision in the Constitution that appears to oust the jurisdiction of the courts from questioning the degree of any consultation undertaken by the Governor (referred to as an "ouster clause").

Another such power is the discretionary power granted to the Governor in section 103 of the Constitution to withdraw monies from the Consolidated Fund to enable the discharge of his or her responsibilities under section 60 of the Constitution. During the consultation process, a suggestion was made that there should be at minimum a constitutional requirement for the Governor to consult with the Minister of Finance before exercising this power.

Members of the public also noted that the ability of the Governor to declare a Bill passed (where the Legislature fails to obtain the requisite majority to pass it) is considered to be a vestige of the Territory's colonial past and does not reflect the modern partnership that the UK Government touts. What is more, the power is exercisable by the Governor in his discretion.⁸⁴ Acts within the discretion of the Governor⁸⁵ (as are acts relating to his special

⁸⁴ Virgin Islands Constitution Order, 2007, s.81(6)

⁸⁵ Virgin Islands Constitution Order, 2007, s.40(1)(b)

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responsibilities⁸⁶) are exempt from the requirement for consultation with Cabinet. However, in the case of the latter (his special responsibilities), the Governor is required to consult with the Premier. Then, even the effect of such consultation is eroded by the ouster clause which reads:

Where the Governor is directed by this Constitution to exercise any function in accordance with the advice of, or after consultation with, any person or authority, the question whether he or she has so exercised that function shall not be enquired into in any court.⁸⁷

Referring to Margaret DeMerieux's *The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions*, Robinson concludes that "since many of these functions were associated with the exercise of the prerogative power, the ouster clauses appear to codify traditional and now outdated understandings about the unreviewability of prerogative powers".⁸⁸ Ouster clauses can be found in relation to the exercise of power by some institutions under a constitution, or exercise of power by a Head of State or by the Governor. Authors have concluded that whilst courts were initially less willing to go behind ouster clauses other than in relation to acts of institutions, that seems to be changing.⁸⁹ To that end, it might be worth revisiting the language of ouster clauses during this exercise.⁹⁰

There is recent precedent in a Caribbean OT's constitution⁹¹ for removal of a similarly worded ouster clause and Commissioners therefore recommend the removal of the ouster clause in section 40(6) of the Constitution.

Before closing out this topic, there is a related matter that is appropriate to be addressed under this ToR.

Of the other areas of the Governor's special responsibilities, the subject of the Public Service was mentioned as a subject that should be devolved to a Minister. When queried further about how the Public Service would be insulated from political interference, the response invariably was that this could be done through the use of a board or commission which would have its members appointed by the Governor. There is perhaps a misunderstanding in the minds of the public that the Governor is responsible for the Public Service as a whole. In fact, as a constitutional matter, the Governor only has special responsibility for "the terms and conditions of service of persons holding or acting in public offices".⁹² To a great extent many of these have, in fact, already been devolved under the **Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008**.

Members of the public did not make any observation that the present arrangement of the Public Service under the Public Service Commission combined with the already devolved powers to local Government⁹³ was not working.

Recommendation No. 23 Powers that need to be reserved to the Governor

The Commission therefore recommends that:

- (a) Relations with Puerto Rico should be added to the list of relationships with the VI which would be covered by a Letter of Entrustment under section 60(4)(c) of the Constitution.

⁸⁶ Virgin Islands Constitution Order, 2007, s.40(1)(c)

⁸⁷ Virgin Islands Constitution Order, 2007, s.40(6)

⁸⁸ Robinson, Tracy and Bulkan, Arif et al. *Fundamentals of Caribbean Constitutional Law* (2nd ed). p260 referencing M Demerieux's *The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions* (1982)31 I.C.L.Q. 263, 265, p2-003-005

⁸⁹ Robinson, Tracy and Bulkan, Arif et al. *Fundamentals of Caribbean Constitutional Law* (2nd ed). p261

⁹⁰ Similar ouster clauses can be found at section 35(3) and 38(3) of the Constitution but they relate to the relationships more directly concerning the UK.

⁹¹ Section 32 of The Cayman Islands Constitution Order, 2009 as amended by The Cayman Islands Constitution (Amendment) Order, 2020.

⁹² Virgin Islands Constitution Order, 2007, s. 60(1)(d). Some additional powers to appoint, remove and exercise disciplinary control over person holding public office are further set out in s92-97.

⁹³ Virgin Islands Constitution Order, 2007, s. 92(8) under which the Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008 have been made.

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- (b) The ouster clause at section 40(6) should be removed.
- (c) A Statement of Partnership (along the lines proposed above) setting out briefly the basic principles and guidance to be followed by the Governor and a Minister to avert and resolve disputes should be considered for adoption outside the framework of the written Constitution.
- (d) There should be a requirement for consultation with the Minister of Finance prior to the exercise of the power in s.103 to withdraw monies from the Consolidated Fund.
- (e) Section 81(6) of the Constitution should be amended to require that the Governor consult with the Premier prior to exercise of his discretion.

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A MECHANISM FOR THE TRANSFER OF RESERVED POWERS TO THE DEVOLVED BVI GOVERNMENT IN THE FUTURE, WITHOUT A FURTHER CHANGE TO THE CONSTITUTION BEING REQUIRED

3.5 Transfer of Reserved Powers / Devolution to GVI

As with the ToR [above](#), this term was one added as a recommendation flowing from the Col Report. Many of the relevant paragraphs discussing this ToR in the Col Report⁹⁴ point to overlap between this ToR and the one above.

Additionally, the Col Report recognised that the end product of the constitutional review exercise should be the establishment of a Constitution "that is sufficiently robust to ensure adherence to the principles of good governance within government" and which enables the people of the BVI to meet their aspirations, including those in respect of self-government within the context of modern democracy".⁹⁵ The inference is that the inclusion in the Constitution of a mechanism for the transfer of reserved powers to the devolved GVI in the future, without a future change to the Constitution being required, is an important step on the pathway towards assisting the people of the VI to meet the abovementioned aspirations.

In the ToR [above](#), the Commission considered existing mechanisms for transfer, by way of delegation and devolution of the Governor's powers that do not require a change to the Constitution. These were:

- (a) Under Letters of Entrustment from the UK Government, the Governor must delegate, to the relevant Minister, the conduct of regional external affairs such as CARICOM, OECS, relations with the US Virgin Islands, matters related to tourism, taxation and financial services, and EU matters which directly affect the interests of the VI. Such letters have already been issued under section 60(4) of the Constitution.
- (b) Regulations delegating to the Public Service Commission of powers vested in the Governor to make appointments, to remove or discipline persons holding or acting in public office. An example of such regulations is the **Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008** issued under section 92(8) of the Constitution.

An important point to add here is that, in both cases, more delegation or devolution can be negotiated in the future, if necessary, without the need to amend the Constitution. (For example, it may be decided to amend the regulations referred to above so that devolved powers may be exercisable over more senior public officers.) Both these mechanisms are very flexible and fairly extensive in their current operations so that the Commission makes no further recommendation in this regard. Members of the public did not have any adverse comments on these existing mechanisms and may not have been fully aware of the breadth and scope of them.

For the second part of this discussion, the Commission notes that, unlike the ToR above, this ToR deals only with 'reserved' powers and is not on its face limited to reserved powers of the office of the Governor. The Commission will therefore use this opportunity to address another matter which featured in its public consultation – that of the "full power" reserved to His Majesty under section 119 of the Constitution to make laws for peace, order and good government of the VI.

Generally speaking, whilst still in a non-independent constitutional arrangement, reserved powers are not typically devolved⁹⁶ – the two concepts are directly opposed. However, there may be some softening in the way the reserved power is executed. For example, a requirement for some kind of meaningful consultation.

⁹⁴ Page 692 of the BVI Col Report which cross-refers the reader to paragraphs 13.129-130 of the BVI Col Report.

⁹⁵ BVI Col Report, page 692.

⁹⁶ Although in Scotland where monetary policy is a reserved matter for the UK Parliament, the Scottish Parliament has recently been given devolved authority to legislate for some fiscal matters.

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The 1774 case *Campbell v Hall* established from back then that, even with granting a colony a legislative assembly, the Crown could reserve its ability to legislate⁹⁷ for that colony. This seems to be the basis for section 119 of the Constitution which reads:

There is reserved to His Majesty full power to make laws for the peace, order and good government of the Virgin Islands.

Even so, whether in today's modern partnership this language should continue to be this austere is the question. The harsh reality of how this plays out in practice came in for rebuke in the House of Lords debate on the **Sanctions and Anti-Money Laundering Bill** in 2018 (since passed). That piece of UK legislation requires certain OTs to implement public corporate registers of beneficial ownership at a time when it is not an international standard. It also relates to financial services which is one of the powers delegated by a Letter of Entrustment. If such registers were not implemented, they would be imposed by an Order-in-Council of the UK. In his memorable contribution to the debate, Lord Neuberger joined others in criticising the lack of prior consultation with the OTs.

I regret to say that the proposed law appears to be old-style colonialism at its worst: damaging legislation which has no cost for the legislating country but which will cause hardship to the victim countries, and does so not merely without representation but without consultation or full investigation.⁹⁸

The Commission notes that similar sentiments were passionately expressed during public consultations. The actions taken by the UK Parliament in an area of delegated responsibility, without consultation with the sitting government, or involvement of the elected legislature, or any obvious regard for the interests of the people of the Territory, stirred anti-UK sentiments in the VI on a scale not seen in modern history. These sentiments culminated on 24 May 2018 with a rare mass protest in the streets of Road Town, Tortola dubbed a "Decision March". Symbolically, the "Decision March" commenced at the site at which the emancipation proclamation which ended slavery in the VI was read in August 1834, and ended intentionally at the Governor's Office. In remarks endorsing the "Decision March", then Premier Dr. the Honourable D. Orlando Smith stated that the actions of the UK Parliament represented a "fundamental breach in the constitutional relationship and modern partnership between the UK and the Virgin Islands nurtured over the past half a century". He concluded his statement by vowing to "fight the UK Parliament's decision for all the violations and injustices that are apparent in it".

In the same debate on the then Anti-Money Laundering Bill in the House of Lords, the Earl of Kinnoull referred to the Sewel Convention now part of the Scotland Act,⁹⁹ and stated:

...to legislate without even consulting these [the OTs'] Parliaments is conventionally wrong. This is why I feel that the Sewell Convention should apply.

The **Scotland Act 1998** sets out general provisions of the Scottish Parliament's ability to pass laws. Prior to 2016, the provision ended with the caveat that the power of the Parliament of the UK to make laws for Scotland remained unaffected. However, the **Sewel Convention** was added in 2016 to recognise that the UK Parliament would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. The Sewel Convention was also alluded to during the Commission's public signature event where a commentator hailed it as an improvement, but recognised its limitations in practice.¹⁰⁰

⁹⁷ (1774) 98 E.R., 1045.

⁹⁸ Sanctions and Anti-Money Laundering Bill House of Lords debate 21 May 2018.

⁹⁹ Section 28 of the Scotland Act, 1998 as amended in 2016.

¹⁰⁰ Former Member of the House of Assembly, Hon. Carvin Malone at the Commission's livestreamed public signature event.

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The 'Interim' Order

From the mid-twentieth-century, the people of the VI have held democratic government (government for the people by the people) sacrosanct and pride themselves on the constitutional advances gained over the past fifty years. The zeal for democratic ideals can be especially appreciated when viewed against the backdrop of the painful legacy of slavery and colonialism. For this reason, it is of grave concern to persons who spoke out at public consultations that the imposition of the **Virgin Islands Constitution (Interim Amendment) Order 2022** (the Interim Order) whereby the UK Government exercised its power to suspend those parts of the Constitution which relate to ministerial government and the House of Assembly, would effectively remove democratic governance from the VI.

The Explanatory Note to the Interim Order noted that '[a]n impact assessment has not been produced for this instrument as no, or no significant, impact on the United Kingdom private, voluntary or public sector is foreseen.' In stark contrast, however, the potential impact on the VI and its people could be very significant constitutionally and otherwise.

While the Commission is loath to make any assessment of whether the Interim Order, was warranted in the circumstances, it does note that since its imposition, the Order has been held in abeyance while efforts to implement the Col recommendations and improve governance in the VI have continued and steady progress is being made. These efforts have continued in partnership with, or under the supervision of the Governor. Even so, to many in the VI, and in the Anglophone Caribbean, the suspension of democratic government in the VI reeks of old-style colonialism. Indeed, the Prime Minister of St. Vincent and the Grenadines, Dr. the Honourable Ralph Gonsalves, at the end of the 43rd summit of the CARICOM leaders described the Order in Council as 'anachronistic and a return to Crown colony government' stating further that '[i]t is unbecoming of the British government in the third decade of the 21st century to have the sword of Damocles hanging over a free people in this manner'.¹⁰¹ CARICOM in their statement following their 45th Meeting held 3-5 July 2023 in Trinidad and Tobago reiterated its position that the UK should remove the Interim Order to impose direct rule over the people of the VI at their discretion and that it opposes any undemocratically acquired additional powers by the Governor over the VI. CARICOM also reiterated that colonialism has no place in modern democratic governance in the Caribbean and encouraged all concerned to agree a clear and responsible path for the people of the VI to achieve self-government.¹⁰²

Yet, some persons see the Interim Order as a necessary by-product of the VI's constitutional relationship with the UK and consider that it could be an effective tool in promoting good governance.

It is acknowledged that, constitutionally, certain powers are reserved to both the UK Government and the UK Parliament. That relationship has, however, oft been promoted as being a familial one reflecting a 'modern partnership' and the Commission is, therefore, of the view that such a draconian power as suspension of democratic government ought not to be used if any lesser measure could be employed to achieve the same ends. Furthermore, and in the spirit of a true partnership, such power should never ever be exercised without consultation with the democratically elected Government, where such consultation is possible.

In this vein, the Commission must acknowledge the remarks of the Premier Dr. the Honourable Natalio D. Wheatley on the improved engagement between the UK Government and the locally elected officials. The Commission is encouraged by his recent remarks that he has 'observed a welcome shift in the UK's engagement with the VI and the tone of communication'.¹⁰³ The Commission considers constructive engagement between the UK Government

¹⁰¹ Loop News. "CARICOM Wants UK to Remove Sword of Damocles over BVI | Loop Caribbean News." Accessed November 9, 2023. <https://caribbean.loopnews.com/content/caricom-wants-uk-remove-sword-damocles-over-bvi>.

¹⁰² CaribDaily.News. "CARICOM Supports British Virgin Islands' Self-Government and Governance Reform." Accessed November 9, 2023. <https://caribdaily.news/article/4fe55661-09a7-42f3-baf4-d823378fea7b>.

¹⁰³ "Statement by Premier Wheatley at the UN on the Situation of the BVI - October 1 | Government of the Virgin Islands." Accessed November 9, 2023. <https://bvi.gov.vg/media-centre/statement-premier-wheatley-un-situation-bvi-october-1>.

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and the locally elected Government to be of benefit to the VI and supports its adoption, particularly at any time when the exercise of power reserved to His Majesty's Government pursuant to section 119 of the Constitution is being considered.

The Commission considers that section 119 is ripe for revision.

A Sewel Convention-like provision was inserted by a 2020 amendment to the Cayman Islands Constitution which added a new section 126 which reads as follows:

Notification of proposed Acts of Parliament extending to the Cayman Islands or Orders in Council extending such Acts of Parliament to the Cayman Islands

126.—(1) Where it is proposed that—

(a) any provision of a draft Act of the Parliament of the United Kingdom should apply directly to the Cayman Islands, or

(b) an Order in Council should be made extending to the Cayman Islands any provision of an Act of Parliament of the United Kingdom,

the proposal shall normally be brought by a Secretary of State to the attention of the Premier so that the Cayman Islands Cabinet may signify its view on it.

(2) This section does not affect the power of the Parliament of the United Kingdom to make laws for the Cayman Islands or the power of Her Majesty to make an Order in Council extending to the Cayman Islands any provision of an Act of Parliament of the United Kingdom.

The Commission sees no reason why a similar provision cannot be included in the new Constitution and recommends accordingly.

It may be appropriate here to note that the UK Parliament itself has raised concerns about the need to have the voices of the OTs recorded in Whitehall on matters directly affecting their peoples. Elsewhere in this Report (5.2 [Representation in UK Parliament](#)) the Commission summarises the most current initiative of the UK Parliament to address this lacuna.

Recommendation No. 24 Transfer of reserved powers to devolved GVI

The Commission therefore recommends that, in respect of the reserved power to legislate for the Territory, section 119 of the Constitution should be followed by a Sewel Convention-like section to the effect that, where a draft UK Act is intended to apply directly to the VI, or an Order in Council is intended to be made to extend any provision of a UK Act to the VI, the proposal would typically be brought by the Secretary of State to the attention of the Premier, so that the VI Cabinet may signify its views on it.

A proposed draft is as follows:

Drafting proposal

Notification of proposed Acts of Parliament extending to the Virgin Islands or Orders in Council extending such Acts of Parliament to the Virgin Islands

120.—(1) Where it is proposed that—

(a) any provision of a draft Act of the Parliament of the United Kingdom should apply directly to the Virgin Islands, or

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(b) an Order in Council should be made extending to the Virgin Islands any provision of an Act of Parliament of the United Kingdom,

the proposal shall normally be brought by a Secretary of State to the attention of the Premier so that the Virgin Islands Cabinet may signify its view on it.

(2) This section does not affect the power of the Parliament of the United Kingdom to make laws for the Virgin Islands or the power of His Majesty to make an Order in Council extending to the Virgin Islands any provision of an Act of Parliament of the United Kingdom.

WHETHER THERE SHOULD BE A REGIME IN RELATION TO ELECTION EXPENSES.

3.6 Regime for Election Expenses

A specific ToR in relation to election expenses was adopted by the HoA, following a recommendation of the Col Report, which questioned whether there should be a regime in relation to election expenses in the form of, for example a requirement on election candidates to submit a breakdown of expenses including donations above a specific sum and/or a cap on such expenses.

During the Commission's consultation, the issue of election expenses was of some concern. Those who commented agreed that a regime should be implemented to regulate election expenses and campaign finances but most commentators suggested that this regime need not be contained in the Constitution itself. This discussion is also related to whether the Territory needs to establish an Elections and Boundaries Commission, which is discussed elsewhere in this Report (see 3.3.5 [Elections and Boundaries Commission](#)).

3.6.1 Regulation of Election Campaign Finances

Although the Territory's Elections Act and Election Regulations set out the scheme for the conduct of elections in the Territory, neither contains a regime to regulate campaign finances.

The regulation of election campaign finances is an issue that arises in all societies around the world where elections of political leaders are held. The **United Nations Convention against Corruption** (UN Convention) was adopted by the UK by ratification in 2006 and made applicable to the Territory by extension in 2006. The UN Convention includes various provisions to combat a variety of forms of corruption, including in the public sector (Article 8).

Article 8 includes provisions requiring parties to the Convention to consider adopting appropriate legislative and administrative measures, to (1) prescribe criteria concerning candidature for and election to public office, and (2) enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

One commentator has aptly summarised the issues as follows:

The regulation, oversight and monitoring of political funding includes apart from disclosure also contribution and spending bans and limits, direct and indirect public funding and less obvious mechanisms such as limited campaigning periods. Global experience also clearly indicates that regulation and monitoring by government agencies is not sufficient, an active civil society and vigilant media is necessary if effective oversight is to be achieved.¹⁰⁴

It may be helpful to give an overview of how some other jurisdictions approach the issue.

In the UK, campaign finances are regulated in accordance with the provisions of the **Political Parties, Elections and Referendum Act, 2000 (PPERA)** and more recently, the **Elections Act 2022**.

¹⁰⁴ Öhman, Magnus, and Hani Zainulbhai, editors. Political Finance Regulation: The Global Experience. International Foundation for Electoral Systems, 2009, <https://www.ifes.org/publications/political-finance-regulation-global-experience>.

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The **PPERA** established an Electoral Commission. It also made provisions dealing with the registration and finances of political parties, donations and expenditure for political purposes, election and referendum campaigns and the conduct of referendums.

The **Elections Act 2022** provided for the administration and conduct of elections, including provisions designed to strengthen the integrity of the electoral process. It also addressed the functions of the Electoral Commission and made provisions in relation to financial information to be provided by a political party on applying for registration, regulation of expenditure for political purposes, and information to be included in electronic campaigning material.

The matters addressed by the **PPERA** and the **Elections Act 2022** fall broadly into the following categories:

Campaign spending

There is a 'regulated period' prior to each election campaign. The length of the regulated period depends on the election, but it covers the period that someone is formally a candidate. During the regulated period, candidates can only spend a limited amount of money on campaigning, and only on certain activities.

Money spent on the following activities counts as 'candidate spending' and so must be within the limit. Any money spent on these activities must be declared to the Electoral Commission.

- Advertising of any kind, including posters, television adverts and online adverts
- Leaflets sent to voters
- Public meetings
- Transport, office, staff and administration costs

Spending on other activities does not need to be reported.

Party spending

Political parties have separate rules for campaign spending. Items of spending that support the candidate are likely to count as candidate spending. Spending that supports the party is likely to count as party spending. The Electoral Commission provides detailed guidance on what counts as candidate and what counts as party spending. There is also a regulated period prior to each election campaign, usually 365 days.

The list of what counts as party election spending is similar to the list for candidate election spending, but also includes market research, manifestos and rallies.

Donations to political parties

Donations can be made to registered political parties. Anything with a value of £500 or below is not regulated. However, the Electoral Commission warns parties to be alert to situations where it appears that a donor is attempting to evade **PPERA** by making a series of small donations. Donations over £500 must be from a permissible donor as defined in the **PPERA**. Anonymous donations over £500 are not permissible. Parties must ensure they know the true source of the money.

Issues that have arisen in recent elections

Concerns have been raised about the transparency of election campaigns and the money behind them, especially in light of increasing use of digital campaigning and social media.

In the US, the US Constitution grants the federal government specifically enumerated powers, with all remaining powers of government reserved to the states. As a result, the states control the administration of elections. The US

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Congress has authority to establish laws regarding campaign finance for federal elections, and the Federal Election Commission (FEC) is the federal regulatory body for federal elections. The **Federal Elections Campaign Act of 1974** established a federal public financing option for federal election campaigns.

Individual states are generally responsible for establishing policies and providing enforcement of campaign finance laws for state and local candidates. As a result, the methods used to regulate elections vary widely. The most common methods used to regulate elections are imposing disclosure and reporting requirements, setting contribution limits for contributions to candidates' campaigns and providing a method for public financing of campaigns.

The most common means of regulating political spending is through disclosure and reporting requirements. All 50 states mandate that candidates report the contributions they receive and the expenditures they make while pursuing public office.

The second-most common means of regulating money in elections is through imposing limits on the amount of money any group or individual can contribute to a campaign.

A third method states use to regulate spending in elections is by providing a means by which candidates can accept public funds to conduct their campaigns. If a candidate opts into one of these programs, he or she agrees to limit the amount of contributions, and can only spend on his or her campaign an amount established by the state. In return, the government will partially or fully fund the campaign.

The US Supreme Court has authority over both federal and state election campaigns and decisions of the US Supreme Court can require states to change their campaign finance policies and processes. Each state is also subject to decisions from state and lower federal courts in their jurisdiction.

The most significant recent US Supreme Court decision in the area of campaign financing was the decision in *Citizens United v. the FEC*¹⁰⁵ which held that states cannot place limits on the amount of money corporations, unions, or political action committees use for electioneering communications, as long as the group does not directly align itself with a candidate. The US Supreme Court has also held that contribution limits are constitutional but expenditure limits are not;¹⁰⁶ that states can limit the amount of money that any one individual or group can contribute to a state campaign;¹⁰⁷ that states cannot limit independent expenditures, and must ensure their contribution limits are high enough to enable the candidate to run an effective campaign;¹⁰⁸ and that states can place a limit on how much any individual or group contributes to any one campaign, but cannot impose aggregate limits on how much an individual or group contributes to all campaigns during an election cycle.¹⁰⁹

Throughout the Commonwealth Caribbean, political party and campaign financing is largely unregulated and, even where there are laws in force, they are often not enforced. An analysis of laws in the twelve Commonwealth Caribbean nations¹¹⁰ conducted in 2005 by the Organization of American States and the International Institute for Democracy and Electoral Assistance (IDEA)¹¹¹ looked at the application of seven different markers of campaign finance regulation and found a variety of different choices:

- Disclosure of Contributions - 5 countries had a requirement but in 2 it was not enforced

¹⁰⁵ 55 US 310 (2010).

¹⁰⁶ *Buckley v. Valeo*, 424 US 1 (1976).

¹⁰⁷ *Nixon v. Shrink Missouri Government PAC*, 528 US 377 (2000).

¹⁰⁸ *Randall v. Sorrell*, 548 US 230 (2006).

¹⁰⁹ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

¹¹⁰ Antigua and Barbuda, Commonwealth of the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

¹¹¹ From *Grassroots to the Airwaves: Paying for Political Parties and Campaigns in the Caribbean*, Organization of American States and IDEA (Washington D. C., 2005). The analysis also included Haiti and Suriname.

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- Disclosure of Spending by Party – None required this
- Disclosure of Spending by Candidate – 5 required this
- Contribution limits - None required this generally, and 1 prohibits anonymous contributions
- Spending limits – 4 had limits, of which 2 were limited to candidates rather than parties and 3 were not enforced
- Public funding – 1 has limited public funding
- Media limits – 1 partial

Other OTs address the conduct of elections in their statutes and not in their respective constitutions.

The Cayman Islands

The **Cayman Islands Elections Law, 2022** sets out a regime for the conduct of elections in the Cayman Islands. It provides for the registration of political parties and includes provisions requiring disclosure by candidates of all election expenses. It caps the amount of expenditure by a candidate after nomination at CI\$40,000 (US\$48,000). A candidate may not accept a contribution exceeding CI\$5,000 (US\$6,000) from an anonymous source and every payment of over CI\$30 (US\$36) made must be accompanied by a voucher setting out the particulars of the payment. Political broadcasts, political announcements and election advertising are regulated as to content, to avoid certain types of abusive, obscene or defamatory language, and as to timing (none can be broadcast on polling day).

Turks and Caicos Islands

The TCI enacted the **Political Activities Ordinance (PAO)** in 2018 which sets out a comprehensive regime for the conduct of elections in TCI. It provides for the registration of political parties and includes provisions requiring disclosure by candidates of all election expenses. Similar to the UK's PPERA and Elections Act 2022, the PAO contains a definition of what constitutes a political donation and a list of permissible donors to election campaigns and political parties, restrictions on amounts and sources of donations, and restrictions on campaign expenditures.

The maximum amount of a permissible donation to a political party is US\$30,000 in any given year. Donations of under US\$150 are presumed to be from a permissible donor (unless there is evidence to the contrary). For donations between US\$150 and US\$3,000, the party must verify that the donor is a permissible donor and for donations of over US\$3,000, the party must verify that the donor is a permissible donor and publicize the amount and identity of the donor.

Party campaign expenditures are restricted in the period of 365 days before polling day. The amount of permitted expenditure during the restricted period is US\$30,000 for each electoral district, US\$40,000 per candidate for the all Island district and US\$100,000 for the leader of the party. Independent candidates may also spend US\$30,000 for each electoral district and US\$100,000 for the all Island district. There are also controls relating to expenditures by third parties.

Regular reports of both donations received and expenditures made must be filed with the Integrity Commission there.

Other electoral issues

The strong sentiment from the public in favour of regulating election expenses appears to be rooted in unconfirmed rumours of vote buying in one form or another that surface during general elections in many jurisdictions. However, this is less a constitutional matter and more a criminal law matter.

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The VI's Elections Act addresses a variety of election offences.¹¹² These include bribery (offering something of value in exchange for a vote), treating (providing food or drink or entertainment in exchange for a vote), undue influence (using or threatening to use force, violence or restraint to influence someone to vote or refrain from voting), personation (voting for a dead person or impersonating another voter) and engaging in a variety of other illegal practices at elections (e.g., inducing a person who is not entitled to vote to vote, publishing a false statement that a candidate has withdrawn from the election, acting in a disorderly manner at a campaign rally; forging, counterfeiting or destroying a ballot paper).

Depending on the particular offence, the penalties for these offences range from fines of US\$500 to US\$10,000, imprisonment from 6 months to 2 years, disqualification from voting for periods from 5 years to 7 years and disqualification from being elected as a member or keeping one's seat (if already elected) for 7 years.

While the categories of offences are sufficiently broad to address most forms of election crime or fraud (including the so-called "white envelope" problem), the problem appears to be a lack of enforcement of the laws already enacted. To that extent, further consideration should be given to increasing the penalties for election offences as a deterrent.

Recommendation No. 25 Regulation of election campaign finances

The Commission therefore recommends that:

- (a) In order to comply with obligations under the UN Convention, and the tenets of transparency and good governance, the Constitution should be amended to mandate establishment of a regime in relation to election expenses. The Commission recommends that the particulars of this regime be enacted into statute rather than incorporated into the Constitution, to enable the VI to have the flexibility to respond quickly to changing conditions or new modalities.
- (b) The policies and procedures enacted by the UK in the PPERA and the Elections Act 2022 or by the TCI in its PAO may be adaptable for use in the Territory due to the similarity of their election systems to the election scheme set out in VI's Elections Act and Election Regulations. In addition, whatever regime is enacted must adopt procedures to deal with the increasing use of digital campaigning and social media. Finally, the VI should explore ways to level the playing field and encourage a more diverse group of candidates to stand for election, including the use of some form of public financing of election campaigns.
- (c) Development of a regime addressing election expenses would complement the establishment of an Elections and Boundaries Commission (see 3.3.5 [Elections and Boundaries Commission](#)).

¹¹² See Part V of the Elections Act.

WHETHER STATUTORY BOARDS SHOULD BE EMBEDDED IN THE CONSTITUTION AND, IF SO, WHETHER THERE SHOULD BE A STATUTORY BOARDS COMMISSION AND, IF YES, ITS FUNCTIONS AND RESPONSIBILITIES

3.7 Constitutional Consideration for Statutory Boards

Recommendation B27 of the Col Report states that:

As part of the proposed Constitutional Review, I recommend that consideration is given to establishing a Statutory Boards Commission, which would be responsible for the process of selection and revocation of statutory board membership, and monitoring the internal policies and procedures put in place by statutory boards (such as declarations of interests and conflicts of interest, at least pending overarching provisions in, e.g., the **Integrity in Public Life Act 2021** and new Registration of Interests legislation) intended to strengthen good governance. Whilst this Commission could have representatives appointed by (e.g.) the Governor, Premier and Leader of the Opposition, I recommend that it has a majority of members appointed from BVI civic society. Those appointments should, of course, be the subject of an open and transparent process.¹¹³

This ToR did not attract much discussion from the general public. Members of the public who did reply in the affirmative invariably focused on their frustrations with the gross delay in the submission of annual reports and financials that unfortunately is characteristic of too many statutory boards. On the contrary, this topic was one which was solidly addressed by the statutory boards themselves and by Public Service Top Managers. The consensus was firmly against embedding statutory boards in the Constitution as a general philosophy.

Although there are already a small number of statutory boards embedded in the Constitution (e.g. the Public Service Commission),¹¹⁴ to elevate statutory boards generally to the level of the Constitution is antithetical to the whole concept of independence of statutory boards. Statutory boards should be held to account by their respective boards and are answerable to the Legislature through the relevant Minister. Issues such as tardy reporting need to be addressed through enforcement mechanisms outside the Constitution including in the relevant governing law and by legislative committees. Issues such as poor governance need to be addressed through appropriate selection of boards of directors and other initiatives such as training of board members. The **Protocol for the Appointment and Removal of Statutory Board Members (Protocol)** issued in March 2023 is a good starting place, although Commissioners do not agree with everything in it.¹¹⁵

To embed statutory boards in the Constitution and/or to create a Statutory Boards Commission is a retrograde step that undermines the functions and responsibilities of the boards of directors.

Several of the written responses that were received pointed out that embedding statutory boards in the Constitution could be viewed as interfering with the operational independence of such boards. In some cases, such independence is a benchmark against which the statutory board is assessed by international standard setting bodies or tested for on-going compliance. For example, the Financial Services Commission's letter to the Commission cites the Group of International Finance Centre Supervisors, the International Association of Insurance Regulators, and the Basel

¹¹³ BVI Col Report, p 490.

¹¹⁴ The 2022 Statutory Boards Review written by attorney, Jamal Smith, considered the Public Service, Teaching, Police and Judicial Service Commissions, the Human Rights Commission, the National Security Council, and The Advisory Committee on the Prerogative of Mercy – all under the Constitution – to be statutory Boards for purposes of that review.

¹¹⁵ For example, the Protocol promotes advertising as the primary means of filling available Board positions and only resorting to other means (possibly headhunting) as an exception or if advertising does not yield fruit. In certain circumstances, however, headhunting can be more effective at identifying the best talent. See paras 2.1 and 10.3 of the Protocol.

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Committee on Banking Supervision as requiring operational independence. The BVI Airports Authority is also subject to similar international requirements for operational independence, as are other statutory bodies.

In addition, embedding statutory boards in the Constitution would arguably create an awkward relationship whereby the (central) Government having granted operational independence to the statutory board on the one hand, finds itself financially liable for unconstitutional acts of the very same statutory board in which the (central) Government no longer plays a management nor operational role. There is good reason why the Constitution makes no mention of its application to statutory boards other than in relation to certain fundamental rights.

A sobering note on which to close out this discussion is that there are some 70 statutory boards in the VI, including various boards, tribunals, committees, councils and commissions – each established under its own legislation and ranging from 0 staff to over 100. These include statutory boards as diverse as the Land Surveyors' Board established under the **Land Surveyors Act**, the National Parks Trust established under the **National Parks Trust Act 2004**, the Virgin Islands General Legal Council established under the **Legal Profession Act**, the British Virgin Islands Electricity Corporation under the **British Virgin Islands Electricity Corporation Act**, and the Board of Trustees established under the **Virgin Islands Climate Change Trust Fund Act**. No effective over-arching law nor commission can adequately address the various governance structures.

One additional recommendation from the public was that all board appointments should be staggered. The Commission agrees and the Col Report suggested that this be included as a default position in the recently developed **Protocol for the Appointment and Removal of Statutory Board Members** (Protocol). However, a provision for rolling or staggered board appointments appears to have been omitted from the Protocol and should be included in a revised version. There was an additional recommendation from the public for term limits to be placed on statutory board members, and for stakeholders and the Leader of the Opposition to have input in board membership. Whilst these matters are outside the remit of the constitutional review, it should be noted that these issues are addressed in either the Protocol or legislation.

Recommendation No. 26 Constitutional consideration for statutory boards

The Commission therefore recommends that:

- (a) There should be no change to the Constitution to embed statutory bodies in the Constitution.
- (b) Issues such as tardy reporting need to be addressed through enforcement mechanisms outside the Constitution including in the relevant governing laws and by legislative committees.
- (c) Issues such as poor governance need to be addressed through appropriate selection of board members and other initiatives such as training for board members.
- (d) The Protocol for the Appointment and Removal of Statutory Board Members issued in March 2023 should be reviewed to address guidance on rolling or staggered board appointments, tardy annual reporting, and good governance training.

WHETHER THE SPEAKER SHOULD CONTINUE TO BE A POLITICAL APPOINTMENT, OR WHETHER HE OR SHE, EVEN IF ELECTED, SHOULD BE INDEPENDENT OF THE POLITICAL PARTIES.

3.8 Appointment or Election of the Speaker

The following discussion and recommendations relate solely to the position of Speaker, as opposed to Deputy Speaker (for which other considerations are applicable).

The ToR regarding whether the Speaker should continue to be a political appointment did not attract a significant number of comments in the consultation process. Those who did mention it were evenly divided between those in favour of a political appointment and those against.

This ToR has its origins in a recommendation from the Col Report.

Section 69 of the VI Constitution states that:

69.—(3) The Speaker shall be elected from among the elected Members of the House of Assembly or (emphasis added) from persons qualified to be elected Members of the House, other than Ministers...

(4) When the House of Assembly first meets after any general election and before it proceeds to the despatch (sic) of any other business except the election of the Speaker, it shall elect a Member of the House who is not a member of the Cabinet to be Deputy Speaker of the House.

A convention of sorts has developed in the Territory that the Speaker is elected from persons who are not members of the Legislature. Several other OTs (Cayman Islands, Montserrat, Anguilla and TCI, for example) have similar constitutional provisions.

Interestingly, whilst the Bermuda Constitution¹¹⁶ restricts the selection of the Speaker to Members of its House of Assembly, under the Gibraltar Constitution¹¹⁷ a person is disqualified for the Speaker position if that person is an elected member of its Parliament!

Commissioners do not believe that restricting the election of the Speaker – whether from among elected Members or from outside – can alone have any appreciable impact on the performance of the Speaker.¹¹⁸ That said, members of the public all agreed that the Speaker should be politically independent. This independence can be very critical to the transparent and fair conduct of legislative business as a whole. However, in the VI where the Legislature is so small and it is not unusual for the Government to hold a majority of only one Member, the independence of the Speaker may be tested when he has to exercise a casting vote. Westminster tradition requires that the Speaker not use his casting vote to create a majority where none existed prior to his vote. This may mean casting a vote with the 'Noes' or siding with an Opposition motion if, in the case where the Government has only a majority of one, that person votes with the Opposition.

Another point to bear in mind if the Speaker were elected is that, under the Constitution, “the Speaker shall be elected from among the elected Members ... or from persons qualified to be elected Members ..., other than Ministers”¹¹⁹ and this applies to Junior Ministers as well.¹²⁰ If the only option were to be an elected Speaker, then, whenever the Government has a slim majority, invariably, the Speaker will need to be appointed from the Opposition

¹¹⁶ Bermuda Constitution Order, 1968, para 32(1)(b).

¹¹⁷ Gibraltar Constitution Order, 2006, para 26(3)(a).

¹¹⁸ In 2015 the UK House of Commons – where the Speaker is elected – tried unsuccessfully to remove its Speaker.

¹¹⁹ Virgin Islands Constitution Order, 2007, s 69(3).

¹²⁰ See new s 52A(3) inserted by The Virgin Islands Constitution (Amendment) Order, 2015.

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side of the HoA. This has two unintended negative consequences. The first is that it deprives the Opposition of a vote. The second is that it narrows the selection of Members who are able and available to serve on committees of the HoA, particularly where a committee must have Opposition Members.

Recommendation No. 27 Appointment or election of the speaker

The Commission therefore recommends that:

- (a) There should be no change made to the current language in section 66(3) of the Constitution which allows the Speaker to be elected from within or outside the HoA.
- (b) It should be a requirement for any Speaker (even where one is chosen from amongst Members) to be politically neutral and impartial and that such neutrality and impartiality must be demonstrated, amongst other things, by the requirement to resign from any political party affiliation. This would be consistent with the Westminster model that is currently followed in the Territory. However, such a requirement is more appropriate for inclusion in the rules and procedures of the HoA rather than in the Constitution.

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WHETHER SECTIONS 66 AND 67 OF THE CONSTITUTION NEED TO BE AMENDED TO MAKE CLEARER THE CIRCUMSTANCES IN WHICH A PERSON SEEKING ELECTION TO THE HOUSE OF ASSEMBLY OR A MEMBER OF THE HOUSE WHO (EITHER PERSONALLY, DOING BUSINESS AS (DBA), OR THROUGH A PARTNERSHIP OR COMPANY WITH WHICH HE OR SHE IS ASSOCIATED) CONTRACTS WITH THE BVI GOVERNMENT OR A PUBLIC AUTHORITY NEEDS TO DECLARE SUCH AN INTEREST, HOW SUCH A DECLARATION SHOULD BE MADE AND THE CONSEQUENCES OF HIM OR HER NOT DOING SO.

3.9 Declaration of Interests - How Made

The Constitution provides for persons to be disqualified from elected membership (section 66) or being able to continue to be a Member (section 67) in certain cases. These include failing to declare that he or she is a party to or otherwise has an interest in any contract with the Government. The language is typical of constitutions in jurisdictions with a British colonial connection. What is not as typical is related language in section 67(7) which allows a Member to be exempted from vacating his or her seat in certain circumstances.

The exemption in part reads:

(7) If in the circumstances it appears just to the House of Assembly to do so, the House may exempt any elected Member from vacating his or her ...seat ...if such Member ... discloses to the House the nature of such contract and his or her...interest ... in it.

The exemption may be viewed as generous but is very appropriate in a jurisdiction with a small population where stricter requirements may shrink the pool of willing, able and qualified political candidates, or impede the ability of Government to access certain services. It is opportune to mention as well that the Commission received a suggestion from a member of the public that the number of contracts a Member is allowed to have with Government should be capped. Again, in a small jurisdiction with already limited vendors offering a particular good or service, capping the number of contracts allowed could have the effect of reducing Government's access to alternative suppliers in a very small marketplace, which itself would present different challenges.

The Col Report (paras 4.79 to 4.96) sets out in some clear detail issues related to sections 66 and 67. Relative to this discussion, they are summarised as follows:

- Some Members of the HoA appear to query whether the term 'contracts' extends to purchase orders, work orders, petty contracts and so forth. It does. There is an intention to contract, and an exchange of promises and payment. The confusion illustrates the need for induction and other training for Members, and the development of guidance and policies on appropriate matters affecting them.
- There is a requirement for prospective Members to publish in the Gazette or a local newspaper a notice of any declared contracts. However, there is no form of notice, and there exists apparent inconsistency in disclosure and confusion around what needs to be disclosed. The Commission is not of the view that this detail should be included in the Constitution but, rather, in policies and guidance developed on the issue. Such guidance and policies could be issued by the Elections and Boundaries Commission, if established. More appropriately, when the Integrity Commission is established, it can be responsible for issuing such

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guidance.¹²¹ In the absence of both an Elections and Boundaries Commission and the Integrity Commission at the moment, such policies and guidance may be issued by the Speaker of the HoA with assistance from the Attorney General.

Although written in the wider context of managing conflicts of interests, Appendix B to the Code of Conduct for Persons in Public Life in TCI¹²² gives an excellent flavour of the style and detail such guidance could contain. It contains relevant guidance on contracts with Government, directorships, shareholdings, partnerships and other interests such as trusts arrangements – all of which fall under sections 66 and 67. The Code of Conduct set out in the third schedule of the **Integrity in Public Life Act, 2021** of the VI, fails to clarify obligations and types of declarations. Paragraph 15 of the Code of Conduct merely states the obligation to declare conflicts when required to. In addition, the legislation has not yet been brought into force at the time of this writing.

- For Members seeking an exemption, once the pre-conditions under section 67 are satisfied, the decision as to whether to allow the exemption is in the unfettered discretion of the HoA. In the constitutions of other jurisdictions that allow an exemption, similar language is contained therein¹²³ and this likely is a recognition that the Legislature should regulate its own affairs. The fact that a Member may be disqualified from sitting if he or she is a party to such contract is, in and of itself, a deterrent and contracts are invariably declared during the campaign period. Therefore, proposals for disqualification of sitting Members based on new contracts, are rare. When they do occur it is likely because of the limited availability of goods and services in the Territory. As a check and balance, therefore, the Commission proposes a redraft of the exemption procedure that would bring more transparency to the exemption procedure without removing the final decision from the purview of the HoA.

Under the constitution of the TCI, where there is no provision for an exemption, the determination of whether a member entered into a prohibited contract rests with the Integrity Commission¹²⁴ to whom the declaration of interest in a contract with Government is made in the first place. The Integrity Commission is also then tasked with making and publishing “rules defining the circumstances in which the acquisition by an elected or appointed member of the House of Assembly of an interest in a contract with the Government is prohibited...”.¹²⁵

As an option, therefore, when an Integrity Commission is established in the VI, consideration should be given to having it play some role in assessing whether it “appears just” to grant an exemption.

- For a sitting Member seeking an exemption, the request must be made by way of a motion placed on the Order Paper for a decision of the HoA.¹²⁶ The process of bringing a motion to the HoA is lengthy, according to evidence before the Col.¹²⁷ Commissioners are of the view that such a procedure represents the type of transparency that the public has been clamouring for in their consultations with them. Additionally, most Constitutions reviewed do not have any procedure set out thereby making the Constitution in the VI progressive in this regard. The Commission therefore recommends no change to this provision.

¹²¹ See section 5(1)(d) of the Integrity in Public Life Act, 2021 which law has not been brought into force.

¹²² Code of Conduct for Persons in Public Life in TCI, published 7 November 2012 by the TCI Integrity Commission.

¹²³ See exemption language in the constitutions of Cayman Islands (s63(f) and Jamaica (s41(1)(f) and (g)).

¹²⁴ Turks and Caicos Islands Constitution Order, 2011, s51(3). The section is subject to s52 which retains the possibility of an appeal to the Court.

¹²⁵ Turks and Caicos Islands Constitution Order, 2011, s51(4)

¹²⁶ Sections 67(8) of the Virgin Islands Constitution Order, 2007. An unsuccessful Member may appeal to the High Court under 67(9).

¹²⁷ BVI Col Report, para 4.85 (ix).

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- For a Member who wishes to seek an exemption, there is distinction drawn in section 67(7) between his or her treatment when he or she is a contracting party in his or her individual capacity on the one hand, and when his or her interest is through an entity, on the other hand. Commissioners agree that this needs to be clarified in the new Constitution and will elaborate on this more fully below, along with providing a suggested redraft of section 67(7).

Section 67(3)(e) is set out in full following:

An elected Member of the House of Assembly shall also vacate his or her seat in the House—

...(e) subject to subsection (7), if he or she becomes a party to any contract with the Government of the Virgin Islands for or on account of the public service or if any firm in which he or she is a partner, or any company of which he or she is a director or manager, becomes a party to any such contract, or if he or she becomes a partner in a firm, or a director or manager of a company, which is a party to any such contract.

Section 67(7) is set out in full following:

(7) If in the circumstances it appears just to the House of Assembly to do so, the House may exempt any elected member from vacating his or her seat under subsection (3)(e) if such member, before becoming a party to such contract as there described, or before or as soon as practicable after becoming otherwise interested in such contract (whether as a partner in a firm or director or manager of a company), discloses to the House the nature of such contract and his or her interest or the interest of any such firm or company in it.

Reading the language carefully and as punctuated, section 67(7) states that, an exemption applies in two scenarios:

- (1) if the Member (in his or her individual capacity or DBA)¹²⁸ disclosed to the HoA his or her interest in the contract, before he or she became a party to such contract; or
- (2) if the Member (acting through a firm or entity) disclosed to the HoA his or her interest in the contracting firm or entity, before **or as soon as practicable after** becoming interested in the contract.

In other words, the option to disclose “as soon as practicable after” does not, on the present construction of section 67(7), apply to circumstances where the Member is a contracting party in his own right (including a sole proprietorship or DBA). This interpretation has not been consistently applied, however, and there are likely cases where the exemption has been granted after a Member contracted in his own right but only disclosed after. The post-contract protection is most likely meant to cover cases where a Member contracts through a firm or an entity but has only a capital interest (as opposed to a management role) in the firm or entity and therefore may not be aware of when that firm or entity contracts and with whom.

Recommendation No. 28 Declaration of interests – how made

The Commission therefore recommends that sections 67(7) and 67(9) should be amended to clarify (i) when and how a declaration of an interest in a contract with Government is to be made, and (ii) when an exemption would apply.

A proposed redraft follows:

¹²⁸ Where a Member is a party through a sole proprietorship or DBA which requires a trade licence, the Member is regarded by law as having entered in to contract as an individual party.

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Drafting proposal

- 67(7) If, in the circumstances and after considering a recommendation of the Integrity Commission, it appears just to the House of Assembly to do so, the House may, exempt any elected member from vacating his or her seat under subsection (3)(e) if such member—
- (a) before or within 45 days of becoming a party¹²⁹ to any such contract as there described, discloses to the House –
 - (i) the nature of such contract, and
 - (ii) his or her interest therein, or
 - (b) acting through a firm, company or other entity, before or as soon as practicable after becoming otherwise¹³⁰ interested in any such contract there described (whether as a partner in a firm, or director, shareholder or manager of a company, or similar participant in any other entity), discloses to the House –
 - (i) the nature of such contract,
 - (ii) his or her interest in any such firm, company, or other entity, and
 - (iii) the interest of any such firm, company, or other entity, in that contract.

(9) In any case in which the House of Assembly, under subsection (7), decides not to exempt an elected member from vacating his or her seat, the member may appeal to the High Court against the decision, and subsections (4), (5) and (6) shall apply in the same manner as they do in the circumstances there specified. PROVIDED that a member shall be declared by the court not to have vacated his seat if he or she establishes to the satisfaction of the court that he or she, acting reasonably, was not aware that he or she, or the firm, company or other entity, was or had become a party to such contract.

(10) For purposes of sections 66 and 67, the term “contract with the Government of the Virgin Islands for or on account of the public service or a public authority” refers to a contract or contracts with a cumulative value of US\$ [10,000] or more.

¹²⁹ See supra. Where a Member is a party through a sole proprietorship or DBA which requires a trade licence, the Member is regarded by law as having entered in to contract as an individual party.

¹³⁰ The reference to ‘other entity’ would capture a non-incorporated business without corporate or legal personality but for which a person would be required to have a licence to conduct such business.

WHETHER SECTIONS 66 AND 67 OF THE CONSTITUTION NEED TO BE AMENDED TO ALSO APPLY TO STATUTORY AND OTHER PUBLIC BODIES.

3.10 Declaration of Interests and Statutory Boards

The Constitution provides (in sections 66 and 67) for persons to be disqualified from elected membership or being able to continue to be a Member in certain cases, including where that person fails to declare that he or she has any interest in “contracts with the Government of the Virgin Islands”. Like the ToR immediately above, this ToR also stems from the Col Report and it can be summarily explained by the straight-forward question that appears in paragraph 4.93 of the Col Report - “...does “the Government of the Virgin Islands” in sections 66(1)(f) and 67(3)(e) include statutory bodies?”.

The Col Report gives an overview of the challenges that have arisen in answering this question¹³¹ and there is no need to reiterate those here.¹³²

The Commission is mindful that the Constitution itself does not refer to statutory bodies except in the sections on fundamental rights and the enforcement of such rights. When it is the intention to refer to a statutory or similar public body, the defined term “public authority” is used and is defined as follows:

“public authority” means any statutory body or company or association in which the Government of the Virgin Islands has an interest and which performs a public function or duty.¹³³

The term “public authority” is not used in sections 66 or 67 of the Constitution. It is a very strong argument that, if that were the intention, it would have been used. Whether this is an oversimplified analysis or not, there is no gainsaying that the issue, left unclarified, has constitutional implications and that this constitutional review exercise is an opportunity to put the matter to rest.

Following a review of constitutions globally, the Commission has concluded that there is no hard and fast rule as to whether such check and balance disclosure provisions should extend to statutory and public bodies. The key question is, what is the mischief that the lack of disclosure is intended to cure? The sections in question bear language typical of that found in constitutions of British Commonwealth countries and those tend not to be explicit about the inclusion or exclusion of statutory bodies. However, provisions can also be found in the constitutions of other countries restricting ministers, senators and presidents from contracting with the State as well as with public agencies.¹³⁴

In coming to a conclusion on this issue, there are several noteworthy points:

- (a) The Commissioner of the Col noted that one of the reasons for an interpretation of the “Government of the Virgin Islands” that did not include statutory bodies was premised on the independence of these bodies.

¹³¹ At paragraphs 4.93- 4.96.

¹³² A reference, for example, to the mid-1990s when the then Speaker lost his seat for failure to declare rental of premises to a statutory body.

¹³³ Section 26(1)(b) of the Virgin Islands Constitution Order, 2007.

¹³⁴ For e.g. see constitution of Thailand (Article 61 - A member of the House of Representatives as a member of the Senate shall: ...Not ...be a partner in contract in business with the attributes of economic monopoly with the State, a State agency or State enterprise; or a be a partner or shareholder in a partnership or company receiving such concession or be a party to the contract of that nature, directly or otherwise;...

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However, based on the evidence presented to him, he expressed doubt that some of these bodies were, in fact, truly independent.¹³⁵

- (a) There are reportedly at least 70 statutory bodies in the Territory. By far the majority of these are not revenue raising and so there will always be a symbiotic relationship of one kind or another between them and central Government.
- (b) There has been inconsistency in whether and how Members (aspiring and sitting) disclose interests in contracts with statutory bodies.
- (c) The mischief that is intended to be addressed is the need for greater transparency – a theme which Commissioners heard at most of its public consultation sessions.

In keeping with public sentiments expressed to Commissioners in support of maximum transparency in the conduct of the public's business the Commission agrees with expanding the definition in the Constitution to include statutory bodies.

Recommendation No. 29 Declaration of interests and statutory bodies

The Commission therefore recommends that the sections 66(1)(f), 67(3)(e), 67(7), and (67(9) of the Constitution should be amended to include express reference to the inclusion of statutory bodies.

A proposed redraft follows:

Drafting proposal

66.—(1) No person shall be qualified to be elected as a member of the House of Assembly

who—

...

(f) is a party to, or is a partner in a firm, or is a director, shareholder or manager of a company, or similar participant in any other entity which is a party to, or has an interest in, any contract with the Government of the Virgin Islands for or on account of the public service or a public authority (as defined in section 26(1)(b)), and has not, within fourteen days before his or her nomination as a candidate for election, published in the Gazette or in a newspaper circulating in the Virgin Islands [filed with the Elections and Boundaries Commission] a notice setting out-

- (i) the nature of such contract and his or her interest in such contract, or
- (ii) the nature of such contract, and
 - (a) his or her interest in the any such firm, company, or other entity, and
 - (b) the interest of any such firm, company, or other entity, in that contract.

67 (3) An elected member of the House of Assembly shall also vacate his or her seat in the

House—

...

¹³⁵ BVI Col Report, para 4.96.

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(e) subject to subsection (7), and in relation to any contract with the Government of the Virgin Islands for or on account of the public service or a public authority (as defined in section 26(1)(b)), if —

(i) he or she becomes a party to any such contract, or

(ii) any firm in which he or she is a partner, or any company of which he or she is a director, shareholder or manager, or any other entity in which he or she is a similar participant, becomes a party to any such contract, or

(iii) he or she becomes a partner in a firm, or a director, shareholder or manager of a company, or a similar participant in any other entity, which is a party to any such contract.

For the recommended drafting for sections 67(7), and 67(9) see the [ToR above](#).

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WHAT SHOULD BE THE PROPER RELATIONSHIP BETWEEN MINISTERS AND THEIR DEPARTMENTS AND WHETHER ANY AMENDMENT TO SECTION 56 OF THE CONSTITUTION SHOULD BE MADE

3.11 What Should be the Proper Relationship Between Ministers and their Departments

This term of reference drew a considerable amount of animated discussion from the public, Public Servants and Ministers alike.

In jurisdictions (following the Westminster model) where there is ministerial government, Ministers (subject to the doctrine of collective responsibility)¹³⁶ are responsible for setting Government policy. They typically campaign on a manifesto which they use to anchor their mandate and set policy directions. Civil Servants assigned to ministries (headed by the Permanent Secretary in the case of the VI) owe their responsibility to the Minister to implement and administer the policy (including rendering advice on the policy to the Minister). Civil Servants may be held to account via the disciplinary processes provided for in legislation made under Chapter VII of the Constitution, and to some extent, via inquiry processes of the Legislature through its various committees (e.g. Public Accounts Committee).

Ministers are answerable to the Legislature for their conduct and activities of their ministries and departments, *in pursuit of Government policies*¹³⁷ (or responsibilities bestowed on them as Ministers). Therefore, both the Minister and the Permanent Secretary are ultimately accountable to the Legislature.

Coming out of the Col Report, a review of the use of discretionary powers was commissioned and was conducted by attorney Anthea Smith. In relation to the Ministers' exercise of their discretionary powers, she was keen to clarify that no discretionary power is unfettered. Such powers can only be exercised within the parameters of the purpose for which they were granted.

In this connection the effect of section 56(6) of the Virgin Islands Constitution Order 2007 is to require that a Minister assigned responsibility for the conduct of any business of the Government, including responsibility for the administration of any department of government, must exercise his or her responsibility in accordance with the policies of the Government as determined by the Cabinet and in accordance with the collective responsibility of the members of the Cabinet for the policies and decisions of the Government. ...Without proper checks, monitoring and accountability administrative or Ministerial discretion will lead to arbitrary exercise of power. The process of judicial review is an important procedure whereby members of the public may challenge the legality of the exercise of a discretionary power by elected public officials.¹³⁸

However, identifying the line where ministerial responsibility ends and the Permanent Secretary's begins is not easy to achieve in practice. The challenge goes way beyond defining the respective roles of the Minister and the Permanent Secretary on paper (as suggested by some members of the public). For example, where does blame lie if a policy fails because of faulty advice from the Civil Service. What if the Permanent Secretary and Minister are at moral (rather than legal) variance?

There is a widening of this gap. On the one hand, elected Ministers ought to have some flexibility to carry out their functions as they are collectively responsible to the Legislature, through Cabinet, for the formulation of policy,

¹³⁶ Section 56(6) of the Virgin Islands Constitution Order, 2007.

¹³⁷ Armstrong R, 'The duties and responsibilities of civil servants in relation to ministers, Note by the Head of the Home Civil Service – the "Armstrong Memorandum" 1985, as amended on 17 July 1996', para 4.

¹³⁸ Anthea Smith, Report on the Discretionary Powers Held by Elected Public Officials, (February 2023), para 20 and 21. At para 22, she recommends legislation which provides an overriding statutory obligation on those making administrative or ministerial decisions to, if requested by the affected party, provide a written statement of the reasons for the decision.

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“including directing the implementation of such policy”.¹³⁹ Anxious to execute their policies, it is not unusual for Ministers to prefer to rely on their advisers for assistance. Even so, Ministers expect to work with a civil service that is effective, efficient and responsive to the Government – whatever the political persuasion of that Government. On the other hand, Permanent Secretaries sometimes have to deal with (i) competing for the Ministers’ attention, (ii) ministerial overreach into the ministries and the wider civil service, and (iii) undue political pressure.

This challenge has perplexed scholars for centuries. In his submission to the Commission, the then Permanent Secretary in the Ministry of Communications and Works refers to *Northcote and Trevelyan* (1854)¹⁴⁰ and *Haldane* (1918).¹⁴¹ There is also the **Fulton Report (1968)**,¹⁴² the **Armstrong Memorandum (1985)** and the **Nolan Principles (1995)**.¹⁴³ All, and more, continue to shape constitutional civil service reform in the UK to this day. Recent proposals for civil service reform¹⁴⁴ (as it relates to the relationship between Ministers and civil servants) include legislation on the Civil Service (including setting out the responsibilities of Permanent Secretaries), a good governance code, and Permanent Secretaries’ access to independent ethics advisers.

The Commission’s recommendations are set out below.

Amendment to section 56?

The 2005 report of the previous Constitutional Review Commission¹⁴⁵ considered the relationship between the Minister and the Civil Service and whether any change to language in the then Constitution¹⁴⁶ was recommended. Their discussion and recommendation gives very limited background as theirs were prefaced on an iteration of the Constitution that has been re-cast and modernised post the 2005 Report.

The current relevant provisions are section 56(1) and (5).

(1) The Governor shall, acting in accordance with the advice of the Premier, by directions in writing, assign to any Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including responsibility for the **administration** of any department of government. [emphasis added]

(5) Where a Minister has been assigned responsibility under this section for the **administration** of any department of government, the Minister shall (subject to this Constitution and any other law) exercise **direction and control** over that department, including directing the implementation of government policy as it relates to that department, and, subject to such **direction and control**, the department shall, unless otherwise agreed between the Governor and the Premier, be under the supervision of a permanent secretary who shall be a public officer; but two or more departments of government may be placed under the supervision of one permanent secretary. [emphasis added]

Comments reaching the Commission highlight that the phrases “business of the Government”, “administration of”, and “direction and control over” are all troublesome. That the Governor may assign responsibility to Ministers for “the conduct of any business of the Government of the Virgin Islands, including responsibility for the administration of any department of government” actually appears in Ministerial appointments – a fact not lost on Ministers.

¹³⁹ Virgin Islands Constitution Order, 2007, section 47(3).

¹⁴⁰ Northcote, S.H., & Trevelyan, C.E., Report on the Organisation of the Permanent Civil Service (1854).

¹⁴¹ Haldane et al, Report of the Machinery of Government Committee, Ministry of Reconstruction, (1918).

¹⁴² Fulton Report on the Civil Service, June 1968.

¹⁴³ Also known as the Seven Principles of Public Life.

¹⁴⁴ Thomas A, Clyne R, Bishop M and Lilly A, A new statutory role for the civil service, Institute for Government, 3 March 2022,

¹⁴⁵ Report of the Constitutional Review Commission 2005, paras 10:38-10:41.

¹⁴⁶ Virgin Islands Constitution Order, 1976, section 18.

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The references to “business” and “administration” appear in all the constitutions of the OTs in the Caribbean as well as Bermuda and Gibraltar. The words even appear in the constitutions of some independent jurisdictions in the Commonwealth Caribbean – parliamentary and republic jurisdictions alike. However, the reference to the Minister exercising “direction and control over that departmental” was added to the existing Constitution during negotiations for its drafting and appears in a new section 56(6). Similar language is contained in the constitutions of Bermuda, Montserrat, the Cayman Islands, and Belize¹⁴⁷. However, wherever they appear, they are preceded by the word “general” i.e. the Minister shall exercise “general direction and control over...”. Of those, only the Virgin Islands’ Constitution goes on to specify, “**including directing the implementation of government policy as it relates to that department...**”. Those words are a clarification of the limit of the Minister’s authority as opposed to a restriction on it. They therefore do not immediately assist with identifying that line where the Minister’s authority ends, and the Permanent Secretary’s begins. Interpretation is the remit of the Court, as the 2005 Report rightly pointed out. It is however a concern that the term “direction and control” is not curtailed by the description “general” and the Commission therefore submits that any revision of the section include the word “general”.

Recommendation No. 30 Proper relationship between ministers and their departments

The Commission therefore recommends that:

- (a) Sections 56(5) should be amended by the addition of the adjective “general” before the phrase “direction and control”. A redraft follows:

Drafting proposal

- (1) The Governor shall, acting in accordance with the advice of the Premier, by directions in writing, assign to any Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including responsibility for the administration of any department of government.
- (5) Where a Minister has been assigned responsibility under this section for the administration of any department of government, the Minister shall (subject to this Constitution and any other law) exercise general direction and control over that department, including directing the implementation of government policy as it relates to that department, and, subject to such general direction and control, the department shall, unless otherwise agreed between the Governor and the Premier, be under the supervision of a permanent secretary who shall be a public officer; but two or more departments of government may be placed under the supervision of one permanent secretary. [emphasis added]

In addition,

- (b) Consideration should be given to several proposals for addressing the relationship between Ministers and the Public Service which, in several cases, build on improving existing options. These include:
 - (i) Updating the Ministerial Code of Conduct to more comprehensively address the conduct of Ministers in their relationship with Public Servants. Inspiration may be drawn from the Ministerial Code issued by the Cabinet Office in the UK in December 2022, or the Code of Conduct for Persons in Public Life in TCI)¹⁴⁸ but adapted to suit local typologies. The Code will only be effective if it is fulsome.

¹⁴⁷ Bermuda 61(5), Montserrat 38(5), Cayman Islands 54(7), Belize (41(2).

¹⁴⁸ Code of Conduct for Persons in Public Life in TCI, published 7 November, 2012 by The TCI Integrity Commission.

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- (ii) Issuance of a Parliamentary Code that supplements the Ministerial Code of Conduct but more specifically in relation to the Minister's behavior (including managing conflicts), and duties as a Member of the Legislature.
- (iii) Induction and training for new Ministers.
- (iv) Re-activation of the Public Accounts Committee¹⁴⁹ – this would hold Accounting Officers (in the Territory this includes all Permanent Secretaries and some Heads of Departments) to account to Parliament.¹⁵⁰
- (v) Enhancement of the policy making process¹⁵¹ (also a recurring comment from members of the public during public consultations of the Commission). This would bring some structure to the process and also allow the Minister's goals to be put in sharper detail and made clearer to the Permanent Secretary. It also adds transparency, legitimacy and stakeholder buy-in (e.g. through the use of green papers, where necessary) before papers are taken to Cabinet. The Cabinet Handbook issued in 2009 should be updated to include the use of green papers and white papers, for example.
- (vi) Ministers should deal only with their Permanent Secretaries (and no other Public Servants in the Ministries without the knowledge of the Permanent Secretaries). Permanent Secretaries should issue clear guidance to staff in their Ministries reminding subordinate Public Servants to bring such discussions with the Ministers, where they do occur, immediately to the attention of the relevant Permanent Secretary.
- (vii) Ministers should have dedicated and regular in-person briefing meetings (at least weekly) with their respective Permanent Secretaries, and be easy to reach and communicate with on short notice in between briefing sessions.
- (viii) Amendment to the Public Service Management Code (launched in the VI on 14 March 2023) to include provisions setting out the procedure for redress where a Permanent Secretary raises concerns about political interference by a Minister.¹⁵² This should:
 - a. not only set out a procedure for escalating concerns regarding Ministerial overreach but should also name a dedicated ethics adviser (the Cabinet Secretary could be assigned this role) whom a Permanent Secretary may access; and
 - b. contain guidance (similar to the legally binding provisions set out in the Public Finance Management Regulations for Accounting Officers) on how to seek a Ministerial directive where the Permanent Secretary believes that to comply with a direction given to him by the Minister would be inconsistent with his (the Permanent Secretary's) duty.
- (ix) Mandatory training for new Permanent and Deputy Permanent Secretaries, including the Financial Secretary and Deputy Financial Secretary.
- (x) Further consideration should be given to whether the Minister actually needs to sit in the Ministry. One member of the public actually raised this. Some jurisdictions have physical separation of the

¹⁴⁹ The Order Paper for the House sitting on 7 September 2023 contains a motion for the Public Accounts Committee to be reconstituted.

¹⁵⁰ See para 9 of the Armstrong memorandum where it states that "...when a civil servant gives evidence to a Select Committee on the policies or actions of his or her Department, he or she does so as the representative of the Minister ... and subject to the Minister's instructions.... The ultimate responsibility lies with Ministers, and not with civil servants, to decide what information should be made available, and how and when it should be released, whether it is to Parliament, to Select Committees, to the media or to individuals".

¹⁵¹ Improved policy-making was also a recommendation of the Institute of Government in the UK but the UK context cannot be applied wholesale to the local context. So locally, the recommendation here is of a more bespoke nature.

¹⁵² Section 22 of the Cayman Islands Public Services Management Law (2018 Revision) addresses this briefly where, ultimately, the Governor would be required to ask the Premier to in turn ask the relevant minister to desist but nothing further is set out beyond that.

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Minister (and his staff) from the Ministry (and its staff). Whether deliberately orchestrated or not, it should lessen the incidents of Ministers' overreach in their Ministries.

- (xi) No legislation specific to the civil service is recommended at this time.

3.12 Next Steps Towards Self-Determination

This section addresses the ToR which requested an examination of the next steps towards self-determination. Before the Commission comments on the recommendations received in relation to this, it is necessary to (a) highlight some points of note collected from our various consultative sessions as well as (b) provide clarity by giving some educational context to the topic.

The need for greater education on the topic of self-determination was the fifth highest recurring theme and recommendation recorded by the Commission (with the need for greater education on the Constitution as a whole being the fourth highest recurring theme and recommendation).

Political self-determination refers to the act or power of a country making decisions on its own including resolving how it chooses to be governed.

Some misconceptions

During our consultative meetings, it was not clear to Commissioners that persons had a clear and/or full appreciation of what political self-determination meant and that several, who thought they did, had an incomplete or inaccurate understanding of Article 73 of the **UN Charter (1945)**. Additionally, not a single person referenced any international work other than the UN Charter or the **UN General Assembly Resolution 1541 (1960)**¹⁵³ (such as the **ICCPR**, the **Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970)**, the **International Labour Organization (ILO) Convention 169 (1989)**, and the recommendations of the UN Committee on the **Elimination of Racial Discrimination (1996)**). What was more of interest to the Commission was that these references misinterpreted the fundamental right of 'peoples' to 'self-determination' as conferring some kind of fundamental right to secession or independence. The topic was passionately discussed in some audiences. However, equally passionate members of the public made it abundantly clear that no promotion of the UN and self-determination was to be further discussed at that particular gathering! That occurrence is cited to show that people either do not want to talk about self-determination because they (incorrectly) equate it with secession, or people do want to talk about it because they (incorrectly) equate it with secession.

This is therefore the first misconception that must be clarified.

The UN Charter (1945) does not speak of a right to self-determination but, rather, to the principle. However, since 1960, various resolutions, declarations and conventions have expressly established this as a right. That said, and as noted by Cats-Baril:

Importantly, while self-determination has been recognised and reaffirmed as a right belonging to all peoples and not just in colonial contexts...there has been no corollary right to secession established under international law.¹⁵⁴

A court finding of a right to secession appears to be reserved for the vilest of human rights breaches.¹⁵⁵

¹⁵³ UNGA Res 1541 (XV) (15 Dec 1960).

¹⁵⁴ Cats-Baril, A, Self Determination- International IDEA Constitution Brief (September 2018), p4.

¹⁵⁵ See general discussion in Cats-Baril, A, Self Determination- International IDEA Constitution Brief (September 2018), and in particular the acknowledgement on p5 that external self-determination which includes secession is "extremely rare in constitutional practice."

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The distinction means that it is important to separate the right to self-determination from the right to secession or independent statehood whilst appreciating that there are models and structures other than independent statehood that lend themselves to greater self-determination and also that, of course, one may lead to the other.

The second misconception to clarify is that self-determination is an act afforded to “peoples”¹⁵⁶ or “all peoples”¹⁵⁷ (emphasis added). This is borne out by the very same **UN Charter** and **UN General Assembly Resolution 1541** referenced by some members of the public but somehow is overlooked or misinterpreted.

The topics of decolonisation and self-determination are historically connected. One could therefore have been initially forgiven for concluding that it was the country that aspired to greater political maturity or independence.

However, from the Charter of the United Nations in 1945, references in all works are to the self-determination of peoples (not countries); i.e. a collective group of peoples.

The third misunderstanding to clarify is related to the second. In accordance with **UN General Assembly Resolution 1541 (XV) (1960)**, self-determination should be the result of the freely expressed wish/voluntary choice of the territory’s peoples...expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.¹⁵⁸ So, not only is the right to self-determination a right of the collective “peoples” expressed voluntarily but, also, it must be exercised through an informed, impartial and democratic process.

The UK Government echoed this in multiple written statements. For instance, in its 2012 UK White paper, **The Overseas Territories, Security, Success and Sustainability (2012)** it states as follows:

Any decision to sever the constitutional link between the UK and a Territory should be on the basis of the clear and constitutionally expressed wish of the people of the Territory. Where independence is an option and it is the clear and constitutionally expressed wish of the people to pursue independence, the UK Government will meet its obligations to help the Territory to achieve it.¹⁵⁹

This was recited in a House of Commons briefing paper as recently as January 2023.¹⁶⁰

As self-determination is a right of the “peoples” collectively, it follows that there must be some mechanism to gauge popular sentiment on the form and direction of self-determination (a referendum, for example).

Internal v External self-determination

As Cats-Baril notes, “[s]elf-determination is a fundamental right under international law but despite years of development in practice it remains a sensitive, often controversial, and complex right to implement and fulfil. It is important to distinguish between internal and external self-determination”.¹⁶¹

Internal self-determination includes a wide range of practices within a state itself - from managing diversity to addressing historic claims for sovereignty and self-governance - and external self-determination refers to the rights “of all peoples to determine freely their political status and their place in the international community...”.¹⁶²

An examination of struggles for internal self-determination throughout history can demonstrate ideas of how to enhance the quest for greater self-determination where secession or independence is not an immediately available option for whatever reason. Such ideas include greater self-government and devolution arrangements, the establishment of oversight bodies and commissions, implementation of rights that seek to preserve culture and

¹⁵⁶ See Article 73 of the UN Charter, and UN General Assembly Resolution 1541 (XV) (1960).

¹⁵⁷ See Article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which state that: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

¹⁵⁸ UN General Assembly Resolution 1541 (XV) (1960) –see Principles VII and IX. (Principles VII and IX).

¹⁵⁹ Foreign and Commonwealth Office -The Overseas Territories - Security, Success and Sustainability, 2012 p15.

¹⁶⁰ Commons Library, The Overseas Territories: An introduction and relations with the UK, CBP-9706, 20 January 2023, p34.

¹⁶¹ Cats-Baril, A, Self Determination- International IDEA Constitution Brief (September 2018), p10.

¹⁶² UN Committee on the Elimination of Racial Discrimination (CERD) (General Recommendation No. 21 1996).

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heritage, and honouring the right of the governed to democratic practices that promote prior informed consent and consultation, to name a few.

In commenting on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970), Hendry and Dickson noted that, “for the first time, the General Assembly had acknowledged that the people of a territory could exercise their right to self-determination other than by choosing independence, free association or integration”¹⁶³ (the only three options for self-determination under the 1541 Resolution which led the UK to abstain on 1541). However, the 1970 Declaration (which the UK voted for) went further and also recognised as self-determination, “any other political status freely determined by a people...”. “It is this ‘other political’ status’ freely determined by the people of the territory ...which the UK Government considers has been reached by all [its] substantially populated territories.”¹⁶⁴

Self-determination is not intended to be a fast-track to independence. Self-determination is a journey that creates increasing opportunities to fashion a governance structure that weighs the need to govern against the rights of the governed. In arriving at this balance, care must be taken that, in its quest to cast away remaining colonial shackles, the Territory does not also discard present mechanisms that serve to anchor good governance.

Over the last three Constitutions, we have seen advancements towards greater internal self-governance. Whilst there has been some devolution of powers, there remains room for further progression on the journey towards self-determination.

In his recent thought piece, Commissioner Dr. Charles Wheatley, OBE penned a sobering opinion that “[t]he task before the Constitutional Review Commission is to rethink, revise and re-chart the course of our self-determination as a people, incorporating the views, visions, and aspirations of the people of the Virgin Islands. Now is the time for all of us to let our views be heard, recognised, respected, and incorporated in a new constitution, as we aim to become the best of and for which we are capable”, he noted.¹⁶⁵

Regardless of the academic complexities of political self-determination, one position remained the dominant constant at the consultative sessions– that the Territory must aspire to a Constitution more advanced (and less colonial in several aspects) than the present one.

Recommendation No. 31 Next steps towards self-determination

Several of the recommendations made throughout this report advance the VI towards increased self-determination. The Commission additionally recommends that, the following next steps towards self-determination should be considered:

- (a) Education –The need for much more education topped the list of recommendations under this ToR. There were several calls for the Commission to be established permanently. Whilst the Commission acknowledges that a permanent Commission would be smaller, a permanent multi-member Commission of competent and apolitical Commissioners is one of the best ways to undertake continued, fair and unbiased constitutional education in general. It may be that other options can be explored and this is discussed further [in this Report](#) (see 5.4.2 Constitutional Review Commission). There were also repeated calls for civics (from primary level) to be taught in the schools as an independent course. The Commission strongly recommends that the Government implements some educational initiative forthwith;
- (b) Greater autonomy of governance concomitant with greater transparency and accountability – the need to be “better financial stewards” is a phrase that the Commission heard regularly along with an acknowledgment that there was a trust/leadership issue that needed to be overcome;

¹⁶³ Hendry, Ian and Dickson, Susan. *British Overseas Territories Law* (2nd ed). Hart, 2018, p278-279.

¹⁶⁴ Supra.

¹⁶⁵ Wheatley, C, *Passing the Baton in Self Determination*, Wheatake 84 (2022).

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- All the independent institutions which are tasked with promoting and protecting good governance should enjoy adequate administrative and financial independence to ensure their effectiveness;
 - Integrity Commission – it is vital that the Integrity Commission and office of Contractor General be immediately established and properly resourced;
 - Human Rights Commission – the Human Rights Commission provided for in the 2007 Constitution should be established forthwith. The road to greater self-determination is paved with other fundamental rights so having the mechanism in place to address these other rights properly, is key;
- (c) A diminishing role of the Governor representing His Majesty as the constitutional Head of State on the one hand, and the enhanced role of the Premier as the elected Head of Government on the other. This could be achieved, for example, by a further reduction in the Governor’s reserved power, special responsibilities, and some discretionary powers, and enhanced constitutional requirements for the Governor to consult the Premier.
- (d) Better planning – There were multiple recommendations that, when analysed, were all grounded in the need for responsible planning. These included:
- an urgent population study to be undertaken including an assessment of what talent and resources the VI has at the moment and what talent and resources it needs as it matures politically;
 - adoption of an effective succession planning ideology including a regulated or monitored strategy that ensures that an adequate number of Virgin Islanders are prepared, qualified and promoted to assume key positions;
 - the need for a thorough and detailed study on the cost and benefits of full internal self-government;¹⁶⁶ and
 - a timeline of goals and strategies to take the VI closer to a pre-independence constitution, including perhaps the establishment of a Decolonisation Commission.
- (e) Assess the wishes of the peoples- another notable recommendation from the public was for mechanisms (e.g. a referendum) to be put in place to accurately measure the wishes of the peoples of the Territory on self-determination but only following a period of fair and unbiased education. Recall that UN General Assembly Resolution 1541 requires such a process to be an informed one.¹⁶⁷ In addition, one member of the public stated that, based on her research, a Decolonisation Commission was needed to conduct the public awareness education about what it means to become decolonised and self-determined prior to undertaking such an assessment. “Uninformed decisions should not belie a referendum”, she said firmly. Given the weight of the subject, any such mechanism must be trusted and independent, and must be promoted in such a manner as to encourage an exceptionally high level of participation from across the entire VI. See the Commission’s [related recommendation on use of referenda](#) (see 3.2.4).

¹⁶⁶ The Commission acknowledges the work of Dr. Carlyle G. Corbin, Assessment of Self-Governance Sufficiency in conformity with internationally-recognised standards (30 June 2021) but the recommendation goes well beyond this.

¹⁶⁷ UN General Assembly Resolution 1541 (XV) (1960) – see Principles VII and IX. (Principles VII and IX).

TO CONSIDER HOW BEST THE LAW ENFORCEMENT AND JUSTICE AGENCIES CAN SIT WITHIN THE CONSTITUTIONAL FRAMEWORK

3.13 Law Enforcement and Justice Agencies

The BVI Col Report noted that this Commission should consider how best the law enforcement agencies can sit within the constitutional framework and further recommended a review of the law enforcement agencies and justice agencies. The objective of such review is to assess the appropriateness of current structures to cope in more modern times.¹⁶⁸ With 60 islands, islets, rocks and quays, the VI's borders pose a challenge to law enforcement to be optimally prepared to deter and investigate crime and prosecute offences.

The review, discussed in greater detail in paragraphs 12.130- 12.132 of the Col Report, forms the basis of recommendations B38 and B41 of the Col Report. In its press release dated 25 September 2023, HM Inspectorate of Constabulary and Fire & Rescue Services announced that it has been commissioned to carry out the review.¹⁶⁹

Nonetheless, the Col Commissioner proposed that the review "might be a strand of the constitutional Review...".¹⁷⁰

The Commission wishes to address its mandate to consider how best the law enforcement agencies can sit within the constitutional framework but, to do so in a way that does not cut-across the on-going law enforcement review. What follows is therefore a high-level discussion on the direction of travel that the Commission feels may be useful as a starting point in the discussion.

The establishment of the National Security Council in the Constitution was considered as one of the modern constitutional advancements that the Constitution brought. The Commission is of the view, therefore, that there can be no discussion on law enforcement without active consideration being given to the role of the National Security Council. Indeed, it is typical of national security councils in other parts of the world to be charged with the duty of coordinating Government's departments and agencies in relation to operations and measures to safeguard internal and external security.

The present formation of the National Security Council reflects a fairly basal structure and is essentially tasked with advising the Governor on matters relating to internal security. The question is whether the time is now ripe for the National Security Council to evolve into a more sophisticated central role (backed by statutory authority and powers) that is more fit for purpose in today's modern day reality.

If so, the National Security Council would then need to be specifically charged under the Constitution with:

- formulating national security policies and strategy (including land, sea, air, cyberspace, social and economic policies and strategy);
- monitoring and integrating same so as to enable the various law enforcement agencies to co-operate properly;
- performing other functions as provided for in an enactment.

A decision would need to be taken as to whether the National Security Council will continue only to have an executive or supervisory type function, or whether it will be something much more structured where it controls the operations

¹⁶⁸ BVI Col Report para 14.14.

¹⁶⁹ <https://hmicfrs.justiceinspectrates.gov.uk/publications/terms-of-reference-british-virgin-islands-inspection/>

¹⁷⁰ See BVI Col Report para 12.131.

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of the related law enforcement organs of the Government. cursory research appears to point to there being more models for the former and, in any event, such a model would be more complementary to the Territory's current constitutional position.

Regardless of the model decided upon, at the very least, the structure of the National Security Council will need to become more formal, with various law enforcement and security agencies advising the National Security Council. These agencies include police, prison, immigration, fire & rescue, customs, and inland revenue (excise). Legislation would need to be enacted to support the National Security Council. The National Security Council would need to be staffed and directed by a Head or whatever name called, who would then typically serve as the Secretary to the National Security Council, instead of the Cabinet Secretary.

Where it is envisaged that the role of the National Security Council could go further and include some element of control over the law enforcement agencies, the supporting law will need to give it enforcement powers such as powers of arrest, search and seizure.

An alternative structure may involve one where the current National Security Council remains as a sort of governing board over a national security bureau – the latter of which would be clothed with more operational functions (in addition to technical and enforcement functions depending on the model chosen).

As part of the law enforcement review, consideration should also be given to whether the Customs Department should be fully relieved of its excise functions and operate purely as a law enforcement agency.

The Commission recognises that the above issues will all need to be refined and reconciled in light of the Territory's constitutional structure where the UK is responsible for defence and internal security. As with other matters discussed in this Report, a more bespoke model would likely need to be devised for the future of the National Security Council, but the above discussion hopefully charts a possible course towards what constitutional advancement could look like in this regard. The discussion should be continued in light of the findings of the law enforcement review presently being conducted by HM Inspectorate of Constabulary and Fire & Rescue Services and therefore the Commission makes no specific recommendation on this at this time.

3.13.1 Judge Only Criminal Trials

In his Col Report, Sir Gary Hickinbottom recommended that consideration be given to granting the Court the power to hear judge only criminal trials. This recommendation was based on testimony to the Col by Tiffany R. Scatliffe, the DPP – a proponent for legislative change to give the Court a discretion to allow judge only criminal trials in cases of murder, gang crime, sexual offences, and matters involving persons in authority, or politicians. According to the Col Report, the DPP said that, in her experience, jurors were reluctant to serve when these sorts of offences came to trial. The DPP commented that, under the current jury system, there is no way to sequester a jury and voiced concerns about securing the integrity of the trial by jury process. According to the Col report, the Commissioner of Police shared these concerns.

The Commission received written comments from the DPP in a similar vein. Extant challenges for the DPP include the familial relationship between potential jurors, the accused, witnesses, and other participants in a trial; the impact of social media and media; and the potential for juror tampering. The DPP noted by way of reminder that, during the Covid-19 pandemic, judge only trials continued in the Magistrate's Court (for non-indictable offences) while the High Court was unable to hold jury trials for several months. Some advantages of judge-only trials are that judges, by their training and experience, are supposed to be less emotional. Judge only trials can lead to quicker disposals of matters. An opinion expressed was that the constitutional right to a fair trial will not be impeded by the use of Judge only trials, as the accused will still have the ability to see, hear and challenge the witnesses and evidence against

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him or her. That the right to a fair trial not only applies to an accused but also applies to the victims, witnesses and society as a whole was emphasised.

In her address at the opening of the law year 2022, Her Ladyship the Honourable Dame Janice Pereira, Chief Justice of the Eastern Caribbean Supreme Court, made a plea for the governments of the member jurisdictions to include in their legislative agendas criminal reform measures such as the implementation of judge-alone criminal trials for specific case types “within the context of the constitutionally guaranteed right to a fair trial”. Her Ladyship pointed out that this mode of trial has been tried and tested in other courts of the region that a plethora of criminal offences are triable by magistrates sitting alone and that taking such measures would go a long way toward reducing the backlog of criminal cases. Her Ladyship also recommended reducing the size of jury panels as a means of decreasing the costs of the operation of the jury system, while boosting the efficiency, accountability and public confidence in the justice system.

Other commentators have suggested that the excessive delays in holding criminal trials has contributed to the rise in crime, as the goal of deterrence is lost when the commission of a crime is separated by years from the punishment imposed. Furthermore, many accused languish for lengthy periods of time on remand, awaiting trial. The trope “justice delayed is justice denied” was emphasised.

A trial by a jury of one’s peers has a venerable history in the UK and other common law jurisdictions. However, in England and Wales, there is no constitutional right to trial by judge and jury, only a general obligation to submit to it in indictable cases.¹⁷¹ Commentators have traced the existence of trial by jury to the **Magna Carta (circa 1215)**, but in some cases the right pre-existed, being traced back to the reign of King Henry II. By the 18th Century, William Blackstone in his Commentaries on the Laws of England referred to trial by jury as part of a “strong and two-fold barrier between the liberties of the people and the prerogative of the Crown”.

The **Convention for the Protection of Human Rights and Fundamental Freedoms** (commonly referred to as the European Convention on Human Rights (ECHR) was adopted by the UK by ratification in 1951 and made applicable to the Territory by extension in 1953. The **ICCPR** was adopted by the UK by ratification in 1976 and made applicable to the Territory by extension in 1976. Both of these international conventions provide for a fair trial, but neither guarantees a trial by jury.

Chapter 2 of the VI’s Constitution is entitled “Fundamental Rights and Freedoms of the Individual”.

Section 16 of the Constitution contains provisions to secure protection of law. Subsection (1) provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Subsection 2 provides that every person who is charged with a criminal offence shall, inter alia, when charged on indictment in the High Court, have the right to trial by jury. The Constitution of the Territory varies from that of most other Caribbean jurisdictions in this regard.

The **Jury Act, Revised Edition 2013**, contains no provisions for trial by a judge alone.

The Jury Act, 2022, has not yet been brought into force. It contains no provisions for trial by a judge alone. It does expand the pool of persons available for jury service by allowing qualified persons between the ages of 18 and 70 to serve as jurors.

In 2009, a report was commissioned by the Foreign and Commonwealth Office of the UK and prepared by Chief Justice Charles Ekins of St. Helena, on the difficulties of selecting impartial juries in criminal and civil trials in the overseas territories. Mr. Justice Ekins reviewed the status of jury trials of civil and criminal matters in each of the OTs and concluded that the use of juries in civil cases had been effectively abandoned and so focused his analysis and recommendations on criminal jury trials. He found that several issues were of particular concern in the selection

¹⁷¹ Review of the Criminal Court of England and Wales by the Right Honourable Mr. Justice Auld, October 2001, p3.

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of impartial juries and that the small pool of potential jurors in small jurisdictions exacerbated the difficulties, especially where one or more of the following scenarios came together in a single case:

- *The standing of the defendant*

Where the defendant is a prominent and/or well known member of the community his/her reputation is likely to be a matter with which all members of the pool of jurors are familiar. The knowledge of that reputation might be a factor of prejudice to the defendant. On the other hand if prominence carries with it power or influence then individual jurors, irrespective of the evidence, might well feel disinclined to speak in favour of a conviction in case ultimately in the minority; and in fear of the personal consequences should word of his/her views leak out.

- *The number of defendants*

The more defendants there are in a criminal case the greater the prospect that the pool of jurors will know/be related to one or more of them or will know one or more of their friends or family.

- *The nature of the offence*

A particularly unpleasant offence, which has caused widespread disgust or excitement could result in prejudice against the defendant. A complex and lengthy case, involving numerous witnesses will increase the likelihood that the pool of jurors will know one or more of the witnesses concerned.

- *The status of the defendant and the victim*

The attitudes displayed by juries depending upon the status of any given accused, i.e. whether of Belonger or non-Belonger status, and the status of the victim. It is a widely if not universally held view that where a Belonger is charged with an offence allegedly committed against a non-Belonger then the presumption of innocence is almost inevitably translated into a certainty irrespective of the actual evidence; on the other hand, where the accused is a non-Belonger and the victim a Belonger despite the best endeavours of the judge, prosecution and defence at best the accused can expect a presumption of guilt on the part of the jury. This would suggest that even assuming that an "impartial" jury-i.e. a jury with no connection to the defendant, victim or witnesses, can be found, the jury will only consider the case in a truly impartial manner where both accused and victim are Belongers, or where both are non-Belongers.¹⁷²

Solutions suggested by Mr. Justice Ekins include:¹⁷³

- a change of venue (most applicable in the VI, Anguilla and Montserrat, all being members of the Eastern Caribbean Supreme Court system)
- increasing the size of the jury pool (as has been done in the Jury Act, 2022)
- reconsideration of the list of exempt occupations
- trial by Judge with lay assessors
- trial by Judge alone

In 2001, a report from the Criminal Courts Review in England and Wales conducted by the Right Honourable Mr. Justice Auld was released. The review considered a variety of issues arising in the criminal courts, with

¹⁷² *Supra.*, at 12 – 13.

¹⁷³ *Supra.*, at 13 – 16.

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recommendations for remediation. A review of the jury system identified the following issues (among others) and made the following recommendations for changes:¹⁷⁴

- The size of the jury – No change to the standard twelve-person jury was recommended but it was recommended that a system in long cases be implemented to permit Judges to name alternate or reserve jurors.
- Qualification for jury service – Inclusion of persons on other lists than just the electoral roll, to include other specified publicly maintained lists (such as motor vehicle and driver registration lists) while still ensuring eligibility of jurors to vote.
- Enforcement of jury service – Rigorous enforcement of the obligation to serve on juries.
- Ineligibility – Everyone except the mentally ill should be eligible to serve as jurors.
- Excusal from jury service – No one should be excused from jury service as of right.

The Criminal Courts Review in England and Wales conducted by the Right Honourable Mr. Justice Auld also examined the issues raised by proposals for trial by judge alone. The following proposals for addressing some of the related issues were among those considered:

- Trial by judge alone at the defendant's option - with the consent of the court after hearing representations from both sides, the defendant should be able to opt for trial by Judge alone in all cases now tried on indictment.¹⁷⁵
- Fraud and other complex cases to be heard by Judge alone – with or without assistance by certain lay experts.¹⁷⁶
- Young defendants – to be tried without a jury in youth court.¹⁷⁷

The **Criminal Justice Act, 2003** makes provision for trials on indictment without a jury in certain circumstances.¹⁷⁸ The prosecution may apply for certain fraud cases to be tried without a jury. These cases are such that the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.¹⁷⁹ In addition, the prosecution may apply for a trial to be conducted without a jury where there is evidence of a real and present danger that jury tampering would take place and notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.¹⁸⁰

¹⁷⁴ Review of the Criminal Court of England and Wales by the Right Honourable Mr. Justice Auld, October 2001, pp 6 – 11.

¹⁷⁵ *Supra.*, at 28 – 30.

¹⁷⁶ *Supra.*, at 43 – 52.

¹⁷⁷ *Supra.*, at 52 -53

¹⁷⁸ Part 7 of the Criminal Justice Act 2003.

¹⁷⁹ *Supra.*, section 43.

¹⁸⁰ *Supra.*, section 44.

Caribbean Jurisdictions

Trinidad and Tobago

In Trinidad and Tobago, there is no right to trial by jury guaranteed in the Constitution. An Act providing for trial by judge alone, at the option of the defendant charged with an indictment, was enacted in 2017.¹⁸¹ The Act provides that every person against whom an indictment has been filed shall be tried by a judge and jury unless he elects to be tried by a judge alone. The Court must be satisfied that the accused person has sought and obtained legal advice in relation to a trial by judge alone. Where the accused does not wish to have legal representation and wishes to be tried by a judge alone, the Court must be satisfied that the accused is competent to make such decision and has waived his right to consult an attorney. In the case of a joint trial, each accused must consent and where there are several charges, the accused must elect to be tried by judge alone on all charges. In April, 2023, a bill to repeal and replace the **Miscellaneous Provisions (Trial by Judge Alone) Act** was proposed¹⁸². The bill would provide that an accused person committed for trial on an indictment must be tried by a judge alone unless the accused elects to be tried by a judge and jury or the Court directs the accused to be tried by a judge and jury. The bill would also allow an accused person to be tried by a judge and lay assessors if the Court considers it necessary to do so in the interests of justice.

Belize

In Belize, there is no right to trial by jury guaranteed in the Constitution. Trials for certain indictable offences take place before a judge alone.¹⁸³ These offences are murder, attempt to murder, abetment of murder and conspiracy to commit murder.¹⁸⁴ In addition, in certain other cases, the prosecution may apply for the trial to be conducted without a jury.¹⁸⁵ The grounds for such an application are:

- that in view of the nature and circumstances of the case, there is a danger of jury tampering or the intimidation of jurors or witnesses;
- that a material witness is afraid or unwilling to give evidence before a jury;
- that the case involves a criminal gang element and would be properly tried without a jury;
- that the complexity of the trial or the length of the trial (or both) is likely to make the trial burdensome to the jury;
- that the interests of justice require that the trial should be conducted without a jury.

In addition, a person accused of an offence not falling within the categories of indictable offences set out above¹⁸⁶ may apply for the trial to be conducted without a jury on the ground that in view of pre-trial publicity, the accused is unlikely to have a fair trial with a jury.¹⁸⁷ The accused person is entitled to make representations to the Judge in connection with these additional applications¹⁸⁸ and if there are several people charged jointly with an offence, and one of them makes an application to be tried without a jury due to pre-trial publicity, they must all agree to be tried without a jury.¹⁸⁹

¹⁸¹ Act No. 10 of 2017, The Miscellaneous Provisions (Trial by Judge Alone) Act.

¹⁸² The Miscellaneous Provisions (Trial by Judge Alone) Bill, 2023.

¹⁸³ The Indictable Procedure Act, Chapter 96 of the Laws of Belize. In 2022, a bill to expand the list of offences triable by judge alone was proposed.

¹⁸⁴ Sections 65A (1) and (2).

¹⁸⁵ Sections 65B (1) and (2).

¹⁸⁶ Section 65A (2).

¹⁸⁷ Section 65B (3).

¹⁸⁸ Section 65B (4).

¹⁸⁹ Section 65B (5).

Antigua and Barbuda

In Antigua and Barbuda, there is no right to trial by jury guaranteed in the Constitution. Pursuant to the **Criminal Proceedings (Trial by Judge Alone) Act, 2021**,¹⁹⁰ certain indictable offences are tried by a judge sitting alone. These indictable offences comprise 26 different categories of offences, including larceny, forgery, corruption, misuse of drugs, money-laundering, proceeds of crime, electronic crimes, malicious damage, firearms and terrorism.¹⁹¹ In addition, an accused person may consent to be tried by a judge alone for any other indictable offence.¹⁹² Similar to Trinidad and Tobago, the Court must be satisfied that the accused person has sought and obtained legal advice in relation to a trial by a judge alone. Where the accused does not wish to have legal representation and wishes to be tried by a judge alone, the Court must be satisfied that the accused is competent to make such decision and has waived his right to consult an attorney. In the case of a joint trial, each accused must consent and where there are several charges, the accused must elect to be tried by a judge alone on all charges.

Finally, the prosecution may apply to have the case tried by a judge alone on the following grounds;¹⁹³

- 1) that in view of the nature and circumstances of the case, there is a danger of jury tampering or intimidation of witnesses.
- 2) that a material witness is afraid or unwilling to give evidence before a jury.
- 3) that the case involves a criminal gang element and would be properly tried without a jury.
- 4) that the complexity of the trial or the length of the trial, or both, is likely to make the trial so burdensome to the jury that the interests of justice require that the trial should be conducted without a jury.

Danger of tampering or intimidation of witnesses includes instances of threatened or actual harm to, or intimidation or bribery of a juror or witness, or any of the family members of such juror or witness; threatened or actual harm to the property of a juror or witness or of any of the family members of such juror or witness has occurred; where the trial is a retrial and the jury in the previous trial was discharged because jury tampering or intimidation of a witness had taken place; where jury tampering or intimidation of a witness has taken place in previous criminal proceedings involving the accused or any of the accused and where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.¹⁹⁴

The Cayman Islands

In the Cayman Islands, there is no right to trial by jury guaranteed in the Constitution. The Criminal Procedure Code (2021 Revision)¹⁹⁵ provides that If a person accused of an indictable offence is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, the accused person may elect to be tried by a judge alone.¹⁹⁶ Where there are two or more persons joined in the same indictment, the election to be tried by a judge alone is only exercisable by all persons jointly.¹⁹⁷

The Turks and Caicos Islands

In the TCI, there is currently no right to trial by jury guaranteed in the Constitution.¹⁹⁸ The **Criminal Procedure Ordinance (2021 Revision)**¹⁹⁹ provides that notwithstanding anything to the contrary in any other law, a judge may

¹⁹⁰ No. 8 of 2021.

¹⁹¹ *Supra.*, Part II, section 4 (1) and (2).

¹⁹² *Supra.*, section 5.

¹⁹³ *Supra.*, section 6.

¹⁹⁴ *Supra.*, section 6 (6).

¹⁹⁵ Supplement No. 5, Published with Legislation Gazette No. 7, 22 January 2021.

¹⁹⁶ *Supra.*, section 129 (1).

¹⁹⁷ *Supra.*, section 129 (5).

¹⁹⁸ The TCI 2006 Constitution provided for the right of trial by jury in s.6(1)(g), but this was not included in the TCI 2011 Constitution.

¹⁹⁹ Chapter 3.03 of the Laws of the Turks and Caicos Islands.

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order that a trial be conducted without a jury if he is satisfied that the interests of justice so require.²⁰⁰ Such an order may be made on application of any party or on the judge's own motion.²⁰¹ In determining this, the judge shall have regard to all the circumstances prevailing, including any or all of the following:

- 1) the nature of the charges;
- 2) the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;
- 3) the length of the trial, and any steps which might reasonably be taken to reduce the length of the trial;
- 4) the likelihood that, if a jury were selected, pre-trial publicity may influence its decision;
- 5) any information tending to suggest that jury tampering may arise.²⁰²

The right to a trial by jury for serious criminal offences is a cornerstone of our criminal justice system. It is enshrined in our Constitution and any derogation from that right should be undertaken reluctantly and only for the most serious of reasons.

Proposals for reform recently submitted to the UK Government by the TCI Government have called for a "return to trial by jury as a fundamental right" with the defendant having an option to elect trial by judge alone.²⁰³

The Commission acknowledges the difficulties inherent in the selection of impartial juries in a small jurisdiction such as the VI, and hopes that the expansion of the pool of persons available for jury service as set out in the new **Jury Act, 2022** will somewhat mitigate the problem. The potential for undue influence and even juror tampering is no greater in the VI than in larger jurisdictions and there is only anecdotal evidence to suggest this has ever happened here. Evaluation of the impact of the **Jury Act, 2022** once it is implemented should be undertaken to ascertain whether further amendments to the regime set out therein are necessary.

Recommendation No. 32 Judge only criminal trials

The Commission therefore recommends that:

- (a) In light of the difficulties faced by the Territory in dealing with the backlog of criminal cases and the difficulties inherent in the selection of impartial juries, the Constitution should be amended to provide for judge alone criminal trials by way of legislation. In essence there should be a legislative pathway for either party to apply for a judge alone trial.
- (b) Such legislation should be subject to wide consultation with all relevant stakeholders, including the Criminal Bar.

A suggested redraft of section 16(2) follows:

Drafting proposal

Section 16 (2) Every person who is charged with a criminal offence shall –

(g) when charged on indictment in the High Court, have the right to a trial by a jury, subject to the provisions of any law enacted by the Legislature to provide for trial by a judge alone.

²⁰⁰ *Supra.*, section 57 (1).

²⁰¹ *Supra.*, section 57 (2).

²⁰² *Supra.*, section 57 (3).

²⁰³ Boyce, Hayden. "Changes to Constitution Proposed." Accessed October 1, 2023. <https://suntci.com/changes-to-constitution-proposed-p4679-129.htm>.

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Figure 3: Educational and consultative session with One VI Agenda



This chapter is dedicated to discussions with the public on other aspects of the Constitution. Members of the public were very keen to discuss matters and the overarching mandate of the Commission to review and determine whether the Constitution is still a “strategic fit” allows the Commission to consider broader matters - some of which are set out below with a relevant recommendation or recommendations following each one.

4.1 Revision of the Preamble

This segment seeks to address the specific concerns raised during our community meetings and consultations regarding the Preamble including whether the reference to God needs to be revised or strengthened.

A considerable number of persons expressed the reference to God in the Preamble needs to be strengthened. In fact, it was stated that the preamble needs to do more than just name God, but should invoke God and make it clear which God it is referring to.

The Commission also received a submission from the BVI Christian Council on this topic.

Constitutional references to God exist in the constitutions of a number of nations, most often in the preamble. A reference to God in a legal text is called *invocatio dei* ('invocation of God') if the text itself is proclaimed in the name of the deity. A reference to God in another context is called *nominatio dei* ('naming of God').

Invocationes and *nominatioes dei* in constitutions are attributed a number of purposes:

- Legitimising the State
- Expressing governmental support for a specific religion
- Challenging the state through reference to suprapositive law and common values
- Anchoring the state in history and tradition

The Commission believes that the interests raised by members of the VI public might be best addressed by adopting the approach in some other constitutions of “Invoking The Almighty God” (in the Preamble).

Comments on other aspects of the preamble were received by the public. The consensus was obviously that the existing preamble was generally very good but that it needed some tightening up. In addition to the comments of a religious nature, other comments were as follows:

- Vision- this should contain reference to continued economic advancement leading to opportunities for Virgin Islanders across all sectors of economy.
- Preamble -should give historical context and/or refer to slavery.
- Preamble- should speak futuristically in terms of what the VI is expected to become.
- Preamble - should refer to the dignity and sanctity of human life.
- Preamble – should refer to accountable government, high standards of integrity, the environment, education, healthcare, retention of culture, partnership with private sector and continuing beneficial ties with the UK.

Recommendation No. 33 Revision of the Preamble

The Commission therefore recommends that the Constitution should be amended by updating the preamble to reflect some minor improvements to the style and language. A proposed redraft follows:

Drafting proposal

Preamble

Whereas, we, the people of the Virgin Islands, a God-fearing people, anchored in the Christian tradition and values, invoking the Almighty God, now wish to proclaim this our Constitution of the Virgin Islands;

Remaining conscious of our ancestral history, and the struggles, labour, sacrifices and achievements of our forebears that serve as pillars of our Territory today;

Valuing the evolution over centuries of a distinct cultural identity which is the essence of a Virgin Islander;

Acknowledging that the society of the Virgin Islands is based upon certain moral, spiritual and democratic values, a belief in the Almighty God, the dignity of the human person, the freedom of the individual and respect for fundamental rights and freedoms and the rule of law;

Mindful that the people of the Virgin Islands have expressed a desire for their Constitution to reflect who they are as a people and their quest for social justice, economic empowerment and political advancement;

Recognising that the people of the Virgin Islands have a free and independent spirit, and have developed themselves and their Islands based on qualities of honesty, integrity, mutual respect, self-reliance and the ownership of the land bequeathed by their forebears, engendering a strong sense of belonging to and kinship with those Islands;

Recalling that because of historical, economic and other reasons many of the people of the Virgin Islands reside elsewhere but have and continue to have an ancestral connection and bond with those Islands;

Asserting that the Virgin Islands should be governed based on adherence to well-established democratic principles and institutions; good, transparent and accountable governance in the conduct of public affairs; participatory decision-making; and the achievement of national objectives based on sustainable planning;

Declaring a duty on the people and those who govern to preserving the Virgin Islands as a safe and healthy environment for ourselves and for generations unborn;

Entrusting those who govern with the continued promotion, modernisation and development of all economic sectors and ensuring a steadily improving quality of life for all people of the Virgin Islands;

Affirming that the people of the Virgin Islands have expressed their desire to become a self-governing people and to exercise the highest degree of control over their affairs; and

Noting that the United Kingdom, the administering power for the time being, has articulated a desire to enter into a modern partnership with the Virgin Islands based on the principles of mutual respect and self-determination and on the freely and democratically expressed wish of the people of the Virgin Islands;

Now, therefore, the following provisions have effect as the Constitution of the Virgin Islands.

4.2 Belonger Status

The subject of the definition of the term ‘Belonger’ was not a dominant topic during the consultation process. It is a very sensitive topic on which understandably, persons may hesitate to speak openly. Not many written comments were submitted to the Commission on the subject either. Importantly, for some of the time that the Commission was engaging in public consultation, a separate independent review of the policy and process for granting residency and belongingship was being conducted. The Commission also reminded members of the public of this in case any wanted to contribute to that exercise.²⁰⁴ Nonetheless, a summary of what was received on the current constitutional definition of ‘Belonger’ follows.

One contribution was received on behalf of foreign (non-VI) parents (one or more currently residing in the VI for work) whose children born in the VI do not qualify on birth for Belonger status. It would, of course, be open for those children, if having spent their first 18 years in the VI and intending to make the VI their home, to apply for residency and Belonger status when each turns 18 years.

In another, a parent who himself obtained Belonger status through naturalisation and has been in the VI since the age of 8, is unable to pass Belonger status to those of his children who were born outside the VI after 2007. Again, it would be open for those children to apply for residency and Belonger status when each turns 18 years.

In a third, a Belonger (other than by birth) is unable to pass the status to his grandchildren born outside the VI.

The Commission should emphasise that, not being an independent country, the VI cannot grant citizenship and so ‘Belonger’ status is simply an immigration status as opposed to a nationality status. So, in most of the cases above, the children would have British Overseas Territories Citizenship (BOTC) status and be entitled to VI passports. In all three cases of ‘Belonger’ status above, what is missing at the time of the birth of the children is a sustained ancestral connection to the Territory and this is not unique to the VI. How much weight to attribute to it is a matter of policy but the Commission does agree that some cases are meritorious.

Most of the other comments received appear to actually be grievances based on nationality issues under the **British Nationality Act 1981** and not directly relevant to the definition of ‘Belonger’ under the Constitution. As noted above, full facts were not always clear nor reliably articulated.

Based on the Commission’s interaction with the public, there is general confusion and a genuine lack of appreciation of the differences between residency status, Belonger status and BOTC status. Similar confusion exists over related documents such as a naturalisation certificate, a Belonger certificate, a BOTC VI passport, a British passport, and a Belonger card.

Given the complexity of the subject and the significant implication to families and relatives born and unborn, persons are urged to obtain professional advice in these and related legal matters such as estate planning. Failure to do so and sometimes failure to act proactively, for example, often leads to even local families of generational Belongers losing their status as more and more of them migrate overseas and therefore have their children overseas. This has led to some calls to extend ‘Belonger’ status down another generation²⁰⁵ but at a time when Belongers who interacted with the Commission were also resolute in their demands for tighter regulation of Belonger status particularly to protect VI ancestry and culture, and better manage VI assets and resources.

²⁰⁴ Malone, Kedrick. Review of Policy and Process for Granting Residency and Belongership. COI Recommendation B.33, Government of the Virgin Islands, 24 July 2023.

²⁰⁵ See amendment to section 16 of the Immigration and Passport Act made by the Immigration and Passport (Amendment) Act, 2019 (Act No. 6 of 2019).

Recommendation No. 34 Belonger status

No change to section 2(2) of the Constitution is recommended. However, the Commission recommends that, a policy should be developed to prioritise the grant of Belonger status in commendable cases as part of the immigration policies recommended for review following the Malone report on the Review of Policy and Process for Granting Residency and Belongership submitted in July 2023.

4.3 Ancestral Virgin Islander

Section 65(2) of the Constitution defines the term “Virgin Islander” as one criterion for eligibility for membership of the HoA. It binds the Members to VI ancestry. During the public consultative meetings, there was a small number of persons who advocated for the widening of the constitutional definition of “Virgin Islander” to allow more persons to be eligible to contest a seat in the Legislature. The vast majority of comments received on this topic were in fact from persons who expressed a wish for the Constitution to continue to recognise the concept of a “Virgin Islander” and were adamant that section 65 should remain unaltered.²⁰⁶

When the VI gained a separate colonial status from “presidency” in the Leeward Islands Federation in 1956 a new “state” was conceptualised as a separate entity or organisation owned by the people. The people understood the Virgin Islands as their home as opposed to the home of other people, a characteristic of the Leeward Islands Federation. Now that the colony of the VI was a separate entity, the inhabitants saw themselves as distinct from those who came from other islands. They were no longer citizens of a federation. They were “citizens” of the VI. They began to consolidate themselves as one people - Virgin Islanders. The “state” and the legal processes were being developed to justify this movement. As immigrants increased with the growth of tourism, particularly after 1959 when Cuba was closed to the American tourists, the desire of Virgin Islanders to distinguish themselves from the immigrants increased.

While the people of the VI may have referred to themselves as Virgin Islanders, the 1976 Constitution of the VI did not. The 1976 Constitution referred to persons as being “deemed to belong to the Virgin Islands”, and wherever necessary the laws of the Territory, simply referred to “Belongers”. For completeness we note, that the term “Virgin Islander” does not refer to citizens of the VI. As the Territory is not an independent country, it is not able to grant citizenship so, instead, the term ‘Belonger’ is used. It is an immigration status (rather than a nationality status) and signifies those who are free from immigration control. In terms of nationality, one would instead refer to British Overseas Territories citizens (since 2002) and, prior to that, British Dependent Territories citizens. Citizenship and nationality are governed by the **British Nationality Act 1981** of the UK and are beyond the scope of this discussion.

The term ‘Virgin Islanders’ was not actually used officially until the 2007 Constitution.

However, pursuant to section 65(2) of the 2007 Constitution, “Virgin Islander” does not encompass all “Belongers” but rather only those “Belongers” with an ancestral connection to the VI.

Section 65 (2) of the **Virgin Islands Constitution Order 2007** states:

a “Virgin Islander” is a person who belongs to the Virgin Islands by birth or descent who was:

- (a) born in the Virgin Islands of a father or mother who at the time of the birth was a British Overseas Territories Citizen (or a British Dependent Territories Citizen) by virtue of birth in the Virgin Islands or by virtue of descent from a father or mother who was born in the Virgin Islands;
- (b) born in the Virgin Islands of a father or mother who at the time of the birth belonged to the Virgin Islands by birth or descent;
- (c) born outside the Virgin Islands of a father or mother who at the time of the birth belonged to the Virgin Islands by birth or descent.

²⁰⁶ “Changes to Constitution Proposed.” The Sun, October 31, 2019, Vol 15 Issue 42 edition. <https://suntci.com/changes-to-constitution-proposed-p4679-129.htm>.

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Whilst section 65 of the Constitution specifically deals with qualifications for elected membership in the HoA, the term “Virgin Islander” is, however, used elsewhere in the 2007 Constitution.

- (i) The preamble recognises that the people of the Territory of the Virgin Islands, have over centuries evolved with a distinct cultural identity which is the essence of a Virgin Islander.
- (ii) Section 36 provides that the Deputy Governor shall be a Virgin Islander as defined in section 65(2).
- (iii) Section 39 provides that the Deputy to the Governor, whenever it is necessary to appoint one, shall be a Virgin Islander.
- (iv) Section 51 provides that the Cabinet Secretary shall be a Virgin Islander as defined in section 65(2).

The position in the 2007 Constitution in relation to the appointment of Deputy Governor, Deputy to the Governor and Cabinet Secretary, which requires that persons appointed to those posts be Virgin Islanders, may be contrasted with the provisions relative to those applicable to the appointment of Attorney General. In relation to the position of Attorney General, section 95(6) mandates that the Attorney General shall be a person who belongs to the VI (unless in the opinion of the Judicial and Legal Services Commission, there is no such person who is suitably qualified). This is a broader category of persons, than the category of persons who are Virgin Islanders as defined by section 65(2).

Of interest, similar eligibility requirements have been proposed in another OT. A recent recommendation for constitutional reform in the TCI contained a proposal that eligibility for the TCI House of Assembly should be restricted to ‘natural born’ Turks and Caicos Islander, meaning that he or she had the status of Turks and Caicos Islander at the time of birth, by birth or descent.

Clarification of the term ‘Virgin Islander’:

The purpose of this submission is to clarify those persons who would fall into the category of Virgin Islanders - those persons who, through their lineage, have an ancestral connection to the VI - and to provide a succinct iteration of the concept that persons may consider using for certain cultural or civic purposes, as appropriate.

Ancestral Virgin Islander

Any *person* who can prove that the Virgin Islands is his or her homeland by ancestry or heritage, through at least three generations either maternally, paternally or both shall be deemed to be an ancestral Virgin Islander.

For the purposes of the above-

The first generation refers to a person:

- (a) born in the Virgin Islands to a father and /or mother who was also born in the Virgin Islands and was also a believer of the Virgin Islands at the time of birth; or
- (b) a person born outside the Virgin Islands to a father and /or mother who was at the time of the birth a believer of the Virgin Islands by birth or descent.

The second generation refers to a person:

- (a) who was born in the Virgin Islands and has at least one grandparent who was born in the Virgin Islands, who was at the time of birth a believer of the Virgin Islands by birth or descent; or
- (b) who was born outside the Virgin Islands and has at least one grandparent who was born in the Virgin Islands, and was at the time of birth a believer of the Virgin Islands by birth or descent.

The third generation refers to a person:

- (a) who was born in the Virgin Islands and who has at least one great-grandparent who was born in the Virgin Islands, and who was at the time of their birth a believer of the Virgin Islands by birth or descent; or
- (b) who was born outside of the Virgin Islands and has at least one great-grandparent who was born in the Virgin Islands, who was at the time of their birth also a believer of the Virgin Islands by birth or descent.

“born in” and “born outside” for purposes of this section includes “adopted in” and “adopted outside”.

If the above (or an amended version) is adopted by Virgin Islanders as acceptable, the Commission anticipates that the definition may then be used and duplicated in certain policy matters or other matters of relevance particularly in relation to the preservation of national and cultural heritage and rights. For example, the Member of the HoA who made the submission referred to above noted that the recognition is essential for reasons related to (a) addressing the issue of remaining large tracts of undivided land, (b) preservation of VI heritage and (c) discussion on possible reparations.

On the last of these, CARICOM (of which the VI is an associate member) has promulgated its **Ten Point Plan for Reparatory Justice** which has been published by the CARICOM Reparations Commission. CARICOM has also instituted a Reparatory Justice Programme. The Plan refers to “the persistent racial victimisation of the descendants of slavery and genocide” as the basis for much of the continued suffering and under development today.

The Plan recognises that not all amends lie in monetary awards. For example, the “injection of science, technology, and capital beyond the capacity of the region” is needed to address the public health crisis in which Caribbean people of African descent account for the highest incidences globally of hypertension and type two diabetes resulting from 400 years of a nutritionally devoid diet. Similarly, an acceptable response to the significant psychological trauma inflicted through those centuries of being regarded as a property (as opposed to human) asset would be much more robust educational opportunities to be made available. Of course, any such discussion does not negate the non-reciprocal investments and opportunities that the UK makes on a national level into the health, educational and public sectors otherwise.

The Commission agrees that there are opportunities now and in the future where it would be necessary to identify a Virgin Islander in ancestral terms and offers the above for consideration.

Recommendation No. 35 Ancestral Virgin Islander

The Commission recommends that, the term “Virgin Islander” in the preamble to the Constitution should be replaced with the phrase “people of the Virgin Islands”, as the term “Virgin Islander” is a defined term in section 65(2) of the Constitution. This should avoid confusion where the term is not intended to import its defined meaning.

4.4 Crown Lands

Crown lands and their disposition is another subject that stirred quite passionate debate across the Territory as a whole, but particularly in the sister islands. It was the subject of a separate review under the Col Report but it also has constitutional relevance. Under the Constitution, the Governor has power to make grants and dispositions of “lands or other immovable property in the Virgin Islands or interests in such property that are vested in Her Majesty for the purposes of the Government of the Virgin Islands”. These are referred to as Crown lands, though there is no actual definition of this in the Constitution. There is also no single law in the Territory that addresses Crown lands. Instead, provisions for Crown lands and related issues are in various other enactments and these are explained further below.

On January 16, 2023, a separate policy review report on VI Crown Lands²⁰⁷ was conducted and submitted by Mr. David Abednego and the Commission has had sight of this report and has a number of recommendations based on the concerns expressed during the various public meetings.

The core issue of public concern was the process and procedures for disposition of Crown lands, the length of time for grants to be made, and the transparency of the grants of Crown lands.

The issue of transparency was a major concern during the public meetings held in the Territory, especially on the islands of Virgin Gorda and Anegada. An area of great concern to the public is the regulation of the seabed, in particular who has rights to and access to the seabed. Any enacted legislation regarding land disposal and seabed management must be clear and effective and should allow for flexibility by the sitting government.

Several persons also raised concerns about use of the word “Crown” being colonial and conveying that land does not belong to the people of the VI.

The overall objective of Crown land disposal and management is that the disposal and management should be carried out in a manner that is free from political influence and implements long term sustainable policies that benefit the people of the VI. Strengthening the disposal and management process, by means of an arm’s length approach from politics and by providing codified written guidelines and criteria that are publicly available, will ensure fairness, efficiency, transparency and public confidence.

According to Potter, 2013,²⁰⁸ a little over 8,000 of the almost 35,000 acres of land in the VI land are recorded on the Land Register as being owned by the Crown (approximately 23%).

The distribution of Crown lands should therefore also be done responsibly so that future Virgin Islanders, born and yet unborn, can benefit therefrom.

At this juncture, it would be beneficial to give a brief overview of the meaning of ‘Crown land’. Recall that, at present, there is no law in the Territory that singularly addresses issues in relation to Crown lands and, as a result, one can find bits and pieces of written law that give some context to the meaning of the term.

Without defining it, the Constitution provides in section 41 under the heading ‘Crown Lands’ that the Governor, with the approval of Cabinet, has power to make grants and dispositions of “lands or other immovable property in the Virgin Islands or interests in such property that are vested in His Majesty for the purposes of the Government of the Virgin Islands”.

²⁰⁷ Abednego, David. Virgin Islands Crown Lands Distribution Policy Review Report. Col Recommendation B.30, Government of the Virgin Islands, 16 Jan. 2023.

²⁰⁸ Potter, Louis. 2013. Land Management Issues in the Virgin Islands, OECS Land Policy Guidelines Project, UN Habitat for a Better Urban Future.

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According to the **Interpretation Act**, Cap 136, s. 10. (1), a reference in an enactment to the Sovereign or to the Crown shall be construed in either case as a reference both to the Sovereign for the time being and as a reference to the Crown in right of its government of the Territory.

The **Physical Planning Act, 2004** does provide a definition in section 2 that “Crown land” means land which belongs to and is vested in the Crown.

The **Registered Land Act**, Cap 229 provides that 9(3) no entry shall be required in the proprietorship section of land which is described as Crown Land and in section 26 that the registration of land as Crown land shall, subject to any registered incumbrances, enable the ‘Governor in Council’ by a disposition registered under this Act to dispose of such land.

Additionally, the Report of the 2005 Constitution Review Commission noted that:

10.25 All 'public' lands in the Virgin Islands are vested in Her Majesty for the purposes of the Government of the Virgin Islands, and are registered under the **Registered Land Act** in the name of the Crown as registered proprietor. Accordingly, section 8 of the Constitution provides for the disposition of Crown property by the Governor, as Her Majesty's representative in the Virgin Islands, in Her Majesty's name and under the public seal. This power can be delegated, either specifically or generally, by the Governor to "any person duly authorised by him in that behalf by writing under his hand ...

The Commission's research in this matter leads to the conclusion that there is no monolithic definition of “Crown land”. Meek, 1946 in ‘A note on Crown Lands in the Colonies’²⁰⁹ notes that:

“...the term “Crown land” is used in a great variety of ways... The general picture is very confused, and the reason, of course, is that each colonial government has to a large extent been allowed to evolve along lines of its own, adapting its land policy to local circumstances rather than following any definite logical pattern”.

In the present day, the use of the term ‘Crown land’ is an administrative or regulatory tool and does not convey any sense of personal ownership by the Monarch. It is possible to clarify and refine the definition to suit local circumstances. To recommend that all lands previously referred to as “Crown land” should henceforth be referred to as a more emotionally neutral word such as “Virgin Islands land” or “public land” is, to a large extent, cosmetic. It would cause some transitional inconvenience but should not have any effect on the use, control and disposal of such lands. Referring to it as “public land” may more closely align with modern concepts of language. Deciding to retain use of “Crown land” would likely be for sentimentality and familiarity in legal jargon than from any practical requirement to do so.

The relevant lands would be the marine estate within the territorial boundaries of the VI, the parcels identified as Crown land on the land register, and any land made forfeit or acquired by the Government.

In conclusion, there is need for more clarity on the policy procedures and approaches to the treatment and disposition of Crown lands. These details should be specified in legislation. However, the Constitution could be amended to require the implementation of such legislation. Of particular mention, whilst Commissioners note that TCI has rules and guidance dealing with the issues of derelict vehicles on Crown lands, the VI has a fairly unique challenge (especially post hurricane seasons) of derelict boats on Crown land and this should also be addressed in any legislation.

²⁰⁹ C. K. Meek, A Note on Crown Lands in the Colonies, 28 Journal of Comparative Legislation and international Law 87 (1946).

Recommendation No. 36 Crown land

The Commission therefore recommends that:

Improvements should be made to the administration and regulation of Crown lands through the following mechanisms:

- (a) Add a definition of Crown Land in the Constitution, which language should address the concerns raised by members of the public that clarifies that Crown Land is vested in His Majesty in trust for the benefit of the people and GVI. The following definition is proposed:
“Crown land” means any rights or interests in the seabed and Territorial Waters, any rights or interests in any Exclusive Fisheries Zone or Exclusive Economic Zone, any rights or interests in land or other immovable property within the Virgin Islands that vests in and may be lawfully granted or disposed of by His Majesty in right of the Virgin Islands.”
- (b) The definition of Crown land in the Physical Planning Act 2004 (and any other existing legislation) be amended to align with any revised definition in the Constitution.
- (c) The Constitution should be amended to include a requirement for the Territory to enact legislation dealing with Crown lands (see drafting proposal below).
- (d) Legislation should provide the necessary principles for transparency in the acquisition, management and disposal of Crown lands and ensuring these Crown lands are used *for the benefit of the people of the Virgin Islands, both present and future, as a whole*. The emphasised words (or words to this effect) should form part of the legislative provisions.
- (e) Include legislation that provides for a protocol, consistent with admiralty law, for the disposal of derelict boats on Crown lands including recouping any public funds spent on such disposal.
- (f) The Governor should retain responsibility to execute dispositions.
- (g) The Cabinet should retain power to grant prior approval of dispositions, in accordance with the recommendation of the authority/process set out in legislation.
- (h) A Minister should retain responsibility for administering Crown land, in accordance with the process and procedures set out in the legislation.
- (i) A committee should be established that provides advice to the Government regarding the use of Crown land. The Crown Land Advisory Committee, if so named, will comprise members of the community and relevant technical experts within Government.
- (j) The Ministry with responsibility for Crown land needs to assess the best approach to establishing a map-based index of grants and licences over seabed in the VI.

Drafting proposal

Definition of Crown lands

“Crown land” means any rights or interests in the seabed and Territorial Waters, any rights or interests in any Exclusive Fisheries Zone or Exclusive Economic Zone, any rights or interests in land or other immovable property within the Virgin Islands that vests in and may be lawfully granted or disposed of by His Majesty in right of the Virgin Islands.

Crown lands

Subject to this Constitution a law enacted by the Legislature shall provide for the transparent acquisition, management and disposal of Crown lands for the benefit of the people of the Virgin Islands, both present and future.

4.5 Preamble to fundamental rights

The ‘Fundamental Rights and Freedom’ chapter in the Constitution can be broadly described as having a triumvirate construction, as follows:

- It opens (in section 9) with a general statement on fundamental rights and freedoms. Most sentences begin with the preambular word “Whereas”. For example, “Whereas ...[the following] fundamental rights and freedoms apply... to ...life, equality...”. However, the last paragraph ends with, “Now, therefore, ...the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms...”;
- The chapter continues with a dedicated section which elaborates on each right;
- Towards the end, the chapter addresses redress and enforcement of the rights.

This style of presentation is found in several constitutions throughout the British OTs and the Commonwealth, having been described by Lord Hoffmann as having “a family resemblance”.²¹⁰

There is a line of Privy Council cases²¹¹ that support the position that the opening general statements (such as in section 9) is a preamble. The premise for this is the use of the word “Whereas”. The Privy Council cases take the view that such provisions drafted like section 9 are not meant to stand on their own as enforceable provisions. Instead, they are prefatory to the spelling out of the individual rights that follow. Thus, it is “the subsequent provisions”, which elaborate on the individual rights with greater specificity and are meant to be enforceable; not the opening general one. Some constitutions also exclude this opening statement from the enforcement provision. Drafters may wish to consider whether it might be an improvement if this clarification is expressly made in section 31 of the VI Constitution.

The Commission is aware of the Caribbean Court of Justice case of *Nervais v The Queen*²¹² which, in a majority judgement, held an opening general provision (similar to section 9 of the Constitution) to be separately enforceable (i.e. substantive and not merely preambular) on the basis that the language in the introductory section went further than some of the provisions bestowing the related rights themselves. However, Honourable Justice Winston Anderson gave a significant dissenting judgement. The majority judgment in *Nervais* is contrary to the line of Privy Council cases (the Privy Council being the final appellate court for the VI and not the Caribbean Court of Justice).

Notably in several Privy Council cases, there is a distinction between constitutional provisions drafted (like section 9) as wholly or predominantly a preamble, and constitutional provisions which contain instead an enacting provision.²¹³ If it is intended for the opening general statement in section 9 of the Constitution to be a separate enforceable provision, instead of the use of the word “Whereas”, a declaratory phrase such as “It is hereby recognised and declared that...” should be used. The later reference to “...the subsequent provisions of this Chapter...” should also be removed. Commissioners are of the view that section 9 was intended to be a preamble and are mindful of the Privy Council cases to that effect. However, the regional development in the *Nervais* case is mentioned in case the draftsmen of the new Constitution see it fit to review the drafting of sections 9 and 31 of the Constitution.

²¹⁰ *Grape Bay Limited v. Attorney General of Bermuda* [2000] 1 W.L.R. 574.

²¹¹ See, for e.g. *Grape Bay Limited v. Attorney General of Bermuda* [2000] 1 W.L.R. 574, *Campbell-Rodrigues v Attorney General of Jamaica* [2007] UKPC 65, *Newbold v Commissioner of Police*, [2014] UKPC 12.

²¹² *Nervais v. The Queen* [2018] CCJ 19 (AJ).

²¹³ *Newbold v Commissioner of Police*, [2014] UKPC 12, at para 32; and *Campbell-Rodrigues v Attorney General of Jamaica* [2007] UKPC 65, at paras 9-12.

Recommendation No. 37 Preamble to fundamental rights

The Commission recommends that it should be clearly articulated that section 9 is a preamble, and the enforcement provision in section 31(1) should be amended to specifically exclude reference to section 9.

Drafting proposal

Preamble to Fundamental rights and freedoms of the individual

9. Whereas every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual;

Whereas those fundamental rights and freedoms are enjoyed without distinction of any kind, such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations, economic status, disability, age, birth, sexual orientation, marital or other status, subject only to prescribed limitations;

Whereas it is recognised that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, equality, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, expression, movement, assembly and association; and
- (c) protection for private and family life, the privacy of the home and other property and from deprivation of property save in the public interest and on payment of fair compensation;

Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Enforcement of protective provisions

31.—(1) If any person alleges that any of the provisions in sections 10 through 30 of this Chapter has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

4.6 Bill of Rights – Right to Marry

During our community meetings and consultations, several topics not specifically mentioned in the ToR were addressed by members of the community. Among these topics was the issue of same-sex marriage and how the VI should address the issue in law and in the Constitution.

The members of the community who spoke to the issue were primarily opposed to any effort to legalise same-sex marriage in the Territory. Notably among secondary students with whom the Commission engaged there were mixed views. Since there was also a significant number of students who spoke in favor of same-sex marriage this may be indicative of an emerging generational divide.

Statutes

The **Marriage Act**, Cap. 272 of the Laws of The Virgin Islands, does not contain a definition of marriage. Although the Marriage Act does contain certain restrictions on who may marry (for example, prohibited degrees of affinity and consanguinity and age restrictions), it does not prohibit marriage by persons of the same-sex nor does it define marriage as being between persons of the opposite sex. The **Marriage Act** is more concerned with procedural and regulatory aspects of the ceremony of marriage. Of note, however, is that the Forms promulgated in the First Schedule to the **Marriage Act** refer to Bachelor/Widower and Spinster/Widow, terms traditionally used to describe men and women respectively.

Of more relevance to the subject is section 13 of **The Matrimonial Proceedings and Property Act, 1995** which sets out the grounds on which a marriage is void or voidable. Section 13(1)(c) states that a marriage is void on the ground that the parties are not respectively male and female.

International Conventions and Covenants

The Conventions of note are the ECHR which was adopted by the UK by ratification in 1951 and made applicable to the VI by extension in 1953, and the **ICCPR** which was adopted by the UK by ratification in 1976 and made applicable to the VI by extension in 1976.

The Constitution

The relevant provision on the subject in the VI Constitution can be found at section 20 which provides that every man and woman of a marriageable age has the right to marry and found a family in accordance with laws enacted by the Legislature. (This section is similar to Article 12 of the ECHR.)

Case Law

European Court of Human Rights (“ECtHR”) Cases (referred to as the “Strasbourg Jurisprudence”)

The ECtHR addressed the issue of same-sex marriage several times over the years in a number of different cases. The conclusions of the ECtHR can be summarised as follows:

- Article 12 of the ECHR (similar to section 20 of the Constitution) which protects the right of every man and woman of a marriageable age to marry and found a family in accordance with laws enacted by the Legislature does not impose an obligation on a Government to grant a same-sex couples access to marriage. This is a *lex specialis* and does not confer a right to same-sex marriage.
- Article 12 secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for the regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman. While it is true that some contracting states have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the contracting states to grant access to marriage to same-sex couples.

- Article 14 of the ECHR which prohibits discrimination on basis of sex and Article 8 of the ECHR which protects private and family life taken in conjunction apply to same sex couples equally as to couples of different sexes. However, the ECtHR stated that having concluded that Article 12 does not impose an obligation on the contracting states to grant same-sex couples access to marriage it was unable to agree that Article 14 taken in conjunction with Article 8 imposed such an obligation.
- The ECtHR noted that although there is no consensus, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. The ECtHR found that a Government must offer convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of a law that grants recognition to civil unions between partners of opposite sexes and, absent this, there would be a violation of Article 14 taken in conjunction with Article 8 of the ECHR.
- The failure to provide any form of legal recognition, such as by way of a civil partnership regime, to same-sex couples is a violation of Article 8 of the ECHR which protects private and family life.

United Kingdom Privy Council cases

Attorney General of Bermuda v Ferguson et al. -This case concerned whether the law of Bermuda recognises same sex marriage. Bermuda enacted a **Domestic Partnership Act, 2018** (DPA) which created a framework whereby adult couples, both same sex and heterosexual, can formalise and register their domestic partnerships. However, the DPA also confines marriage to a union between a man and a woman, explicitly stating in section 53 of the DPA that “a marriage is void unless the parties are respectively male and female.”

Section 15(1)(c) of the **Bermuda Matrimonial Causes Act, 1974** states that a marriage is void on the ground that the parties are not respectively male and female. The **DPA**, at section 48 (1), provides further that the DPA and other sections of Bermuda law (including section 15 (1) (c) of the **Bermuda Matrimonial Causes Act, 1974** are to take effect notwithstanding anything to the contrary in the **Bermuda Human Rights Act** (HRA). Thus, the protections of the HRA (which includes prohibitions against discrimination on the basis of sex and sexual orientation) are not available in support of same-sex marriage.

Bermuda’s Constitution does not confer any right to marry. The ECHR was adopted by the UK by ratification in 1951 and made applicable to Bermuda by extension in 1953.

The DPA was challenged on the basis that its confining of marriage to a man and a woman was invalid.

The Privy Council found as follows on the various matters in issue:

- The Bermuda Constitution does not confer any right to same-sex marriage; nor does the ECHR. The only right in the ECHR to marriage is to heterosexual marriage (see discussion below in *Day and anor. v The Governor of the Cayman Islands and anor.*)
- Under the Strasbourg Jurisprudence, there is a right to a legally recognised union which is not marriage. The Bermuda Legislature passed the DPA which gives same-sex couples the right to enter into a domestic partnerships and this gives them all the rights that married couples have. However, this institution is not called marriage.

*Day and anor. v The Governor of the Cayman Islands and anor.*²¹⁴ concerned whether same sex marriage is recognised in Cayman Islands law. Section 2 of the Cayman Islands **Marriage Law, 2010** defines marriage as “the union between a man and a woman as husband and wife”. The ECHR was adopted by the UK by ratification in 1951 and made applicable to the Cayman Islands by extension in 1953. The Bill of Rights enshrined in the Cayman

²¹⁴ [2022] UKPC 6.

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Islands Constitution is based on the ECHR. However, the provision on marriage explicitly provides that “Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family”.²¹⁵

The Government conceded that the Legislative Assembly of the Cayman Islands was required to provide a legal status functionally equivalent to marriage, such as civil partnership. The Court of Appeal found that Government and the Legislative Assembly were in breach of this obligation and this finding was not appealed. This obligation was complied with by the promulgation of the **Civil Partnership Law 2020**.

The Privy Council stated that the ECHR is a treaty which is applicable in relation to the Cayman Islands and forms part of the background against which the Constitution was promulgated. However, based on the Strasbourg Jurisprudence, the ECHR does not include a right for same-sex couples to marry. The Privy Council went on to emphasise that their interpretation of the Bill of Rights does not prevent the Legislative Assembly from introducing legislation to recognise same-sex marriage. The Privy Council also held that the very specific wording of the right to marry in section 14 of the Cayman Island Bill of Rights, operated to confine the right to persons of the opposite sex. The effect of this interpretation is that it is a matter for the choice of the Legislative Assembly rather than a right laid down in the Constitution.

Eastern Caribbean Supreme Court (BVI) Case

*Forbes and Lettsome v The Attorney General*²¹⁶ - This matter is currently pending in the High Court of the Virgin Islands. The case is challenging as unconstitutional the prohibition of same sex marriages in the VI. Ms. Forbes and Ms. Lettsome (the “applicants”) are a same sex couple, both Virgin Islanders, who were married abroad, and who have mounted a legal challenge to have their union legally recognised in the VI. The BVI Christian Council has intervened in the litigation as an interested party, presumably to make its opposition to same-sex marriage known to the Court.

The applicants are seeking the following relief:

- A declaration that the marriage between the applicants which took place in the UK with effect from 28 July 2011 is valid under the laws of the VI.
- A declaration that the prohibition of same-sex marriages by consenting adults with no familial relation is contrary to the Constitution.
- A declaration that section 13(1)(c) of the **Matrimonial Proceedings and Property Act** is contrary to the Constitution and is therefore void and of no effect.
- An order that the laws of the VI relating to marriage be modified to bring them into conformity with the Constitution.

At the time of writing a judgment is expected.

Referenda

In June 2016 the people of Bermuda were asked to express their views on whether same-sex marriage or another form of same-sex union should be legally recognised. The referendum was not valid because the turnout was too low. A majority of Bermudians voted against both same-sex marriage and legal recognition of same-sex union of a different kind.

²¹⁵ Cayman Islands Constitution Order, 2009, s.14.

²¹⁶ BVIHCV 20021/0054.

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On 30 June 2023, a proposed resolution by the House of Assembly of the Virgin Islands on the issue was gazetted. The proposed resolution provides for a referendum to be conducted to ask the following questions:

- a. Are you in favour of same sex marriage being legalised in the Virgin Islands; and
- b. Are you in favour of legislation which would provide for civil unions or domestic partnership in the Virgin Islands, which would allow same-sex couples to have rights, privileges and benefits, including but not limited to property rights, health and medical benefits, employment and social security survivors benefits.

Analysis

The Strasbourg Jurisprudence and the Privy Council decisions discussed above circumscribe the extent of an obligation to provide a form of legal recognition to same-sex relationships (such as civil unions or domestic partnerships) which some jurisdictions have addressed in legislative enactments.

In the Constitution itself, based on the strong public sentiment that marriage should be restricted to persons of the opposite sex, it is recommended that section 20 of the Constitution be amended to state clearly that marriage is between a man and a woman of the opposite sex.

Recommendation No. 38 Bill of Rights – Right to marry

The Commission therefore recommends that section 20 of the Constitution should be amended to state clearly that marriage is between a man and a woman of the opposite sex.

Protection of the right to marry and found a family

20. – (1) Every man and woman of a marriageable age has the right to marry a person of the opposite sex and found a family in accordance with laws enacted by the Legislature.

4.7 Bill of Rights – Freedom of expression and freedom of assembly – political activities

One recommendation received was that the sections in the Constitution addressing freedom of expression (section 23) and freedom of assembly and association (section 24) ought to be amended to allow for more flexibility for public officers. The issue is of sufficient importance that Commissioners are of the view that it ought to be addressed. Indeed, during the writing of this Report, the interpretation of those rights was the subject of constitutional challenge in Barbados in the matter of *Natalie Murray v The Attorney General of Barbados* BB 2023 HC 2 (judgment dated 28 February 2023).

Under the Barbados Constitution, nothing done under any law contravenes either of these freedoms “to the extent that it is reasonably justifiable in a democratic society ... or imposes restrictions on public officers that are reasonably required for the proper performance of their functions”.

Constitutions of several other Caribbean jurisdictions (including Belize and Guyana), where similar language is found, were reviewed for this purpose.

General Orders (1971, revised 1982) are a colonial vestige that continue to apply to the VI Public Service. It states, at paragraph 3.16, as follows:

Officers are expressly forbidden to participate actively on behalf of any party or candidate in an election to the Legislature or Local Authority election. They are expressly forbidden to act as agents, sub-agents or canvassers at elections of this nature.

The crux of the recent decision in the Barbados High Court (which turned on similar language in the Barbados General Orders) was that the *blanket* prohibition of public officers engaging in active politics is unconstitutional and inconsistent with the rights to freedom of expression and association outlined in the constitution of Barbados.

The case involved a public officer who sought constitutional relief after disciplinary action was contemplated against her after she spoke on a Barbados Labour Party (BLP) platform during the 2022 general election.

The relevant text is contained in the **Barbados General Order** 3.18.1, which states:

Officers and employees are expressly forbidden to participate actively in politics, including the following:-
(a) being adopted as a parliamentary candidate; (b) canvassing on behalf of any party or candidate for election to the House of Assembly; (c) acting as agents or subagents for any candidates for election; (d) holding office in party political organisations; and (e) speaking at political meetings.

The High Court Judge stated (para 38-39) that:

It is plain to the Court that General Order 3.18.1 is a sweeping, blanket ban, permitting of no exceptions. The restriction is absolute and universal to all public servants from lower-level public servants . . . to the highest rank public servant. This sort of blanket restriction does not satisfy the qualification in the Constitution that the restriction be reasonably required for the proper performance of their function. It is therefore inconsistent with the general right guaranteed by freedom of expression and association....In the circumstances, I hold that General Order 3.18.1 has not satisfied the criterion of being reasonably required as it is disproportionate in not distinguishing between classes of civil servants as to the restraints imposed on freedom of expression and/or the types of political activity. It is therefore void for unconstitutionality.

In the St Christopher case, *Leon Natta-Nelson v The Attorney General of Saint Christopher and Nevis* KN 2019 HC 27, an accountant in the Customs Department (Mr. Natta-Nelson) was desirous of contesting an electoral seat against the Prime Minister but was prevented from participating in political activities pursuant to Rules 36 and 38 of the Public Service (Conduct and Ethics of Officers). After a lengthy debate including on Mr. Natta-Nelson’s level of

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seniority and an extensive discussion on proportionality, the Court concluded that Rules 36 and 38 contravened the right to freedom of expression and association guaranteed by the constitution of Saint Christopher and Nevis.

Both cases followed the Privy Council decision in *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69 (an appeal from Antigua and Barbuda) which would also be binding on Courts in the VI which reconfirmed a three-way test to assess whether a restriction on a fundamental right was excessive or arbitrary: consider first whether the legislative objective is important enough to restrict a fundamental right; then (ii) whether the measures used to underpin these objectives are rationally connected to it; and then (iii) whether the means used to restrict the freedom are more than are necessary to achieve the legislative objective.

The Commission must stress that there are other judicial review cases in several jurisdictions that, in fact, *upheld* language governing public officers and political activity. Regardless, the common theme across the cases is one of balance and proportionality (the third limb of the *de Freitas* test).

As noted in *Natta-Nelson* (p42):

In deciding whether any such restriction is constitutional the court must of necessity consider where to strike that balance paying close attention to the need to preserve the impartiality and neutrality of public officers in order to preserve public confidence in the conduct of public affairs.

As noted in the Natalie Murray case (para 23):

...it is pellucid that General Order 3.18.1 applies to all civil servants without distinctions. It does not distinguish between different categories of civil servants. It is all embracing. The rank or function of the civil servant is of no moment. Further it is all embracing in terms of type of activity.

The Commission is of the view that it is not the Constitution that needs to be amended but, rather, any relevant rules, regulations and guidance (e.g. General Orders) which address behavior of Public Servants at political activities. It is the latter which need to conform to the former.

Whilst the Commission has concluded that the recommendation is one more appropriately addressed outside of the Constitution, we would like to close with an acknowledgment of recent attempts by the Deputy Governor to be just in his appreciation of these rights as they apply to Public Servants in the VI. In **Election Guidance Notes for Public Officers** attached to the Deputy Governor Circular #2 of 2023 dated 9 March 2023 (at para 5.3), it states as follows:

While there is justification for some restraint on a public officer's freedom of expression and ensuing participation in political matters, it is recognised that public officers cannot, and indeed are not expected to, be silent members of society. A democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. And, as such, all members of society should be permitted, and indeed are encouraged, to participate in that discussion. Therefore, a blanket prohibition against all public discussion and participation in all public issues as well as engagement in activities by all public officers would simply deny fundamental rights to public officers. As such, a balance is required.

The principle stated above is a good beginning. What is now required, in the view of the Commission, is an updating of the language in the guidance governing the Public Service. The Commission is aware that there were on-going attempts to produce a Public Service Management Code to replace General Orders in their entirety and that, during the writing of this Report, the new Public Service Management Code was actually finalised and issued. However, the issue of permissible political activity is not addressed directly in the new Code in that the blanket ban on political activity in General Orders has not been addressed at all, although it was taken out. Bespoke references in the new Code to social media behavior do not remedy the oversight. The Deputy Governor may therefore wish to reconsider the omission.

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Inspiration may be found in the UK's Civil Service Management Code at paragraphs 4.4 and 4.4 Annex A. Civil Servant positions are ranked in categories – e.g. 'politically restricted' such as senior civil servants and some mid-level civil servants, or 'politically free' such as industrial grades. Approval may be granted for other civil servants to take part in political activities depending, for example, on the level of sensitivity of their job. Permission can be withdrawn at any time and without notice. A similar model has also been used in the Overseas Territory of Montserrat in their '**Election Guidance Notes for Public Officers in the Montserrat Public Service**' issued in September 2019. In the US, political activity by employees working in the executive branch of the federal government is regulated under **The Hatch Act 1939** on which there is much information publicly available.

Recommendation No. 39 Freedom of expression and freedom of assembly – political activities

The Commission therefore recommends that there is no need to amend the Constitution to protect the right of public servants to participate in political activities. However, the Public Service Management Code should be amended, or supplementary guidance provided, to reflect the modern-day constitutional case law which rejects an absolute ban on political activities by public servants. Further consideration may be given to categorising Public Service posts according to permitted levels of political activity similar to what has been done in the UK and followed in Montserrat.

4.8 Bill of Rights – Freedom of expression and freedom of assembly – resign to run

Another issue brought to the Commission is the perceived need for a public servant to resign in order to contest a seat for political office. The ancillary question to this is whether the officer, if unsuccessful, has an option to be reinstated in his former position or to rejoin the Public Service although in a different position. Finding an appropriate approach to take in a small jurisdiction with a limited pool of qualified persons – particularly where the political talent is likely to emanate from the very same Public Service – is a challenge.

In the Constitution at section 66 it states (under the heading ‘Disqualifications for elected membership’) that:

No person shall be qualified to be elected as a Member of the House of Assembly who— (a) holds, or is acting in, any public office;....

In the Montserrat Constitution there is a similar section. In the case of *Vickie Stephenson v Deputy Governor Lyndell Simpson and The Attorney General*²¹⁷, the High Court of Montserrat was swift to confirm that, where such a prohibition exists in the Constitution, a public servant must resign in order to run for political office.

The position in the UK is generally similar but depends on whether the civil servant is in the politically free category or politically restricted category and is summarised in paragraphs 4.4.19 -4.4.21 of the Civil Service Management Code as follows:

- 4.4.19 Civil servants are disqualified from election to Parliament (**House of Commons Disqualification Act 1975**) and from election to the European Parliament (**European Parliamentary Elections Act 1978**). They must therefore resign from the Civil Service before standing for election in accordance with paragraphs 4.4.20 and 4.4.21.
- 4.4.20 Civil servants in the *politically free group* [emphasis added] are not required to resign on adoption as a prospective candidate. But to prevent their election being held to be void they must submit their resignation before they give their consent to nomination in accordance with the Parliamentary Election Rules.
- 4.4.21 All other civil servants, including civil servants on secondment to outside organisations, must comply with the provisions of the **Servants of the Crown (Parliamentary, European Parliamentary and Northern Ireland Assembly Candidature) Order 1987**. They must not issue an address to electors or in any other manner publicly announce themselves or allow themselves to be publicly announced as candidates or prospective candidates for election ...; and they must resign from the Civil Service on their formal adoption as a parliamentary candidate or prospective candidate in accordance with the procedures of the political party concerned. Civil servants not in the politically free group who are candidates for election must complete their last day of service before their adoption papers are completed.

In Bermuda, section 30(3)(c) of the Bermuda Constitution addresses disqualification of membership and states (amongst other things) that the Legislature may by law provide “that a person may stand as a candidate for election to the House of Assembly notwithstanding that he holds or is acting in any public office specified (in the manner aforesaid) by such law if he undertakes to relinquish or, as the case may be, to cease to act in that office if he is elected as a member of that House....” Section 30(4) goes on to state that such law “may contain incidental and consequential provisions, including provision that a member who has given such an undertaking ... shall be incapable of taking his seat in the House until he has fulfilled that undertaking and shall vacate his seat if he has not fulfilled it within such time as is specified by such law....” The Commission is not in favour of the Bermuda approach as it considers the alternatives discussed herein to be clearer in interpretation and much more flexible.

²¹⁷ [2019] ECSC J1106-2.

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This leaves the next question of whether, unsuccessful, the former public servant has an option to be reinstated to his former post or to rejoin in another position in the Public Service.

The UK's Civil Service Management Code does address the issue of reinstatement and rejoining – although it does not recognise the subtleties between the two concepts – as follows:

- 4.4.6 Departments and agencies must reinstate civil servants in the politically free group who resign to stand for election (see paragraph 4.4.20 below) provided they apply within a week of declaration day if they are not elected. If they are elected, they must still be subsequently reinstated if:
- a. they cease to be a Member after an absence from the Civil Service of not more than five years; and
 - b. they apply for reinstatement within three months of ceasing to be a Member.

If the first of these two conditions is not met, reinstatement is at the discretion of the department or agency, but departments and agencies are encouraged to treat applications sympathetically.

- 4.4.7 Departments and agencies have discretion to reinstate civil servants who are not in the politically free category following resignation to stand for election to Parliament or the European Parliament. Discretion to reinstate should normally be exercised only where it is possible to post staff, at least initially, to non-sensitive areas.
- 4.4.8 Where a civil servant is reinstated, the period of the break will not count for pay or superannuation purposes. Salary will not be payable during the break.

- 4.4 Annex para 4: Where a civil servant is adopted as a parliamentary candidate and is therefore required to resign, departments and agencies may, at their discretion, make an ex-gratia payment equivalent to the period of notice to be given to the individual if the adoption process does not reasonably allow for the individual to give full notice.

This issue was also discussed in the Stephenson case (where, interestingly, the concepts of political grouping of Civil Service posts were adopted from the UK's Civil Service Management Code but not the provisions on reinstatement). There, the Judge considered that the ordinary meaning of 'resign' is to surrender power to another and that, therefore, in the absence of the Legislature addressing the matter, the constitutional position is that an unsuccessful public servant should not harbor any anticipation of being reinstated to his post or rejoining the Public Service (see paras 23 and 24 of judgment).

...Further, there is the danger an anticipation of reinstatement would undermine the effect of any guidance on neutrality.... So, to avoid casual candidacy, and to preserve the neutrality of the public service, there cannot be any 'anticipation' of reinstatement"(see paras 32-34 of Stephenson judgement)

In summary, a constitutional amendment is not necessary to address this issue in the VI. In the absence of legislation, the constitutional position is that a public servant must resign in order to contest an election and that, if unsuccessful, there is no default position that he should be considered for reinstatement to his position or able to rejoin the Public Service in a different capacity. However, the Public Service Management Code may be amended in the future to reflect a more modern position on political activities in this regard. If this is done, the Commission suggests the following guidance:

- (a) **only** public servants in the **politically free** group would not be required to resign on adoption as a prospective candidate. However, in order not to be disqualified under the Constitution, they must submit their resignation prior to being nominated on nomination day;
- (b) **only** public servants in the **politically free** group who resign to stand for election would be eligible to be reinstated provided they apply within a week of the return of officers in a General or By-Election. If

- (c) the nature of the post is such that it cannot remain vacant in the interim (e.g. ambulance driver, fireman etc.), then the officer is to be allowed to re-join the Public Service in a similar position (subject to availability) provided he applies within a week of the return of officers in a General or By-Election; and all other public servants must resign prior to adoption as a prospective candidate and, if unsuccessful, must reapply to re-join the Public Service. This way, the Public Service Commission will be afforded the opportunity to make a decision about reinstatement or rejoining in the fresh set of circumstances.

The Commission notes the current policy in the VI that the period of a break from the Public Service (for up to 5 years) does not count for superannuation purposes and so nothing above should be construed as deviating from this policy.

Recommendation No. 40 Freedom of expression and freedom of assembly - Resign to run

The Commission therefore recommends that the existing requirements in the Constitution for a public servant to resign if he or she is desirous of contesting an election should remain.

4.9 Right to an Education

The absence of a right to secondary education in the VI Constitution attracted some criticism even when it was pointed out, as highlighted in the 2005 Commission report,²¹⁸ that such a right exists in the **Education Act**.

Section 22(2) of the VI Constitution declares that:

Every child of the appropriate age, as prescribed by law shall be entitled to receive primary education which shall, subject to subsection (4) be free.

This right is further defined in the **Education Act 2004** which came into force in January 2005, and initially provided in its definition section for the compulsory school age of 5-16 years²¹⁹ and repeated the upper age limit of 16 years in section 28(1). However, the **Education (Amendment) Act 2014**, amended both the definition of “compulsory school age” and section 28(1) of the Education Act 2004 by replacing the words “sixteen years” with the words “seventeen years” in both places.²²⁰ This amendment made it mandatory for every child to attend school until the last day of the school calendar in the school year in which he/she attains 17 years of age or receives his/her diploma or certificate whichever occurs first.

Very importantly, by section 17 (1) of the Education Act 2004 the tuition fees in respect of a child attending such a programme in a public school under section 28 (i.e. from age 5 to seventeen), “shall not be charged to the student or the parents of the student”. This section has also been amended by the **Education (Amendment) Act 2014**, by replacing subsection (2) with the following:

- (2) Notwithstanding subsection (1),
- (a) tuition fees may be payable in such amounts for such purposes, and by such persons as the Minister may prescribe by Order published in the Gazette;
 - (b) other charges, such as book loan fees and lab fees may be imposed at a public school or assisted private school with the approval of the Minister.”

No Order pursuant to 17(2) of the Education Act has been made. Therefore, the existing law provides for free education for students up to the age of 17 years attending a public school. This effectively means up to and including secondary level.

Section (30) of the **Education Act 2004** also prohibits discrimination on any grounds, against any person who is eligible for admission to a public school or an assisted private school, as a student, on the grounds of “race, place of origin, political opinions, colour, creed, sex, mental or physical handicap”.

The core question for consideration is whether compulsory education up to age 17 years - that is, primary and secondary education as provided by law - should be a constitutional right. Two of the OT’s in the Caribbean have included such a provision in their Constitutions.

The **Montserrat Constitution Order 2010**, in section 12 (2) states:

“Every child of the appropriate age, as provided by law shall be entitled to receive primary and secondary education which shall, subject to subsection (3) shall be free.”

The **Cayman Islands Constitution Order 2009**, section 20 (2) states:

²¹⁸ Report of the Constitutional Review Commission (2005), para 7.24

²¹⁹ Education Act, 2004 (No. 10 of 2004), section 2.

²²⁰ Education (Amendment) Act, (No. 8 of 2014), section 3(b) and section 10.

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“The government shall seek reasonably to achieve the progressive realisation, within available resources, of providing every child with primary and secondary education which shall subject to subsection (3) shall be free.”

A number of attendees at public meetings discussed this subject and felt strongly that the right to education up to secondary level ought to be a constitutional right. A few persons believed the right ought to remain at primary level, while another few supported the claim that primary, secondary and tertiary education ought to be a constitutional right.

There is also the argument that the available resources in the VI may not be adequate to support making primary **and secondary education** a constitutional right.

A primary education in this century does not equip a student with the skills and competencies to survive the diversity, turbulence, challenges and changes within society. For example, a student of this age will be challenged with the impact of scientific (climate change) and technological advances (AI) on their lives, further supporting the inadequacy of a primary and secondary education for successful living. It can also be argued that the present-day foundation of secondary education may not be adequate for successful living. One can also argue that it is because of the potential deficiencies at primary and secondary levels why the **Education (Amendment) Act, 2014** extends compulsory education to age 17.

Our sister OT's of Montserrat and the Cayman Islands have seen the importance of primary and secondary levels of education in laying a foundation for life and have made it a constitutional right. The Cayman Islands Constitution acknowledges the progressive nature of the right which gives the government room to address the needs in a timely manner.

Relevant international instruments such as the **International Convention on Economic, Social and Cultural Rights** and the **UN Convention on the Rights of the Child** refer to the progressive implementation of free secondary education.

Recommendation No. 41 Right to an education

The Commission therefore recommends that, section 22(2) of the Constitution should be amended to refer to the progressive realisation of free secondary education.

A proposed draft follows:

Drafting proposal

(2) Every child of the appropriate age, as provided by law, shall be entitled to receive primary education which shall, subject to subsection (4), be free. The Government shall pursue the progressive realisation of free secondary education up to the age of seventeen years, in accordance with the available resources of the Territory.

4.10 Right to Education for ‘Special Needs’ Children and Persons

There were repeated requests from the public for education for children and persons with special needs to be addressed in the Constitution.

The core issue can be stated as follows. Termination of education at the age of 18 years has recently been applied to students with special needs. Commentators asserted that the right to education for students with special needs must take into account that those children may need a longer time to absorb primary and secondary curriculum, hence the law should allow them a longer time to complete compulsory schooling. It was felt that the Constitution should protect their right to receive the primary and secondary education afforded by the Government without discrimination on the basis of their ‘special needs’, be it physical or mental disability.

Relevant laws for the VI include the following:

- Section 22 of the Constitution - Protection of the right to education provides that every child of the appropriate age, as provided by law, shall be entitled to receive primary education which shall, subject to subsection (4), be free.
- Section 26 of the Constitution - Protection from discrimination includes disability as a ground for discrimination and provides that no law shall make any provision that is discriminatory either of itself or in its effect. However, it is permissible for laws to accord privilege or advantage to persons who may have a disability, provided such privilege is reasonably justifiable in a democratic society.
- Section 30 of the Constitution on the Protection of children provides that the Legislature may enact laws to promote the well-being and welfare of children and provide them with such facilities as would aid their growth and development.
- The **UN Convention of the Rights of the Child** has been extended to the VI; however, the **UN Convention on the Rights of Persons with Disabilities** has not.
- The VI **Education Act 2004** (as amended) includes a Division on ‘Special Education’ establishing an obligation for the Chief Education Officer to provide special education programmes for students of compulsory school age who by virtue of intellectual, communicative, behavioural, physical or multiple exceptionalities are in need of special education.
- The VI **Mental Health Act 2014** incorporates the United Nations General Assembly Resolution 46/119 ‘Principles for the protection of persons with mental illness and the improvement of mental health care’, which acknowledges that persons sequestered in mental health facilities should have access to education. That law does not otherwise address the educational needs of persons, particularly children, who may be suffering from a mental disability.

One member of the public highlighted the rights enshrined in the **UN Convention on the Rights of Persons with Disabilities**, in particular the right to enjoy all rights without discrimination, right to medical treatment, right to economic and social security, right to employment and reasonable remuneration, stating “disabled persons are entitled to have all their rights taken into account in all areas of social and economic planning but these kids are left behind”.

Further concerns expressed centered on the lack of adequate medical care within the Territory for physically disabled persons (their disability could not be accommodated by medical services providers), the level of educational facility afforded (the VI has one learning centre for special needs students but it was destroyed by Hurricane Irma and presently under reconstruction), and the lack of reserved handicap parking for persons with disabilities. But by far the most serious concern was fulfilment of the right to education and the capacity of ‘special needs’ students to enjoy

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the right here in the VI without having to incur the very high costs (whether to parents or the Government) to travel outside of the Territory.

Commentators challenged the Commission that the constitutional right to education for special needs students, taking into account their disability, should entail an exception from the 17-year age limit in the **Education Act, 2004**.

The Constitution contains a guaranteed right to primary education (s.22) and prohibits discrimination on the basis of disability (s.26). This falls short of the strongest level of protection which would be a guaranteed right to education for children with disabilities or protection against discrimination on the basis of disability in education.²²¹ The VI also enjoys a free public secondary education system under legislation in the Education Act 2004.

The vision expressed by members of the public was that of a VI where students with special needs or disabilities should be able to benefit from free public education up to secondary level until they were 21 or older, based on what would be in the best interests of the person, who may need more time to assimilate the standard curriculum. This matter may be quite adequately addressed by making specific provision in the Education Act or other legislation so the question remains whether it needs to be elevated to the status of a constitutional provision.

The VI has recognised the need to accommodate students with disabilities in Vision 2036, the National Sustainable Development Plan. Vision 2036 establishes National Outcome #3 as ‘An Educated and Highly Skilled Population’ and states that:

the structure of the education and training sector must provide opportunities for all, fostering both inclusiveness and equity. It recognizes that infrastructure and facilities of the education sector must be equipped for our 21st century learners and some may need to be retrofitted to meet, and in the case of new infrastructure designed to accommodate all students including those with **disabilities**, ensuring that no one is left behind.

The VI is also in the process of developing a national policy on special needs education.

Arguably, the issues raised by the public fall well within the ambit of implementation of the current constitutional provisions and require no further constitutional intervention. However, both the participants and the state have clearly expressed a vision of further development of education for children and persons with special needs or disabilities. One could also argue that this vision warrants expression, though not necessarily at this time a guarantee on the same level as free primary education. The costs to give effect to such a right remains a legitimate concern.

Accordingly, language to reflect the aspirational nature of this vision should be added to section 22 of the Constitution (or in a later section after section 31).

Recommendation No. 42 Right to education Special needs children and persons

The Commission therefore recommends that section 22(2) of the Constitution should be supplemented with a subsection that provides for an aspirational right to education for children and persons with special needs. This would represent a progressive step that would buttress the existing prohibition against discrimination in the Constitution.

A suggested redraft follows:

²²¹ For example, Art. 63(6) (Right to Education) of the Dominican Republic Constitution (2015) provides that [t]he eradication of illiteracy and the education of people with special needs and with exceptional abilities are obligations of the State.

Drafting proposal

22.—(1) This section is without prejudice to section 21.

(2) Every child of the appropriate age, as provided by law, shall be entitled to receive primary education which shall, subject to subsection (4), be free.

Such law may, as far as practicable, make special provision for children *and persons* with disabilities and may make provision to provide them with facilities or access to such facilities as would aid their growth and development.

4.11 Human rights protection for the elderly

The Commission was asked, and reminded, to consider human rights protection for the elderly. The elderly are to enjoy the same human rights as other persons within society.

Existing laws and policies of the VI already go a significant way in recognising the elderly as a special subset of the population. For example, health care at the local public hospital is free for the elderly. Also, a pension is provided to senior citizens who contributed to the social security scheme. In addition, the Social Development Department offers various services to address the needs of the needy elderly in the communities. Lastly, but importantly, the elderly may avail themselves of the protection in the Constitution against discrimination on the grounds of age, and other rights. Arguably, then, their dignified treatment, their private affairs, their religious beliefs and freedom of association - to mention a few - are just as secured regardless of their advancing age. The matter for discussion is whether more needs to be done and, if so, whether it should be elevated to the level of the Constitution as a positive, on-going and binding obligation on the Government – one on which it may be challenged and liable financially if it fails to honour such obligation.

Rights for the elderly were not considered as a special subset on individuals when human rights conventions were being developed in earlier years. A shift in focus has come about due largely to the changes in life expectancy. Human rights for the elderly is a developing area. The elderly may be identified by the defining characteristic of age but, otherwise, the group is not homogenous. Their needs vary as much as their number. In addressing this issue in the VI, Commissioners are conscious of the need not to overlook at least two related issues.

First, it would be helpful for the Government to undertake the type of population policy that is briefly discussed elsewhere in this Report (see 5.1 Population policy) which can then feed the relevant data on the elderly in the VI to help determine exactly where any policy focus on this group is best placed.

The second is a cultural point. It is not traditionally part of VI culture for families to transfer to the Government their obligations to care for elderly family members. However, it is recognised that circumstances are changing. Such familial obligations, however, are expressly given recognition in some constitutions in other countries.²²²

Recommendation No. 43 Human rights protection for the elderly

The Commission therefore recommends that, a provision specifically for the elderly should be included in the Constitution within the fundamental rights chapter.²²³ A proposed draft follows:

Drafting proposal

Protection of the elderly

The Legislature may enact such laws as it considers fit to promote the well-being and welfare of the elderly and to afford them protection from harm, exploitation, neglect, abuse, maltreatment or degradation and to provide them with such facilities that would enhance their welfare.

²²² The constitution of the Dominican Republic (2015), at article 57 for example, includes the following sentence under its fundamental rights chapter: "The family, society, and the State shall come together for the protection and the assistance of elderly people and shall promote their integration into active community life."

²²³ This would be similar to section 30 of the Constitution dealing with the protection of children.

4.12 Right to Fish and Farm

The Commission was reminded by a member of the public to address an issue that he raised in relation to fishing and farming. So as not to diminish the clarity and passion of the reminder, it is set out below in full:

Dear all. I take this opportunity to reiterate the importance of my contribution at the meeting held in Virgin Gorda in 2022. The input referenced is the establishment of the constitutional right for British Virgin Islands citizens to fish and farm by registration only and not by permit or license. The survival of our forebears and equally our present and future generations is directly impacted by these primary occupations. Hence the need for special constitutional protection of our livelihood (*sic*) and existence. I respectfully submit.

At the meeting in question, the community member explained that fishermen and farmers should be able to operate up to a certain level without it being considered a commercial activity.

The general constitutional position appears to be that there is typically no constitutional right to farm or fish – not even as an aspirational social right. Allowances for such activities, and the extent to which they will be recognised and regulated, are more so found in separate laws enacted by a Legislature to address agriculture and fisheries. A review of several constitutions across the world underscore this and, when any reference to ‘fishing’ or ‘farming’ is made in a constitution, it is to set out the obligation of the Government to formulate policies and/or to enact laws to regulate the sectors. In other words, all the things mentioned by the commentator may be included in a constitution, but as policy obligations.

Just by way of example, the Commission has come across language such as:

In pursuit of the agricultural policy objectives the state shall provide preferential support to small and medium-sized farmers...,²²⁴ and

The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of the communal marine and fishing resources, ... It shall provide support ...The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion....²²⁵

These are not ‘rights’. The commentator was very clear that he wanted a constitutional right for a specific thing. Whilst the Commission is fully in favour of including progressive rights in the Constitution where these can be accommodated, it does not wish to do so where it is not clear what the right would mean, and what obligations would be on the Government so that the right can be enforced against it, if necessary.

The present position in the VI is that, other than pure backyard farming or pleasure shore-fishing, for example, some registration or licensing arrangement is applicable for both subsistence fishing and farming. The requirements are typically neither onerous nor costly, but are necessary. In the area of subsistence fishing, for example, such regulation is designed to dovetail with and monitor wider marine safety, vessel operational and over fishing related obligations locally and internationally.

Any further consideration of the commentator’s request whether in the Constitution or in separate legislation would therefore prove challenging in today’s modern landscape and, if the Government were so minded to address it, would require thorough analysis and examination of all the associated issues, including international obligations.

²²⁴ Portugal Constitution 1976 rev 2005.

²²⁵ Philippines Constitution 1987.

Recommendation No. 44 Right to fish and farm

The Commission therefore recommends that no amendment should be made to the Constitution to include a right to fish and farm without a licence.

4.13 Right to bodily integrity

At one of the public meetings, the Commission was asked to consider including in the Constitution a right to bodily integrity. The right to bodily integrity entitles one to freedom from imposition of acts against one's own body to which one did not consent.

It is an extremely wide and far-reaching right and the right is afforded to adults as well as to children. By way of example, some of the social issues and actions relative to this right include ear-piercings, abortions, circumcision for boys, sterilisation of differently-abled children, corrective' surgeries on intersex children, and euthanasia, to name only a very few.

The Constitution already recognises some of these physical integrity rights – for example, the right to life, freedom from torture, and protection from inhumane treatment. However, a singular statement in a constitution declaring the right to bodily integrity or physical integrity is less common. Considering the existing constitutional protections, and given the formative nature of the law and jurisprudence in this area, the Commission recommends against express provision in the Constitution of a right to bodily integrity.

Recommendation No. 45 Right to bodily integrity

The Commission therefore recommends that there should be no change to the Constitution to include a fundamental right to bodily integrity.

4.14 Accessibility of laws

A person's ability to easily and freely access laws that govern him bears a direct correlation to his access to justice. They are inextricably linked.

Yet, the VI struggles to regularly consolidate **all** laws, and to make them publicly accessible free of charge. It is not only the public who are affected but also judges, lawyers, court personnel, and many other stakeholders.

Laws are published in the Official Gazette and only accessible (other than by Government users) by paid subscription. What is more, not all laws are published in the Gazette. Laws prior to 2006 are not available through the Gazette. A compounding factor is that the search engine in the Gazette only works for 'recent gazettes', that is, the gazettes that were published within a two-month range prior to the search date. Finding other laws therefore requires one to know the exact date that they were gazetted, or conduct the painstakingly tedious task of searching the database manually. In addition, there is no publicly accessible index of laws.

Regarding consolidations, multiple decades have passed without a general law revision exercise being undertaken. The last effort at an official consolidation after a decades-long hiatus was in 2013 and the concentration was on financial services and criminal related laws. By the time those were published in 2016, several of those laws had had significant and multiple amendments.

Since 2013, there have been laws that have been officially consolidated. However, such consolidations are not widely published. Most stakeholders are left to undertake research through unreliable feats of mental gymnastics – comparing multiple updated provisions in amendment laws against the principal law. ([See the related topic of the Law Reform Commission](#))

The result is that stakeholders suffer in silence. Several (including professional firms) resort to unofficial consolidations. It is inevitable, but unfortunate, that sometimes the incorrect law is quoted or relied on. Sometimes it also leads to legislation inadvertently not being brought into force.

The question then becomes whether this is a constitutional matter. There is no denying that both aspects of unimpeded accessibility (publication of consolidated laws as well as free access) are constitutional matters affecting quality of justice and the rule of law. Laws apply to everyone within a country and they should thus be accessible by all, regardless of the purpose for which they need to be accessed.

Recommendation No. 46 Accessibility of laws

The Commission therefore recommends that prior to Chapter 10 of the Constitution (Transitional and Miscellaneous)²²⁶ a new section should be included to address the accessibility of laws. A proposed draft follows:

Drafting proposal

Accessibility of laws

As an essential element of the rule of law and the administration of justice, there shall be:

- (a) free and easy access to the Territory's legislation (including an index of legislation); and
- (b) regular law revision,

and financial resources must be made available for these purposes.

²²⁶ It is not the recommendation of the Commission to include this in the fundamental rights section at this time.

4.15 Cabinet and Cabinet reform

A significant number of comments were submitted to recommend changes in the Constitution in relation to Cabinet, including various issues relating to Cabinet procedure. Most comments were predicated on the need to clarify existing provisions governing Cabinet. However, several called for fundamental changes.

Mandatory attendance of Attorney General

The Commission received a recommendation that section 49(3) of the Constitution should expressly stipulate that the Attorney General is one of the persons required to attend any meeting of the Cabinet where business is being transacted, in addition to the required quorum. Whilst this recommendation appears logical, there seems to be little or no precedent for such a stipulation in other Caribbean OTs. Also, the Commission has not received evidence that the Cabinet practices otherwise. Further, with few exceptions, all Cabinet papers must contain comments from the Attorney General.²²⁷ The Commission therefore makes no recommendation on this matter.

Power to invite other persons

On the issue of who attends Cabinet meetings, other than Cabinet members, the Constitution limits the persons whom Cabinet can summon to public officers and officers of statutory boards. It was recommended to the Commission that this needs to be expanded as Cabinet may benefit from the counsel of others, for example private individuals and specialists. The extension would also allow the Cabinet to invite representatives of other districts not represented in Cabinet, and Junior Ministers, from time to time. The suggested amendment is already provided for in other OT Constitutions. Whilst Cabinet cannot summon other such persons, it may invite them. The Commission therefore recommends that section 50(1) of the Constitution be amended to permit Cabinet to invite “any other person”. The current drafting of 50(2) (dealing with summoning statutory bodies) should otherwise remain.

50.—(1) Whenever any business before the Cabinet renders the presence of a public officer **or any other person** desirable, the Premier may summon such public officer, **or invite such other person**, to a meeting of the Cabinet; and the Premier shall summon such an officer if the Governor, acting in his or her discretion, so requests.

The role of the Cabinet Secretary

There were a number of suggested amendments relating to the role and functions of the Cabinet Secretary. Several of these would buttress the constitutional footing of the Cabinet Office but several were procedural or administrative and more appropriate for inclusion in the Cabinet Handbook. Having noted that, the Commission does agree that the political neutrality and objectivity of any policy advice given by the Cabinet Office can be emphasised in section 51(3)(a) of the Constitution, given that it is a pivotal characteristic of the holder of such office. The Commission also agrees that, whilst the functions of the Cabinet Secretary are substantially set out, a general reference to administrative support (other than the catch-all provision in 51(3)(g)) is noticeably absent and that this can be rectified by a simple amendment to section 51(2), based on the similar provision used in other constitutions.²²⁸ The relevant sub-sections would then read as follows:

51(2) The Cabinet Secretary shall have charge of the Cabinet Office, attend meetings of the Cabinet and be responsible for **arranging the business for and** keeping the minutes of the meetings of the Cabinet and for conveying the conclusions reached at the meetings to the appropriate person or authority.

²²⁷ Cabinet papers related to departmental annual reports are an example of the exception to this practice.

²²⁸ See s36 Singapore Constitution, s.62 St Christopher and Nevis Constitution and s69(2) of the Bermuda Constitution, for example.

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(3) The Cabinet Secretary shall— (a) provide such **impartial** policy advice and **administrative and technical** support to the Cabinet as the Cabinet may require;....

Responsibility to chair Cabinet

The Cabinet-related provision in the Constitution that appears to be the source of greatest agitation is section 49. That section is typical of other OT constitutions and simply states that the Governor shall, so far as practicable, attend and preside at meetings of the Cabinet. It goes on to state that, in the absence of the Governor, there shall preside at any meeting of the Cabinet, the Premier, or in his or her absence, the Deputy Premier. Invariably, an appointment of an acting Governor is made when the Governor is absent. The appointment of a Governor's Deputy under section 39 where no acting appointment to the office of the Governor is made, is rare.

Although on its face plain and clear, section 49 is believed to be at the centre of interpretation and misinterpretation depending on the legal advice provided. The cause of the confusion seems to stem from the differing ways in which the office of the Governor may be interpreted as relevant – whether there is an acting Governor, whether there is just the Governor's Deputy but no acting appointment – whether the substantive Governor is in or out of the VI. In the Commission's view, 'Governor' should only be interpreted to include a person holding an appointment as Governor or to act as Governor. This would be in keeping with the **Interpretation Act**. All other circumstances are irrelevant and, in the absence of such an appointment, if the Governor is not available to chair Cabinet, the Premier should chair it. The Commission is loath to recommend changes to the current provision where not necessary. There are other instances where attempts to clarify have led to more confusion. It is respectfully suggested that the Cabinet Handbook should address the issue.

The Commission received additional recommendations relative to Cabinet reform. They include the issue of who should chair Cabinet, and also some thoughts on enhancing Cabinet's policy role.

Whenever this issue of Cabinet came up, it was the unanimous view of commentators that the Premier should be the Chairman of Cabinet, reflecting a more modern constitutional structure.

Whether the Cabinet Office should be fulfilling a greater and more central role in coordinating policy was also raised. Presently, the Cabinet Office serves as a secretariat. Several comments received pointed to the need for a stronger policy coordination function in Government. This need is highlighted throughout this Report and the Commission was assured at its meeting with Public Service Top Managers that the creation of a central unit for this purpose under Premier's Office is imminent. Looking to the future, the Government may wish to undertake a review of how policies across Government departments are coordinated, developed and implemented and whether there is greater appetite for the Cabinet Office to do more – such as public consultations, constitutional reform, guidance for Ministers, guidance on good governance, Public Service training, housing certain tribunals and projects of an independent or apolitical nature. An example of the latter would be to facilitate information requests under any future [Freedom of Information](#) legislation. Most of these initiatives can be implemented without the need for any amendment to the Constitution.

Recommendation No. 47 Cabinet and Cabinet reform

The Commission therefore recommends that:

- (a) Section 50(1) of the Constitution should be amended to permit Cabinet to invite "any other person";
- (b) Section 51(2) of the Constitution should be amended, consistent with the formula used in other constitutions, to add the responsibility of the Cabinet Secretary for arranging the business for the Cabinet;
- (c) Section 51(3)(a) of the Constitution should be amended to specify that policy advice given by the Cabinet Secretary be politically impartial, and to also include a general reference to administrative support to be given by the Cabinet Secretary;

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- (d) Section 49 of the Constitution should be amended to provide that the Premier shall preside at meetings of Cabinet, an arrangement which is more reflective of a modern constitutional structure; and
- (e) The Cabinet Office should be playing a stronger role in the coordination, development and implementation of Government's policy across departments.

4.16 Pension Fund

The Constitution states that awards of pensions shall be a charge on and paid out of the Consolidated Fund or the Pension Fund of the VI.²²⁹

Currently, there is no Pension Fund established and pensions continue to be a charge on the Consolidated Fund.

One commentator explained that the Government presently has a defined benefits pensions system which is an unfunded liability on the Territory's coffers and recommended that it be switched to a contributions-based arrangement. The present system cannot be sustained into the future given improved life expectancies and the number of persons retiring on the basis on 25 years of service. His recommendation is for the Government to change from the present arrangement to a hybrid of benefit-based and contributions-based plan to allow for a smooth transition/grandfathering of existing pensions. The hybrid was also suggested to give sufficient time for an investment strategy to be effective. Arguably, even with the grandfathering into a hybrid system, the existing pensioners would have to start contributing (noting that pensions are only vested after 10 years of contributions).

The Report of the 2005 Commission notes the Chief Auditor as saying that the Government was at that time looking into setting up a Pension Fund. Work on the Pension Fund appears to be in train although it remains unclear to the Commission exactly how close the VI is to having this fully in place. In communication with this Commission, the Financial Secretary's update to the Public Service Top Managers noted that the actual legislative and operational framework for the Pension Fund remain incomplete.

It is important that legislation is enacted to manage financial liability of the Territory, in addition to protecting the rights of public servants, when transitioning to a contributory pension system.²³⁰

Recommendation No. 48 Pension Fund

The Commission therefore recommends that the current optional language in section 100 ("Consolidated Fund or Pension Fund"), of the Constitution should be redrafted to require transitional legislation following the establishment of the Pension Fund. A proposed redraft follows.

Drafting proposal

Pensions, etc, charged on Consolidated Fund or Pension Fund

100. Awards granted under any law for the time being in force in the Virgin Islands shall be charged on and paid out of the Consolidated Fund or Pension Fund of the Virgin Islands. The Territory shall establish transitional legislation once the Pension Fund is established addressing, amongst other things, that there shall be no further liability on the Consolidated Fund for new employees in specified circumstances.

²²⁹ Virgin Islands Constitution Order, 2007, s100.

²³⁰ Grenada Public Workers Union et al v. Attorney General of Grenada et al; Claim GDAHCV 2019/0224.

4.17 Qualification for Elected Membership to be Reduced to 18 years

A proposal was made to the Commission that consideration should be given to reducing age for qualification to hold elected office from 21 years to 18 years.

International electoral standards, which are defined in the international public human rights law, allow restricting candidacy on the basis of age. The interpretation of the ICCPR offered by the United Nations Human Rights Committee in the General Comment 25 states:

Any conditions which apply to the exercise of the rights protected by article 25 (of the ICCPR) should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen.

In the US, many groups have attempted to lower the age of candidacy requirements in various states.²³¹ During the early 2000s, the British Youth Council and other groups successfully campaigned to lower the age of candidacy requirements in the UK. As a result, the age of candidacy was lowered from 21 to 18 in England, Wales and Scotland on 1 January 2007, when section 17 of the **Electoral Administration Act 2006** came into force.

Recommendation No. 49 Qualification for elected membership to be reduced to 18 years

The Commission therefore recommends that no change should be made to the Constitution to reduce the age for qualification to hold elected office to 18. International practice continues to favour restricting elected office to persons who have attained the age of 21.

²³¹ In 1994, South Dakota voters rejected a ballot measure that would have lowered the age requirements to serve as a State Senator or State Representative from 25 to 18. In 1998, however, they approved a similar ballot measure that reduced the age requirements for those offices from 25 to 21. In 2002, Oregon voters rejected a ballot measure that would have reduced the age requirement to serve as a State Representative from 21 to 18.

4.18 Defining the Role and Responsibilities of the Premier in the Constitution

The Commission received a proposal during the public consultation process that the role and responsibilities of the Premier be defined in the Constitution.

The Commission acknowledges that it would be difficult to codify all the roles, responsibilities and powers of the Premier in this manner, and that there are divergent views on whether it would even be desirable to do so. Whilst supporters of codification note that it would bring clarity, it would or could reduce flexibility.

Notably, in the UK there is no constitutional definition or single source for what the role of Prime Minister involves and the powers the holder of that office can exercise. The role and powers are a matter of convention and usage, not statute, and therefore to a large degree flexible and subject to variation and change over time. In 2011 the UK government did however publish a Cabinet Manual which contains arguably the most comprehensive official account of the role and powers of the Prime Minister.²³² Also, the devolved Administrations have set out the basic architecture of how the Premier is appointed and, in broad terms, his or her executive functions.

It is useful to note that in some Caribbean countries, there is a movement towards developing job descriptions for both parliamentarians and Ministers of government, however, there are no proposals for these to be included in the Constitution.

It is the view of the Commission that the wide powers enjoyed by the Premier, coupled with the fact that the Premier performs functions in both the Executive and the Legislative arms of Government, intensify the need for clarity around the extent and legitimacy of those powers. There is a compelling case for the need to develop an open and transparent statement of the Premier's roles, responsibilities and powers in law.

The Commission further notes that there is room for improving clarity in the minds of the public around the roles, responsibilities and duties of the Premier. Defining the role and powers of the Premier could also be a significant step in the direction of improving the checks and balances on the Premier and the mechanisms by which he or she is held accountable. Where powers, roles and responsibilities are clearly defined, arguably the House of Assembly, the Cabinet and the people could be more assertive in instances where the Premier is perceived to be acting outside the scope of his or her powers.

However, it is not a common feature of the constitutions of the Caribbean or the British OTs to outline the roles and responsibilities of the Premier/Prime Minister, although it is generally accepted that these extend far and wide. David Burt, Premier of Bermuda has commented that, "The Premier is the leader of the government, so the Premier runs the Cabinet – myself and ten other cabinet ministers. We're the ones who have the responsibility for government. There is not any particular limit on the items we can do..."²³³ The Cayman Islands stands out as an exception as section 50 of that territory's constitution specifically addresses the functions of the Premier and imposes an obligation on the Premier to exercise those functions in the best interests of the Cayman Islands.²³⁴

While increased clarity on the responsibilities of the Premier and Ministers would be helpful, the Commission of the view that it is not appropriate for such details to be included in the Constitution and would recommend that such roles and responsibilities be published by the Premier's Office or other appropriate body. However, the Commission is of the view that wording similar to that contained in the Cayman Islands Constitution would provide some guidance to Premiers in the exercise of their powers.

²³² House of Commons, Political and Constitutional Reform Committee, Role and powers of the Prime Minister, First Report of Session 2014–15, 2014 (<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/351/351.pdf>)

²³³ Business View Magazine, A Conversation with David Burt, Premier of Bermuda, November 2017. (<https://businessviewcaribbean.com/brochures/nov-2017/premier%20of%20bermuda/HTML/2-3/>)

²³⁴ Section 50, Cayman Islands Constitution Order, 2009: Functions of the Premier states that [t]he Premier shall have such functions as are conferred on him or her by or under this Constitution, and shall exercise those functions in accordance with this Constitution and any other law and in the best interests of the Cayman Islands.

Recommendation No. 50 Defining the role and responsibilities of the Premier in the Constitution

The Commission therefore recommends that the Constitution should be amended by adding a provision to section 52 stipulating that, in exercise of his or her functions under the Constitution, the Premier shall exercise those functions in the best interests of the Territory. A proposed draft follows:

Drafting proposal

52(1A). The Premier shall have such functions as are conferred on him or her by or under this Constitution, and shall exercise those functions in accordance with this Constitution and any other law and in the best interests of the Virgin Islands.

4.19 Fixed date for elections

Whilst not a very frequently recurring suggestion, a few persons submitted proposals to the Commission that a fixed date for elections be implemented.

Many Western nations have fixed-term elections, including the US, UK and Canada, as well as most countries in continental Europe. Notably, some fixed-term systems allow for early elections under extraordinary circumstances.

The fixed date approach has not always worked effectively. For example, Canada adopted fixed date election law with exceptions in 2007, then used the exceptions to hold a general election in 2008 and again in 2011. The UK adopted a **Fixed-term Parliaments Act** in 2011 under which general elections were scheduled for the first Thursday of May, in the fifth year after the previous election. One election was held at the time it specified. That Act, having been deemed ineffective, was later repealed and replaced by the **Dissolution and Calling of Parliament Act 2022** which returned the UK to its historical system whereby governments have a maximum term of 5 years, with the Prime Minister being able to call an election before that time at their choosing.

Arguments in favour of setting the election in advance:

- Improves fairness of electoral system by eliminating ability of governing parties to manipulate the timing of elections to partisan advantage.
- Provides a level of certainty to businesses, enhancing the ability to plan.
- Conceivably, it also reduces the frequency of elections as well as the associated costs to tax payers.
- Significantly, especially to parties in opposition, it removes the ability of the governing party to call the election when it is politically expedient to do so in order to give itself an advantage (allowing the Premier to call an early election means that the Government can choose a time when it is popular in the polls, rather than waiting for the end of its term, when it may not be so popular).
- Improves transparency and predictability.
- Does not affect the power of the HoA to dissolve for elections if the Government loses the confidence of the majority.

Arguments against:

- Early elections may sometimes be to the overall best interest of a country, e.g. when a government with a small majority needs to establish a clear majority.
- The ability to 'go to the people' is a considered to be a fundamental feature of the Westminster model, and so a government with a very slim majority, which is unable to function effectively due to the strength of the opposition, would effectively be denied the chance to return to the people for a fresh mandate before the end of the term.
- They are less democratic because voters have to wait longer before they can express their disapproval.
- They can lead to ineffective governments being in power for longer unless there were mechanisms in place to facilitate an early election, for example, via a no-confidence motion.
- They lead to longer (and thus more expensive) election campaigns so it is difficult for people who are not rich to stand for office. If the election is called only a month or so in advance, then that mercifully limits the length of the campaign. This, presumably, could be countered by establishing, in law, a fixed campaign period.

The underlying sentiment behind the call for fixed date elections appears to be a frustration with the Westminster System in general and the significant powers that that system confers on the Premier, including the power to decide when to have an election.

The Commission is however of the view that establishing a fixed election date is not a magic bullet as typically there will always be exceptions in the legislation allowing for elections to be called at an earlier date. The Commission does however believe that there is strong public discontent with the power of the Premier to call a ‘snap’ election and that these powers should be curtailed if possible, perhaps by designating a minimum period after a general election in which a Premier can exercise his power to call a subsequent election, or by establishing a suitable period of notice which a Premier must provide to the public ahead of setting an election date.

Recommendation No. 51 Fixed date for elections

The Commission therefore recommends that no amendment should be made to the Constitution to provide for a fixed date for elections. However, the power of the Premier to call a snap election should be moderated if possible, perhaps by designating a minimum period after a general election in which a Premier can exercise his power to call a subsequent election, or by establishing a suitable period of notice (90 days) which a Premier must provide to the public of an election date.

This would enable the public to receive advance notice of the election date – and allow the Government/ Premier the liberty to dissolve the HoA – anywhere between 21 to 60 days prior to the election.

Drafting proposal

General elections

86.(1) A general election shall be held at such time within **two months**, but not earlier than **twenty-one days**, after every dissolution of the House of Assembly as the Governor shall appoint by proclamation published in the *Gazette*.

(2) Notwithstanding subsection (1) the Governor, acting in accordance with the advice of the Premier, by proclamation published in the *Gazette* shall give not less than 90 days notice of the date of a general election.

4.20 Run-off Provisions

The Commission received a submission from one member of the public that run-off voting be implemented in the Territory. Whilst run-off voting is a generic term used to describe any voting method that involves a number of rounds of voting, with eliminations after each round, the reference in this context is, we believe, to the two-round system known as 'run-off voting' in the U.S., where the second round is known as a run-off election.

The two-round system is widely used in the election of legislative bodies and directly elected presidents, as well as in other contexts, such as in the election of political-party leaders or within companies. It generally ensures a majoritarian result. Contrast this with the first-past-the-post system, where the winning candidate only needs one vote more than his or her leading opponent in order to win their seat and does not need to achieve a majority of votes (50%+1) in their constituency.

Under the two-round election system, the election process usually proceeds to a second round only if in the first round no candidate received a simple majority (more than 50%) of votes cast, or some other lower prescribed percentage. Usually only the two candidates who received the most votes in the first round, or only those candidates who received above a prescribed proportion of the votes, are candidates in the second round. Other candidates are excluded from the second round. The second round of voting must be held after there is sufficient time to count and verify the results of the first round. Second rounds may be held on the same day in smaller settings, or up to one month later (for e.g. in the U.S. State of Georgia). France traditionally has a two-week break before the second round.

The Commission acknowledges the drawbacks of the current first-past-the-post system, particularly in that a party does not have to receive a majority of total votes cast in order for it to win, which in turn poses the question whether or not it has the right to govern.

However, run-off voting places considerable pressure on the electoral administration by requiring it to run a second election a short time after the first, thus significantly increasing both the cost of the overall election process and the time that elapses between the holding of an election and the declaration of the result. This has the potential to lead to instability and uncertainty. In the recent general election in the Territory, second round voting would have been required in 3 districts (3, 4 and 9). There is also the added burden that run-off voting places on the voter, who has to turn out to the polling station twice. In practice, there is a sharp decline in turnout between the first round and the second. For these reasons and, noting that this was not a popular proposal, the Commission would not recommend a switch to run off voting.

Recommendation No. 52 Run-off provisions

The Commission therefore recommends that no amendment should be made to the Constitution to replace the first-past-the-post voting system with run-off voting.

4.21 Five-year election cycle

During the public consultation process one recommendation was that the Territory move from a 4 year election cycle to a 5 year cycle, however, it was not a frequent proposal

Since the **Parliament Act 1911**, the UK has maintained a *maximum* parliamentary term of 5 years²³⁵ Considerable public consultation was done at the time of the introduction of the **Fixed-term Parliaments Act 2011**, now repealed. Other parliamentary term lengths were proposed for the fixed-term, the results of which were documented in a report by the Constitution Committee. Of all the issues arising from the Fixed-term Parliaments Bill, the proposal for a 5 year *fixed* term was described in the report as creating “the most unease”.

The Deputy Prime Minister of the day set out the Government's case for a five year term:

"It is ... a length of time ... with which people are familiar ... [and] there is a pattern of five year Parliaments, at least recently ... Given the tendency for governments to be somewhat hamstrung and paralysed for a considerable period before a general election is held ... you are in practice talking about a government that can get on and do difficult things ... for about four years ... That provides a degree of stability and transparency to the political system which outweighs the self-evident fact that if you did that over a period of time, people would be voting less frequently ... I think that is a reasonable balance to strike. If one goes to four years, one is talking about a three-year period in which governments are not blighted by their own sense of mortality ... That strikes me as a rather short period. For all of those factors, we have tended to settle on five years."

Dr Gary Levy, former Professor of Political Science at the University of Western Ontario and Ottawa University, observed that opinion polls suggested that voters "abhor elections", and that constant electioneering would mean it would not be possible to keep pace with China and other developing countries where elections "do not consume the time, energy, money and political capital of the western style elections that we hold so dear." David Howarth, a former MP whose own private member's bill had set out a term of four years, saw "no obviously dispositive method for deciding between the two proposals ... fairness points more to four years, stability to five".

In the end, the Committee concluded that:

Whilst acknowledging the case made by the Deputy Prime Minister for a 5-year term, nonetheless the majority of the Committee consider that a 4 year term should be adopted for any fixed-term parliamentary arrangement at Westminster. In the view of the majority, the shift from a 5-year maximum to a 5 year norm would be inconsistent with the Government's stated aim of making the Legislature more accountable, inconsistent with existing constitutional practice and inconsistent with the practice of the devolved institutions and the clear majority of international Legislatures.

Amongst the OTs, 4-year terms are not uncommon, though the position is different in the Commonwealth Caribbean.

Overseas Territories / Crown Dependencies	Rest of Caribbean
Anguilla – 5 years	Antigua – 5 years
Bermuda – 5 years	Bahamas – 5 years
VI – 4 years	Barbados – 5 years
Cayman – 4 years	Dominica – 5 years
Gibraltar – 4 years	Grenada – 5 years
Monsterrat – 5 years	Jamaica – 5 years

²³⁵ With brief interruption during World War II.

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TCI – 4 years ²³⁶ Jersey – 4 years	St Christopher and Nevis – 5 years St Lucia – 5 years St Vincent – 5 years Trinidad – 5 years Guyana – 5 years
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Whilst a 5 year term may arguably be more conducive to allowing an administration to govern effectively, ultimately, as aptly put by the Constitution Committee in the UK in 2011, “the need to deliver effective government must be balanced against the need to maintain democratic accountability.”²³⁷ It is the opinion of the Commission that any change in the length of the general election cycle is of the utmost constitutional significance and would therefore require extensive public consultation and debate on the benefits and drawbacks of different term lengths, particularly in light of the fact that there was not significant public outcry for a shift to a 5 year term.

Whilst 5-year terms have become more common there are still a significant number of countries that maintain a 4-year election cycle. In addition, it is difficult to judge from the UK experience whether governments required to last for 5-years would be any less popular or successful than they would otherwise have been (since typically governments do not last the full 5-year term).

Overall, there was very little agitation from the public for a 5-year term in the VI.

Recommendation No. 53 Five-year election cycle

The Commission therefore recommends that no amendment should be made to the Constitution to provide for five-year election cycles.

²³⁶ Note that a 5-year term has been proposed in submissions for constitutional reform presented to the UK Government in 2023. See Turks and Caicos Weekly News. “New Constitutional Reform Proposal Submitted to the UK –Premier,” May 26, 2023. <https://tcweeklynews.com/new-constitutional-reform-proposal-submitted-to-the-uk-premier-p13273-127.htm>.

²³⁷ <https://publications.parliament.uk/pa/ld201011/ldselect/ldconst/69/6911.htm>.

4.22 Local Government

Participants at public meetings expressed a sense of dissatisfaction with delivery of services and accountability for implementation of Government projects and programmes at the local level. People were dissatisfied with the efficacy of district representatives, particularly where such representatives became Ministers, and were also dissatisfied with lack of effective government action on the ground in the areas directly touching on daily life such as:

- Condition of roads
- Public buildings
- Waste management
- Beautification
- Social support for elderly and indigent
- Youth and unemployment
- Business development in the district
- Building stronger community

In Anegada and Jost Van Dyke there were calls for a separate representative for their island in the HoA, despite small populations on these islands. The most passionate of these calls came from the more geographically remote island of Anegada. That island currently shares an elected representative with Virgin Gorda, another sister island, but with a much larger population. Jost Van Dyke shares a representative with a community on the largest island of Tortola where the central seat of Government lies.

Nonetheless, both Anegada and Jost Van Dyke communities made it clear that they wanted an elected representative of their own, who should be a resident of their own community and therefore be more accessible to them.

Therefore, the question was raised whether what was really needed was another legislator, or was there instead a need for more effective mechanisms at the community level.

This issue falls most directly within the [overarching ToRs](#) to

- Re-evaluate the vision
- Determine whether the Constitution remains a strategic fit
- Make recommendations for reform

There is no existing provision in the Constitution dealing with local government but the subject has been mentioned in some reports including the following:

- The Renwick Report recommended for Anegada an Advisory Development Committee to evolve gradually into a form of local government. The report further recommended that Anegada eventually become a separate constituency for election of a Member of the Legislature, but only at such time when the size of the population of the island so warrants.
- The Duncan Report on the review of the at-large system also mentioned the possibility of institutionalised district committee, a form of local government, to supplement the possibility of reverting to a totally at-large system of representation, and adequate political representation for the sister islands if elections reverted to all at-large candidates.

This issue was not raised by Members of the HoA in written submissions nor in responses to letters from the Commission.

The issue was raised in campaign statements by the Premier and the subsequent policy decision issued by Cabinet at its 5 April 2023 meeting that 'District Councils' are going to be established. The Permanent Secretary in the

Premier's Office has been directed to prepare a policy to inform the drafting of legislation. No public consultation has yet taken place (See related discussion earlier in 3.2.11 Direct election of Premier and Revision of At-large System).²³⁸

Review of Local Government Models

Reviewing a selection of local government models from the UK, its Crown dependencies, Cayman Islands, Grenada, St. Vincent and the Grenadines, Kiribati, Bermuda, St Christopher and Nevis, and TCI, the functioning local government systems in England, Jersey and Kiribati derive from a long-rooted tradition of local governance systems.²³⁹ Each of these models utilises *elected* representatives, enabling legislation, and multiple budgetary sources, with varying degrees of constitutional mention. In Jersey local government heads are also members of the parliament, and eligible for ministerial positions.

Ragoonath²⁴⁰ notes that local governments in the islands were modelled on systems in the colonising power, and began developing in the British islands following recommendations in the 1945 Moyné West Indian Commission Report.

The VI also received a local government Act around that time, which made provision for the establishment of mixed nominated and elected 'District Councils', the size of which would be determined by the 'Administrator' (currently styled the 'Governor'). These councils would have had substantial powers to set taxes, and make bylaws dealing with a whole host of operational issues, including:

- (a) Cleanliness of public places
- (b) Repair of roads
- (c) Caring for the sick/elderly
- (d) Sanitation generally
- (e) Regulating slaughter houses and markets
- (f) Lighting
- (g) Water supply
- (h) Fire prevention
- (i) Cemeteries
- (j) Keeping of animals
- (k) Abatement of nuisances

Having just completed 50 years with no representative government, the Islanders at the time did not accept the then Administrator's proposal that District Councils should be implemented, with the councils selecting the Member to represent the district in national parliament. They preferred immediate direct democracy at a national level, which was secured in the 1954 Constitution. Thus, the **District Councils Act 1952** was never implemented.

Analysis

The objectives to be satisfied by establishing local government are increased public participation by citizens at the local level, and improved delivery of services within the district. It would benefit the development of political leadership, community pride, and civic engagement. As elections could be based on residency requirements and

²³⁸At fn 52, 53 and 54

²³⁹ See picture insert at the end of this topic

²⁴⁰ Ragoonath, Bishnu. "Yes to Local Government, No to Participatory Democracy: The Local Governance Reform Dilemma in Trinidad, St. Lucia and St. Vincent." *Commonwealth Journal of Local Governance*, vol. 0, May 2009. ResearchGate, <https://doi.org/10.5130/cjlg.v0i0.1097>.

CHAPTER 4 – RECOMMENDATIONS ON OTHER ASPECTS OF THE CONSTITUTION

not nationality requirements, District Councils could foster more harmonious communities, irrespective of immigration status.

Review of the models suggest that elected councils are more effective than appointed councils. Successful councils are supported by legislation, the ability to receive fees for certain services in the district, e.g. property taxes, and a dedicated budget from central government.

District Councils could be considered in connection with other issues raised in this constitutional review exercise, namely,

- (1) The size of the HoA
- (2) The addition of a sixth Minister
- (3) The election of the Premier-at-large
- (4) The continuation or abolition of the at-large system

Opinions are divided as to whether district representatives should continue to be appointed as Ministers. There is some sentiment that attention to district issues suffers when district representatives become Ministers. There is countervailing sentiment that ministerial appointments increase district representatives' ability to direct funding towards district initiatives.

Detailed examination of the alternatives lies outside the scope of this review. It is anticipated that, in accordance with the Cabinet decision already taken, a substantive policy development process with well researched white paper (policy proposals) and green paper (policy recommendations) and adequate public consultation will inform selection of the preferred model. Some options for consideration during the substantive policy development process could be:

- Option 1: District Councils (they could also be called Civic Councils, Parish Councils, Community Councils) are established as separate entities, with no direct participation in the HoA. The elected representatives for the district continue to be elected during national elections. The councilors and the representatives have to work with each other. Scrutiny tools could be put in place to ensure mutually accountable representation. For e.g. District Councils could hold regular assemblies, which district representatives and Ministers would be required to attend.
- Option 2: Elected representatives for each district continue to be elected at national elections, and become *ex-officio* head of the District Councils.
- Option 3: District Councils elections could elect a head of the District Councils, who becomes an *ex-officio* Member of the HoA and be able to vote on legislation, but could not be appointed as a Minister. All other Members of the HoA would be elected at-large during national elections. The Premier and all Ministers would then be appointed from the at-large candidates only, satisfying the public's desire to vote for the Premier and Ministers.
- Option 4: To minimise costs and divisiveness, political parties should be absolutely prohibited at the local level, Councilors should run independently, and campaign financing regulations should be in effect to ensure transparency.
- Option 5: Sitting Councilors should be disqualified from standing for national elections and vice versa.

Considering the foregoing, the Commission would propose:

- If established, District Councils should be elected (at the local level), not appointed.
- Powers, responsibilities and mechanisms for accountability should be clearly identified in legislation.

CHAPTER 4 – RECOMMENDATIONS ON OTHER ASPECTS OF THE CONSTITUTION

- Dedicated budgetary allocation must be made (e.g. the funds previously voted for discretionary spending by elected representatives).
- District Councils should be able to accept donations, subject to transparency requirements, similar to Non Profit Organisations.
- Significant public participation and consultation should occur prior to preparation of the legislation.
- In keeping with typical models internationally, District Councilors should receive only a nominal stipend but with all official expenses borne by the public purse.
- District Councilors should be apolitical in the performance of their duties but will be expected to maintain an active and professional working relationship with relevant elected district representative(s).

Note that District Council and electoral constituency boundaries do not necessarily need to coincide. Accordingly, some models could grant Jost Van Dyke and Anegada their own District Councils even while requiring continued sharing of an elected Member of the HoA with larger districts.

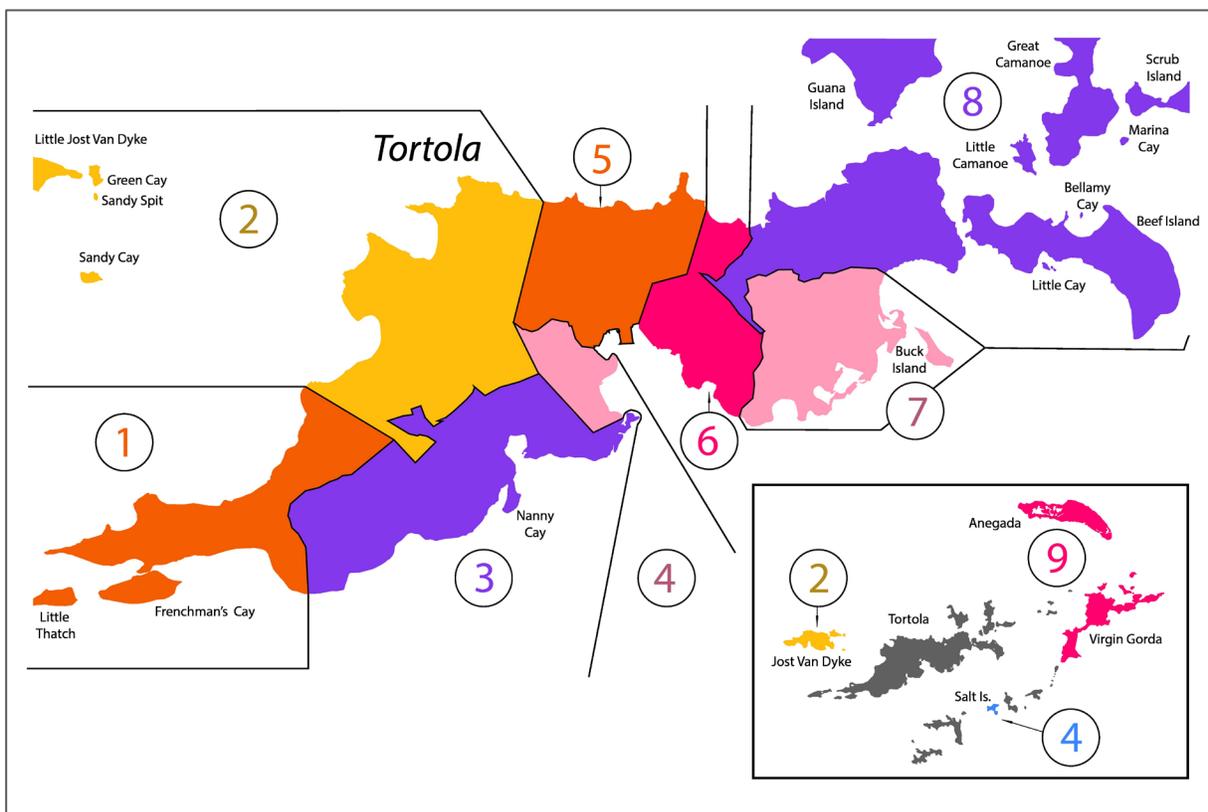


Figure 4: Electoral divisions of the VI 2023 (Source: GVI)

At present, the VI is divided into 9 districts. Anegada (162 registered voters) shares a district with Virgin Gorda (1,747 registered voters). Jost Van Dyke (186 voters) falls within District 2, the majority of whom (1,520 registered voters) reside on Tortola.

In Anegada and Jost Van Dyke, given the geographical experience of their location and insularity and the nuances of their contributions to the economic life of the Territory, an argument was posited for a separate representative for their islands in the HoA despite their small populations. The question was raised however, whether what was really needed was another legislator, or was there instead a need for more effective mechanisms at the community level.

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The argument continues that the VI is no less of a distinct global political unit because of its small population. The earliest configuration of the Planters' Assemblies (VI Legislatures of 1774 and 1780) recognised the island of Jost Van Dyke as a separate constituency. So separate representation for the less populated islands is not without precedent in VI history.

Whether these arguments are sufficient to allocate separate seats to Jost Van Dyke and Anegada in an expanded HoA should fall for consideration by an independent boundaries review commission (see Elections and Boundaries Commission). However, the Commission considers that the establishment of local government with the power to address hyper-local issues such as the maintenance of roads and public infrastructure, care of the elderly and indigent, schools, and community development may well address the concerns of these islands raised during the public consultation process. Therefore, the local government model should be given a fair opportunity to work and be evaluated prior to revisiting the issue of a separate representative.

Recommendation No. 54 Local Government

The Commission therefore recommends that the Constitution should be amended to add a new provision to support establishing District Councils.

Drafting proposal

Subject to this Constitution a law enacted by the Legislature shall provide for the establishment, functions and jurisdiction of District Councils.



Figure 5: CRC Members at Jost Van Dyke Meeting

Backdrop is the soon to be repaired JVD Methodist Church damaged by the devastating hurricanes of 2017.

Given the magnitude of the consultation undertaken in preparation for this Report, it is not surprising that there were several suggestions from the public that were not directly relevant for inclusion in the Constitution, but which the Commission considers worthy of mention. The following topics fall into this category.

5.1 Population policy

There has been significant population growth in the VI over the last five decades, not as a result of births (fertility) and deaths (mortality), but largely as a result of development-driven immigration. About 80% of the population growth of the VI is due to migrant workers who are required to secure work permits. Public infrastructure and services are struggling to keep up with the growing demands of an increasing population.

During public consultation, the need for an effective population policy was noted more than once as something that required urgent attention as it would lead to more effective policy making generally. It was also suggested as a mandatory step to further self-determination.

A population policy is determined by the government of a country and aims to achieve and maintain the ideal population size and quality by either increasing or decreasing it. Overpopulation can lead to over-consumption and increased pressures on resources and services such as health care and education. On the other hand, a population can also become under-populated, which is often unsustainable.

Three main elements are considered when deciding on a population policy, these are fertility, mortality, and migration. A government will also examine its past and present population demographics in order to predict future population demographic trends/changes. This aids in determining the optimum population size for the resources a country has and should lead to suitable population policies being formulated for the country.

Recommendation No. 55 Population policy

The Commission therefore recommends that,

A population policy should be formulated in order to support informed and effective policy-making, provide a cornerstone for 'a prosperous vibrant thriving and internationally competitive economy', and as a mandatory step towards self-determination.

5.2 Representation in UK Parliament

A desire for the Territory to have representation in the UK Parliament was raised at least once during public consultation. Although it was not a recurring theme, ironically it became a very topical issue in the UK Parliament itself, during the writing of this Report. Commissioners therefore felt the need to address it.

On 11 May 2023, the House of Commons held a debate on the OTs. Part of the debate raised the wider issues of how the UK Parliament examines policy affecting OTs (particularly given its ability to make laws for all OT), and how OTs are represented in Westminster. As poignantly put by one Member of Parliament:

Our Overseas Territories are not backwaters. They are the very frontier of protecting our environment, providing defence for the world and enterprise. It is about time the UK Government properly paid them respect.²⁴¹

Whilst having representation by way of members of parliament with voting rights was mentioned,²⁴² it was recognised that that was not the only solution.²⁴³ Amongst other possibilities, the U.S. model of full participating rights without voting rights was mentioned²⁴⁴ as was the French model.²⁴⁵

It was also noted during the debate that not all OTs would want to have representation in Parliament itself and that several had indicated that they had no desire for it when asked before by the Foreign Affairs Committee. What was acknowledged was that people of the OTs were the best persons to make their voices heard and mention was made of the inquiry being discussed by the Procedure Committee.

The Commission notes that on 6 July 2023, the Procedure Committee reopened its constitutional inquiry to examine options for OTs' representation within the House of Commons and that evidence was being submitted up to 1 September 2023.²⁴⁶

Recommendation No. 56 Representative in UK Parliament

The Commission reserves making any recommendation on whether the Territory should have representation in the UK Parliament at this time, particularly in light of the on-going UK constitutional inquiry into this matter.

²⁴¹ Henry Smith MP

²⁴² Lloyd Russell-Moyle, MP

²⁴³ Karen Bradley MP mentioned other examples such as the CPA, the British Group of Inter-Parliamentary Union, and the British-Irish Parliamentary Assembly as important fora for inclusion in the legislative process.

²⁴⁴ Lloyd Russell-Moyle MP

²⁴⁵ David Jones, MP

²⁴⁶

5.3 Electoral System

The Commission was invited to consider whether the first-past-the post (FPTP) system currently in place ought to be replaced with a “party-list” type of proportional representation (PR) system.

Electoral systems comprise a set of rules which determine how elections and referenda are conducted and how outcomes are ascertained. The main types of voting systems are the plurality method; the majority rule; proportional representation system; and the mixed method system. The rules of those systems along with Guidelines issued by the International Institute for Democracy and Electoral Assistance complement electoral laws in a country.

Since around 1950 when the Legislative Council was restored²⁴⁷ general elections and by-elections in the VI have been held on the basis of the FPTP system.

The FPTP system, sometimes referred to as ‘winner-takes-all plurality rule’ or ‘single member district plurality system’ is recognised internationally as being the second most widely used type of national voting system. It represents a form of plurality voting whereby the electorate cast their votes for specific candidates: the candidate or party (as the case may be) garnering the most votes wins. However, the candidate or party who gets the most votes may not necessarily accumulate the majority of votes. In that regard, the plurality system intersects with the majoritarian electoral system where the candidate amassing the highest number of votes wins the seat being contested based on the “winner-takes-all principle”.

This system has been in use in the UK since the Middle Ages and is in use (with some adaptations) by countries such as the US and other Commonwealth nations such as Canada and India.

The FPTP system has been used for decades in the VI. Representation on this topic has been low. The Commission is of the view that although there has been discontent expressed on imbalances of inequality of voters amongst the nine electoral districts, there has been very little agitation to challenge the effectiveness of the current FPTP system.

Recommendation No. 57 Proportional representation

The Commission therefore recommends that no action should be taken at this time to displace the electoral system now in use in the VI. The Commission found no compelling desire to change the current system. Such a change is therefore not warranted nor justifiable. Should there be a compelling desire to change the electoral voting system in the VI in the future, there should first be education and wide public consultation.

²⁴⁷ There were no political parties in existence at this point of the Territory's history.

CHAPTER 5- OTHER RECOMMENDATIONS AND DISCUSSIONS

5.4 Miscellaneous

The following are a number of comments that, whilst most have no direct bearing on the written Constitution, were expressed during public consultation (sometimes multiple times) and which the present Commission feels are worthy of mention. In some cases, the comment was also addressed in the 2005 Commission Report.

5.4.1 Clarifications and Amendments

There are some minor drafting changes that should be addressed during the current review.

- Prescribed time for elections— Paragraphs 86 and 118 (transitional) of the Constitution seem to conflict with paragraph 48 of the 1976 constitution. Paragraph 48 of the 1976 Constitution refers to election preparation of 2 months. Paragraph 118 of the [2007] Constitution – the transitional paragraph- refers instead to 3 months. Transitioning means that one keeps what immediately obtained –i.e. 2 months. The reference in paragraph 118 of the Constitution to 3 months therefore appears to be an error.
- A global change would need to be made under the new Constitution to replace references to the Police Force with new references to the Police Service, and the Commission notes that a complementary Police Bill is in the legislative process, and the change in the new Police Act should be contemporaneous with the new Constitution.

5.4.2 Constitutional Review Commission

One of the highest recurring themes during public consultation was what the public perceived to be the need for on-going education on the Constitution. An obvious way to achieve this would be for the Constitutional Review Commission to be a permanent Commission. That said, this may not necessarily be an efficient use of resources and the task may instead be undertaken by another Commission,²⁴⁸ or Government Department. In fact, if a permanent Commission were established, it could be placed under the Cabinet Office. Commissioners see no reason why regular education on the Constitution cannot be undertaken by a reformed Cabinet Office (without the need to form a stand-alone Commission) – a Cabinet Office that is recast into its true role as the policy coordinating office for the Government. The educational material would need to be vetted by the Attorney General's Chambers. The essential characteristics, regardless of the model, will have to be that the content is accurate and balanced, educating impartially and objectively on **all** aspects of the Constitution. Public education could include guest lecturers. Periodic reports should be submitted and recommended constitutional changes should be kept under regular review.

5.4.3 Law Reform Commission

Pursuant to the Law Reform Commission Act, 2000, the Law Reform Commission existed in the VI from around 2002 for over 10 years. During the public consultation exercise, there were calls to reinstate this. This would be ideal as, in giving effect to its mandate of generally updating laws, the Law Reform Commission would also prepare consultation papers, hold public consultations, and facilitate various committees. However, the absence of a Law Reform Commission appears to be linked to a resourcing issue and, to compensate without losing substance, the Attorney General's Chambers is currently, and as a first step, focusing on consolidation and revision of all the laws of the VI with the objective of having them accessible and available online free of charge.

5.4.4 Referendum Act

On a number of occasions, members of the public expressed a desire to see referenda, under the Referendum Act, being able to have sufficient flexibility to poll a particular segment of the population. This is for statistical purposes.

²⁴⁸ Under s114 of the Montserrat Constitution Order, 2010, this lies with the Electoral Commission. Commissioners do not believe that this is the best arrangement that could be put forward for consideration.

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The current formulation of the law restricts participants in a referendum to voters on the voters list and this approach is fairly standard.

Commissioners believe that the comment from members of the public was driven by insufficient public consultation in the formation of Government policy (locally as well as globally) and the absence of professional pollsters in the VI.

Referenda in a small jurisdiction are actually quite costly (similar to the cost of holding a general election). Also, whilst no referendum has been held in the VI to date, it appears clear that they are reserved for matters of national importance. Other mechanisms, besides referenda, are available for to survey specific segments of the population on issues of general public interest.

5.4.5 Ministry with Responsibility for the Diaspora

In its oral and written presentations to the Commission, the Virgin Islands Communal Association (VICA) submitted a paper which covered many topics – several of which are already touched on in some fashion throughout this Report. One matter was the significant role played by Virgin Islanders in the diaspora. Dr. Franklyn Penn gave an oral presentation (from outside the Territory) on behalf of others in the diaspora. It is perhaps best to quote directly from VICA's written presentation as follows:

Due to the small size and limited opportunities for capacity building and education available in the Virgin Islands, it is common practice for many Virgin Islanders to study and work abroad for a period of time. (As is the case for persons from many other countries.) Virgin Islanders, however, maintain their links to the Territory and often contribute to the socio-economic growth of the Territory. This is a well-established practice which can be linked back to the 1940's when Hope Stevens and other Virgin Islanders worked to create the Civic League, which was instrumental in achieving the 1950 constitution....

VICA went on to mention the valuable assistance that was given by the diaspora after the devastation of Hurricane Irma in 2017. The group asked for a Ministry for the Diaspora. This is not directly a matter for the written Constitution as there is an existing procedure for allocation of Ministry subjects. Establishment of its own Ministry could be something to work towards in the future when there may be more structure and legislation that can form a ministerial subject. As a first step, Commissioners agree with the idea that the diaspora should be accorded special recognition within the Government structure, perhaps a 'Diaspora Desk' in the Premier's Office or the Office of the Deputy Governor. Further, the Government and the Public Service should actively develop policies and mechanisms to address the issues affecting this special group, which policies should be subsumed under wide plans for strategic development of the VI. This includes access to this group as a resource for the advancement of the Territory in health, education and other key areas.

The need for some form of representation on issues affecting the diaspora was manifested when Commissioners met with BVI Belongers in the USVI. Belongers there expressed high levels of frustration with, for example, making a costly trip to Tortola only to be denied services or, in several cases, being made aware for the first time about updated immigration policies when they presented at the ferry terminal. The relevant departments have since been made aware of the concerns but, had there been a Diaspora Desk, these and other matters could be professionally coordinated, communicated and resolved.

5.4.6 Tax Exemption for First Acre of Land

During the public consultation, the issue of introducing a constitutional tax-free guarantee on the first acre of undeveloped land owned by Belongers was raised. The underlying reason for the concern is to safeguard Belongers from forfeiture of all their property if they cannot afford to pay the annual property tax imposed by Government. This

CHAPTER 5- OTHER RECOMMENDATIONS AND DISCUSSIONS

issue is not a novel one. In fact, a comment similar in nature came up several years ago in consultation for constitutional reform in the neighbouring USVI.

At least two Caribbean OTs²⁴⁹ do not impose annual property taxes. However, the existing property taxes for Belongers are still at what can fairly be described as nominal rates (and Government's deliberate policy has always been, and continues to be, to keep them low). Currently, Belongers pay \$10 for 0.01 – 1 acre per parcel of land, and any additional part of a parcel or an additional acre of land is an additional \$3 to the base \$10. Under section 16 of the **Land and House Tax Act (as amended)**, property tax is a first charge over the relevant property and, if unpaid after more than 90 days, may be recovered as a civil debt. Such action is provided for under the Constitution as a saving to the otherwise general protection from deprivation of property, on the premise that it is reasonably justifiable in a democratic society.²⁵⁰ Beyond that, the matter is a revenue matter for the Legislature on which the Commission makes no further comment or recommendation.

5.4.7 Government Publications

The public has expressed frustration with not being able to find reports after they have been laid on the table of the House of Assembly. The relevant ministries and departments are not consistent in publishing these reports, to make them publicly accessible. At the minimum, in this day and age, reports should be published on the website of that department or ministry. Some never see the light of day after they are tabled. Others are appended to news releases and yet others are added to the rolling marquee on the home page of the Government's website. Apart from legal directives imposing specific publication requirements on a Government department or ministry, there should be consistency with how and where additional copies of such reports are published. In all cases, they should be easy to locate.

The Commission further submits the consideration be given to establishing a central repository for materials related to the business of the House of Assembly including reports which are laid. For ease of accessibility this repository should be online.

5.4.8 Excessive Number of Statutory Bodies

The Commission has noted throughout this Report that it was hesitant to recommend increasing the number of statutory bodies. Yet it has, in fact, recommended a number of new statutory commissions and boards, so an explanation is warranted. An independent review on statutory boards was carried out by attorney-at-law Mr. Jamal Smith pursuant to a recommendation of the CoI Report. By Mr. Smith's tally there are at least 70 of such statutory boards in existence. This is a very high number for a jurisdiction as small as the VI. The Commission therefore recommends that the Government should undertake a review of whether:

- all existing statutory boards are needed and whether any can be amalgamated; or
- whether there could be some sharing of resources amongst existing statutory bodies, such as secretariats and human and capital resources.

This Commission did not see itself as the appropriate body to make such an assessment because the Commission has no knowledge of:

- the reasons why some statutory commissions already provided for in law (e.g. the Human Rights Commission and the Integrity Commission) have not yet been established; and

²⁴⁹ namely, TCI and Cayman Islands.

²⁵⁰ Virgin Islands Constitution Order, 2007, section 25(3)(a)(i).

CHAPTER 5- OTHER RECOMMENDATIONS AND DISCUSSIONS

- any existing policy or financial implications that may be relevant.

In the case of two commissions (the Human Rights and Complaints Commissions) the Commission has recommended against combining these but, that said, the Commission is of the view that there is nothing preventing a shared secretariat and recommends that this be explored. The Public Service Commission and the Judicial and Legal Services Commission presently share a secretariat. Further, it has been confirmed to the Commission that plans are underway to establish a shared secretariat body to support other commissions, as part of wider efforts towards centralisation and streamlining wherever possible.

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Figure 6: Public Consultations



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CHAPTER 6 – SUMMARY OF RECOMMENDATIONS

THE COMMISSION THEREFORE RECOMMENDS THAT:

Recommendation No. 1 Transparency and Public Consultation

- (a) Section 72 of the Constitution should be amended to include a requirement for Standing Orders to give due regard to representative democracy, accountability, transparency and public participation. A drafting proposal follows;
- (b) Where possible all hearings and meetings should be held in public;
- (c) Where there are annual reporting and accounting requirements on Government departments, those timeframes must be strictly adhered to in order to support scrutiny by the HoA;
- (d) Every opportunity for public consultation should be utilised during the legislative process, in particular ensuring the publication of all Bills prior to debate.

Recommendation No. 2 Junior Ministers

- (a) The position of Junior Minister should be abolished in order to promote an environment that supports clear separation between the Executive and the Legislature and availability of backbenchers as a necessary check and balance on the Executive, and in light of the recommendation by the Commission that a sixth Minister be introduced;
- (b) In the event that the Commission's recommendation for introduction of a sixth Minister is not approved, the Commission recommends that:
 - (i) there be no increase in the number of Junior Ministers (i.e. that the maximum number of Junior Ministers that may be appointed be kept at 2); and
 - (ii) the role of Junior Ministers be clarified, but that such clarification of the role of Junior Ministers be included in the Ministerial Code of Conduct (which presently applies to Junior Ministers) and not in the Constitution itself.

Recommendation No. 3 Bicameralism

- (a) There should be no change to the Constitution to provide for a bicameral house at this time. Adding an upper chamber, by itself, would not address the underlying issues limiting the effectiveness of the legislature. Recommended actions that should provide the benefits which are *desired* to accrue from bicameralism – i.e. improved quality of debate, greater number of backbencher to Minister votes, increased transparency and accountability include:
 - expansion of the HoA,
 - reform and strengthening of the select committee system,
 - increase in technical and administrative resources available to committees and the HoA, including a dedicated parliamentary research unit to aid in researching issues and preparing members for informed debate,
 - improvement of parliamentary procedures, and
 - publicising of committee stage meetings
- (b) However, given that the move to bicameralism was a prominent theme in the public consultation process and on the campaign trail in the 2023 General Election, and given that such a move would constitute a fundamental change to the structure of government in the Territory, the Commission further recommends wider education, public consultation and engagement on the issue should be undertaken. If, after consultation, the public consensus is that the Territory would be better served by a bicameral Legislature, the Commission recommends that the members of the upper house be nominated rather than elected.

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Recommendation No. 4 Use of Referenda

There should be no amendment to the Constitution to provide for the introduction of people-initiated referenda at this time as there is not yet sufficient experience with people-initiated referenda in the OTs and Commonwealth Caribbean to make an informed assessment of whether the benefits outweigh the disadvantages.

Recommendation No. 5 Freedom of Information

- (a) The Territory should enact Freedom of Information legislation – legislation on which the Government has given its continued commitment.
- (b) When a freedom-of-information regime is established, it should fall under the Cabinet Office (see 4.15 [Cabinet and Cabinet Reform](#)).
- (c) The Constitution should be amended to include a specific right of persons to access information generated by organs of the State and its entities, in accordance with legislation.

Recommendation No. 6 Term limits for Premier

- (a) The issue of whether to adopt term limits be put to a referendum;
- (b) In the event that a decision is made that the positions of Premier and Deputy Premier be voted for directly, the Commission would recommend that consideration be given to implementing term limits for holding such offices;
- (c) In the event that a decision is made to require selection of the positions of Premier and Deputy Premier from the at-large candidates, the need for term limits would in the opinion of the Commission be less significant; and
- (d) In the event that a decision is made to retain the status quo, given the small size of the pool of persons eligible for elected office in the Territory, unless stringent measures for succession planning are implemented, imposing term limits on holders of elected office is likely to do more harm than good. Further, the potential for abuse of power is not necessarily tied to length of term in office. Other methods of strengthening accountability and curbing abuse of power can be explored, e.g. implementation of powers of recall of elected Ministers ([see 3.2.7](#)). In addition, there are existing constitutional mechanisms which can be utilised to remove an ineffective Premier: (a) if he loses his position as party leader, (b) if he loses the confidence of a majority the members of the HoA he would need to resign or call an election, (c) if he loses his seat or (d) if his party loses a general election.

Recommendation No. 7 Recall provisions for elected officials

- (a) Legislation should be enacted to provide a recall mechanism and section 67(3) of the Constitution should be amended to include circumstances where a Member of the HoA has been recalled as an additional ground for vacating his or her seat in the HoA.
- (b) The recall legislation should:
 - (i) define grounds on which a recall mechanism can be triggered (similar to the UK model and including serious breaches of the Code of Conduct prescribed by the **Integrity in Public Life Act 2021** as a ground for recall);
 - (ii) restrict the right of recall to those persons who voted in the election held for the relevant representative and district;
 - (iii) ensure that the threshold for signatures needed to initiate the recall process is sufficiently high so as to make recall the last resort, not the norm; and
 - (iv) establish a 'safe harbour period' after assumption of office before recall mechanisms can be initiated, so as to give elected representatives adequate time to deliver on promises.
- (c) The recall mechanism should be designed with the following considerations:

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- (i) striking a balance between giving elected representatives freedom to perform their jobs and make difficult decisions when necessary and holding them to account when they do not maintain certain standards of conduct;
- (ii) reducing the risk of instrumentalisation, polarisation and permanent campaigning; and
- (iii) minimising the risk of inappropriately motivated recalls by ensuring a robust process to verify the authenticity of demands, for example, by empowering a body to assess the validity of the reasons supporting the recall.

Recommendation No. 8 Grounds to remove Ministers (other than recall)

- (a) Immediate steps should be taken to establish the Integrity Commission and the mechanisms necessary to ensure the proper working thereof;
- (b) Section 53(3) of the Constitution should be amended to require a Minister to vacate office in circumstances where such Minister has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the Integrity in Public Life Act, 2021, noting that the laws and procedures governing the Integrity Commission will ensure that the Minister is afforded due process; and

In addition,

- (c) An express provision should be included in the Constitution to stipulate that the Premier, in the exercise of his powers and functions, is required to act in the best interest of the Territory.

Recommendation No. 9 Disqualification for membership – convictions or pending criminal matters

- (a) There continue to be no restriction on persons with pending criminal matters holding public office.
- (b) There be a comprehensive review of the offences which could, upon conviction, operate to disqualify persons from holding public office, with a view to ascertaining whether the categories of offences are sufficiently wide to protect the interests of the Territory.
- (c) There should be mandatory disclosure of any spent convictions by persons seeking to be elected to the HoA.

Recommendation No. 10 Procedure for a member to resign

To ensure that there is clarity around the timing and procedure for resignation of elected Members of the HoA and further to ensure that the ability of an elected Member to resign is not hindered by the absence of a Speaker:

- (a) Amend section 67(3)(a) of the Constitution to make it clear that an elected Member is permitted to resign at any time after winning a seat in a general election and to stipulate alternative persons to whom resignation letters can be addressed in the event that no Speaker is in place or the Speaker is absent.
- (b) Increase the deposit amount required from candidates for election and make such deposit non-refundable if the candidate resigns within 6 months of winning his or her seat.
- (c) Amend s 67(3) of the Constitution to require an elected Member to vacate his or her seat where he or she has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the **Integrity in Public Life Act, 2021**.
- (d) If provisions for recall of elected officials are included in the Constitution as recommended (see 3.2.7 [Recall provisions for Elected Officials](#)), an additional ground should be inserted in section 67(3) to require an elected Member to vacate his or her seat where he or she has been recalled.

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Recommendation No. 11 Direct election of the Premier and revision of at-large system

- (a) The Territory should adopt a system of election of the Premier and the Deputy Premier by selecting the holders of these offices from the pool of at-large candidates, rather than through a direct election. This would enable the voters to choose their leaders, while at the same time keeping the largely parliamentary system of government now in effect;
- (b) An electoral boundaries review be commissioned both to assess and review the electoral boundaries following shifts in the population since the last such exercise and also to pave the way for the future appointment of a sixth Minister;
- (c) Subject to such boundaries review, either
 - (i) increase the number of seats in the House of Assembly from 13 to at least 15, made up of 9 district seats and 6 at-large seats (an increase of 2), or
 - (ii) increase the number of seats in the House of Assembly from 13 to 15, all at-large;
- (d) In the hybrid model, amend sections 52(1)(a) and (b), (2) and (3) of the Constitution to make it a requirement that the at-large Member who commands majority support in the HoA should be appointed as Premier, regardless of party affiliation, and that the Deputy Premier must similarly be appointed from amongst the Members who were elected at-large. For consistency, section 70(2)(a) in relation to the Leader of the Opposition may need to be revised accordingly;
- (e) In the hybrid model (mixture of district and Territorial seats), a Government should, as far as possible form its Cabinet from amongst at-large Members although it is not being advocated that that be a mandatory requirement;
- (f) In the hybrid model, at-large Members should concentrate on national issues and raise such matters for debate in the HoA. Their duties and responsibilities should be set out in legislation or in guidance in order to distinguish them from those representatives who hold district seats;
- (g) With regards to the issues of voting directly for the Premier and Deputy Premier, a review of whether the Territory should abandon the parliamentary system and implement a presidential system or a hybrid or semi-presidential system should be undertaken if the first recommendation above proves unsatisfactory; and
- (h) With regard to the at-large system the outstanding review of the 'pilot' project should be undertaken.

Recommendation No. 12 Fixed House of Assembly Schedule

In the interest of parliamentary democracy, transparency, good governance and accountability, efforts should be made (through the Standing Orders)²⁵¹ to improve the scheduling of Government business by:

- (a) setting and publishing an annual calendar²⁵² setting out when the HoA can be expected to meet;
- (b) allowing Members of the HoA adequate time to review legislation and prepare for sittings;
- (c) providing Members of the HoA and the public with adequate notice of the agenda for a sitting of the HoA; and
- (d) providing Members of the HoA and the public with sufficient advance notice of any changes to the schedule and/or the agenda.

²⁵¹ The Order Paper for the House sitting on 7 September 2023 contains a motion for a Standing Orders Committee to be reconstituted.

²⁵² Fixed scheduling does not fetter the right of the Speaker to convene special sittings as the need arises.

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Recommendation No. 13 House of Assembly inquiries and hearings

- (a) The HoA should make greater use of inquiries conducted by Select Committees as a useful and important tool to improve the quality of governance in the Territory;
- (b) Hearings should be conducted in public, unless there is some justifiable reason for privacy; and
- (c) Particular committees, such as the Public Accounts Committee and Register of Interests Committee should be placed on a constitutional footing, providing a timeframe for their establishment, and curtailing the capacity to revoke, amend or suspend Standing Orders without good reason.

Recommendation No. 14 Direct voting for Ministers

No amendment to the Constitution should be made to implement direct voting for Ministers.

Recommendation No. 15 Increased number of ministers

Steps should be taken to provide for a sixth Minister, commencing with a boundaries review, as mandated by the Constitution. This recommendation is tied to [Recommendation No. 2 on Junior Ministers](#).

Recommendation No. 16 Integrity Commission

Given the significance of an Integrity Commission to good governance:

- (a) the Integrity in Public Life Act, 2021, be brought into force without further delay;
- (b) notwithstanding that legislation has already been enacted to establish an Integrity Commission, the requirement for an Integrity Commission be enshrined in the Constitution by including a new provision;
- (c) the necessary ancillary change be made to s3(1)(b) so that members of the Integrity Commission are not regarded as persons holding public office;
- (d) the necessary ancillary changes be made to s108(5) on remuneration of certain offices;
- (e) a new section be inserted after section 108 to, amongst other things, give the Integrity Commission a role in recommending appropriate levels of remuneration for the Speaker and elected Members of the House of Assembly and any ensuing amendments be made to the Integrity in Public Life Act, 2021.

Recommendation No. 17 Contractor General

- (a) The Contractor General Act, 2021 should be brought into force without further delay;
- (b) Notwithstanding that legislation has already been enacted to establish the Contractor General, the requirement for a Contractor General be enshrined in the Constitution by including a new provision (see drafting proposal below);
- (c) The necessary ancillary change be made to s3(1)(b) so that the Contractor General is not regarded as a person holding public office; and
- (d) The necessary ancillary changes be made to s108(5) on remuneration of certain offices.

Recommendation No. 18 Administrative and financial independence

A greater degree of administrative and financial independence would improve the effectiveness of independent institutions. Accordingly,

- (a) Section 108(5) of the Constitution should be redrafted to separate independent institutions that have their own budgets.
- (b) This should be followed by a new but related section stipulating that independent institutions in the Constitution shall enjoy administrative and financial independence.

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- (c) It is further recommended that each of the DPP, the Auditor General, the Complaints Commissioner, and the Registrar of Interests be listed in regulation 5 of the Appointment to Public Office (Devolution of Human Resource Functions) Regulations, 2008 as an 'Authorised Officer' to whom the Governor may delegate some of the Governor's powers to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices.

Recommendation No. 19 Human Rights Commission

- (a) The Constitution be amended in section 34(1) to make the establishment of a Human Rights Commission mandatory; and
- (b) The Human Rights Commission should be established, with despatch.

Recommendation No. 20 Complaints Commissioner

There should be no amendment to the Constitution, however, the Complaints Commissioner Act, 2003 should be amended to allow for the Complaints Commissioner to refer certain matters in certain circumstances (to be decided on) to the Integrity Commission. Those matters would then be subject to the wider powers of the Integrity Commission.

Recommendation No. 21 Elected Attorney General

There should be no amendment to the Constitution to provide for an elected Attorney General.

Recommendation No. 22 Elections and Boundaries Commission

An Elections and Boundaries Commission should be established:

- (a) provision should be made in the Constitution for the establishment of an independent Elections and Boundaries Commission. This would need to be supplemented by primary legislation that addresses the other matters not addressed in the Constitution such as funding and staffing;
- (b) in the interest of cost and efficiency, electoral commissioners should be appointed, as opposed to elected;
- (c) the necessary ancillary change should be made to section 3(1)(b) of the Constitution so that members of the Elections and Boundaries Commission are not regarded as persons holding public office; and
- (d) the necessary ancillary change should be made to section 108(5) of the Constitution to include the Chairman and members of the Elections and Boundaries Commission as officers that are paid out of the Consolidated Fund.

Recommendation No. 23 Powers that need to be reserved to the Governor

- (a) Relations with Puerto Rico should be added to the list of relationships with the VI which would be covered by a Letter of Entrustment under section 60(4)(c) of the Constitution.
- (b) The ouster clause at section 40(6) should be removed.
- (c) A Statement of Partnership (along the lines proposed above) setting out briefly the basic principles and guidance to be followed by the Governor and a Minister to avert and resolve disputes should be considered for adoption outside the framework of the written Constitution.
- (d) There should be a requirement for consultation with the Minister of Finance prior to the exercise of the power in s.103 to withdraw monies from the Consolidated Fund.
- (e) Section 81(6) of the Constitution should be amended to require that the Governor consult with the Premier prior to exercise of his discretion.

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Recommendation No. 24 Transfer of reserved powers to devolved GVI

In respect of the reserved power to legislate for the Territory, section 119 of the Constitution should be followed by a Sewel Convention-like section to the effect that, where a draft UK Act is intended to apply directly to the VI, or an Order in Council is intended to be made to extend any provision of a UK Act to the VI, the proposal would typically be brought by the Secretary of State to the attention of the Premier, so that the VI Cabinet may signify its views on it.

Recommendation No. 25 Regulation of election campaign finances

- (a) In order to comply with obligations under the UN Convention, and the tenets of transparency and good governance, the Constitution should be amended to mandate establishment of a regime in relation to election expenses. The Commission recommends that the particulars of this regime be enacted into statute rather than incorporated into the Constitution, to enable the VI to have the flexibility to respond quickly to changing conditions or new modalities.
- (b) The policies and procedures enacted by the UK in the PPERA and the Elections Act 2022 or by the TCI in its PAO may be adaptable for use in the Territory due to the similarity of their election systems to the election scheme set out in VI's Elections Act and Election Regulations. In addition, whatever regime is enacted must adopt procedures to deal with the increasing use of digital campaigning and social media. Finally, the VI should explore ways to level the playing field and encourage a more diverse group of candidates to stand for election, including the use of some form of public financing of election campaigns.
- (c) Development of a regime addressing election expenses would complement the establishment of an Elections and Boundaries Commission (see 3.3.5 Elections and Boundaries Commission).

Recommendation No. 26 Constitutional consideration for statutory boards

- (a) There should be no change to the Constitution to embed statutory bodies in the Constitution.
- (b) Issues such as tardy reporting need to be addressed through enforcement mechanisms outside the Constitution including in the relevant governing laws and by legislative committees.
- (c) Issues such as poor governance need to be addressed through appropriate selection of board members and other initiatives such as training for board members.
- (d) The Protocol for the Appointment and Removal of Statutory Board Members issued in March 2023 should be reviewed to address guidance on rolling or staggered board appointments, tardy annual reporting, and good governance training.

Recommendation No. 27 Appointment or election of the speaker

- (a) There should be no change made to the current language in section 66(3) of the Constitution which allows the Speaker to be elected from within or outside the HoA.
- (b) It should be a requirement for any Speaker (even where one is chosen from amongst Members) to be politically neutral and impartial and that such neutrality and impartiality must be demonstrated, amongst other things, by the requirement to resign from any political party affiliation. This would be consistent with the Westminster model that is currently followed in the Territory. However, such a requirement is more appropriate for inclusion in the rules and procedures of the HoA rather than in the Constitution.

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Recommendation No. 28 Declaration of interests – how made

Sections 67(7) and 67(9) should be amended to clarify (i) when and how a declaration of an interest in a contract with Government is to be made, and (ii) when an exemption would apply.

Recommendation No. 29 Declaration of interests and statutory bodies

In keeping with public sentiments expressed to Commissioners in support of maximum transparency in the conduct of the public's business, sections 66(1)(f), 67(3)(e), 67(7), and (67(9) of the Constitution should be amended to include express reference to the inclusion of statutory bodies.

Recommendation No. 30 Proper relationship between ministers and their departments

- (a) Sections 56(5) should be amended by the addition of the adjective “general” before the phrase “direction and control”.

In addition,

- (b) Consideration should be given to several proposals for addressing the relationship between Ministers and the Public Service which, in several cases, build on improving existing options. These include:
 - (i) Updating the Ministerial Code of Conduct to more comprehensively address the conduct of Ministers in their relationship with Public Servants. Inspiration may be drawn from the Ministerial Code issued by the Cabinet Office in the UK in December 2022, or the Code of Conduct for Persons in Public Life in TCI)²⁵³ but adapted to suit local typologies. The Code will only be effective if it is fulsome.
 - (ii) Issuance of a Parliamentary Code that supplements the Ministerial Code of Conduct but more specifically in relation to the Minister's behavior (including managing conflicts), and duties as a Member of the Legislature.
 - (iii) Induction and training for new Ministers.
 - (iv) Re-activation of the Public Accounts Committee²⁵⁴ –this would hold Accounting Officers (in the Territory this includes all Permanent Secretaries and some Heads of Departments) to account to Parliament.²⁵⁵
 - (v) Enhancement of the policy making process²⁵⁶ (also a recurring comment from members of the public during public consultations of the Commission). This would bring some structure to the process and also allow the Minister's goals to be put in sharper detail and made clearer to the Permanent Secretary. It also adds transparency, legitimacy and stakeholder buy-in (e.g. through the use of green papers, where necessary) before papers are taken to Cabinet. The Cabinet Handbook issued in 2009 should be updated to include the use of green papers and white papers, for example.
 - (vi) Ministers should deal only with their Permanent Secretaries (and no other Public Servants in the Ministries without the knowledge of the Permanent Secretaries). Permanent Secretaries should

²⁵³ Code of Conduct for Persons in Public Life in TCI, published 7 November, 2012 by The TCI Integrity Commission.

²⁵⁴ The Order Paper for the House sitting on 7 September, 2023 contains a motion for the Public Accounts Committee to be reconstituted.

²⁵⁵ See para 9 of the Armstrong memorandum where it states that “...when a civil servant gives evidence to a Select Committee on the policies or actions of his or her Department, he or she does so as the representative of the Minister ... and subject to the Minister's instructions.... The ultimate responsibility lies with Ministers, and not with civil servants, to decide what information should be made available, and how and when it should be released, whether it is to Parliament, to Select Committees, to the media or to individuals”.

²⁵⁶ Improved policy-making was also a recommendation of the Institute of Government in the UK but the UK context cannot be applied wholesale to the local context. So locally, the recommendation here is of a more bespoke nature.

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issue clear guidance to staff in their Ministries reminding subordinate Public Servants to bring such discussions with the Ministers, where they do occur, immediately to the attention of the relevant Permanent Secretary.

- (vii) Ministers should have dedicated and regular in-person briefing meetings (at least weekly) with their respective Permanent Secretaries, and be easy to reach and communicate with on short notice in between briefing sessions.
- (viii) Amendment to the Public Service Management Code (launched in the VI on 14th March 2023) to include provisions setting out the procedure for redress where a Permanent Secretary raises concerns about political interference by a Minister.²⁵⁷ This should:
 - a. not only set out a procedure for escalating concerns regarding Ministerial overreach but should also name a dedicated ethics adviser (the Cabinet Secretary could be assigned this role) whom a Permanent Secretary may access; and
 - b. contain guidance (similar to the legally binding provisions set out in the Public Finance Management Regulations for Accounting Officers) on how to seek a Ministerial directive where the Permanent Secretary believes that to comply with a direction given to him by the Minister would be inconsistent with his (the Permanent Secretary's) duty.
- (c) Mandatory training for new Permanent and Deputy Permanent Secretaries, including the Financial Secretary and Deputy Financial Secretary.
- (d) Further consideration should be given to whether the Minister actually needs to sit in the Ministry. One member of the public actually raised this. Some jurisdictions have physical separation of the Minister (and his staff) from the Ministry (and its staff). Whether deliberately orchestrated or not, it should lessen the incidents of Ministers' overreach in their Ministries.
- (e) No legislation specific to the civil service is recommended at this time.

Recommendation No. 31 Next steps towards self-determination

Several of the recommendations made throughout this report advance the VI towards increased self-determination. The Commission additionally recommends that, the following next steps towards self-determination should be considered:

- (a) Education –The need for much more education topped the list of recommendations under this ToR. There were several calls for the Commission to be established permanently. Whilst the Commission acknowledges that a permanent Commission would be smaller, a permanent multi-member Commission of competent and apolitical Commissioners is one of the best ways to undertake continued, fair and unbiased constitutional education in general. It may be that other options can be explored and this is discussed further [in this Report](#) (see 5.4.2 Constitutional Review Commission). There were also repeated calls for civics (from primary level) to be taught in the schools as an independent course. The Commission strongly recommends that the Government implements some educational initiative forthwith;
- (b) Greater autonomy of governance concomitant with greater accountability – the need to be “better financial stewards” is a phrase that the Commission heard regularly along with an acknowledgment that there was a trust/leadership issue that needed to be overcome;

²⁵⁷ Section 22 of the Cayman Islands Public Services Management Law (2018 Revision) addresses this briefly where, ultimately, the Governor would be required to ask the Premier to in turn ask the relevant minister to desist but nothing further is set out beyond that.

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- All the independent institutions which are tasked with promoting and protecting good governance should enjoy adequate administrative and financial independence to ensure their effectiveness;
 - Integrity Commission – it is vital that the Integrity Commission and office of Contractor General be immediately established and properly resourced;
 - Human Rights Commission –the Human Rights Commission provided for in the 2007 Constitution should be established forthwith. The road to greater self-determination is paved with other fundamental rights so having the mechanism in place to address these other rights properly, is key;
- (c) A diminishing role of the Governor representing His Majesty as the constitutional Head of State on the one hand, and the enhanced role of the Premier as the elected Head of Government on the other. This could be achieved, for example, by a further reduction in the Governor’s reserved power, special responsibilities, and some discretionary powers, and enhanced constitutional requirements for the Governor to consult the Premier.
- (d) Better planning – There were multiple recommendations that, when analysed, were all grounded in the need for responsible planning. These included:
- an urgent population study to be undertaken including an assessment of what talent and resources the VI has at the moment and what talent and resources it needs as it matures politically;
 - adoption of an effective succession planning ideology including a regulated or monitored strategy that ensures that an adequate number of Virgin Islanders are prepared, qualified and promoted to assume key positions;
 - the need for a thorough and detailed study on the cost and benefits of full internal self-government;²⁵⁸ and
 - a timeline of goals and strategies to take the VI closer to a pre-independence constitution, including perhaps the establishment of a Decolonisation Commission.
- (e) Assess the wishes of the peoples- another notable recommendation from the public was for mechanisms (e.g. a referendum) to be put in place to accurately measure the wishes of the peoples of the Territory on self-determination but only following a period of fair and unbiased education. Recall that UN General Assembly Resolution 1541 requires such a process to be an informed one.²⁵⁹ In addition, one member of the public stated that, based on her research, a Decolonisation Commission was needed to conduct the public awareness education about what it means to become decolonised and self-determined prior to undertaking such an assessment. “Uninformed decisions should not belie a referendum”, she said firmly. Given the weight of the subject, any such mechanism must be trusted and independent, and must be promoted in such a manner as to encourage an exceptionally high level of participation from across the entire VI. See the Commission’s [related recommendation on use of referenda](#) (see 3.2.4).

Recommendation No. 32 Judge only criminal trials

- (a) In light of the difficulties faced by the Territory in dealing with the backlog of criminal cases and the difficulties inherent in the selection of impartial juries, the Constitution should be amended to provide for judge alone criminal trials by way of legislation. In essence there should be a legislative pathway for either party to apply for a judge alone trial;

²⁵⁸ The Commission acknowledges the work of Dr. Carlyle G. Corbin, Assessment of Self-Governance Sufficiency in conformity with internationally-recognised standards (30th June 2021) but the recommendation goes well beyond this.

²⁵⁹ Supra, fn4.

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- (b) Such legislation should be subject to wide consultation with all relevant stakeholders, including the Criminal Bar.

Recommendation No. 33 Revision of the Preamble

The Constitution should be amended by updating the preamble to reflect some minor improvements to the style and language.

Recommendation No. 34 Belonger status

No change to section 2(2) of the Constitution is recommended. However, the Commission recommends that,

a policy should be developed to prioritise the grant of Belonger status in commendable cases as part of the immigration policies recommended for review following the Malone report on the Review of Policy and Process for Granting Residency and Belongership submitted in July 2023.

Recommendation No. 35 Ancestral Virgin Islander

The term “Virgin Islander” in the preamble to the Constitution should be replaced with the phrase “people of the Virgin Islands”, as the term “Virgin Islander” is a defined term in section 65(2) of the Constitution. This should avoid confusion where the term is not intended to import its defined meaning.

Recommendation No. 36 Crown land

Improvements should be made to the administration and regulation of Crown lands through the following mechanisms:

- (a) Add a definition of Crown Land in the Constitution, which language should address the concerns raised by members of the public that clarifies that Crown Land is vested in His Majesty in trust for the benefit of the people and GVI. The following definition is proposed:
 - “Crown land” means any rights or interests in the seabed and Territorial Waters, any rights or interests in any Exclusive Fisheries Zone or Exclusive Economic Zone, any rights or interests in land or other immovable property within the Virgin Islands that vests in and may be lawfully granted or disposed of by His Majesty in right of the Virgin Islands.”
- (b) The definition of Crown land in the Physical Planning Act 2004 (and any other existing legislation) be amended to align with any revised definition in the Constitution.
- (c) The Constitution should be amended to include a requirement for the Territory to enact legislation dealing with Crown lands (see drafting proposal below).
- (d) Legislation should provide the necessary principles for transparency in the acquisition, management and disposal of Crown lands and ensuring these Crown lands are used *for the benefit of the people of the Virgin Islands, both present and future, as a whole*. The emphasised words (or words to this effect) should form part of the legislative provisions.
- (e) Include legislation that provides for a protocol, consistent with admiralty law, for the disposal of derelict boats on Crown lands including recouping any public funds spent on such disposal.
- (f) The Governor should retain responsibility to execute dispositions.
- (g) The Cabinet should retain power to grant prior approval of dispositions, in accordance with the recommendation of the authority/process set out in legislation.
- (h) A Minister should retain responsibility for administering Crown land, in accordance with the process and procedures set out in the legislation.

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- (i) A committee should be established that provides advice to the Government regarding the use of Crown land. The Crown Land Advisory Committee, if so named, will comprise members of the community and relevant technical experts within Government.
- (j) The Ministry with responsibility for Crown land needs to assess the best approach to establishing a map-based index of grants and licences over seabed in the VI.

Recommendation No. 37 Preamble to fundamental rights

It should be clearly articulated that section 9 is a preamble, and the enforcement provision in section 31(1) should be amended to specifically exclude reference to section 9.

Recommendation No. 38 Bill of Rights – Right to marry

Section 20 of the Constitution should be amended to state clearly that marriage is between a man and a woman of the opposite sex.

Recommendation No. 39 Freedom of expression and freedom of assembly – political activities

There is no need to amend the Constitution to protect the right of public servants to participate in political activities. However, the Public Service Management Code should be amended, or supplementary guidance provided, to reflect the modern-day constitutional case law which rejects an absolute ban on political activities by public servants. Further consideration may be given to categorising Public Service posts according to permitted levels of political activity similar to what has been done in the UK and followed in Montserrat.

Recommendation No. 40 Freedom of expression and freedom of assembly-- Resign to run

The existing requirements in the Constitution for a public servant to resign if he or she is desirous of contesting an election should remain.

Recommendation No. 41 Right to an education

Section 22(2) of the Constitution should be amended to refer to the progressive realisation of free secondary education.

Recommendation No. 42 Right to education Special needs children and persons

Section 22(2) of the Constitution should be supplemented with a subsection that provides for an aspirational right to education for children and persons with special needs. This would represent a progressive step that would buttress the existing prohibition against discrimination in the Constitution.

Recommendation No. 43 Human rights protection for the elderly

A provision specifically for the elderly should be included in the Constitution within the fundamental rights chapter.²⁶⁰

²⁶⁰ This would be similar to section 30 of the Constitution dealing with the protection of children.

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Recommendation No. 44 Right to fish and farm

No amendment should be made to the Constitution to include a right to fish and farm without a licence.

Recommendation No. 45 Right to bodily integrity

There should be no change to the Constitution to include a fundamental right to bodily integrity.

Recommendation No. 46 Accessibility of laws

Prior to Chapter 10 of the Constitution (Transitional and Miscellaneous)²⁶¹ a new section should be included to address the accessibility of laws.

Recommendation No. 47 Cabinet and Cabinet reform

- (a) Section 50(1) of the Constitution should be amended to permit Cabinet to invite “any other person”;
- (b) Section 51(2) of the Constitution should be amended, consistent with the formula used in other constitutions, to add the responsibility of the Cabinet Secretary for arranging the business for the Cabinet;
- (c) Section 51(3)(a) of the Constitution should be amended to specify that policy advice given by the Cabinet Secretary be politically impartial, and to also include a general reference to administrative support to be given by the Cabinet Secretary;
- (d) Section 49 of the Constitution should be amended to provide that the Premier shall preside at meetings of Cabinet, an arrangement which is more reflective of a modern constitutional structure; and
- (e) The Cabinet Office should be playing a stronger role in the coordination, development and implementation of Government’s policy across departments.

Recommendation No. 48 Pension Fund

The current optional language in section 100 (“Consolidated Fund or Pension Fund”), of the Constitution should be redrafted to require transitional legislation following the establishment of the Pension Fund.

Recommendation No. 49 Qualification for elected membership to be reduced to 18 years

No change should be made to the Constitution to reduce the age for qualification to hold elected office to 18. International practice continues to favour restricting elected to office to persons who have attained the age of 21.

Recommendation No. 50 Defining the role and responsibilities of the Premier in the Constitution

The Constitution should be amended by adding a provision to section 52 stipulating that, in exercise of his or her functions under the Constitution, the Premier shall exercise those functions in the best interests of the Territory.

Recommendation No. 51 Fixed date for elections

No amendment should be made to the Constitution to provide for a fixed date for elections. However, the power of the Premier to call a snap election should be moderated if possible, perhaps by designating a minimum period after a general election in which a Premier can exercise his power to call a subsequent election, or by establishing a suitable period of notice (90 days) which a Premier must provide to the public of an election date.

²⁶¹ It is not the recommendation of the Commission to include this in the fundamental rights section at this time.

CHAPTER 6 – SUMMARY OF RECOMMENDATIONS

This would enable the public to receive advance notice of the election date – and allow the Government/ Premier the liberty to dissolve the HoA – anywhere between 21 to 60 days prior to the election.

Recommendation No. 52 Run-off provisions

No amendment should be made to the Constitution to replace the first-past-the-post voting system with run-off voting.

Recommendation No. 53 Five year election cycle

No amendment should be made to the Constitution to provide for five-year election cycles.

Recommendation No. 54 Local Government

The Constitution should be amended to add a new provision to support establishing District Councils.

Recommendation No. 55 Population policy

A population policy should be formulated in order to support informed and effective policy-making, provide a cornerstone for ‘a prosperous vibrant thriving and internationally competitive economy’, and as a mandatory step towards self-determination.

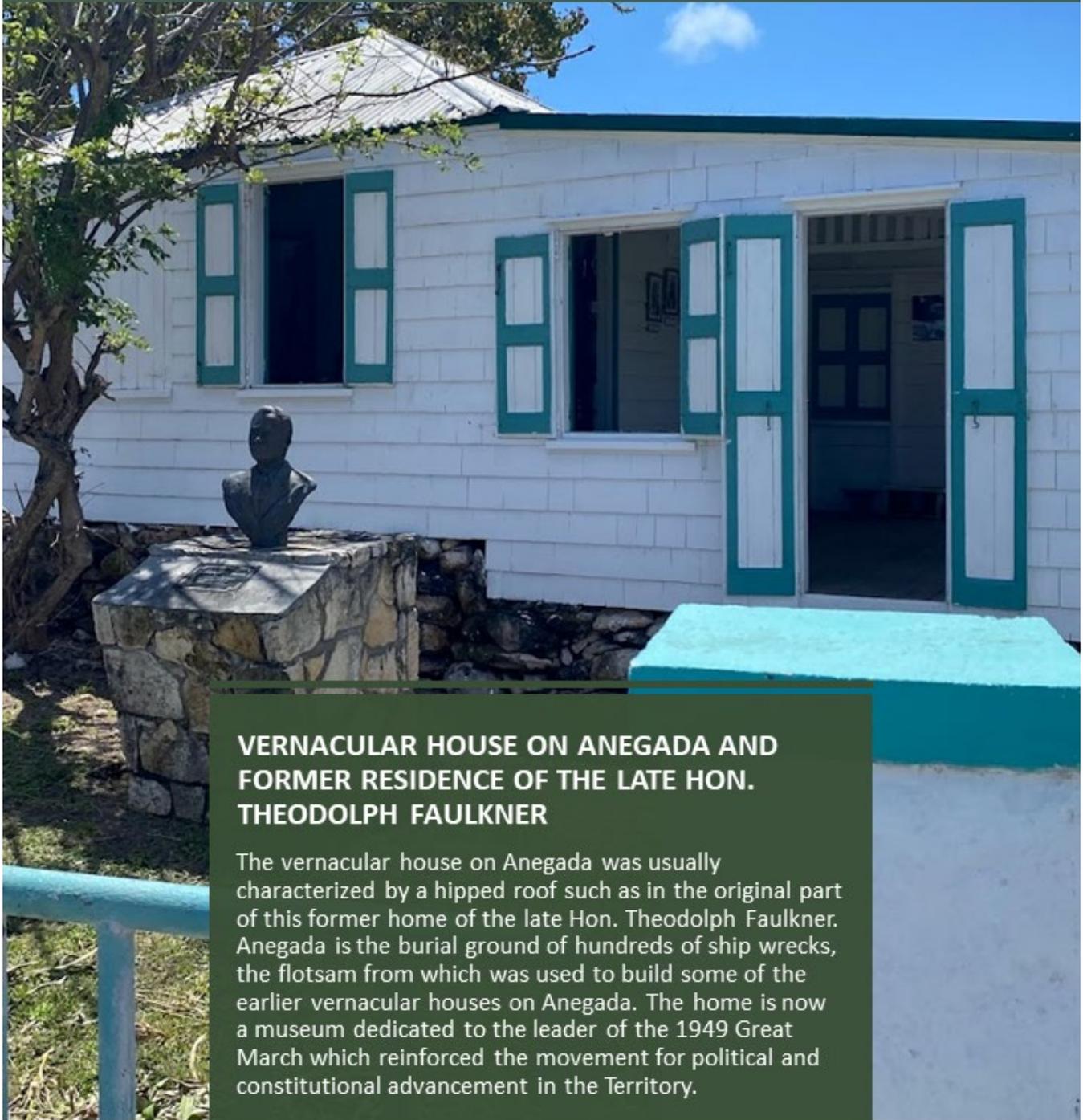
Recommendation No. 56 Representative in UK Parliament

The Commission reserves making any recommendation on whether the Territory should have representation in the UK Parliament at this time, particularly in light of the on-going UK constitutional inquiry into this matter.

Recommendation No. 57 Proportional representation

No action should be taken at this time to displace the electoral system now in use in the VI. The Commission found no compelling desire to change the current system. Such a change is therefore not warranted nor justifiable. Should there be a compelling desire to change the electoral voting system in the VI in the future, there should first be education and wide public consultation.

LOOKING TO OUR FUTURE THROUGH THE LENS OF THE PAST.



VERNACULAR HOUSE ON ANEGADA AND FORMER RESIDENCE OF THE LATE HON. THEODOLPH FAULKNER

The vernacular house on Anegada was usually characterized by a hipped roof such as in the original part of this former home of the late Hon. Theodolph Faulkner. Anegada is the burial ground of hundreds of ship wrecks, the flotsam from which was used to build some of the earlier vernacular houses on Anegada. The home is now a museum dedicated to the leader of the 1949 Great March which reinforced the movement for political and constitutional advancement in the Territory.

APPENDICES

6.1 Appendix 1 –Data and Statistics

MEETINGS OF COMMISSIONERS		
No.	Date	Place
1	18 July 2022	Ward Building
2	15 November 2022	Virtual
3	7 December 2022	Virtual
4	23 February 2023	Cutlass Tower
5	1 April 2023	Cutlass Tower
6	29 April 2023	Cutlass Tower
7	20 May 2023	Cutlass Tower
8	8 June 2023 (Focus Group)	Cutlass Tower
9	20 June 2023	Cutlass Tower
10	8 July 2023	Cutlass Tower
11	13 July 2023 (focus group)	Virtual
12	15 July 2023	Cutlass Tower
13	24 July 2023	Cutlass Tower
14	25 July 2023	Cutlass Tower
15	26 July 2023	Cutlass Tower
16	27 July 2023	Cutlass Tower
17	28 July 2023 (Focus Group)	Cutlass Tower
18	26 August 2023	Cutlass Tower
19	2 September 2023	Cutlass Tower
20	18 September 2023	Virtual – focus group
21	20 September 2023	Virtual - Edit Committee
22	21 September 2023	Virtual – Edit Committee
23	23 September 2023	Virtual – Edit Committee
24	25 September 2023	Virtual – Edit Committee
25	27 September 2023	Virtual – Edit Committee
26	28 September 2023	Virtual – Edit Committee
27	1 October 2023	Virtual – Edit Committee
28	4 October 2023	Virtual – Edit Committee
29	5 October 2023	Virtual – Edit Committee
30	7 October 2023	Virtual – Edit Committee
31	8 October 2023	Virtual – Edit Committee
32	10 October 2023	Virtual – Edit Committee
33	12 October 2023	Virtual – Edit Committee
34	19 October 2023	Cutlass Tower
35	20 November 2023	Virtual

APPENDICES

EDUCATIONAL AND CONSULTATIVE ENGAGEMENTS

Town Hall Meetings	12
Meeting with Private audiences (incl Rotary and League of BVislanders in USVI)	25
High School outreach	2
Signature livestream event	1
Interviews	5
TOTAL	45

ATTENDEES (IN PERSON)

Town Hall Meetings	465
Meeting with Private audiences (incl Rotary and and BVislanders in USVI)	352
High Schools	170
Signature livestream event	14
Interviews	(see social media stats below)
TOTAL	1,001

SOCIAL MEDIA INTERVIEWS

Real Talk –segment 1	6,862
Real Talk – segment 2	9,643
284 Media interview	877
Talking points	282
Signature event	1,500
Smith & Young twitter space	unknown
Your constitution Website	[total unknown due to late tracking]
TOTAL	19,164+ views

INVITATIONS SENT BY THE COMMISSION FOR COMMENTS

Sent	47
TOTAL Replied to	16

APPENDICES

ESTIMATE OF SUBMISSIONS RECEIVED

	Oral*	Written**
Written (Online portal/e-mail/letter)	N/A	156
Town hall meetings	134	N/A
Private meetings	155	N/A
Signature event	5	7
Social media	N/A	7
TOTALS	294	170

* Received from approximately 200 persons or groups of persons.

**Received from approximately 89 persons.

APPENDICES

6.2 Appendix 2 -List of consultative engagements

	Date	Location	Time	Medium	Description	Number of persons
NOVEMBER 2022						
1	1 November 2022	Tortola -Anegada Room Marias by the Sea	2:00pm	In person	Horatio Ofman	1
2	8 November, 2022	Tortola -Anegada Room Maria's by the Sea	10:00am	In person	House of Assembly	11
3	9 November, 2022	Tortola -Anegada Room Marias by the Sea	11:00am	In person	Michael Fay	1
4	9 November, 2022	Tortola (West)-West End Community Center	6:00pm	In person	Community Meeting	@30 1 HoA Member
5	14 November, 2022	Tortola -One VI Agenda Youth Group	5:00pm	In person	Youth Group	18 persons physically, approximately 4 on-line
6	16 November, 2022	Virgin Gorda - Vanterpool Building Conf Rm 2	10:00am	In person	Virgin Gorda Pastors	5 Community members 2 House of Assembly members
7	16 November, 2022	Virgin Gorda - Vanterpool Building Conf Rm 2 Virgin Gorda	11:00am	In person	Virgin Gorda community	11 community members 1 HOA member
8	17 November, 2022	Tortola (West)-Leonora Delville Primary School	6:00pm	In person	Community Meeting	13 community members 1 HOA member
9	19 th November, 2022	Tortola (East) – Willard Wheatley Primary School	6:00pm	In person	Community Meeting	35 community members 3 HOA members
10	21 November, 2022	Tortola -Anegada Room Maria's by the Sea	9:30am	In person	Louis Potter	1
11	22 November, 2022	Tortola (Sea Cow's Bay)-Valarie O. Thomas Community Centre	6:00pm	In person	Community Meeting	@47
12	23 rd November, 2022	Tortola -Anegada Room Maria's by the Sea	9:30am	In person	Complaints Commissioner – Erica Smith-Penn	1
13	23 rd November, 2022	Virgin Gorda (Central) -Catholic Community Centre, Valley Virgin Gorda	6:00pm	In person	Community Meeting	@47 community members 2 HOA members
14	29 th November, 2022	Virgin Gorda (Noth)-North Sound Methodist Church Hall	6:00pm	In person	Community Meeting	@35 3 HOA members
15	30 th November, 2022	Tortola - Anegada Room Maria's by the Sea	11:00am	In person	CCT	4
16	30 th November, 2022	Tortola -Meeting with VI Youth Parliament At BVI Finance Cutlass Tower	5:30pm	In person	Youth Group	7
DECEMBER 2022						
17	1 st December, 2022	Tortola -Virgin Islands Christian Council Road Town Methodist Church Hall	5:30pm	In person	Church representatives	15

APPENDICES

18	2 nd December, 2022	Tortola - Department of Youth Affairs and Rotaract and Sports meeting at Ward Building		In person	Youth Group	13
19	5 th December, 2022	Talking Points	5:00pm	Talk show interview	Radio Face Book	unknown
20	4 th December, 2022	Anegada - Claudia Creque Educational Centre	2:00pm	In person	Community Meeting	12 Community members 3 HOA members
21	7 th December, 2022	Jost Van Dyke - Methodist Church Hall	10:30	In person	Community Meeting	14
22	7 th December, 2022	Real Talk- Segment One	7pm premiere airing	Television Talk Show interview with Commissioners Penn-Lettsome and Ronnie Skelton	Govt Face Book Real talk Facebook Flow TV –Caribbean wide	Govt FB- 862 Real Talk FB- 6,000 Flow TV C'bean wide – confirming As of 31 Jan 2023
23	8 th December, 2022	Signature Livestreamed Event Eileene Parsons Auditorium	7:00pm	In person Facebook TV	Community Meeting Live Streamed	12 community members present 2 HOA members present 1,400 views As of 31 Jan 2023
24	12 th December, 2022	Tortola -Methodist Men. Road Town Methodist Church	4:00pm	In person	Church Group	@10
25	14 th December, 2022	Tortola (Eastern) - Long Look Methodist Church Congregation Long Look Methodist Church	6:00pm	In person	Church Group	17
26	15 th December, 2022	284 Media	10:30am	TV News interview	Face Book	877 views AS of 31 Jan 2023
27	25 th November, 2022	Real Talk- Segment Two	7pm premiere airing	Television Talk Show interview with Commissioners Maya Barry and Noni Georges	Govt Face Book Real talk Facebook Flow TV –Caribbean wide	Govt FB- 643 Real Talk FB- 9,000 view Flow TV C'bean wide – confirming As of 31 Jan 2023
JANUARY 2023						
28	10 th January, 2023	Clarence Faulkner	6:00pm	In person	Individual	5
29	11 th January, 2023	New Life Baptist Church	6:30pm	In person	Church Group	55
30	12 th January, 2023	Rotary Club	12:00pm	In person	Civic organisation	50+
31	12 th January, 2023	Tortola North - Enis Adams School	6:30pm	In person	Community Meeting	15 plus 1 elected rep
32	17 th January, 2023	Cane Garden Bay – Cane Garden Bay Baptist Church	6:30pm	In person	Community Meeting	50 plus 3 elected reps
33	17 th January, 2023	Top Managers, Public Service- Dep Gov's Off	10:00 am	In person	Public Service	9

APPENDICES

34	19 th 2023	January,	Long Look – Francis Lettsome school	6:30pm	In person	Community Meeting	25
35	24 th 2023	January,	Tortola Central – New Testament Church of God	6:30pm	In person	Community Meeting	60
36	26 th 2023	January,	Troy Christopher and company	6pm	In person	Private meeting	7
37	31 st 2023	January,	Irada Potter	10:30	In person	Private meeting	1
38	31 st 2023	January,	Hon Julian Fraser	11:30	In person	Private meeting	1
39	31 st 2023	January,	Virgin Islands Communal Association (VICA)	5:30	In person	Private meeting	20 plus 4 online
FEBRUARY 2023							
40	3 rd 2023	February,	Social Security Board with full staff	3pm	In person	Private meeting	76
41	16 th 2023	February,	Geraldine Ritter-Freeman	2pm	In person	Private meeting	1
42	22 nd 2023	February,	Cedar International School- 12 th grade	2pm	In person	Private outreach	20
43	28 th 2023	February,	Elmore Stoutt High School- 12 th graders	9am	In person	Private outreach	150
MAY 2023							
44	27 th May, 2023		St. Thomas, USVI – League of BVI Islanders	10am	In person	Community meeting	19
45	22 June 2023		Smith and Young Twitter space	7:30pm	Social media	Interview	unknown

APPENDICES

6.3 Appendix 3 - Persons who submitted written recommendations

LIST OF PERSONS WHO SUBMITTED WRITTEN COMMENTS***

- | | | |
|----------------------------|--------------------------------|--|
| 1. Tifern Henley | 27. John Penn | 52. Sarah Penney |
| 2. Horacio Ofman | 28. Jamaal Hodge | 53. Virgin Islands Communal Association |
| 3. Gareth Thomas | 29. Robin F. Gaul | 54. BVI Christian Council |
| 4. Scherrie Griffin | 30. Afiya Smith | 55. William Penn |
| 5. Edgar Leonard | 31. Claudius Rymer | 56. Najan Christopher |
| 6. Ruairi Bourke | 32. Irvin Meade | 57. Troy Christopher |
| 7. Abdul Liburd | 33. Dwayne Nibbs | 58. Prudence Mathavious |
| 8. Akeem Smith | 34. Jacqueline M. Nibbs-Foster | 59. Leroy Vanceto Smith |
| 9. Nidia Turnbull | 35. Danny Stoutt | 60. Brittney Smith |
| 10. Verna E. Penn Moll | 36. Roslyn Gilbert | 61. Mary Roy |
| 11. Louis Potter | 37. Gloria L George-Fahie | 62. New Life Baptist Church |
| 12. Eiko Takehara | 38. Anonymous (Juliet) | 63. Dr. Irad Potter |
| 13. Humphry Leue | 39. Rudolph Vanterpool | 64. James Connor |
| 14. Dorian Hodge | 40. Heather James | 65. Jack Husbands |
| 15. Zanti Dick-Read | 41. Bianca Villafana | 66. Dr. Harlan Vanterpool |
| 16. Bevin George | 42. Diane Drayton | 67. Julian Willock |
| 17. Lorna G. Smith, OBE | 43. Brenda Lettsome-Tye | 68. One VI Agenda |
| 18. Neil M. Smith | 44. Dr. Robert Mathavious, OBE | 69. Geraldine Ritter-Freeman |
| 19. Rawle Brian Gibbons | 45. Shaina Smith-Archer | 70. Hon. Julian Fraser |
| 20. Noreen Callwood | 46. Michelle Mathavious | 71. Einstein Samuels |
| 21. Daniel Davies | 47. Delma Maduro | 72. Concerned Virgin Islanders of the Virgin Islands |
| 22. Mitchel Penn | 48. Roxanne Toussaint | 73. Benito Wheatley |
| 23. Hakim Creque | 49. Kedrick Malone | |
| 24. Dr. Heskith Vanterpool | 50. Sonia O'Neal | |
| 25. Marsha – Ann Gumbs | 51. Josephine Callwood | |
| 26. Ermin Penn | | |

*** most persons submitted multiple comments

APPENDICES

LIST OF PERSONS WHO SUBMITTED WRITTEN COMMENTS* IN RESPONSE TO FORMAL INVITATION

No.	Name of Person Submitting Comments
1	Director, National Parks Trust of the VI (Dr. Cassander Titley-O'Neal)
2	Managing Director, British Virgin Islands Financial Services Commission (Mr. Kenneth Baker)
3	Chairman, Board of Governors, H. Lavity Stoutt Community College (Prof. Arthur Richardson)
4	Board member, H. Lavity Stoutt Community College (Ms. Lynette Harrigan OBE)
5	Permanent Secretary, Ministry of Education, Youth Affairs and Sports (Dr. Marcia Potter)
6	Permanent Secretary, Ministry of Communications and Works (Mr. Ronald Smith-Berkeley)
7	Chairman, International Tax Authority (Mr. Kenneth Baker, Interim Chairman)
8	Registrar of the Supreme Court (Ms. Vareen Vanterpool-Nibbs)
9	Director of Public Prosecutions (Ms. Tiffany R Scatliffe)
10	Attorney General (Hon. Dawn J. Smith)
11	Permanent Secretary, Ministry of Health and Social Development (Ms. Petrona M. Davies)
12	Cabinet Secretary (Ms. Sandra Ward)
13	Supervisor of Elections (Ms. Scherrie Griffin)
14	Tortola Toastmasters Club
15	Public Service, Top Managers
16	Commissioner of Police (Comm. Mark Collins)

*The Complaints Commissioner met with the Commission in person only.

APPENDICES

6.4 Appendix 4 -Persons who submitted oral recommendations

1. Adrianna Soverall
2. Akeem Leonard
3. Akeem Robinson
4. Akesha Robinson
5. Albert Thomkins
6. Albert Wheatley
7. Albertina Septus
8. Alice Potter
9. Alujah Mohabir
10. Anderson Ham
11. Annjel Flax
12. Archibald Christian
13. Art Christopher
14. Averard Penn
15. Ayanna Hull
16. Bernie Harrigan
17. Bevin George
18. Birch Lettsome
19. Bishop Paul A. Ricketts
20. Broderick Penn
21. Carl Martin
22. Carmen Blyden
23. Carnel Smith
24. Cedar International School
25. Charmaine Brathwaite
26. Chelsea Forbes
27. Chezley Stoddard
28. Christina Yates
29. Clarence Faulkner
30. Claude Skelton-Cline
31. Claudia Hodge
32. Claudius Rymer
33. Coccoeye-Robert Penn
34. Coden Fahie
35. Daniel Davies
36. Darrell Alonze Ruan Jr.
37. David Archer
38. Dawn Leonard
39. Dean Callwood
40. Deborah James
41. Delane Lennon
42. Delores Creque
43. Dennis Callwood
44. Denniston Fraser
45. Dereck Marshall
46. DeShawn Douglas
47. Desiree Flanders-Harrigan
48. Desiree Soars Vanterpool
49. Diane Drayton
50. Diane Levons
51. Donnel Flax
52. Dr. Amber Wheatley-Buckell
53. Dr. Cassander Titley-O'Neal
54. Dr. Connie George
55. Dr. Franklyn Penn, VICA
56. Dr. Harlan Vanterpool
57. Dr. Irad Potter
58. Dr. Karl Dawson
59. Dr. Marcia Potter
60. Dr. Michael Turnbull
61. Dr. Mitchel Penn
62. Dr. Nicholas Buckell
63. Dr. Ronald Georges
64. Dylan Penn
65. Edward DeCastro
66. Edwin Forbes
67. Egbert Forbes
68. Elise Donovan
69. Elmore Stoutt High School
70. Elvia Smith-Maduro
71. Emerald Pemberton
72. Erica Smith-Penn
73. Esme Potter, Methodist
74. Esther Wheatley
75. Ethlyn Joseph
76. Euson Malone
77. Frederick Chico Lawson
78. Gerald Chinnery
79. Geraldine Ritter-Freeman
80. Glenda Rabsatt
81. Glenroy Forbes
82. Gloria Fahie
83. Gregory Levons Sr.
84. Grethel Smith
85. Halstead Lima
86. Hazel Ann Hannaway Boreland
87. Hilroy George
88. Hon Alvera Maduro Caines
89. Hon Carvin Malone

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90. Hon Marlon Penn
91. Hon Melvin Turnbull
92. Hon. Julian Fraser
93. Hon. Kye Rymer
94. Hon. Melvin Mitch
Turnbull
95. Hon. Natalio Wheatley
96. Hon. Shereen Flax-
Charles
97. Hon. Vincent Wheatley
98. Horatio Ofman
99. Humphrey Leue
100. Ibrahim Maduro
101. Ishmael Brathwaite
102. Iverson Smith
103. Jacqueline Nibbs
104. Janice Graham
105. Jeanette Scatliffe-Boynes
106. Jeremy Vanterpool
107. John Chinnery
108. John Penn
109. John Samuel
110. Joseph Abbott-Smith
111. Josephine Callwood
112. Joycelyn Hoyte
113. Julian Willock
114. Juliet Smith
115. Katherine Smith
116. Keith Dawson
117. Kelvin Thomas
118. Ken Brown
119. Kenneth Thomas
120. Kevon Lettsome
121. Koiley Christopher
122. Kyle Ricketts
123. Lauralee Anthony
124. Leall Antonio Robinson
Sr.
125. Lemuel Smith
126. Lindy Soars Francis
127. Lisa Hodge
128. Lori Freeman
129. Lorna George
130. Lorna Soars Johnson
131. Lorne Greene
132. Lorraine LaRose
133. Louis Potter
134. Luce Hodge Smith
135. Malvern Brathwaite
136. Marco Leonard
137. Maria Leonard
138. Mark Street
139. McLloyd Walters
140. Medita Wheatley
141. Melissa Potter, VICA
142. Michael Fay, KC
143. Moleto Smith
144. Najan Christopher
145. Nigel Massicote
146. Nikia Cheltenham
147. Pastor Dore
148. Pastor Gleason E. Brooks
149. Pastor Gregory A.
George
150. Pastor Ishmael Charles
151. Pastor John Cline
152. Pastor Jovan Cline
153. Pastor Keith Lewis
154. Pastor Myron Stevens
155. Pastor Naaman Chalwell
156. Pastor Trent Berg
157. Pastor Wayne Hoyte
158. Pearline Scatliffe-Lennard
159. Petrona Davies
160. Phyllis Mercer
161. Randolph George Snr.
162. Rashawn Johnson
163. Raymond Fonseca
164. Reese Creque
165. Ronald Smith-Berkeley
166. Rosalia Gardener
167. Rosita Scatliffe
Thompson
168. Roxanne DeWindt-
Toussaint
169. Roxanne Ritter-Herbert
170. Rudolph Lettsome
171. Sachkia Barnes
172. Sandra George-Leonard
173. Sandra Philip Hodge
174. Sandra Ward, Cabinet
Secretary
175. Sasha Flax

APPENDICES

- | | | |
|--------------------------|-------------------------|------------------------|
| 176. Selvyn Dawson | 185. Stephanie Faulkner | 194. Tony Harrigan |
| 177. Shaina Smith-Archer | 186. Stephen McMaster | 195. Troy Christopher |
| 178. Sharon Flax Brutus | 187. Stephon Mactavious | 196. Vernon Vanterpool |
| 179. Shavon Henley | 188. Sylvia Freeman | 197. Vivian Hendricks |
| 180. Shea Alexander | 189. T. Smith | 198. William Penn |
| 181. Shereen Flax-Mars | 190. Talesha Jones | 199. Winnifred Milton |
| 182. Sherman Chinnery | 191. Temulji Hughes | 200. Yadali Thomas |
| 183. Skyla Hodge | 192. Tessa Callwood | |
| 184. Sonia O'Neal | 193. Theodore James | |

TOTAL – 200

APPENDICES

6.5 Appendix 5 - History of constitutional development (updated)



1627: Carlisle Proprietorship

1627: Grant from King James I to James Hay 1st Earl of Carlisle of 'all the Caribbee islands'



1672: Colony of the Leeward Islands

1672: Annexation by William Stapleton, Governor of the Leeward Islands
1735: Attempted establishment of constitutional Government by William Matthew, Jr. Governor of the Leeward Islands



1774: Bicameral House of Assembly

1774: Bicameral House of Assembly established under a Lt. Governor in the VI reporting to Governor of the Leeward Islands in Antigua;
Comprised of Council (upper house) of 12 nominated members; Legislative Assembly (lower chamber) of 11 elected members
1780: Assembly increased to 15 elected members
1837 amendments: Legislative Assembly reduced to 9 elected members (selected at-large)
1854: Upper house abolished; Legislative Assembly reduced from 9 to 6 elected persons and 3 nominated persons
1859: Legislative Assembly reduced to 3 elected members and 3 nominated members.
1867 : Legislative Assembly reduced to 3 ex-officio members and 3 members nominated by the President.



1871: Presidency of the Virgin Islands

1871: Legislative representative to the Federal Assembly of the Leeward Islands reduced to 1 appointed member.



1902: Abolition of the Virgin Islands Assembly

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1950: Restoration of Legislative Assembly

1950: Virgin Islands Constitution Act passed by the Leeward Islands Federal Legislature provided for establishment of unicameral legislature of 4 elected members; 2 nominated members; 2 ex-officio members presided over by the Commissioner.



1954: Colony of the Virgin Islands

1954: Virgin Islands Constitution and Elections Act, 1954 established the Virgin Islands as a separate colony with direct relationship to the UK, no longer part of the federal assembly.
1965: Proudfoot Constitutional Review Report



1967: Ministerial Government

1967: Virgin Islands Constitution Order
1976: Virgin Islands Constitution Order
1994: Virgin Islands Constitution (Amendment) Order
1973: Constitutional Review Commission



1976: Constitution

1976: Virgin Islands Constitution Order
1979: Virgin Islands Constitution (Amendment) Order
1982: Virgin Islands Constitution (Amendment) Order
1991: Virgin Islands Constitution (Amendment) Order
1992: Constitutional Review Commission
1994: Virgin Islands Constitution (Amendment) Order
1999: White Paper Partnership for Progress and Prosperity (UK)
2002: British Overseas Territories Act (UK)
2005: Farara Constitutional Review Commission



2007: House of Assembly

2007: Virgin Islands Constitution Order
2012: White Paper The Overseas Territories: security, success and sustainability (UK)
2015: Virgin Islands Constitution (Amendment) Order
2021: Commission of Inquiry
2022: Virgin Islands Constitution (Amendment) Order

Explanatory note

Commissioners found the constitutional history as published in the Report of the 2005 Constitutional Review Commission to be so detailed and thorough that there was no need to attempt to repeat the entire exercise. The chapter was compiled by former Commissioner Mr. Elihu Rhymer, B.E.M who sadly passed away during the writing of this Report, with material on earlier periods sourced primarily from the works of Norwell Harrigan, Pearl Varlack and Isacc Dookhan.²⁶² What follows is largely a copy of his script edited by Commissioner Noni M. Georges and updated by Commissioner Dr. Charles Wheatley, OBE where necessary to bridge the gap between the previous exercise and the current one.

The Virgin Islands - Background to Constitutional History

- 1.1 The Virgin Islands is a sub group at the northern end of the Lesser Antilles archipelago, which arcs across the Atlantic, from the eastern tip of South America to approximately ninety miles off the eastern end of Puerto Rico. While geographically a single chain of islands, the group comprises two distinct territorial systems.
- 1.2 For nearly three hundred and fifty years, the British have exercised sovereignty over the north-eastern portion of islands (the principal ones being: Tortola, Virgin Gorda, Anegada and Jost Van Dyke). By the purchase from Denmark in 1917 of the Danish West Indies (principally: St. Thomas, St. Croix and St. John), the United States of America established sovereignty over this group, which was renamed the Virgin Islands of the United States of America and soon became shortened to "The Virgin Islands". To avoid confusion in the day to day usage, the northerly group began to be called 'British Virgin Islands'²⁶³. However, the official name of this Territory is the **Virgin Islands**. The Commission is of the view that every effort should be made, officially and otherwise, to reverse the trend towards the *de facto* surrender of the proper name of this Territory.
- 1.3 The documented constitutional history of this Territory began in 1493, when Christopher Columbus stumbled upon this cluster of islands, which it is reported he named the *Virgin Islands* in memory of the legendary St. Ursula.
- 1.4 By the early 17th century, not only were Europeans aware of the existence of a whole new world to the west, but their wars became extended to these new 'West Indies', and the Virgin Islands was caught up in those struggles.
- 1.5 The Virgin Islands, with its many islands and natural harbours was a haven for legitimate naval vessels, licensed brigands and pirates. Given its size, topography, aridness and poor quality of soil, the Virgin Islands became more attractive as a station along the trade route from South America and the Greater Antilles than as a settled territory. Spanish failure as the principal claimant to establish a settlement left the way open for the French, Dutch, Danish and British to become stakeholders.
- 1.6 Since the early 1620s' Britain commenced the establishment of colonial settlements along the Lesser Antilles chain of islands and instituted governance structures in islands such as Barbados, Antigua and St Christopher.

²⁶² Dookhan, Isaac. A History of the British Virgin Islands: 1672 to 1970. England, UK: Caribbean Universities Press in association with Bowker Publishing Company, 1975.

Harrigan, Norwell and Pearl Varlack. The Virgin Islands Story, England, UK: Caribbean Universities Press, 1975.

²⁶³ It is to be noted that throughout this Report the correct name of the Territory has been used.

APPENDICES

Carlilse Proprietorship

- 1.7 In 1627 King James I granted Letters Patent to James Hay, 1st Earl of Carlisle to all the Caribbean islands, which included “Anegoda”. There was no attempt by the English to settle the Virgin Islands at that time and by 1660 the family died out when Carlilse’s son left no heir.

The First Constitution

Annexation to the Colony of the Leeward Islands

- 1.8 The Colony of the Leeward Islands was established by royal warrant in 1671. The first Governor, Colonel William Stapleton, in 1672 took the opportunity of the outbreak of the Third Dutch War, to attack a small Dutch settlement on Tortola in July of the same year. This event began the British hegemony over the island group.
- 1.9 At the end of the third Anglo-Dutch war, the Treaty of Westminster (1674) required the return of the Virgin Islands to the Dutch. This did not take place. Harassment from Spain, conflicting claims from the Dutch and French, all had a negative impact on the attractiveness of the Virgin Islands to settlers. However, for brigands, pirates and others of like mind, the lack of institutions for governance afforded the perfect environment for their plundering activities.
- 1.10 Initially, the British had no interest in establishing settlements in the Virgin Islands, but merely wished to deny them to others as points from which attacks could be mounted on the colonies being established on the larger islands in the Antillean chain. This lack of interest did not, however, deter a small group of planters and their families in 1680 from leaving Anguilla and moving to Virgin Gorda.
- 1.11 Strategic defence of the settlements was indeed problematic. The many islands, bays and coves provided perfect cover for even one marauding vessel to wreak havoc on an undefended isolated community. The Spanish had not accepted that other European powers had the right of placing settlements on unoccupied territories, which Spain claimed to have discovered and whose ownership was validated by Papal Bulls in 1493 and 1506. The Spaniards did everything to prevent others from establishing settlements, including providing official backing to pirates or anyone prepared to attack such settlements. Settlements in the Virgin Islands were in constant danger, given their proximity to Puerto Rico.
- 1.12 After 1718, the British did not actively pursue sovereignty rights over St. Thomas, but St. John and St. Croix were still somewhat open to question. During the Napoleonic Wars the three islands were taken over by the British, but after the Treaty of Paris (1815) they remained in Danish possession until sold in 1917 to the United States of America. The rights of sovereignty by Britain in respect of Tortola, Virgin Gorda, Anegada and Jost Van Dyke were agreed by 1735 and they have since remained British possessions. With the settlement of the sovereignty issue the population began a steady growth.

Development of Governance Institutions

- 1.13 There were three reasons for the lack of interest and hence the reluctance to establish institutions of governance:
- (a) Low potential economic viability due to nature of land mass, topography and soil quality;
 - (b) Strategic difficulties in sustaining a viable defence; and
 - (c) Issues relating to sovereignty of the islands
- 1.14 Due to its geographical and geological characteristics, questions of the economic viability of the Virgin Islands as a socio-political unit have plagued this Territory from the “get go.” For example, a genuine effort

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in 1711 was made by a Captain John Walton, to encourage settlements in the islands by establishing “the institution of a regular system of administration”²⁶⁴. This effort was discouraged by Governor Hamilton, who was more interested in promoting the welfare of the new Leeward Islands Colony of St Christopher, Nevis, Antigua and Montserrat.

- 1.15 His reports on the physical characteristics and productive capacity of the Virgin Islands were deliberately designed to create an unfavourable picture of the islands. He portrayed them as being “barren, mountainous, and rocky, and could produce nothing else but timber.” By 1716 there were 247 whites and 125 blacks on Virgin Gorda; 103 whites and 44 blacks on Tortola; and 17 whites and 6 blacks on Beef Island. By 1717 these numbers had increased respectively to: 317 whites and 308 blacks; 159 whites and 176 blacks on Virgin Gorda and Tortola, but had declined on Beef Island.
- 1.16 An unfavourable report by Captain Candler sailing through the islands on *HMS Winchelsea* did not help in shifting the general impression of the Council of Trade and Plantations (distant fore-runner to the Colonial Office) on the viability of settlements although the overall populations of whites had increased, with only a small decrease in the number of blacks. Because of these reports, a decision was taken in April 1718 to remove the inhabitants from Tortola and Virgin Gorda. Despite this decision, however, the population continued on a steady increase.

The (failed) Matthew Councils and Assemblies 1735 – 1774

- 1.17 By 1734, it became evident that the principal islands required institutions to administer justice and governance. As Governor of the Leeward Islands Colony, Governor Matthew made appropriate provisions for the establishment of nominated councils and elected legislative assemblies in Tortola and Virgin Gorda in early 1735. This system, like that of the Leeward Islands Colony itself, was patterned off the Parliament of England; the King being represented by the Governor, the Council taking the place of the House of Lords and the Assembly that of the House of Commons. Each Council consisted of six (6) and each Assembly of nine (9).
- 1.18 Members of the Councils were appointed by the Governor and members of the Assemblies were elected generally by the inhabitants. There was no property requirement to be a voter as effective proprietary rights in many cases were in some doubt.
- 1.19 To effect the election, Tortola was divided into three divisions, viz.: Fat Hogs Bay Division, Road Division, and Saka Bay Division. Each returned three (3) Members.
- 1.20 Virgin Gorda was divided into two divisions: viz: Valley Division, which returned six (6) Members; and North and South Sound Division, which returned three (3) Members.
- 1.21 It was subsequently realised that Governor Matthew had exceeded his authority under his Commission in establishing Assemblies. The Assemblies, as a result, were never called into session, although the Councils took up their duties, which included magisterial and tax-levying functions.
- 1.22 The appointment of James Purcell as Lieutenant-Governor for the Virgin Islands in 1747, as well as the expanding population, kept alive agitation for some form of civil government. Petitions were sent. Finally, during a personal visit to Britain in 1754 Purcell, with support from agents and leading merchants trading with the Leeward Islands, was able to present the case to the Lords of Trade for establishing some form of government in the Virgin Islands. Purcell favoured constitutional government, but he believed that legislative authority should be vested in the Governor and Council. If an Assembly was granted, he felt it should be for the whole Territory, rather than one for Virgin Gorda and one for Tortola. He also favoured a

²⁶⁴ Dookhan, A History of the British Virgin Islands, pg 21.

property qualification and recognised the need to involve the public in matters of taxation. However, his enthusiasm for advancement in civil government was not shared by Leeward Islands Governor George Thomas, who intimated that the inhabitants were so illiterate that a legislative body would only turn their heads and questioned the sincerity of Lt.-Governor Purcell in promoting such institutions of governance for the Virgin Islands.

Second Constitution

1774 Council and Assembly

- 1.23 European war in the 1750s and looming difficulties with the American colonies distracted any likely attention for the introduction of civil governance in the Virgin Islands. Nonetheless, the productive capacity of the islands was growing at an increasing rate, as was the population. By 1756, this was estimated at 1,184 whites and 6,121 blacks.²⁶⁵ The improved economic climate coincided in 1773 with the appointment of a progressive thinker in the person of Sir Ralph Payne as Governor of the Leeward Islands.

“He was impressed with the productivity of the islands, especially Tortola, the prospects of augmented trade and the willingness of the people to be governed. He deplored their neglect, ‘half a century having elapsed since the Virgin Islands had been visited by the Chief Governor’. Vexed by the ‘most irregular and impolitic constitution and nature of Government’ which existed in the Virgin Islands, and prompted by a petition from the inhabitants, which his own encouragement stimulated, Payne recommended the early institution of civil government”²⁶⁶

- 1.24 In July 1773, Governor Payne was instructed by the Secretary of State for the colonies to introduce into the Virgin Islands a representative system of Government, based on a Governor, a nominated Council, and an elected Assembly.
- 1.25 The generosity toward political advancement did not come without its price. One element in the Petition for civil governance was an undertaking to pay a 4 ½ % excise tax on all produce and this was made a condition of the undertaking to introduce representative government.
- 1.26 The proclamation for the institution of a Legislature in the Virgin Islands was issued by Governor Payne on November 30, 1773. It provided for:
- (a) A Council of twelve (12) members nominated by the Governor;
 - (b) An Assembly of eleven (11) members: -
 - (i) eight (8) representing Tortola,
 - (ii) two (2) representing Virgin Gorda, and
 - (iii) one (1) representing Jost Van Dykes.
- 1.27 All white men who had attained the age of 21 years and who possessed 40 acres of land or a house worth £40, and all sons of the required age who were heirs apparent of persons possessing 80 acres of land or a house valued at £80, were eligible as candidates for election. Qualification for electors included possession of 10 acres of land or a building worth £10. Tortola, Virgin Gorda and Jost Van Dyke were each to be treated as a single constituency. Voters and representatives had to be resident in the island.
- 1.28 Governor Payne was present for the opening of the first Legislature on January 31, 1774. In his speech he stressed the need for immediate action to pass certain laws necessary for the welfare and good government of the Virgin Islands. Bitter conflict between the Governor and the Assembly (all being plantation owners)

²⁶⁵ Dookhan, A History of the British Virgin Islands, pg 28.

²⁶⁶ Ibid, pg 30.

over an all-important tax Bill and confirmation of land titles led to a stalemate. The Assembly refused to pass any legislation for the establishment of a court system.

Third Constitution

1780 amendments

- 1.29 When the Governor was given the authority to establish a court system without the approval of the Legislature, suspicions as to the intentions became more entrenched and opposition bordered on insurrection. A number of members were suspended from the Assembly, which was then reconstituted. New electoral districts were established and qualifications for voters and candidates were prescribed. The three constituencies on Tortola (Road Town, Eastern and Western) each had three representatives with an extra one for Road Town. Virgin Gorda had two (Valley and Sound) each with one representative and an extra for Spanish Town. Jost Van Dyke was a single constituency with two representatives. This made for an Assembly of fifteen (15) representatives.
- 1.30 The new assembly proved to be just as intransigent as the former and it was not until the British Government gave a firm undertaking not to challenge titles to lands which were settled without grants, that the way was clear for the passage of both the Court Bill and the Quieting Bill in 1783.
- 1.31 From the onset of the establishment of representative legislative institutions in the Virgin Islands there existed a struggle between the perceived interest of the colonial administrators and that of the Territory's inhabitants. This pattern of relationship continued throughout the rise, fall and re-emergence of representative government.
- 1.32 Establishment of an assembly and council (a sort of executive council or cabinet) coincided with the economic emergence of the Virgin Islands:
- "From about 1740 to the end of the century economic progress accelerated, periods of war bringing considerable prosperity to the islands...improved products in sugar, molasses, rum, cotton, lime-juice, ginger, indigo, coffee, aloes, pimento, turtle shell, mahogany, timber and plank was to the value of £30,000 sterling in Tortola and £15,000 in Virgin Gorda."²⁶⁷
- 1.33 Historians of this period (1756-83) usually refer to it economically as the "golden era". During this period the enslaved population reached its peak at 9,000, with a white population of approximately 1,200.

Fourth Constitution

- 1.34 Settlement of the land tenure issues, establishment of courts of justice and the general economic prosperity enabled Governor Shirley in 1785 to report that the Virgin Islands were beginning to feel the beneficial effects of good order leading to a well-regulated community. Unfortunately, economic progress in the islands had been fuelled by European wars and the American War of Independence. With the turn of the century and relative peace after the Napoleonic wars, competition from beet sugar, the movement against slavery as the basis of an economic system, and eventual abolition of the slave trade all affected the prosperity of the West Indies and especially the Virgin Islands.
- 1.35 The machinery of representative government which had been established was predicated on the presence of a white planter class. Although the number of free blacks was on the increase, they had no vote. In 1815 they petitioned the Lord Commissioners of Trade and Plantations for civil rights and three years later

²⁶⁷ Harrigan and Varlack, *The Virgin Islands Story*, pg 54.

legislation was passed permitting free blacks the right to vote for a representative in the assembly, who had to be a white freeholder.

- 1.36 Nevertheless, steeply declining electoral participation, due partly to a steady exodus of whites, led to increasing curtailment in legislative activity.

1816 – 1833: Dissolution and Reconstitution of the federal Colony of the Leeward Islands

- 1.37 In 1816, the Colony of the Leeward Islands was dissolved and the Virgin Islands grouped with St. Christopher, Nevis, Anguilla and the Virgin Islands under a separate Governor. In 1833, the Leeward Islands colony was reconstituted under one Governor in Antigua.

1837 amendments

- 1.38 Continuing challenges with participation in governance institutions led to reduction in the size of the Virgin Islands Assembly from 15 members to 9 members elected at large from a single constituency, while the appointed Council of 12 remained, under the direction of the Chief Governor of the Leeward Islands in Antigua.

1854 amendments

- 1.39 In 1854 the upper chamber of the Virgin Islands Council was abolished and elected representatives in the Assembly were reduced from 9 to 6. The colony was governed by a President, appointed by the monarch, who had the power to nominate 3 persons to the Assembly. The President served under the Governor of the Leeward Islands in Antigua.

1859 amendments

- 1.40 In 1859 the Virgin Islands Assembly was reduced to 3 elected members and 3 members appointed by the President, with the appointed President of the colony having the deciding vote.

1867 amendments

- 1.41 By 1867 all pretence to the operation of a Legislative Council in which there were elected representatives came to an end. An Act was passed to reconstitute the Legislative Council to provide for three official members and three unofficial members nominated by the President with the approval of the Crown.

1871: The Presidency of the Virgin Islands

Fifth Constitution

- 1.42 In 1871 a single federal colony comprising all the Leeward Islands and Dominica was created,²⁶⁸ but in the federal assembly the Virgin Islands was not represented by an elected member. Diminishing government personnel presented a problem in appointing even official members of the Legislature, due to the multiple appointments of one individual to several posts.

1902: Abolition of the Virgin Islands Assembly

- 1.43 By 1902 the Federal Council abolished the local Assembly, bringing the status of the Territory back to what it was in the beginning. In the words of Harrigan and Varlack:

²⁶⁸ The Leeward Islands Act, 1871 passed by the British Parliament, established the colony of the Leeward Islands consisting of six presidencies: Kelsick, Cecil A. "Constitutional History of the Leewards." *Caribbean Quarterly* 6, no. 2–3 (May 1960): 177–209. <https://doi.org/10.1080/00086495.1960.11829810>.

“The 'legislature' (in the person of the governor) had practically nothing of any real importance to the islands to legislate about and the function of the executive was the maintenance of law and order and the collection of taxes from miserably poor people”²⁶⁹

Sixth Constitution

- 1.44 For the first thirty years of the twentieth century, constitutionally the Virgin Islands went to sleep. Not until the 1930s did civic minded Virgin Islanders seriously begin to question the quality of governance in the presidency. Hope Stevens of New York, Tortola and Nevis had been travelling through the Caribbean promoting labour movements and awakening political consciousness. In the Virgin Islands he encouraged the formation of a Civic League, which attracted membership from among the progressive thinkers of the day – “Men like Howard Penn, Herman Abbott, Rufus DeCastro and David Fonseca”²⁷⁰
- 1.45 The Civic League was backed by the British Virgin Islands Pro-Legislative Committee of America. Together they began to demand the reinstatement of an elected Legislature and petitioned the Secretary of State for the Colonies to that effect. These stirrings were taking place at a time when practically every British colony in the Caribbean had experienced riots or other forms of insurrections short of armed conflict. As a result of those conflicts the West Indies Royal Commission under the chairmanship of Lord Moyne, was appointed in 1938 to investigate “what had gone so wrong in the British Caribbean colonies. In the Virgin Islands, we prepared a petition for them, to tell them what we wanted and raising our concerns about all the things we did not have”²⁷¹.
- 1.46 The Second World War placed the Moyne's Commission recommendations on hold, but it was instrumental in paving the way for advanced constitutions in the colonies after the war. The war had also been beneficial to the Virgin Islands (Br.) in that activities in St. Thomas related to defences created opportunities for employment by a large number of Virgin Islanders (Br.).
- 1.47 The real impetus for addressing the issue of elected representation in the Virgin Islands arose out of the anguish felt by a fisherman from Anegada, Mr. T. H. Faulkner, who had come to Road Town with his wife who was approaching her time of delivery. While he awaited his wife's delivery at the Peebles Hospital, an issue arose between himself and the medical doctor, which, it appears, he was unable to have resolved to his satisfaction and there was no representative of the people to whom he could make a complaint or have assistance in seeking redress. With no representative, he decided to take the matter directly to the people. Night after night he took to the rostrum in the market square in front of the administration building. He spoke to the issues that concerned him and the need for the people to have a say in the governance of the country. His public outcry resonated with the people as more and more persons gathered around to listen to his nightly lectures. Eventually there emerged a political groundswell which on the 24th November, 1949 culminated in the largest political demonstration in the history of the Territory. The people, led by Faulkner, I. G. Fonseca and C. L. DeCastro, marched through the streets of Road Town to the office of the Commissioner, J. A. C. Cruikshank, where they presented a petition setting out grievances pertaining to the manner in which the presidency was being administered. The petition stated *inter alia*:

“We are imbued with a desire to decide our local affairs our own selves. We have outgrown that undesirable stage where one official. or an official clique, makes decisions for us ... We are seeking the privilege of deciding how our monies are spent and what shall be our Presidential laws and policies”²⁷².

²⁶⁹ The Virgin Islands Story by Norwell Harrigan and Pearl Varlack; pg 55.

²⁷⁰ Life Notes by Joseph Reynold O'Neal, pg 44.

²⁷¹ Life Notes by Joseph Reynold O'Neal, pg 45.

²⁷² The Virgin Islands Story by Norwell Harrigan and Pearl Varlack; pg159.

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1950: Virgin Islands Constitution Act

- 1.48 As a result of the demonstration an announcement was made in February 1950 that Lord Baldwin, Governor of the Leeward Island Colony, appointed H. R Penn to chair a committee to make recommendations for the establishment of a Legislative Council. Representatives from all the villages and out-islands were appointed to the committee by Commissioner Cruikshank. On the appointed day, all the membership met in the Methodist School, exchanged opinions, and based on the terms of reference recommended a Constitution similar to that of Montserrat.²⁷³ In July, 1950 the **Virgin Islands Constitution Act** was passed by the Leeward Islands Federal Legislature. The Legislative Council of the Virgin Islands, established thereby provided for eight members of whom two were ex-official members, two nominated members and four elected members. The Commissioner was to preside as President of the Legislative Council.
- 1.49 Candidates for election were required to make a deposit, which they would lose if they failed to poll a certain percentage of votes. Adult suffrage was based on a literacy test. For purposes of the election, the Territory was to be treated as one constituency. Most importantly, the Executive Council (policy decision making) was to include two of the four elected members. The General elections were held in November 1950. Nine candidates contested the election and 67.4% of the registered voters cast their ballots.

Seventh Constitution

1954: Virgin Islands Constitution and Election Order 1954

- 1.50 In 1953 Governor Sir Kenneth Blackburne appointed a second Constitutional Committee to further improve the Constitution. The meeting of this second Committee took place at the Anglican School. Again Mr. H. R. Penn was Chairman and Mr. McWelling Todman, a senior civil servant was secretary.²⁷⁴ The recommendations provided for five constituencies and six elected members, two members representing the Road Town constituency.
- 1.51 De-federation of the Leeward Islands Colony in 1956, to clear the way for the creation of the West Indies Federation, further empowered the local Legislature. The Presidency, by opting not to participate in the new federal state, was elevated to colony status, with greater legislative authority and a direct line to the Colonial Office in the United Kingdom. The title of Commissioner was now changed to Administrator. Under the reformed constitution, the two members elected by other elected members to the Executive Council, were given oversight for "trade and production" and "works and communication". This was a small but important step on the road to ministerial responsibility.
- 1.52 An issue which constantly arose in general political discussions, was whether the Virgin Islands, both British and American, should be amalgamated as one territory under the United States of America.
- 1.53 This matter appeared to have been given serious consideration, particularly in the late 1950s and early 1960s when it was believed that discussions on the topic were taking place between London, Washington and even St. Thomas. In 1964 Nigel Fisher, Parliamentary Under-Secretary of State for the Colonies visited both the British and United States Virgin Islands. In discussions with members of the Legislature in the Virgin Islands (Br.), the impression must have been communicated that the people's representatives did not favour such a merger at this time even though a plebiscite might well suggest such a desire. This position could have accounted for the official report in 1965, to the effect that the British Government had no intention of proposing any change in the status of the territory unless this is strongly requested by the people themselves.

²⁷³ Memoirs of H.R. Penn by H.R.Penn, pg 26.

²⁷⁴ Memoirs of H.R. Penn by H.R.Penn, pg 30.

Eighth Constitution

1967: *Virgin Islands Constitution Order, 1967*

- 1.54 The sense that there was a growing dissatisfaction in the territory with Britain as a colonial master as compared with the United States of America, might have hit a nerve. This could have led to the new proposals put forward by the Colonial Office in 1964 to pass responsibility for internal governance of the colony to representatives of the people in the form of a State Council, which would have both legislative and executive functions. The idea was rejected by the politicians as unfamiliar and lacking in British precedent.
- 1.55 As a way forward, Dr Mary Proudfoot was appointed in 1965 to review the constitution. After appropriate public consultation throughout the territory, she concluded that constitutional advancement to ensure elected members more initiative in the direction of the colony's affairs was justified. Such progress was essential to laying a solid base for self-government. A conference was convened in London on 4 October 1966, with representatives from the Colonial Office and the Virgin Islands and agreement was reached on all the substantive issues as recommended in what became known as the "Proudfoot Report".
- 1.56 Recommendations implemented from the report were an increase in elected representatives to the Legislative and Executive Councils respectively from six to seven and from three to four. Non-elected members in the Legislature were reduced from four to three and in the Executive Council from three to two.
- 1.57 The normal life of the Legislature was extended from three to four years. A ministerial system was introduced to provide for three ministers including a Chief Minister. The latter was to be appointed by the Administrator, as the elected member who, in the opinion of the Administrator, could best command a majority in the Legislature. The Chief Minister so appointed would advise the Administrator on the appointment or dismissal of the other two ministers. The special responsibilities of the Administrator (after 1970 the Governor) were defence, and internal security, external affairs, the public service, the courts and, for a time, finance. Other matters were left to the control of Ministers and the Administrator had to seek and act on the advice of Executive Council. Provision was also made for election of a Speaker from outside the Legislature.
- 1.58 Recall that in 1867 the Virgin Islands Legislature, such as it was, passed an Ordinance by which all pretence of representative Government was brought to an end. "Crown Colony Government", a system built on the "principles of legislative subordination to the executive and the subordination of the executive to the Crown"²⁷⁵ was put into place. One hundred years later to the month, Her Majesty's Privy Council established The **Virgin Islands Constitution Order (1967)** - A new constitutional instrument that made for meaningful participation by the people in the executive authority of the country through the mechanism of the ministerial system. History has demonstrated that the desire for effective power sharing by politicians of the day was not to achieve 'power over', 'but power for' enabling economic empowerment of the people through the development of their country. The same is true of politicians today seeking constitutional change.
- 1.59 In the general election of 1967, seventeen candidates were nominated for the seven available seats. A full slate of candidates were fielded by the United Party, five by the Democratic Party and five by the People's Own Party. 3,645 persons were registered as voters and 71.36% cast their ballots on election day. The United Party won four of the constituencies with a total 1,094 votes. The Leader of the United Party having

²⁷⁵ The Virgin Islands Story by Norwell Harrigan and Pearl Varlack, pg 50.

been defeated, H.L. Stoutt was selected as leader and appointed by the Administrator as the first Chief Minister of the Virgin Islands.²⁷⁶

Ninth Constitution

1973: Deverell/daCosta Constitutional Review Commission

- 1.60 To assume that an advance of constitutional authority will somehow create smooth sailing into the future borders on naiveté. A dynamic struggle for power is the consistent pattern between the metropolitan ruler and the colony at each stage on the road to self-determination. In itself, this is not necessarily a bad thing, as it is the crucible in which statecraft is forged.
- 1.61 The positive attitude shown by Her Majesty's United Kingdom Government in granting a ministerial system of government to the Virgin Island Colony, did not initiate a long honeymoon period. This may have been the result of three factors. First, the lack of a clear majority by any of the parties contesting the 1971 election resulted in difficulties forming a Government. The Democratic Party, under the leadership of Dr. Q. W. Osborne, won three seats but needed a fourth in order to form the Government. To secure that seat he offered the office of Chief Minister to Mr. W. Wheatley who had run and won, as an independent candidate.
- 1.62 Conflict arose between Wheatley and Osborne within the first year in office. Chief Minister Wheatley secured his own position by recruiting the sole winning candidate of the United Party, and then asked the Governor to revoke Osborne's appointment as a minister of Government. In the second year, there was disagreement between the Chief Minister and Minister O. Cills who resigned but was persuaded to return, thus avoiding the fall of the government. These internal struggles within the government had an impact on governance capacity.
- 1.63 The second difficulty arose out of the Wickham's Cay and Anegada lease agreements. Former Administrator M. S. Staveley had imprudently issued Crown leases to a British Corporation for nearly two thirds of Anegada and a large area of the foreshore of Road Town, including the mangrove island of Wickham's Cay. Public out-cry against this 'giving away' of the people's heritage was focused through a pressure group; The Positive Action Movement, under the leadership of Noel Lloyd and Walter DeCastro. Pressure continued to mount on the government to have these leases rescinded. The new Governor Cudmore was not in a position to rescind the leases as compensation would be involved and the monies would have to come from the United Kingdom Government.
- 1.64 Third, a situation of increasing political unrest was further fuelled by the decision of Governor Cudmore, against the advice of the Executive Council, to commute the death sentence of a prisoner convicted of murder. In general, the Government's internal squabbles, coupled with the people's dissatisfaction over unreasonable leases and what was perceived as the reckless exercise of the prerogative of mercy, all resulted in focus on the Queen's representative as a target of frustration.
- 1.65 Two ministers of the Government joined with Positive Action in leading a public demonstration, supported by a petition, demanding the removal of Governor Cudmore. This was followed by the successful passage of a Resolution in the Legislative Council demanding the recall of the Governor. The Secretary of State for Foreign and Commonwealth Affairs rejected the Petition on the grounds that the Governor had acted within his legitimate authority. Ministers of Government then concluded the real problem was that the Governor had too much power. By a Resolution of the Legislative Council, a Constitutional Committee of the whole House, was established with the Speaker of the House (Honourable. H. R. Penn) as Chairman.

²⁷⁶ Ibid, pg 172.

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- 1.66 Members of the Legislature were unable to agree on an approach for seeking the views of the people. Therefore, on 22 May 1973, a second Resolution was unanimously passed by the Legislature requesting the United Kingdom Government to appoint a Constitutional Commissioner to obtain the ideas from the people and to recommend a new Constitution for the Virgin Islands. The Secretary of State agreed and appointed: Sir Colville Deverell, KCMG, CVO, CBE from the U.K. and Mr. Harvey L. daCosta, CMG, QC, from Jamaica. The secretary to the Commission was a Mr. W.J. Dixon from the Foreign and Commonwealth Office.
- 1.67 The Commission under the Chairmanship of Sir Colville Deverell, visited the Virgin Islands and held well attended meetings throughout the Territory. They also received 31 memoranda from individuals, and one from the BVI United Party (which was actually signed by Chief Minister W.W. Wheatley, Minister Conrad Maduro, Minister Oliver Cills and Member for Second District, Austin Henley). The Commission reported on 20 December 1973 to the Secretary of State for Foreign and Commonwealth Affairs.
- 1.68 A number of recommendations were made that addressed concerns expressed by the people. One of the most innovative was for four members of the Legislative Council to be elected at-large (by the Territory as a whole). Single member constituency representation was increased from seven to eight to enable the constituency of Virgin Gorda / Anegada to be represented by two candidates. This Commission also recommended the entrenchment of a Bill of Rights in the Constitution.
- 1.69 The Government of the day did not favour the introduction of at-large representation in the Legislature, and as a result rejected the Report. Under Chief Minister Wheatley they advanced their own proposal for constitutional change. This was debated and passed but only with a majority of one. It did not meet with support from the Opposition led by Hon. H. L. Stoutt. Nothing further developed from this. A second proposal was again brought to the Legislature for debate on the 3rd July, 1975, the very day the Legislative Council was being dissolved. Again it was only supported from the Government side of the House and was not further pursued.

1976: Virgin Islands Constitution Order, 1976

- 1.70 The 1975 General Elections did not produce a clear majority for any party and the loyalties, which appeared to have existed prior to and in the course of the election campaign, fell apart in the aftermath. Mr. W. Wheatley again emerged as Chief Minister, but with a different team.
- 1.71 At the very first meeting of the Legislative Council on 30th April, 1976, a Resolution was brought to the Legislature with proposals for amendments to the Virgin Islands Constitution Order 1967 as amended.
- 1.72 The proposed amendments included all the recommendations of the Deverell / Costa Commission, with the only notable exceptions being provision for at-large representation in the Legislature and the entrenchment of a 'Bill of Rights'.
- 1.73 The Resolution asked for:
- Finance to be the responsibility of a Minister and as a consequence, the Financial Secretary should cease to be a member of the Executive and Legislative Councils;
 - The Governor to consult with the Chief Minister on the exercise of his remaining reserve powers;
 - The Governor, before exercising the prerogative of mercy, to consult with an Advisory Committee consisting of the Attorney General, the Chief Medical Officer and four other members appointed by the Governor after consultation with the Chief Minister;
 - The title of the post Chief Secretary to be changed to that of Deputy Governor;
 - The Chief Minister to be appointed by the Governor on the recommendation of the elected

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members of the majority Party in the Legislative Council; if there is no majority Party, the Governor will appoint the member who in his judgement is best able to command a majority;

- Provisions to be made for the appointment of a Deputy Chief Minister and an Acting Chief Minister whenever the Chief Minister is absent from the Virgin Islands or is otherwise absent from duty for a period of 48 hours or more;
- Increase in the number of elected members from seven to nine to be elected in single member constituencies; and the removal of the provision for a nominated member;
- Entitlement to be registered as a voter to be lowered from twenty-one to eighteen;
- Provision for the removal of the Speaker (or Deputy Speaker) from office if six or more elected members of the Legislature vote in favour of a Resolution calling for their removal;
- The Chief Minister to be consulted by the Governor prior to an appointment of a Permanent Secretary or Head of a Department;
- Provision to be made for the appointment of a leader of the Opposition.

1.74 The usual procedure to secure such constitutional changes entailed the Secretary of State for Foreign and Commonwealth Affairs inviting a delegation to London for talks on the issues and amendments being sought.

1.75 In this instance all the issues were resolved through correspondence, which in itself was an expression of confidence in the growing political maturity of the Territory. The changes were so significant that instead of just providing for amendments, a whole new **Virgin Islands (Constitution) Order 1976** was prepared. These constitutional advancements substantially opened the way for the local political leadership of the Territory to shape its course for the future. The General Election of 1979 was held under the new constitution, with the Virgin Islands Party gaining the majority and Mr. H. L. Stoutt being appointed Chief Minister for the second time. Amendments in 1979, allowed for the appointment of a third Minister, expanding Executive Council. The Teaching Service Commission was added in a 1982 Amendment and the Governor's 'special responsibilities and power to delegate were set out in a 1991 Amendment.

Impact of Constitutional Change on Economic Growth and Development

1.76 Over the twenty-five years after the introduction of the ministerial system, our political leadership, while in the process of their own maturation, were able to demonstrate the effective use of power in lightening the darkness in areas of education, health and generally to create an **infrastructural** base for giant strides in the economic development of the Territory. The Herculean leaps made by the Territory is best evidenced in the statistical data.

1.77 Population growth, stagnant for one hundred (100) years, **suddenly** took-off in the 1970s and grew at a substantial pace over the next fifty (50) years. The growth was not from a sudden increase of births and an absence of deaths. It was the result of an increase in the demand for a labour force, with the range of skills necessary to sustain the expanding increase in economic activities, mainly in tourism, construction, financial services, transportation and communication. The increase was specifically associated with inflow of labour, not only from the Caribbean, but also the United States and Europe.

Table 1: Population of the British Virgin Islands for Census Years from 1871 to 2010

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Year	Male	Female	Total	Sex Ratio	Average Annual Population Change
1871	3,379	3,272	6,651	1.03	...
1881	2,583	2,704	5,287	0.96	(13.97)
1891	2,140	2,499	4,639	0.86	5.48
1901	2,254	2,654	4,908	0.85	11.76
1911	2,613	2,949	5,562	0.89	(9.45)
1921	2,335	2,747	5,082	0.85	21.88
1946	3,146	3,359	6,505	0.94	17.88
1960	3,930	3,991	7,921	0.98	18.10
1970	5,131	4,541	9,672	1.13	11.95
1980	5,617	5,368	10,985	1.05	34.29
1991	8,614	8,103	16,717	1.06	27.82
2001	11,436	11,725	23,161	0.98	17.44
2010	13,820	14,234	28,054	0.97	...

Source: Central Statistics Office, Government of the Virgin Islands

1.78 The economic activity sectors are highly indicative of rapid growth in the areas already identified. The second and third tables of data, and related chart below, show sectoral activities which became involved in driving the economy. In terms of the Gross National Product, one is able to see evidence of the sustained trend of the Territory's growth and development leading to an enhanced quality of life for the people of this community. The Virgin Islands is a classic example of the use of power for the good of the people.

Table 2: Gross Value Added at Current Prices by Economic Activity 1984-2020 (US\$'000)

Economic Activity/Industry	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Agriculture, Hunting & Forestry	1,540	1,540	1,560	1,570	1,570	1,640	1,860	1,358	1,494	1,632
Fishing	2,020	2,120	2,170	2,780	2,830	3,120	4,278	3,758	4,197	4,599
Mining and Quarrying	110	160	160	210	240	300	504	127	233	362
Manufacturing	2,270	2,310	2,870	3,450	3,730	4,300	4,677	1,781	4,808	7,835
Electricity, Gas and Water	2,680	2,870	3,600	4,100	4,780	5,210	5,222	4,133	5,064	5,994
Construction	6,830	5,910	5,430	6,530	7,340	9,450	16,331	4,724	10,049	15,373
Wholesale and Retail Trade	6,480	6,610	7,170	7,560	8,060	11,200	93,909	25,011	33,285	41,558
Hotel and Restaurant	16,760	18,000	18,970	24,630	26,140	28,250	35,903	25,791	27,831	29,868
Transport and Communications	7,730	8,700	9,740	12,280	14,410	21,280	29,078	10,360	18,701	27,042
Financial Intermediation	5,490	5,940	6,250	7,300	8,200	10,630	33,339	11,407	15,318	19,229
Real Estate, Renting & Business Activity	15,260	16,500	17,290	18,720	19,320	20,580	46,345	18,925	23,038	45,888
Government Services	11,280	10,250	11,820	12,910	17,790	19,000	14,555	17,052	19,245	21,437
Education	4,593	6,644	7,545	8,446

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Health & Social Work	4,674	2,613	3,452	4,291
Other Community, Social & Personal Services	4,610	4,700	4,820	6,000	6,290	6,500	5,016	1,325	1,486	4,297
Import Duty	8,400	9,480	11,240	15,140	17,620	23,750	11,264	11,394	12,777	14,160
Less :FISIM	-5,160	-5,210	-5,270	-6,520	-7,180	-9,010	-13,446	9,224	-12,547	-15,869
GDP at Current Market Prices US\$000	86,300	89,880	97,820	116,660	131,140	156,200	298,102	155,627	175,976	236,142

Economic Activity/Industry	1994	1994	1995	1996	1997	1998	1999	2000^{re}	2001^{re}	2002^{re}
Agriculture, Hunting & Forestry	1,769	1,769	3,114	3,455	3,673	4,014	4,080	4,085	4,087	4,088
Fishing	5,019	5,019	4,172	4,477	4,835	5,146	5,368	5,375	5,377	5,377
Mining and Quarrying	956	956	310	286	312	385	358	359	359	359
Manufacturing	10,863	10,863	14,946	17,224	25,369	28,673	27,102	27,135	27,145	27,149
Electricity, Gas and Water	6,925	6,925	7,569	8,638	10,437	10,796	11,143	11,730	13,250	13,841
Construction	20,697	20,697	31,143	27,289	32,644	44,698	49,132	52,188	77,432	88,288
Wholesale and Retail Trade	49,831	49,831	59,111	65,347	79,264	83,019	91,410	103,626	109,120	100,652
Hotel and Restaurant	41,905	41,905	58,764	67,740	82,649	96,270	102,491	117,017	124,616	107,091
Transport and Communications	35,382	35,382	45,513	52,863	57,982	67,963	79,830	90,821	96,177	85,683
Financial Intermediation	23,140	23,140	28,408	30,654	36,015	40,011	43,484	49,339	41,211	41,394
Real Estate, Renting & Business Activity	68,737	68,737	96,590	117,116	135,291	159,430	190,469	214,959	224,753	216,165
Government Services	23,630	23,630	26,632	27,346	29,585	33,185	34,809	40,272	44,730	51,859
Education	9,347	9,347	10,145	11,550	12,267	13,532	13,878	16,056	17,834	20,676
Health & Social Work	5,130	5,130	6,266	6,872	7,200	8,578	9,611	11,120	12,351	14,319
Other Community, Social & Personal Services	7,180	7,180	9,953	13,576	15,716	18,039	21,734	21,761	21,769	21,772
Import Duty	15,543	15,543	17,090	18,631	19,134	20,566	23,037	25,527	24,072	21,998
Less :FISIM	-19,191	-19,191	-23,014	-24,318	-29,875	-33,591	-34,988	-40,754	-34,186	-34,483
GDP at Current Market Prices US\$000	306,863	306,863	396,713	448,745	522,498	600,714	672,951	750,617	810,096	786,228

Economic Activity/Industry	2003^{re}	2004^{re}	2005^e	2006^e	2007^e	2008^e	2009^e
Agriculture, Hunting & Forestry	4,086	4,090	4,094	4,100	4,102	4,100	4,096
Fishing	5,375	5,381	5,385	5,393	5,396	5,394	5,389
Mining and Quarrying	359	359	359	360	360	360	360
Manufacturing	27,136	27,166	27,189	27,229	27,245	27,234	27,207
Electricity, Gas and Water	14,537	16,001	16,880	17,774	18,713	18,817	19,586
Construction	49,180	44,079	59,905	50,488	78,478	70,840	62,783
Wholesale and Retail Trade	95,220	101,090	120,755	132,475	137,776	134,740	115,418
Hotel and Restaurant	100,856	103,781	131,649	139,955	143,889	142,456	117,725
Transport and Communications	80,876	84,542	104,116	112,453	116,284	114,423	96,287
Financial Intermediation	38,557	48,625	45,863	58,783	61,955	49,643	38,189
Real Estate, Renting & Business Activity	205,075	221,903	254,806	284,944	298,468	289,636	253,568

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Government Services	45,955	48,331	51,589	61,608	67,561	70,433	68,394
Education	18,322	19,269	20,568	24,563	26,936	28,081	27,268
Health & Social Work	12,689	13,345	14,245	17,011	18,655	19,447	18,884
Other Community, Social & Personal Services	21,762	21,786	21,804	21,836	21,849	21,840	21,819
Import Duty	23,893	27,220	29,516	33,473	36,237	37,140	47,719
Less :FISIM	-32,256	-40,850	-38,691	-49,798	-52,703	-42,405	-32,756
GDP at Current Market Prices	711,622	746,119	870,033	942,648	1,011,202	992,180	891,937

Table 3: Gross Value Added at Current Prices by Economic Activity 2010-2020 (US\$M)

Economic Activity/Industry	2010	2011	2012	2013	2014	2015r	2016r	2017r	2018r	2019p	2020p
Agriculture	0.51	0.53	0.54	0.55	0.57	0.6	0.7	0.66	0.45	0.60	0.58
Fishing	1.05	1.10	1.12	1.13	1.16	1.1	1.2	1.08	0.69	0.88	0.77
Mining & Quarrying	0.84	0.82	0.77	0.36	0.79	0.8	1.5	1.01	0.84	1.23	1.01
Manufacturing	22.27	19.83	21.91	21.52	26.18	27.5	29.5	26.27	27.96	28.02	26.43
Electricity and Water	12.26	17.73	18.81	19.82	19.62	23.8	24.7	17.47	20.30	18.91	19.36
Construction	15.54	13.71	14.92	20.71	20.50	29.5	39.7	41.54	51.83	56.09	55.01
Wholesale and Retail	169.19	127.34	119.11	119.70	116.08	120.13	123.14	143.98	148.34	169.03	162.07
Accommodation and Food Services	94.83	94.53	77.21	71.25	87.63	106.25	132.71	92.71	83.15	96.43	80.47
Transportation and Storage	37.51	36.06	38.53	51.67	52.46	52.82	75.68	60.07	54.85	63.09	54.73
Information and Communication	49.96	63.51	59.41	43.05	42.93	48.60	41.65	33.04	41.20	61.39	47.16
Financial and Insurance Activities	312.06	312.65	322.48	334.46	352.96	351.75	415.58	416.28	488.65	470.77	462.82
Real Estate	108.13	95.22	130.62	120.42	148.26	158.42	142.55	110.55	106.97	138.11	136.06
Professional Services	78.40	83.82	93.92	105.26	111.10	108.69	108.96	108.97	141.03	149.29	145.62
Administrative Services	43.45	37.04	38.49	43.88	39.33	55.52	36.17	27.29	23.81	33.07	28.21
Public Administration, Defence and Social Security	96.72	95.43	102.11	107.14	108.77	112.90	116.98	117.15	97.73	97.34	94.46
Education	46.58	42.85	40.86	39.26	43.55	42.82	53.19	58.13	50.84	50.90	47.70
Human Health and Social Work	45.46	42.46	51.71	51.50	51.58	56.95	72.46	71.41	75.82	89.65	91.02
Other Services	12.14	15.95	20.84	18.55	13.68	17.30	33.32	29.11	23.90	28.46	27.70
Private Households with employed persons	3.37	3.36	3.43	3.24	3.25	3.06	3.46	3.44	2.56	3.32	3.14
Less FISIM	65.98	64.43	72.51	72.87	73.26	77.1	84.7	84.92	92.24	93.14	91.43
GVA at Basic Prices	1,084.3	1,039.5	1,084.3	1,100.6	1,167.2	1,241.5	1,368.5	1,275.26	1,348.68	1,463.45	1,392.91
Taxes on Products	33.48	34.52	32.96	31.81	35.62	40.65	42.57	34.60	38.62	50.30	36.37
less Subsidies on production	0.23	0.20	0.40	0.47	0.34	0.38	5.27	0.16	0.41	0.12	0.54
GDP at Current Market Prices	1,117.6	1,073.8	1,116.9	1,131.9	1,202.4	1,281.7	1,405.8	1,309.7	1,386.9	1,513.6	1,428.7

Figure 7: GDP 1984 - 2021



Tenth Constitution

1993: Wallace Constitutional Review Commission

1.79 The Constitutional Review requested by way of a Resolution in the Legislative Council on 27 November, 1992 did not arise out of any **immediate** crisis seeking a solution in an advanced constitutional instrument. It was merely a feeling that the time was ripe for a further review.

The Commissioners appointed in July 1993 were:

- Mr. Walter Wallace (Chairman),
- Hon. Dr. Howard Fergus and
- Mr. Alford Penn.

1.80 With the exception of Dr. H. Fergus, from our sister territory of Montserrat, the other two Commissioners were well known in the Virgin Islands. Mr. Wallace was a former governor of the Virgin Islands who had since been involved at the Foreign and Commonwealth Office in matters pertaining to the Territories. Mr. Alford Penn, a Virgin Islander, had held the post of Deputy Governor for many years.

1.81 The review was conducted in the Virgin Islands between 1 November and 3 December, 1993. There were twelve public meetings, a number of private interviews and forty-five written submissions. The Commission's Report was **submitted** on 3 December, 1993 to the Secretary of State for Foreign and Commonwealth Affairs.

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- 1.82 Except for a few substantial issues identified below, the Report may be viewed as primarily recommendations for the 'tidying up' of the Constitution. The more substantive recommendations were:
- Expanding the elected membership of the Legislative Council by the addition of four representatives to be elected at-large;
 - Entrenchment of a 'Bill of Rights' in the Constitution;
 - Provision for a public register of interest;
 - Provision for an Ombudsman;
 - Abolition of proxy voting;
 - Provision for referendum on constitutional change
- 1.83 Most of the recommendations made in the Report were dealt with in the **Virgin Islands (Constitution) (Amendment) Order 1994**, which resulted in expansion of the Legislative Council from 9 to 13 members by the creation of 4 'at-large' members; and the **Virgin Islands (Constitution) (Amendment) Order 2000** which provided for the establishment of the Complaints Commissioner and Registrar of Interests. It is significant that even though it was the second time that a recommendation for entrenchment of a 'Bill of Rights' had been made, this was not included until the adoption of the Virgin Islands Constitution Order, 2007, Chapter 2, sections 9-34: Fundamental Rights and Freedom of the Individual.
- 1.84 The most controversial recommendation was that of representatives elected at-large. The Government of the day was totally against the introduction of this system. The same issue had resulted in a circuitous route in dealing with the recommendations of the Deverell / Costa Report. On this issue alone a request was made for a delegation to London for discussions. The Foreign and Commonwealth Office issued a direct invitation to the then Leader of the Opposition (Hon. E. W. Brewley) to participate in the discussions and the recommendation of the Commission prevailed.
- 1.85 It might be noted with some amusement, that had there been no provision for at-large representations, the incumbent political party might have lost the 1995 General Elections. Subsequent General Elections (1999 and 2003) have demonstrated the truth of the reasoning of both the Deverell / daCosta and the Wallace / Fergus / Penn Commissions. The field of candidates broadened and quality of debates in the Legislature improved.
- 1.86 Note that during the meetings soliciting public views for the 2022-2023 constitutional review, the public advanced strong views for changes in the role of the at-large representatives in the governance of the Territory.

2004: Farara Constitutional Review Commission

- 1.87 In 2004, the Territory launched a Constitutional Review Commission. According to that Commission's own Report published in 2005, the decision came about as a direct result of the decision by Her Majesty's Government in the United Kingdom in 2001 to invite each of its Overseas Territories to appoint a local commission to review and make recommendations for changes to and advancement of their respective constitutions. The UK's decision in 2001 is undoubtedly related to the publication of a historic white paper entitled Partnership for Progress and Prosperity: Britain and the Overseas Territories presented to the UK Parliament by Mr. Robin Cook, the then Secretary of State for Foreign and Commonwealth Affairs in March 1999. The purpose of the paper was to establish a more modern relationship between the UK and its OTs - one built on a new partnership.

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- 1.88 The 2004 Commissioners were:
- Gerard St. C Farara K.C – Chairman
 - Stuart Donovan
 - Vance Lewis
 - Audley Maduro
 - Carvin Malone
 - Edison O’Neal
 - Elihu Rhymer
 - Joanne Williams-Roberts
 - Persia Stoutt
 - Tashi O’Flahery Maduro was Secretary (pro tem) and Ms. Kimberly Crabbe (Secretary).
- 1.89 In its Report the 2004 Commission noted that, the issues that challenge the Virgin Islands in this century will be significantly different from those of the past. The big question is how does a micro-territory position itself in a new global setting to continue to provide its people with an enhanced quality of life and at the same time maintain a posture of dignity and cultural identity. It will not be possible to address this question until Virgin Islanders are clear about the goals of the Territory’s self-determination journey.
- 1.90 The Wallace / Fergus / Penn commission stated that 'independence' was not in any way an issue and that there were those who asked them "to tell the Queen that we are satisfied". Nevertheless, that commission was "encouraged to learn that there were those in the community who believe that the BVI should properly aspire to nationhood". The said commission commended "their vision of the future", and went on to state, "there is nothing inevitable about independence, nor can it come like a thief in the night." It recommended that the cost, obligations, and liabilities of independence should be assessed and the findings made public. The present favours greater internal autonomy with additional powers given to the elected representatives while preparing for independence in the future.
- 1.91 It is precisely from this point that we are able to make the connection with the task that the 2004 Constitutional Commission has been asked to undertake. Of the seven special items, which the 2004 Commission is to consider, not one addresses the question of 'independence'. What may be intended by this constitutional review then, is the achievement of greater breadth and depth in constitutional authority further enabling the people of the Virgin Islands the means to pursue their social and economic aspirations. However, this objective is being sought at the very time when British sovereignty in breadth and depth is being eroded by Brexit and internationally by treaty obligations, some of which have been demonstrated to be against the best interests of the Virgin Islands. This has been stated explicitly in the words of our former Deputy Governor, Mr. Elton Georges, CMG, OBE.

"The major point of contention remains the view of the Territories that while imposition by HMG of requirements under international law is recognised as a genuine responsibility, Britain should not impose obligations of non-legally binding political' agreements into which it enters such as those within the OECD and the European Union. This applies especially when the Territories consider the application of these agreements to be against their interest. Britain lumps such agreements (into which it enters without consultation with the Territories) with others such as internationally

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recognised UN Security Council resolutions calling them all 'Britain's international commitments' and positing a responsibility on the part of the Territories to observe them" ²⁷⁷

- 1.92 It is not unfair for Britain to expect that the Territories should not indulge in activities that put at risk the welfare of the United Kingdom, including discharging its international obligations, and that Britain would want to retain the constitutional authority to deal with such matters should they arise. However, as far as is legally possible, these circumstances and eventualities should be clearly defined and not bundled in miscellaneous wrappings.
- 1.93 Political leaders, pressed by their constituents will continue to seek greater and greater authority to deliver more to their people'. Dr. Isaac Dookhan has made the following observation.

"The history of the British Virgin Islands in the twentieth century has demonstrated the importance of legislative government in achieving progress. When the islands were more or less under external control before 1950, economic growth was negligible; thereafter, the restoration of a legislature enabling greater local participation in directing local affairs has been followed by rapid economic expansion. As such, therefore, the strengthening of the political machinery by permitting more self-government seems imperative if greater prosperity and eventually complete economic self-sufficiency are to be achieved." ²⁷⁸

Conclusion

2007: Virgin Islands Constitution Order, 2007

- 1.94 The 2005 Report of the Constitutional Review Commission led to the Territory's present **Virgin Islands Constitution Order, 2007** which replaced the Constitution of 1976. The new Constitution includes for the first time a chapter setting out the fundamental rights and freedoms of the individual and provisions for their enforcement. It provides for a Governor as Her Majesty's representative and for a Premier and Ministers who, together with the Attorney General, form a Cabinet. It provides for an elected House of Assembly, which together with Her Majesty, forms the Legislative Council. The Eastern Caribbean Supreme Court continues to have jurisdiction in the Territory. Provisions are made for Public Service, Judicial and Legal Services Teaching Service and Police Service Commissions, respectively, to provide advice on appointments to offices in these services. A new National Security Council is established, as is the Office of Director of Public Prosecutions. Provision is also made for public finance, a Complaints Commissioner, and a Register of Interests. There was a short amendment in 2015 to introduce the concept of Junior Ministers. There remained no further constitutional amendment until the **Virgin Islands Constitution (Interim Amendment) Order 2022** which, at the time of writing, has not been brought into effect. This amendment, if brought into effect, would suspend several parts of the Constitution related to the HoA and its powers. The amendment was made following the conclusion of a Commission of Inquiry established in January 2021 by the then Governor to conduct an extensive and wide-reaching review of the Territory's governance and make recommendations for improvement.
- 1.95 This disturbing development has been met both locally and regionally with deep concern. The potential suspension of democratic government in the VI has been cited as 'anachronistic' and 'unbecoming of the

²⁷⁷ In an address delivered at the Wilton Park Conference on Britain and the Overseas Territories: Making the Partnership work, 25 Nov 2004.

²⁷⁸ A History of the British Virgin Islands by Isaac Dookhan p 234.

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British government in the third decade of the 21st century',²⁷⁹ with views expressed that colonialism has no place in modern democratic governance in the Caribbean.²⁸⁰

- 1.96 Yet, some persons see the Interim Order as a necessary biproduct of the VI's existing constitutional relationship with the UK and consider it an effective tool in promoting good governance.
- 1.97 The Order has been held in abeyance while efforts to implement the CoI recommendations and improve governance in the VI have continued and steady progress is being made. These efforts have continued in partnership with, or under the supervision of the Governor. Encouragingly, Premier Dr. the Honourable Natalio D. Wheatley has recently remarked on the improved engagement between the UK Government and the locally elected officials.²⁸¹
- 1.98 Against this historical context, upon which the 2023 Constitutional Review Report will precipitate the next chapter of VI constitutional development, we are reminded by the 2004 Commission that,

The political leaders of the Overseas Territories have but one well from which to draw additional constitutional authority; that well is Britain. The Territories should not be made to be apprehensive by the 'bogeyman' threat of 'independence'. To use the same old Virgin Islands saying used by our former Deputy Governor at the Wilton Park Conference: a partnership is a leaky ship. However, a true spirit of Partnership for Progress and Prosperity must take into consideration the very real dangers that would be faced by micro-state entities seeking to cope in a global setting in which the nation state itself is of diminishing global significance. The Commission is of the view that the new global reality requires creative relationships beyond that of the former 'official colonial mind', which conceived of a linear progress from colony to nation-state. Novel relationships have to be explored that provide for the political aspirations of a people within a dignified setting other than being coerced into **adopting** a national status that is both unrealistic and unsustainable.

²⁷⁹ Loop News. "CARICOM Wants UK to Remove Sword of Damocles over BVI | Loop Caribbean News." Accessed November 9, 2023. <https://caribbean.loopnews.com/content/caricom-wants-uk-remove-sword-damocles-over-bvi>.

²⁸⁰ CaribDaily.News. "CARICOM Supports British Virgin Islands' Self-Government and Governance Reform." Accessed November 9, 2023. <https://caribdaily.news/article/4fe55661-09a7-42f3-baf4-d823378fea7b>.

²⁸¹ "Statement by Premier Wheatley at the UN on the Situation of the BVI - October 1 | Government of the Virgin Islands." Accessed November 9, 2023. <https://bvi.gov.vg/media-centre/statement-premier-wheatley-un-situation-bvi-october-1>.

6.6 Appendix 6 -Proposal for bi-cameralism received during consultations

HON JULIAN FRASER RA

A Bi-Cameral Parliament & Its Composition

- 1 There shall be a Parliament of the Virgin Islands which shall consist of His Majesty, a House of Representatives and a Senate
- 2 The House of Representatives shall consist of 13 elected members, one of whom shall be the Speaker.
- 3
 - a) The Senate of the Virgin Islands shall consist of a President and 6 other elected members.
 - b) Each House of Parliament shall be equal in respect of their Legislative role. Any member of either house can introduce a Bill in their respective houses. A bill other than a Money Bill can originate in either House, however, in order to be considered passed by Parliament, it must be passed by both houses, except:
 - i) That the House of Representatives may pass a Bill which originated in the House of Assembly but failed to gain approval of the Senate after two attempts.
 - c) A failed Bill can be reintroduced by any member in either House for the purposes of entertaining the amendments of another house.
 - d) Joint Sessions of Parliament for the purposes of passing a previously failed Bill shall require a 2/3 majority of the membership present for passage.
 - e) (i) Joint Sessions of Parliament can occur by resolution passed in the House of Representatives. Or

(ii) by order of the Governor upon request of the Premier.
- 4 (1) For the purposes of elections to the House of Representatives the Virgin Islands shall be divided into 9 Electoral Districts..... Which shall return 9 Representatives, one for each District. And in addition
For the purposes of elections to the House of Representatives the Virgin Islands shall be further divided into 3 Regions - see Sec 4(2) Which shall return 3 Representatives, one for each Region, and they shall be elected through at-large balloting from among their respective regions. Additionally, there shall be a 4th Representative elected at-large by all 3 Regions, who shall be a full Member and the Speaker.

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- i) No Regional Candidates standing for election to the House of Representatives can be associated with, or be a part of any Political Party that is represented by any person contesting or has contested any of the Seats in either the House of Representatives or the Senate.
- (2) For the purpose of elections to the Senate of the Virgin Islands, in the case of 6 of the members the Virgin Islands shall be divided into 3 Regions, namely: Eastern, Central and Western Regions. These regions shall reflect by proportion, the 9 electoral districts and they shall be constituted as follows:

Eastern Region (Districts 7, 8 & 9)

Central Region (Districts 4, 5 & 6)

Western Region (Districts 1, 2 & 3)

- i) After a General election, each region shall return to the Senate, 2 Senators, for a total of 6.
- ii) In the case of the Senate President however, who in addition to being president is a full member, he shall be elected from at large balloting from among all three regions. And
- iii) He shall be non-aligned with any political party which has candidates in either house or with their members

5 The Governor shall dissolve the House of Representatives at the expiration of 5 years.

6 The Governor shall dissolve the Senate of the Virgin Islands at the expiration of 5 years from the date when the Senate first meets after a general election unless it has been sooner dissolved.

7 In the case of the Senate, except where there is a snap election after a request for Dissolution which is premature of the expected 5 years term of a member, only members elected in the election prior to the last election, shall vacate their seats.

A) The Premier must be from among the Membership of the House of Representatives, provided he is recommended by a majority of the non-Regional members of the House.

B) A Bill brought to the House of Representative by any Member other than a government Member and passed, can be vetoed by the Premier by a motion requiring a simple majority.

And the veto [sic] can be overturned by a 2/3 majority of both the Senate and the House of Representatives.

C) In order to strengthen the Senate as a reviewing house, it shall have a continuing but rotating membership. "ROTATION OF SENATORS AND HALF SENATE ELECTIONS".

At the end of each 2 1/2 years there shall be elections held in each region for the election of half the number of senators excluding the president in the Senate.

OBJECTS AND REASONS

Madam Chairperson, the views expressed are based on firsthand knowledge of the inner workings of Two of the Three branches of Government, 8 years of which was as a Minister on the Executive, and 16 years as a member of the Opposition. All for a total of 24 years in the Legislative.

Madam Chairperson, the primary objective of the Legislature is to make Laws, and provide oversight of the Executive, to hold the Government accountable, *if you will*.

Under our current system, where half or more of the government representatives are members of the Executive, and because of the whip system, the legislature is merely a Rubber Stamp for the Executive. This has been observed by Parliaments throughout the world, and unlike the Virgin Islands, most countries have sought means to overcome the problem.

In the Virgin Islands it is high time that we step up to the plate by doing something. Because this situation persists, the Legislature is the only arm of government which lacks any independence, so is certainly powerless, and fails to serve the people as intended.

Madam Chairperson, I wish to offer for your consideration for entry into your Report as part of any recommendations you may be offering for reform to our Constitution, a **BICAMERAL PARLIAMENT** as a solution to the problem as stated. I think this serves well as a solution to the shortcomings responsible for Col's Recommendation R-2(i) & (vii)

If it means anything. Bermuda is an Overseas Territory like us, and they have a Bicameral System.

Madam Chairperson, I am aware that this is a new and somewhat complex concept, so I am prepared to work with you to further clear any lack of understanding

6.7 Appendix 7 -Draft Constitution

STATUTORY INSTRUMENTS

2023 No. 0000

CARIBBEAN AND NORTH ATLANTIC TERRITORIES

The Virgin Islands Constitution Order 2023

Made - - - - xx xx 2023

Laid before Parliament xx xx 2023

Coming into force in accordance with section 1(2)

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SCHEDULE 1 — FORMS OF OATHS AND AFFIRMATIONS

SCHEDULE 2 — REVOCATIONS

At the Court at Buckingham Palace, the *** day of ***2023

Present,

The King's Most Excellent Majesty in Council

His Majesty, in exercise of the powers conferred upon Him by sections 5 and 7 of the West Indies Act 1962 and of all other powers enabling Him to do so, is pleased, by and with the advice of His Privy Council, to order, and it is ordered, as follows:

Citation, commencement and establishment of Constitution

1.—(1) This Order may be cited as the Virgin Islands Constitution Order 2023.

(2) This Order shall come into force on the day on which the Legislative Council of the Virgin Islands is dissolved next following the day on which this Order is made, which day is in this Order referred to as “the appointed day”.

(3) On the appointed day the following provisions of this Order shall have effect as the Constitution of the Virgin Islands; but until the day after the polling in the first general election in the Virgin Islands after the appointed day—

THE CONSTITUTION OF THE VIRGIN ISLANDS

Whereas, we, the people of the Virgin Islands, a God-fearing people, anchored in the Christian tradition and values, invoking the Almighty God, now wish to proclaim this our Constitution of the Virgin Islands;

Remaining conscious of our ancestral history, and the struggles, labour, sacrifices and achievements of our forebears that serve as pillars of our Territory today;

Valuing the evolution over centuries of a distinct cultural identity which is the essence of a Virgin Islander;

Acknowledging that the society of the Virgin Islands is based upon certain moral, spiritual and democratic values, a belief in the Almighty God, the dignity of the human person, the freedom of the individual and respect for fundamental rights and freedoms and the rule of law;

Mindful that the people of the Virgin Islands have expressed a desire for their Constitution to reflect who they are as a people and their quest for social justice, economic empowerment and political advancement;

Recognising that the people of the Virgin Islands have a free and independent spirit, and have developed themselves and their Islands based on qualities of honesty, integrity, mutual respect, self-reliance and the ownership of the land bequeathed by their forebears, engendering a strong sense of belonging to and kinship with those Islands;

Recalling that because of historical, economic and other reasons many of the people of the Virgin Islands reside elsewhere but have and continue to have an ancestral connection and bond with those Islands;

Asserting that the Virgin Islands should be governed based on adherence to well-established democratic principles and institutions; good, transparent and accountable governance in the conduct of public affairs; participatory decision-making; and the achievement of national objectives based on sustainable planning;

Declaring a duty on the people and those who govern to preserving the Virgin Islands as a safe and healthy environment for ourselves and for generations unborn;

Entrusting those who govern with the continued promotion, modernisation and development of all economic sectors and ensuring a steadily improving quality of life for all people of the Virgin Islands;

Affirming that the people of the Virgin Islands have expressed their desire to become a self-governing people and to exercise the highest degree of control over their affairs; and

Noting that the United Kingdom, the administering power for the time being, has articulated a desire to enter into a modern partnership with the Virgin Islands based on the principles of mutual respect and self-determination and on the freely and democratically expressed wish of the people of the Virgin Islands;

Now, therefore, the following provisions have effect as the Constitution of the Virgin Islands.

CHAPTER 1 INTERPRETATION

Interpretation

2.—(1) In this Constitution, unless it is otherwise provided or required by the context—

“the Chief Justice” means the Chief Justice of the Eastern Caribbean Supreme Court;

“the Court of Appeal” means the Court of Appeal established by the Supreme Court Order 1967;

“dollars” means dollars in the currency of the Virgin Islands or the United States of America;

“election” means election of an elected member of the House of Assembly and “general election” shall be construed accordingly;

“the *Gazette*” means the official *Gazette* of the Virgin Islands;

“the High Court” means the High Court established by the Supreme Court Order 1967;

“legal practitioner” means a person qualified as a legal practitioner as prescribed by law;

“the Police Force” means any police force established for the Virgin Islands under any law in force in the Virgin Islands;*

“public authority” means any statutory body or company or association in which the Government of the Virgin Islands has an interest and which performs a public function or duty;

“public office” means, subject to section 3, any office of emolument in the public service or any office of emolument under any local government council or authority in the Virgin Islands;

“public officer” means the holder of any public office and includes any person appointed to act in any such office;

“public service” means the service of the Crown in a civil capacity in respect of the Government of the Virgin Islands;

“session”, in relation to the House of Assembly, means the sittings of the House commencing when the House first meets after being constituted by this Constitution, or after its prorogation or dissolution at any time, and terminating when the House is next prorogued or is dissolved without having been prorogued;

“sitting”, in relation to the House of Assembly, means a period during which the House is sitting continuously without adjournment and includes any period during which the House is in committee.

**there needs to be an overall change of references from ‘Police Force’ to ‘Police Service’ and this change should be contemporaneous with the entry into force of the new Police Act. The constitutional amendments may need to include transitional and disapplication provisions to the extent necessary.*

(2) For the purposes of this Constitution, a person belongs to the Virgin Islands if that person—

(a) is born in the Virgin Islands and at the time of the birth his or her father or mother is or was—

(i) a British overseas territories citizen (or a British Dependent Territories citizen) by virtue of birth, registration or naturalisation in the Virgin Islands or by virtue of descent from a father or mother who was born in the Virgin Islands; or

(ii) settled in the Virgin Islands; and for this purpose “settled” means ordinarily resident in the Virgin Islands without being subject under the law in force in the Virgin Islands to any restriction on the period for which he or she may remain, but does not include persons on contract with the Government of the Virgin Islands or any statutory body or Crown corporation;

- (b) is born in the Virgin Islands of a father or mother who belongs to the Virgin Islands by birth or descent or who, if deceased, would, if alive, so belong to the Virgin Islands;
- (c) is a child adopted in the Virgin Islands by a person who belongs to the Virgin Islands by birth or descent;
- (d) is born outside the Virgin Islands of a father or mother who is a British overseas territories citizen by virtue of birth in the Virgin Islands or descent or who belongs to the Virgin Islands by virtue of birth in the Virgin Islands or descent;
- (e) is a British overseas territories citizen by virtue of registration in the Virgin Islands;
- (f) is a person to whom a certificate has been granted under section 16 of the Immigration and Passport Act 1977 of the Virgin Islands (in this subsection referred to as “the Act”, and references to the Act or to any section thereof include references to any enactment amending, replacing or re-enacting the same) and has not been revoked under section 17 of the Act; and (without prejudice to the right of any person to apply for the grant of such a certificate under the Act) a British overseas territories citizen by virtue of naturalisation in the Virgin Islands has a right by virtue of this Constitution to apply for the grant of such a certificate;
- (g) is the spouse of a person who belongs to the Virgin Islands and has been granted a certificate under section 16 of the Act; or
- (h) was immediately before the commencement of this Constitution deemed to belong to the Virgin Islands by virtue of the Virgin Islands (Constitution) Order 1976.

(3) In this Constitution, unless it is otherwise provided or required by the context, any reference to the holder of an office by a term designating or describing his or her office shall be construed as including a reference to any person who, under and to the extent of any authority in that respect, is for the time being performing the functions of that office.

(4) In this Constitution, unless it is otherwise provided or required by the context, references to the functions of the Governor shall be construed as references to his or her powers and duties in exercise of the executive authority of the Virgin Islands and to any other powers or duties conferred or imposed on him or her as Governor by or under this Constitution or any other law.

References to public office

3.—(1) For the purposes of this Constitution, a person shall not be considered to hold a public office by reason only that—

- (a) he or she is in receipt of a pension or other like allowance in respect of public service; or
- (b) he or she is in receipt of any remuneration or allowances in respect of his or her tenure of the office of Minister, Speaker, Deputy Speaker or member of the House of Assembly, the Contractor General, or member of the Public Service Commission, the Teaching Service Commission, the Judicial and Legal Services Commission, the Police Service Commission, the Integrity Commission, the Human Rights Commission, the Elections and Boundaries Commission, or the Advisory Committee on the Prerogative of Mercy.

(2) If it is provided by any law in force in the Virgin Islands that an office shall not be a public office for the purposes of section 66(1)(a), this Constitution shall have effect accordingly as if that provision of that law were enacted herein.

(3) References in section 60 and Chapter 7 to public offices shall not be construed as including references to—

- (a) the office of a member of any board, committee or other similar body (whether incorporated or not) established by any law in force in the Virgin Islands; or
- (b) any office of emolument under any local government council or authority in the Virgin Islands.

Appointments

4.—(1) In this Constitution, unless it is otherwise provided or required by the context, any reference to power to make appointments to any office shall be construed as including a reference to power to make appointments on promotion or transfer to that office and to power to appoint a person to perform the functions of that office during any

period when it is vacant or the holder of it is unable (whether by reason of absence or infirmity of body or mind or any other cause) to perform those functions.

(2) Where by this Constitution any person is directed, or power is conferred on any person or authority to appoint a person, to perform the functions of an office if the holder of that office is unable to perform those functions, the validity of any performance of those functions by the person so directed or of any appointment made in exercise of that power shall not be called in question in any court on the ground that the holder of the office is not unable to perform the functions of that office.

(3) Where this Constitution vests in any person power to make appointments to any office, a person may be appointed to that office, notwithstanding that some other person may be holding that office, when that other person is on leave of absence pending relinquishment of that office; and where two or more persons are holding the same office by reason of an appointment made in pursuance of this subsection, then, for the purposes of any function conferred on the holder of that office, the person last appointed to the office shall be deemed to be the sole holder of the office.

Re-election or reappointment

5. Any person who has vacated his or her seat in the House of Assembly or has vacated any office constituted by or under this Constitution may, if qualified, again be elected as a member of the House or appointed to that office, as the case may be, from time to time in accordance with this Constitution.

Removal from office

6. In this Constitution, unless it is otherwise provided or required by the context, any reference to power to remove a public officer from office shall be construed as including a reference to any power conferred by any law to require or permit that officer to retire from the public service.

Resignation

7. For the purposes of this Constitution, the resignation of the holder of any office that is required to be addressed to any person shall have effect from the time that it is received by that person, unless otherwise specified in the letter of resignation.

Power to amend or revoke instruments

8. Where any power is conferred by this Constitution to make any proclamation, order or regulations or to give any directions, the power shall be construed as including a power exercisable in like manner to amend or revoke any such proclamation, order, regulations or directions.

CHAPTER 2

FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

Preamble to Fundamental rights and freedoms of the individual

9. Whereas every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual;

Whereas those fundamental rights and freedoms are enjoyed without distinction of any kind, such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations, economic status, disability, age, birth, sexual orientation, marital or other status, subject only to prescribed limitations;

Whereas it is recognised that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, equality, liberty, security of the person and the protection of the law;

- (b) freedom of conscience, expression, movement, assembly and association; and
- (c) protection for private and family life, the privacy of the home and other property and from deprivation of property save in the public interest and on payment of fair compensation;

Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Interpretation of Chapter 2

10.—(1) In this Chapter, unless the contrary intention appears—

“contravention”, in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law or tribunal having jurisdiction in the Virgin Islands, including His Majesty in Council, but excepting, save in section 14, a court established by or under disciplinary law;

“disciplinary law” means a law regulating the discipline of any disciplined force;

“disciplined force” means—

- (a) a naval, military or air force;
- (b) any police force of the Virgin Islands;
- (c) the prison service of the Virgin Islands;

“member”, in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline;

“minor” means a person who has not attained the age of eighteen years or such other age as may be prescribed for this purpose by any law;

“period of public emergency” means any period during which—

- (a) His Majesty is at war; or
- (b) there is in force in the Virgin Islands a proclamation of emergency under section 27(1) or under any law enacted by the Legislature to like effect.

(2) In relation to any person who is a member of a disciplined force raised under a law enacted by the Legislature, nothing in or done under the authority of the disciplinary law of that force shall be held to contravene the provisions of this Chapter other than sections 11, 13 and 14.

(3) In relation to any person who is a member of a disciplined force raised otherwise than as aforesaid and lawfully present in the Virgin Islands, nothing in or done under the authority of the disciplinary law of that force shall be held to contravene any of the provisions of this Chapter.

Protection of right to life

11.—(1) Every person has a right to life which shall be protected by law.

(2) No person shall be deprived intentionally of his or her life.

(3) A person shall not be regarded as having been deprived of his or her life in contravention of this section if he or she dies as a result of a lawful act of war or the use, to such extent and in such circumstances as are permitted by law, of force which is no more than absolutely necessary—

- (a) for the defence of any person from violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) for the purpose of suppressing a riot, insurrection or mutiny.

Equality before the law

- 12.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms.

Protection from inhuman treatment

13. No person shall be subjected to torture or to inhuman or degrading treatment or punishment.

Protection from slavery and forced labour

- 14.—(1) No person shall be subjected to slavery, servitude or forced labour.
- (2) For the purposes of subsection (1), “forced labour” does not include—
- (a) any labour required in consequence of the sentence or order of a court;
 - (b) any labour required of a member of a disciplined force in pursuance of his or her duties as such or, in the case of a person who has conscientious objections to service in a naval, military or air force, any labour that such person is required by law to perform in place of such service;
 - (c) labour required of a person while he or she is lawfully detained that is reasonably necessary in the interests of hygiene; or
 - (d) any labour required for the purpose of dealing with any situation arising during a period of public emergency or at a time when any other emergency or calamity threatens the well-being of the community, to the extent that the requiring of such labour as may be prescribed in emergency regulations is reasonably justifiable for that purpose.

Protection of right to personal liberty

- 15.—(1) Every person has the right to liberty and security of the person.
- (2) No person shall be deprived of his or her personal liberty, save as may be authorised by law in any of the following cases—
- (a) in execution of the sentence or order of a court (whether of the Virgin Islands or otherwise) in respect of a criminal offence of which that person has been convicted or in respect of any other order of the court;
 - (b) for the purpose of bringing that person before a court in execution of the order of a court;
 - (c) upon reasonable suspicion of that person having committed or of being about to commit a criminal offence under any law;
 - (d) in the case of a minor, under the order of a court or in order to bring that person before a court or with the consent of his or her parent or legal guardian, for his or her education or welfare;
 - (e) for the purpose of preventing the spread of an infectious or contagious disease;
 - (f) in the case of a person who is, or reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;
 - (g) for the purpose of preventing the unlawful entry of that person into the Virgin Islands, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from the Virgin Islands, or for the purpose of restricting that person while he or she is being conveyed through the Virgin Islands in the course of his or her extradition or removal as a convicted prisoner from one country to another.
- (3) Any person who is arrested or detained shall be informed promptly, as prescribed by law, in a language that he or she understands, of the reason for his or her arrest or detention and of his or her right to remain silent.
- (4) Any person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, which shall include the right to hold private communication with such legal practitioner and, in the case of a minor, to communicate with his or her parent or legal guardian.

(5) Any person who is arrested or detained—

- (a) for the purpose of bringing him or her before a court in execution of the order of a court; or
- (b) upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under any law,

and who is not released, within the period prescribed by law, shall be brought promptly before a court.

(6) If any person arrested or detained as mentioned in subsection (5)(b) is not charged within the period or extended period prescribed by law, then, without prejudice to any further proceedings, he or she shall be released either unconditionally or on reasonable conditions, including such conditions as are reasonably necessary to ensure that he or she appears later for trial or for proceedings preliminary to trial.

(7) For the purpose of subsection (2)(a), a person charged with a criminal offence in respect of whom a special verdict has been returned that he or she was guilty of the act or omission charged but was insane when he or she did the act or made the omission shall be regarded as a person who has been convicted of a criminal offence, and the detention of that person in consequence of such a verdict shall be regarded as detention in execution of the order of a court.

Provisions to secure protection of law

16.—(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence shall—

- (a) be presumed to be innocent until he or she is proved guilty according to law;
- (b) be informed promptly, as prescribed by law, in a language that he or she understands and in detail, of the nature of the offence charged;
- (c) be given adequate time and opportunity for the preparation of his or her defence;
- (d) be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal practitioner of his or her own choice or where he or she is unable to afford to retain a legal practitioner and the interests of justice so require, by a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law;
- (e) be entitled to examine in person or by his or her legal practitioner the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution;
- (f) be permitted to have without payment the assistance of an interpreter if he or she cannot understand or speak the language used at the trial of the charge; and
- (g) when charged on indictment in the High Court, have the right to a trial by a jury, subject to the provisions of any law enacted by the Legislature to provide for trial by a judge alone.

and except with that person's own consent the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.

(3) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(4) No person who shows that he or she has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(5) No person shall be tried for a criminal offence if he or she shows that he or she has been granted a pardon for that offence, either free or subject to lawful conditions.

APPENDICES – DRAFT CONSTITUTION

(6) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(7) Every person who has been convicted by a court of a criminal offence shall have the right—

- (a) to receive free of charge a copy of his or her conviction record and any sentence imposed as a consequence thereof; and
- (b) to appeal to a superior court against the conviction or the sentence or both as may be prescribed by law.

(8) When a person has, by a final decision of a court, been convicted of a criminal offence and, subsequently, the conviction has been quashed, or that person has been pardoned, on the ground that a newly-disclosed fact shows that there has been a miscarriage of justice, he or she shall be compensated out of public funds for any punishment that he or she has suffered as a result of the conviction unless it is proved that the non-disclosure in time of that fact was wholly or partly his or her fault.

(9) For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law.

(10) Except with the agreement of all the parties thereto, all proceedings for the trial of any criminal charge or for the determination of the existence or extent of any person's civil rights or obligations before any court or other authority, including the announcement of the decision, shall be held in public.

(11) Nothing in subsection (10) shall prevent the court or other authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority may—

- (a) by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of the welfare of minors or the protection of the private lives of persons concerned in the proceedings; or
- (b) by law be empowered or required to do in the interests of defence, public safety, public order or public morality.

(12) Nothing in any law or done under its authority shall be held to contravene—

- (a) subsection (2)(a), to the extent that the law in question imposes on any person charged with a criminal offence the burden of proving particular facts;
- (b) subsection (2)(e), to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or
- (c) subsection (4), to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force; but any court so trying and convicting such a member shall in imposing any sentence take into account any punishment imposed on that member under that disciplinary law.

Protection of right of prisoners to humane treatment

17.—(1) All persons deprived of their liberty (in this section referred to as “prisoners”) have the right to be treated with humanity and with respect for the inherent dignity of the human person.

(2) Save where the interests of defence, public safety, public order, public morality, public health or the administration of justice otherwise require, unconvicted prisoners shall be segregated from convicted prisoners.

(3) Every juvenile prisoner shall be segregated from adult prisoners and shall be entitled to have any criminal proceedings against him or her pursued with the greatest possible expedition.

Protection of freedom of movement

18.—(1) A person shall not be deprived of his or her freedom of movement, that is to say, the right to move freely throughout the Virgin Islands, the right to reside in any part of the Virgin Islands, the right of a person who belongs to the Virgin Islands or on whom residence status has been conferred by law to enter and leave the Virgin Islands, and immunity from expulsion from the Virgin Islands.

APPENDICES – DRAFT CONSTITUTION

(2) Any restriction on a person's freedom of movement that is involved in his or her lawful detention shall not be held to contravene this section.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision—

- (a) for the imposition of restrictions on the movement or residence within the Virgin Islands or on the right to leave the Virgin Islands of persons generally or any class of persons that are reasonably justifiable in a democratic society in the interests of defence, public safety, public order, public morality or public health;
- (b) for the imposition of restrictions, by order of a court, on the movement or residence within the Virgin Islands of any person or on any person's right to leave the Virgin Islands either in consequence of that person having been found guilty of a criminal offence or for the purpose of ensuring that he or she appears before a court later for trial for a criminal offence or for proceedings relating to his or her extradition or lawful removal from the Virgin Islands;
- (c) for the imposition of restrictions on persons who do not belong to the Virgin Islands; but—
 - (i) no restriction may be imposed by virtue only of this paragraph on the right of any such person, so long as he or she is lawfully present in the Virgin Islands, to move freely throughout the Virgin Islands and to reside anywhere in the Virgin Islands;
 - (ii) no restriction may be imposed by virtue only of this paragraph on the right of any such person to leave the Virgin Islands; and
 - (iii) no such person shall be liable, by virtue only of this paragraph, to be expelled from the Virgin Islands unless the requirements specified in subsection (4) are satisfied;
- (d) for the imposition of restrictions on the acquisition or use by any person of any land or other property in the Virgin Islands and the imposition of any fee in respect thereof;
- (e) for the imposition of restrictions on the movement or residence within the Virgin Islands or on the right to leave the Virgin Islands of any public officer that are reasonably required for the proper performance of his or her functions;
- (f) for the removal of a person from the Virgin Islands to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence of which he or she has been convicted, or to relocate to some other country for the protection of the person with his or her consent; or
- (g) for the imposition of restrictions on the right of any person to leave the Virgin Islands that are reasonably justifiable in a democratic society in order to secure the fulfilment of any obligations imposed on that person by law.

(4) The requirements to be satisfied for the purposes of subsection (3)(c)(iii) are as follows—

- (a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;
- (b) that person has the right, save where the interests of defence, public safety or public order otherwise require, to submit reasons against his or her expulsion to a competent authority prescribed by law;
- (c) that person has the right, save as aforesaid, to have his or her case reviewed by a competent authority prescribed by law; and
- (d) that person has the right, save as aforesaid, to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority.

(5) For the purposes of subsection (3)(e), "law" in subsection (3) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government of the Virgin Islands.

Protection of private and family life and privacy of home and other property

19.—(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.

(2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such manner as to promote the public benefit;
- (b) for the purpose of protecting the rights and freedoms of other persons;
- (c) to enable an officer or agent of the Government of the Virgin Islands, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of the Virgin Islands or that authority or body corporate, as the case may be;
- (d) to authorise, for the purpose of enforcing the judgment or order of a court in any proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or
- (e) for the prevention or detection of offences against the criminal law or the customs law.

Protection of the right to marry and found a family

20.—(1) Every man and woman of a marriageable age has the right to marry a person of the opposite sex and found a family in accordance with laws enacted by the Legislature.

(2) No person shall be compelled to marry without his or her free and full consent.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of public order, public morality or public health;
- (b) for regulating, in the public interest, the procedures and modalities of marriage; or
- (c) for protecting the rights and freedoms of other persons.

(4) Spouses shall be entitled to equal rights and subject to equal responsibilities—

- (a) as between themselves, both during the marriage and, if the marriage is dissolved, at its dissolution; and
- (b) as regards their children, where there are any, both during the marriage and, if the marriage is dissolved, at and after its dissolution;

but this equality of rights and responsibilities shall be subject to such arrangements or measures as may be agreed or as may be ordered by a court, in accordance with prescribed law, in the interests of the spouses and their children.

Protection of freedom of conscience

21.—(1) No person shall be hindered in the enjoyment of his or her freedom of conscience.

(2) Freedom of conscience includes freedom of thought and of religion, freedom to change one's religion or belief, and freedom, either alone or in community with others and either in public or in private, to manifest and propagate one's religion or belief in worship, teaching, practice and observance.

(3) No religious community or denomination shall be prevented from or hindered in providing religious instruction for persons of that community or denomination in the course of any education provided by it whether or not it is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such education.

(4) No person shall be compelled to take any oath which is contrary to his or her religion or belief or to take any oath in a manner which is contrary to his or her religion or belief, although such person may be required to make an affirmation in lieu of taking an oath.

(5) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of defence, public safety, public order, public morality or public health; or

- (b) for the purpose of protecting the rights and freedoms of other persons, including the right of any person to observe and practise his or her religion or belief without the unsolicited intervention of adherents of any other religion or belief.

(6) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

Protection of the right to education

22.—(1) This section is without prejudice to section 21.

(2) Every child of the appropriate age, as provided by law, shall be entitled to receive primary education which shall, subject to subsection (4), be free. The Government shall pursue the progressive realisation of free secondary education up to the age of seventeen years, in accordance with the available resources of the Territory.

(2A) Such law may, as far as practicable, make special provision for children and persons with disabilities and may make provision to provide them with facilities or access to such facilities as would aid their growth and development.

(3) Except with his or her own consent (or, in the case of a minor, the consent of his or her parent or legal guardian), no person attending a public educational institution shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance.

(4) Every person who is the parent or legal guardian of a child shall be entitled to have his or her child (of whatever age) educated, at his or her own expense unless a law otherwise provides, in a private school (that is to say, a school other than one established by a public authority) and, in such a school, to ensure the religious and moral education of his or her child in accordance with his or her own convictions.

(5) Nothing in any law or done under its authority shall be held to contravene subsection (4) to the extent that it is reasonably justifiable in a democratic society and to the extent that the law makes provision requiring private schools, as a condition of their being allowed to operate and on terms no more onerous than are applicable to schools established by a public authority, to satisfy—

- (a) such minimum educational standards (including standards relating to the qualifications of teaching staff and other staff) as may be prescribed by or under any law; and
- (b) such minimum standards imposed in the interests of public order, public morality or public health as may be so prescribed.

Protection of freedom of expression

23.—(1) No person shall be hindered in the enjoyment of his or her freedom of expression.

(2) A person's freedom of expression includes freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence or other means of communication.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings or proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or public shows; or
- (c) that imposes restrictions on public officers that are reasonably required for the proper performance of their functions.

(4) For the purposes of subsection (3)(c), "law" in subsection (3) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government of the Virgin Islands.

Protection of freedom of assembly and association

24.—(1) No person shall be hindered in the enjoyment of his or her freedom of peaceful assembly and association.

(2) The freedom of peaceful assembly and association includes the right to assemble freely and associate with other persons and, in particular, to form or belong to political parties or trade unions or other lawful associations for the promotion and protection of his or her interests.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the rights and freedoms of other persons; or
- (c) for the imposition of restrictions on public officers that are reasonably required for the proper performance of their functions.

(4) For the purposes of subsection (3)(c), “law” in subsection (3) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government of the Virgin Islands.

Protection from deprivation of property

25.—(1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except in accordance with law and where—

- (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, or the development or utilisation of any property in such manner as to promote the public benefit;
- (b) there is reasonable justification for any hardship that may result to any person having an interest in or right to or over the property;
- (c) provision is made by a law applicable to the taking of possession or acquisition—
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right to or over the property a right of access to the High Court, whether direct or on appeal from a tribunal or other authority, for the determination of his or her interest or right, the legality of the taking of possession or acquisition and the amount of compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation; and
- (d) the same rights of appeal as are accorded generally to parties to civil proceedings in the High Court sitting as a court of original jurisdiction are given to any party to proceedings in that Court relating to such a claim.

(2) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he or she has received any amount of that compensation, the whole of that amount to any country of his or her choice outside the Virgin Islands.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1)—

- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—
 - (i) in satisfaction of any tax, rate, statutory contribution, levy or due;
 - (ii) by way of penalty for breach of the law or forfeiture in consequence of breach of the law;
 - (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
 - (iv) by way of the taking of a sample for the purposes of any law;
 - (v) when the property consists of an animal, upon its being found trespassing or straying;
 - (vi) in the execution of a judgment or order of a court;

- (vii) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants;
- (viii) in consequence of any law with respect to the limitation of actions or prescription;
- (ix) for so long as may be necessary for the purposes of any examination, investigation, trial or enquiry or, in the case of land, for the purpose of carrying out on it work of reclamation, erection of a utility service item for the public benefit, drainage, soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has, without reasonable excuse, refused or failed, to carry out),

provided that the provision or, as the case may be, the thing done under its authority is reasonably justifiable in a democratic society;

- (b) to the extent that the law in question makes provision for the taking of possession of, or the acquisition of any interest in or right to or over, any of the following property, that is to say—
 - (i) enemy property;
 - (ii) property vested in the Crown as *bona vacantia*;
 - (iii) property of a deceased person or a person who is unable, by reason of legal incapacity, to administer it personally, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest in it;
 - (iv) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of that person or body and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - (v) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or by order of a court for the purpose of giving effect to the trust.

(4) Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision for the compulsory taking of possession of any property, or the compulsory acquisition of any interest in or right to or over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds.

Protection from discrimination

26.—(1) In this section, the expressions—

- (a) “discriminatory” means affording different treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations, economic status, disability, age, birth, sexual orientation, marital or other status.
- (b) [Moved to definition section]

(2) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(3) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting under any written law or performing the functions of any public office or any public authority.

(4) Subsection (2) shall not apply to any law so far as the law makes provision—

- (a) for the imposition of taxation or appropriation of revenue by the Government of the Virgin Islands or any local authority or body for local purposes;
- (b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, the Virgin Islands of persons who do not belong to the Virgin Islands, or for any other purpose with respect to such persons to the extent that the provision is reasonably justifiable in a democratic society;

- (c) for the application, in the case of persons of any such description as is mentioned in subsection (1)(a) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description; or
- (d) whereby persons of any such description as is mentioned in subsection (1)(a) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing in any law shall be held to contravene subsection (2) to the extent that it makes provision with respect to qualifications (not being qualifications specifically relating to any such description as is mentioned in subsection (1)(a)) for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established by law for public purposes.

(6) Subsection (3) shall not apply to anything that is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(7) Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (1)(a) may be subjected to any restriction on the rights and freedoms guaranteed by section 18, 19, 20, 21, 22, 23 or 24 if that restriction would, in accordance with that section, be a restriction authorised for the purposes of that section on the ground that—

- (a) the provision by or under which it is imposed is reasonably required in the interests of a matter, or for a purpose, specified in that section; and
- (b) the provision and the restriction imposed under it are reasonably justifiable in a democratic society.

(8) Nothing in subsection (3) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

Provisions for periods of public emergency

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

- (a) the well-being or security of the Virgin Islands is threatened by war, invasion, general insurrection, public disorder, natural disaster or other public emergency; and
- (b) the declaration is considered necessary by the Governor to maintain or restore peace and order.

(2) A proclamation shall be taken to be published if it is published in the *Gazette* or in a newspaper published in the Virgin Islands, or if it is posted in prominent public places or announced on the radio.

(3) Without prejudice to the power of the Legislature to make laws under this Constitution, during a period of public emergency the Governor may make such regulations for the Virgin Islands as appear to him or her to be necessary or expedient for securing the public safety, the defence of the Virgin Islands or the maintenance of public order, or for maintaining supplies and services essential to the life of the community.

(4) Regulations made under subsection (3) shall—

- (a) have effect only prospectively;
- (b) have effect, subject to this section, notwithstanding the provisions of any other law in force in the Virgin Islands or any rule of law having effect therein;
- (c) unless previously revoked, expire at the end of the period of public emergency during which they were made unless provision for their continuance in force (without or without modification) is made by the Legislature.

(5) Nothing in any law or done under its authority shall be held to contravene any of the provisions of this Chapter other than sections 11, 13, 14(1), 16(2)(a), 16(3), 16(4), 16(5) and 16(6) to the extent that the law authorises the taking during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists in the Virgin Islands during that period.

(6) Before exercising any function under subsection (1) or (3) or under any law enacted by the Legislature to like effect, the Governor shall consult the Cabinet or, if that is not practicable in the circumstances, the Premier; but if in the judgement of the Governor it is impracticable for him or her to consult either the Cabinet or the Premier, the function shall be exercised by the Governor acting in his or her discretion.

(7) Where the Governor has consulted the Cabinet or the Premier under subsection (6), the Governor shall, save in matters falling within the Governor's special responsibilities under section 60(1), act in accordance with any advice given to him or her by the Cabinet or the Premier, unless instructed otherwise by a Secretary of State.

(8) Where any proclamation of emergency has been made by the Governor under subsection (1), a copy of the proclamation shall as soon as practicable be laid before and debated in the House of Assembly, and if the House is not due to meet within five days of the making of that proclamation it shall meet within that period or as soon as practicable thereafter.

(9) A proclamation of emergency shall, unless it is sooner revoked by the Governor, cease to be in force at the expiration of a period of fourteen days beginning on the date on which it was made or such longer period as may be provided under subsection (10), but without prejudice to the making of another proclamation of emergency at or before the end of that period.

(10) If at any time while a proclamation of emergency is in force (including any time while it is in force by virtue of this subsection) a resolution is passed by the House of Assembly approving its continuance in force for a further period not exceeding three months, beginning on the date on which it would otherwise expire, the proclamation shall, if not sooner revoked, continue in force for that further period.

(11) Nothing contained in this section or any emergency regulations shall be construed to preclude the House of Assembly from—

- (a) meeting whenever practicable in accordance with its Standing Orders; and
- (b) directing that reports relating to the emergency, including the implementation of any emergency regulations, be prepared and presented in such manner and within such periods to the House of Assembly as the House may determine.

Protection of persons detained under emergency laws

28.—(1) When a person is detained by virtue of any law in relation to a period of public emergency the following provisions shall apply—

- (a) notification shall, not more than ten days after the commencement of his or her detention, be published in a public place (and thereafter as soon as possible in the *Gazette*) stating that he or she has been detained and giving particulars of the provision of law by virtue of which his or her detention is authorised;
- (b) he or she shall (if not sooner released), as soon as reasonably practicable and in any case not more than four days after the commencement of his or her detention, be informed, in a language that he or she understands, of the grounds on which he or she is detained and furnished with a written statement;
- (c) his or her case shall, not more than thirty days after the commencement of his or her detention and thereafter during the detention at intervals of not more than three months, be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice;
- (d) he or she shall be afforded reasonable opportunity to consult a legal practitioner of his or her own choice and to hold private communication with such legal practitioner; and
- (e) he or she shall, at the hearing of his or her case by the tribunal appointed for its review, be permitted to appear in person or by a legal practitioner of his or her own choice.

(2) For the purpose of subsection (1)(d) and (e), if the detained person is unable to retain a legal practitioner of his or her own choice, the tribunal may approve such person as it deems fit to make representations to it, provided that nothing in subsection (1)(d) or (e) shall be construed as entitling a detained person to legal representation at public expense.

(3) On any review by a tribunal of the case of a detained person under this section, the tribunal may make recommendations concerning the necessity or expediency of continuing his or her detention to the authority by which

it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

Protection of the environment

29. Every person has the right to an environment that is generally not harmful to his or her health or well-being and to have the environment protected, for the benefit of present and future generations, through such laws as may be enacted by the Legislature including laws to—

- (a) prevent pollution and ecological degradation;
- (b) promote conservation; and
- (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Protection of children

30. The Legislature may, in addition to any rights and freedoms provided in this Chapter which afford protection to children, enact such laws as it considers fit to promote the well-being and welfare of children and to afford them protection from any harm, exploitation, neglect, abuse, maltreatment or degradation and to provide them with such facilities as would aid their growth and development.

Protection of the elderly

30A. The Legislature may enact such laws as it considers fit to promote the well-being and welfare of the elderly and to afford them protection from harm, exploitation, neglect, abuse, maltreatment or degradation and to provide them with such facilities that would enhance their welfare.

Enforcement of protective provisions

31.—(1) If any person alleges that any of the provisions in sections 10 through 30A of this Chapter has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

- (a) to hear and determine any application made by any person under subsection (1); and
- (b) to determine any question arising in the case of any person that is referred to it under subsection (7),

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The High Court may decline to exercise its powers under subsection (2) if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(4) Without prejudice to the generality of subsections (2) and (3), where, in exercise of its powers under those subsections, the High Court determines that one of the foregoing provisions of this Chapter has been contravened in relation to any person, it may order, or, as the case may be, declare that the court which made the reference to it under subsection (7) (“the referring court”) has the power to order (within such limits as the High Court may declare), the award to that person of such damages as the High Court or, as the case may be, the referring court considers just and appropriate.

(5) An award of damages may not be made under subsection (4) in respect of the enactment of any law by the Legislature or the making, under such a law, of any subordinate legislation, but such an award may be made in respect of anything done by any person acting by virtue of any such law or subordinate legislation or in performing the functions of any public office or any public authority.

(6) [Deleted]

(7) If in any proceedings in any court (other than the High Court, the Court of Appeal, His Majesty in Council or a court-martial) any question arises as to the contravention of any of the foregoing provisions of this Chapter, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in the opinion of the court in which the question arose, the raising of the question is merely frivolous or vexatious.

(8) Where any question is referred to the High Court under subsection (7), the High Court shall give its decision on the question and the referring court shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to His Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of His Majesty in Council.

(9) An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the High Court under this section, and an appeal shall lie as of right to His Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case.

(10) The Legislature may by law confer on the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred on it by this section.

(11) The Legislature may by law make, or provide for the making of, provision with respect to the practice and procedure—

- (a) of the High Court in relation to the jurisdiction and powers conferred on it by or under this section;
- (b) of the High Court or the Court of Appeal in relation to appeals under this section from determinations of the High Court or the Court of Appeal; and
- (c) of other courts in relation to references to the High Court under subsection (7),

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought.

Proceedings which might affect freedom of conscience

32. If a court's determination of any question arising under this Chapter might affect the exercise by a religious organisation (itself or its members collectively) or by an individual of the right to freedom of conscience as defined and protected by section 21, it must have particular regard to the importance of that right.

Proceedings which might affect freedom of expression

33.—(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the right to freedom of expression as defined and protected by section 23.

(2) No such relief shall be granted so as to restrain publication before trial, unless the court considers and makes an order that the interests of justice will not be served by such publication.

(3) The court shall have particular regard to the importance of the right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
 - (i) the material has become, or is about to become, available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published; and
- (b) any relevant privacy code.

Establishment of a Human Rights Commission

34.—[Moved to 'Good Governance and Democracy' section]

CHAPTER 3 THE GOVERNOR

Governor

35.—(1) There shall be a Governor of the Virgin Islands who shall be appointed by His Majesty by Commission under His Sign Manual and Signet and shall hold office during His Majesty's pleasure.

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

(3) Subject to the provisions of this Constitution and of any other law by which powers or duties are conferred on the Governor, the Governor shall do and execute all things that belong to his or her office (including the exercise of any powers with respect to which the Governor is empowered by this Constitution to act in his or her discretion) according to such instructions, if any, as His Majesty may from time to time see fit to give him or her; but the question whether or not the Governor has in any matter complied with any such instructions shall not be enquired into in any court.

(4) A person appointed to the office of Governor shall, before entering upon the functions of that office, make oaths or affirmations of allegiance and for the due execution of that office in the forms set out in Schedule 1.

Deputy Governor

36.—(1) There shall be a Deputy Governor who shall be such person, being a Virgin Islander as defined in section 65(2), as His Majesty may designate as such by instructions given through a Secretary of State and who shall hold office during His Majesty's pleasure.

(2) If the office of Deputy Governor is vacant or if the person holding that office is—

- (a) acting in the office of Governor under section 37;
- (b) absent from the Virgin Islands; or
- (c) for any other reason unable to perform the functions of the office of Deputy Governor,

such person as His Majesty may designate by instructions given through a Secretary of State shall act in the office of Deputy Governor during His Majesty's pleasure.

Acting Governor

37.—(1) During any period when the office of Governor is vacant or the Governor is absent from the Virgin Islands or is for any other reason unable to perform the functions of his or her office—

- (a) the Deputy Governor; or
- (b) if the office of Deputy Governor is vacant, or the Deputy Governor is absent from the Virgin Islands or is for any other reason unable to perform the functions of the office of Governor, such person as His Majesty may designate by instructions given through a Secretary of State (in this section referred to as "the person designated"),

shall, during His Majesty's pleasure, act in the office of Governor and shall perform the functions of that office accordingly.

(2) Before assuming the functions of the office of Governor, the Deputy Governor or the person designated shall make the oaths or affirmations directed by section 35(4) to be made by the Governor.

(3) The Deputy Governor shall not continue to act in the office of Governor after the Governor has notified him or her that he or she is about to assume or resume the functions of that office, and the person designated shall not continue to act in that office after the Governor or Deputy Governor has so notified him or her.

(4) The Governor or the Deputy Governor shall not, for the purposes of this section or section 36, be regarded as absent from the Virgin Islands or as unable to perform the functions of his or her office—

- (a) by reason that he or she is in passage from one part of the Virgin Islands to another;
- (b) at any time when there is a subsisting appointment of a deputy under section 39; or
- (c) by reason of absence from the Virgin Islands for a period not exceeding forty-eight hours for the purpose of visiting the United States Virgin Islands.

(5) In this section “the Governor” means the person holding the office of Governor and “the Deputy Governor” means the means the person holding the office of Deputy Governor.

Functions of Deputy Governor

38.—(1) Subject to subsection (2), the Deputy Governor shall—

- (a) assist the Governor in the exercise of his or her functions relating to matters for which the Governor is responsible under section 60;
- (b) assist the Governor in the exercise of such of his or her other functions, being functions in the exercise of which the Governor is not obliged to act in accordance with the advice of any other person or authority, as the Governor, acting in his or her discretion, may direct; and
- (c) perform such other functions, not of a ministerial nature, as (subject to this Constitution and any other law) may be assigned to the Deputy Governor, at the request of the Premier, by the Governor acting in his or her discretion.

(2) The Governor, acting in his or her discretion, may, by writing under his or her hand, authorise the Deputy Governor to exercise for and on behalf of the Governor any or all of the functions of the office of Governor, subject to such exceptions and conditions as the Governor may from time to time so specify.

(3) The power and authority of the Governor shall not be affected by any authority of the Deputy Governor under subsection (2) and, subject to the provisions of this Constitution and of any other law by which any function which the Deputy Governor is authorised to exercise is conferred, the Deputy Governor shall comply with such instructions relating to the exercise of that function as the Governor, acting in his or her discretion, may from time to time address to the Deputy Governor; but the question whether or not the Deputy Governor has in any matter complied with any such instructions shall not be enquired into in any court.

(4) Any authority given under subsection (2) may at any time be varied or revoked by His Majesty by instructions given through a Secretary of State or by the Governor, acting in his or her discretion, by writing under his or her hand.

(5) In subsection (2) the reference to any functions of the office of Governor does not include a reference to—

- (a) the functions conferred on the Governor by this section; or
- (b) any functions conferred on the Governor by any Act of the Parliament of the United Kingdom or by any Order of His Majesty in Council or other instrument made under any such Act other than this Order.

Deputy to Governor

39.—(1) Whenever the Governor—

- (a) has occasion to be absent from the seat of Government but not from the Virgin Islands;
- (b) has occasion to be absent from the Virgin Islands for a period which he or she has reason to believe will be of short duration; or
- (c) is suffering from any illness which he or she has reason to believe will be of short duration,

the Governor may, acting in his or her discretion, by instrument under the public seal, appoint the Deputy Governor, or if the Deputy Governor is not available any other person in the Virgin Islands who is a Virgin Islander as defined in section 65(2), to be his or her deputy during such absence or illness and in that capacity to perform on his or her behalf such of the functions of the office of Governor as may be specified in that instrument.

(2) The power and authority of the Governor shall not be affected by the appointment of a deputy under this section, and a deputy shall comply with such instructions as the Governor, acting in his or her discretion, may from time to time address to the deputy; but the question whether or not a deputy has in any matter complied with any such instructions shall not be enquired into in any court.

(3) A person appointed as a deputy under this section shall hold that appointment for such period as may be specified in the instrument by which he or she is appointed, and the appointment may be revoked at any time by His Majesty by instructions given through a Secretary of State or by the Governor, acting in his or her discretion.

Exercise of Governor's functions

40.—(1) Subject to this section, the Governor shall consult with the Cabinet in the exercise of all functions conferred on him or her by this Constitution or any other law for the time being in force in the Virgin Islands, except—

- (a) when acting under instructions given to him or her by His Majesty through a Secretary of State;
- (b) when exercising any function conferred on him or her by this Constitution or any such other law which is expressed to be exercisable by the Governor in his or her discretion, or in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet; or
- (c) in any case which, in his or her opinion, involves a matter for which he or she is responsible under section 60;

but in exercising his or her powers in relation to matters to which paragraph (c) applies, the Governor shall consult with the Premier.

(2) The Governor shall not be obliged to consult with the Cabinet or the Premier if, in his or her judgement—

- (a) His Majesty's service would sustain material prejudice;
- (b) the matter is not materially significant so as to require consultation; or
- (c) the urgency of the matter requires the Governor to act before he or she can consult the Cabinet or the Premier,

but in any case falling within paragraph (c) the Governor shall, as soon as practicable, communicate to the Cabinet the measures which he or she has adopted and the reasons for them.

(3) In any case in which the Governor is required under this section to consult the Cabinet, the Governor shall act in accordance with the advice of the Cabinet unless in his or her opinion such advice would affect a matter for which he or she is responsible under section 60.

(4) Where the Governor is directed by this Constitution to exercise any function after consultation with any person or authority other than the Cabinet, he or she shall not be obliged to exercise that function in accordance with the advice of that person or authority.

(5) Whenever the Governor, in pursuance of subsection (3), acts contrary to the advice given by the Cabinet, he or she shall, as soon as practicable, report his or her action and the reasons for it to a Secretary of State.

Definition of Crown lands

40A - Crown land" means any rights or interests in the seabed and Territorial Waters, any rights or interests in any Exclusive Fisheries Zone or Exclusive Economic Zone, any rights or interests in land or other immovable property within the Virgin Islands that vests in and may be lawfully granted or disposed of by His Majesty in right of the Virgin Islands.

Crown lands

41 (1) Subject to this Constitution a law enacted by the Legislature shall provide for the transparent acquisition, management and disposal of Crown lands for the benefit of the people of the Virgin Islands, both present and future.

(2) Subject to any law for the time being in force in the Virgin Islands, the Governor or the Minister when duly authorised by the Governor by writing under his or her hand, in His Majesty's name and on His Majesty's behalf, may, under the public seal, make grants and dispositions of lands or other immovable property in the Virgin Islands or interests in such property that are vested in His Majesty for the purposes of the Government of the Virgin Islands; but any such grant or disposition shall require the prior approval of the Cabinet.

(3) The Minister shall have responsibility for administering all lands and other property referred to in subsection (1).

(4) In this section "the Minister" means the Minister charged with responsibility for Crown lands.

Powers to constitute offices and make appointments, etc

42. Subject to Chapter 7 and any law for the time being in force in the Virgin Islands, the Governor, in His Majesty's name and on His Majesty's behalf, may—

- (a) constitute offices for the Virgin Islands and make appointments to them, to be held during His Majesty's pleasure; and
- (b) dismiss any person so appointed or take such disciplinary action in relation to him or her as the Governor may think fit.

Powers of pardon, etc

43.—(1) The Governor may, in His Majesty's name and on His Majesty's behalf—

- (a) grant to any person concerned in or convicted of any offence against any law in force in the Virgin Islands a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any sentence passed on that person for such an offence;
- (c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or
- (d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to His Majesty on account of such an offence.

(2) In the exercise of the powers conferred on the Governor by this section the Governor shall consult with the Committee established by section 44, but the Governor shall decide whether to exercise any of those powers in any case in his or her own deliberate judgement, whether the members of the Committee concur in his or her decision or otherwise.

Advisory Committee on the Prerogative of Mercy

44.—(1) There shall be in and for the Virgin Islands an Advisory Committee on the Prerogative of Mercy (in this section and section 43 referred to as "the Committee"), which shall consist of the Attorney General, the Director of Health Services and four members appointed by the Governor after consultation with the Premier.

(2) The Committee shall not be summoned except by the authority of the Governor, acting in his or her discretion; and the Governor shall preside at all meetings of the Committee.

(3) No business shall be transacted at any meeting of the Committee unless there are at least three members present, of whom one shall be the Attorney General.

(4) The office as a member of the Committee of any member appointed by the Governor under subsection (1) shall become vacant if the Governor, acting after consultation with the Premier, revokes that appointment.

(5) Subject to subsection (3), the Committee shall not be disqualified for the transaction of business by reason of any vacancy in its membership, and the validity of the transaction of any business by the Committee shall not be affected by reason only of the fact that some person who was not entitled to do so took part in the proceedings.

(6) Subject to this section the Committee may regulate its own proceedings.

The public seal

45. The Governor shall keep and use the public seal for sealing all things that require to be sealed.

CHAPTER 4 THE EXECUTIVE

Executive authority of the Virgin Islands

46.—(1) The executive authority of the Virgin Islands shall be vested in His Majesty.

(2) Subject to this Constitution, the executive authority of the Virgin Islands may be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him or her.

(3) Nothing in subsection (2) shall operate so as to prejudice any law for the time being in force in the Virgin Islands whereby functions are, or may be, conferred on persons or authorities other than the Governor.

Cabinet

47.—(1) There shall be a Cabinet in and for the Virgin Islands which shall consist of the Premier, four other Ministers and one *ex officio* member, namely the Attorney General.

(2) The number of Ministers referred to in subsection (1) may be increased by a law made in pursuance of section 63(2) which increases the number of elected members of the House of Assembly; but in no circumstances may the number of Ministers exceed two-fifths of the total number of elected members of the House.

(3) The Cabinet shall have responsibility for the formulation of policy, including directing the implementation of such policy, insofar as it relates to every aspect of government, except those matters for which the Governor has special responsibility under section 60, and the Cabinet shall be collectively responsible to the House of Assembly for such policies and their implementation.

(4) Subject to this Constitution, the Cabinet shall determine its own rules of procedure for the conduct of its business.

Meetings of the Cabinet

48. The Cabinet shall meet regularly at such times as its rules of procedure may prescribe, and shall also meet whenever the Premier, or the Governor, acting in his or her discretion, where practicable after consultation, so requests; and upon receipt of such request the Cabinet Secretary shall summon the Cabinet.

Proceedings in the Cabinet

49.—(1) The Premier shall, so far as practicable, attend and preside at meetings of the Cabinet.

(2) In the absence of the Premier there shall preside at any meeting of the Cabinet the Governor, or in his or her absence, the Deputy Premier.

(3) Subject to section 63(4), no business shall be transacted at any meeting of the Cabinet if there are less than three Ministers present, one of whom shall be the Premier or the Minister performing the functions of the Premier under section 55.

(4) The Cabinet Secretary, the Governor and the Premier shall form a Cabinet Steering Group for the purpose of setting the agenda of the Cabinet; the Governor and the Premier shall each be entitled to inscribe items on the agenda and the Cabinet Secretary shall comply accordingly.

(5) In the absence of any member of the Cabinet Steering Group the person performing the functions of that member shall act in his or her place.

(6) The Attorney General and the Governor shall not be entitled to vote in the Cabinet.

(7) Subject to subsection (3), the Cabinet shall not be disqualified for the transaction of business by reason of any vacancy in its membership (including any vacancy not filled when the Cabinet is first constituted or is reconstituted at any time), and the validity of the transaction of business in the Cabinet shall not be affected by reason only of the fact that some person who was not entitled to do so took part in the proceedings.

Summoning of persons to the Cabinet

50.—(1) Whenever any business before the Cabinet renders the presence of a public officer or any other person desirable, the Premier may summon such public officer or invite such other person to a meeting of the Cabinet; and the Premier shall summon such an officer if the Governor, acting in his or her discretion, so requests.

(2) Where a matter before the Cabinet concerns or relates to a statutory body and the presence of an officer of the statutory body is considered desirable, the Premier may summon that officer to a meeting of the Cabinet.

Cabinet Secretary

51.—(1) There shall be—

- (a) a Cabinet Office, which shall be an office in the Government of the Virgin Islands; and
- (b) a Cabinet Secretary, whose office shall be a public office, who shall be a person who is a Virgin Islander as defined in section 65(2) and who shall be appointed in accordance with section 92(5), (6) and (7).

(2) The Cabinet Secretary shall have charge of the Cabinet Office, attend meetings of the Cabinet and be responsible for arranging the business for and keeping the minutes of the meetings of the Cabinet and for conveying the conclusions reached at the meetings to the appropriate person or authority.

(3) The Cabinet Secretary shall—

- (a) provide such impartial policy advice and administrative and technical support to the Cabinet as the Cabinet may require;
- (b) transmit copies of all papers submitted for consideration by the Cabinet to its members;
- (c) inform all its members of the summoning of any meeting of the Cabinet and of the matters to be discussed at any such meeting;
- (d) furnish all its members, as soon as practicable after each meeting of the Cabinet, with a copy of the confirmed minutes of the previous meeting showing the matters discussed and the conclusions reached at the meeting;
- (e) promote and facilitate adherence to the rules of procedure of the Cabinet;
- (f) monitor the implementation of Cabinet decisions and report periodically to the Cabinet in respect thereof; and
- (g) perform such other functions as are incidental to the functions of the Cabinet Secretary.

(4) The functions conferred on the Cabinet Secretary by subsection (3)(b), (c) and (d) may be exercised by the Cabinet Secretary in person or by officers subordinate to him or her acting under and in accordance with his or her general or special instructions.

Appointment of Ministers

52.—(1) The Premier shall be appointed by the Governor as follows—

- (a) the Governor shall appoint as Premier the elected [at-large]** member of the House recommended by a majority of the elected members of the House;
- (b) if no recommendation is made under paragraph (a), the Governor, acting in his or her discretion, shall appoint as Premier the elected [at-large]** member of the House of Assembly who, in his or her judgement, is best able to command the support of a majority of the elected members of the House.

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(2) The other Ministers shall be appointed by the Governor in accordance with the advice of the Premier from among the elected members of the House of Assembly.

(3) The Governor, acting in accordance with the advice of the Premier, shall appoint one of the Ministers elected at-large as Deputy Premier.

(4) The appointment of a Deputy Premier under subsection (3) may be revoked by the Governor, acting in accordance with the advice of the Premier, but such revocation shall not in itself affect the Minister's tenure of office as a Minister.

(5) If occasion arises for making an appointment of any Minister between a dissolution of the House of Assembly and the polling in the next following general election, a person who was an elected member of the House immediately before the dissolution may be appointed as if he or she were still a member of the House.

(6) Appointments made under this section shall be made by instrument under the public seal.

**** The reference to 'at-large' is only relevant if the hybrid model is retained. Note also that the reference to 'political party' is deleted from this section as well as from section 70(2)(a), regardless of which model is adopted.**

52A.*—(1) The Governor, acting in accordance with the advice of the Premier, may appoint no more than two Junior Ministers from among the elected members of the House of Assembly to assist in the performance of Ministerial functions relating to economic development.

(2) Section 50(1) shall apply in relation to Junior Ministers as it applies in relation to public officers.

(3) Sections 3(1)(b), 52(5) and (6), 53(3) and (4), 54, 56, 69(3) and 112(4) shall apply in relation to Junior Ministers as they apply in relation to Ministers.

(4) Sections 61, 69(4) and (5) and 74(1) shall apply in relation to Junior Ministers as they apply in relation to members of the Cabinet.

**Section 52A to be deleted if the 6th Minister is given.*

Functions of the Premier

52(1A). The Premier shall have such functions as are conferred on him or her by or under this Constitution, and shall exercise those functions in accordance with this Constitution and any other law and in the best interests of the Virgin Islands.

Tenure of office of Ministers

53.—(1) If a motion on the Order Paper that the House of Assembly should declare a lack of confidence in the Government of the Virgin Islands receives in the House the affirmative votes of a majority of all the elected members of the House, the Governor shall, by instrument under the public seal, revoke the appointment of the Premier; but before so revoking the Premier's appointment the Governor shall consult with the Premier and, if the Premier so requests, the Governor, acting in his or her discretion, may dissolve the House of Assembly instead of revoking the appointment.

(2) The Premier shall vacate his or her office if, after the polling in a general election and before the House of Assembly first meets thereafter, the Governor, acting in accordance with section 52(1), informs the Premier that he or she is about to appoint another person as the Premier.

(3) Any Minister shall vacate his or her office if—

- (a) he or she ceases to be a member of the House of Assembly for any reason other than a dissolution;
- (b) he or she is not an elected member of the House of Assembly when it first meets after a general election;
- (c) he or she is required under section 67(4) to cease to perform his or her functions as a member of the House of Assembly;

- (d) he or she resigns it by writing under his or her hand addressed to the Premier or, in the case of the Premier, he or she resigns it by writing under his or her hand addressed to the Governor; or
 - (e) he or she has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the Integrity in Public Life Act, 2021.
- (4) A Minister other than the Premier shall also vacate his or her office if—
- (a) the Premier vacates his or her office; or
 - (b) his or her appointment is revoked by the Governor, acting in accordance with the advice of the Premier, by instrument under the public seal.

Absence of Ministers from the Virgin Islands

54. The Premier shall give written notice to the Governor before being absent from the Virgin Islands, and any other Minister shall obtain the written permission of the Premier before being absent from the Virgin Islands; but where in either case the Premier or Minister is to be absent from the Virgin Islands for a period not exceeding forty-eight hours, prior verbal notification shall be given to the Governor or the Premier, as the case may be.

Performance of functions of Premier in certain events

55.—(1) If the Premier is expected to be absent from the Virgin Islands for more than forty-eight hours, the Governor shall authorise the Deputy Premier to perform the functions of the office of Premier; and the Governor shall revoke this authority on the return to the Virgin Islands of the Premier.

(2) If both the Premier and the Deputy Premier are expected to be absent from the Virgin Islands for more than forty-eight hours, the Governor shall authorise another Minister designated by the Premier to perform the functions of the office of Premier; and the Governor shall revoke this authority on the return to the Virgin Islands of either the Premier or the Deputy Premier.

(3) If the Cabinet advises the Governor that the Premier is unable to perform his or her functions by reason of illness, the Governor shall authorise the Deputy Premier to perform the functions of the office of Premier; and the Governor shall revoke this authority if the Cabinet advises him or her that the Premier is again able to perform his or her functions.

(4) If the Cabinet advises the Governor that both the Premier and the Deputy Premier are unable to perform their functions by reason of absence or illness, the Governor shall authorise another Minister designated by the Premier (or, if the Premier makes no such designation, appointed by the Governor on the advice of the Cabinet, and where the Cabinet fails to give such advice within twenty-four hours of the Governor seeking such advice, selected by the Governor in his or her discretion) to perform the functions of the office of Premier; and the Governor shall revoke this authority if the Cabinet advises him or her that the Premier or the Deputy Premier is again able to perform his or her functions.

(5) Any authority given or revoked by the Governor under this section shall be in writing.

Assignment of responsibilities to Ministers

56.—(1) The Governor shall, acting in accordance with the advice of the Premier, by directions in writing, assign to any Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including responsibility for the administration of any department of government.

(2) Without prejudice to section 60(2), (3) and (4), a Minister shall not be assigned responsibility under this section for any of the matters mentioned in section 60(1).

(3) The Governor may not confer on any Minister authority to exercise any function that is conferred or imposed by this Constitution or any other law on the Governor or any person or authority other than a Minister; but nothing in this subsection affects the power of the Legislature under section 71.

(4) For the avoidance of doubt, subject only to subsections (2) and (3), any matter may be assigned to a Minister under subsection (1).

(5) Where a Minister has been assigned responsibility under this section for the administration of any department of government, the Minister shall (subject to this Constitution and any other law) exercise general direction and control over that department, including directing the implementation of government policy as it relates to that department, and, subject to such general direction and control, the department shall, unless otherwise agreed between the Governor and the Premier, be under the supervision of a permanent secretary who shall be a public officer; but two or more departments of government may be placed under the supervision of one permanent secretary.

(6) A Minister assigned responsibility for any matter under this section shall exercise his or her responsibility in accordance with the policies of the Government of the Virgin Islands as determined by the Cabinet and in accordance with the collective responsibility of the members of the Cabinet for the policies and decisions of the Government.

(7) The Governor, acting in his or her discretion, may at any time request from a Minister any official papers or seek any official information or advice available to that Minister with respect to a matter for which that Minister is responsible under this section, and shall inform the Premier of any such request.

National Security Council

57.—(1) There shall be in and for the Virgin Islands a National Security Council which shall consist of—

- (a) the Governor, as Chairman;
- (b) the Premier;
- (c) one other Minister appointed in writing by the Governor, acting in accordance with the advice of the Premier;
- (d) the Attorney General, *ex officio*; and
- (e) the Commissioner of Police, *ex officio*.

(2) A Minister appointed under subsection (1)(c) shall vacate his or her seat on the National Security Council if—

- (a) his or her office becomes vacant under section 53; or
- (b) the Governor so directs in writing, acting in accordance with the advice of the Premier.

(3) The National Security Council shall advise the Governor on matters relating to internal security and the Governor shall be obliged to act in accordance with the advice of the Council, unless he or she considers that giving effect to the advice would adversely affect His Majesty's interest (whether in respect of the United Kingdom or the Virgin Islands); and where the Governor has acted otherwise than in accordance with the advice of the Council, he or she shall report to the Council at its next meeting.

(4) The Commissioner of Police shall—

- (a) provide regular briefings to the National Security Council on matters of internal security, including the Police Force;
- (b) have responsibility for the day to day operation of the Police Force and shall report regularly on such operation to the Governor; and
- (c) inform the Premier of any significant security developments in the Virgin Islands, including the occurrence of any significant criminal activity.

(5) The National Security Council may invite any person or summon any public officer to attend and participate in, or provide briefings to, the Council on the areas of their work bearing on internal security.

(6) The Governor, acting in his or her discretion, may summon a meeting of the National Security Council whenever he or she considers it desirable to do so, and the Governor shall summon such a meeting whenever the Premier so requests.

(7) Subject to this section, the National Security Council may regulate its own procedure.

(8) The Cabinet Secretary shall be the Secretary to the National Security Council.

Attorney General

58.—(1) There shall be an Attorney General of the Virgin Islands, whose office shall be a public office and who shall be appointed in accordance with section 95.

(2) The Attorney General shall be the principal legal adviser to the Government of the Virgin Islands.

Director of Public Prosecutions

59.—(1) There shall be a Director of Public Prosecutions, whose office shall be a public office and who shall be appointed in accordance with section 95.

(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so—

- (a) to institute and undertake criminal proceedings against any person before any civil court in respect of any offence against any law in force in the Virgin Islands;
- (b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

(3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him or her in person or by officers subordinate to him or her acting under and in accordance with his or her general or special instructions.

(4) The powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority; but where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

(5) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court or to His Majesty in Council shall be deemed to be part of those proceedings.

(6) In the exercise of the powers conferred on him or her by this section and section 88(2) the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

Governor's special responsibilities

60.—(1) The Governor shall be responsible for the conduct (subject to this Constitution and any other law) of any business of the Government of the Virgin Islands, including the administration of any department of government, with respect to the following matters—

- (a) external affairs, subject to subsection (4);
- (b) defence, including the armed forces;
- (c) internal security, including the Police Force, without prejudice to section 57;
- (d) the terms and conditions of service of persons holding or acting in public offices, without prejudice to section 92; and
- (e) the administration of the courts;

and the Governor shall keep the Premier fully informed concerning the general conduct of these matters, and the Premier may request information in respect of any particular matter.

(2) The Governor, acting after consultation with the Premier, may assign to any member of the Cabinet responsibility for the conduct, on behalf of the Governor, of any business in the House of Assembly with respect to any of the matters mentioned in subsection (1).

(3) The Governor, acting in his or her discretion, may, by directions in writing, delegate, with the prior approval of a Secretary of State, to the Premier or any other Minister designated by the Governor on the advice of the Premier such

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responsibility for matters of external affairs or internal security as the Governor may think fit upon such terms and conditions as he or she may impose.

(4) Notwithstanding subsection (3), the Governor shall, by directions in writing, delegate to the Premier or to any other Minister designated by the Governor on the advice of the Premier, on the terms and conditions set out in subsection (5), responsibility for the conduct of external affairs as they relate to any matters that fall under the portfolios of Ministers, including—

- (a) the Caribbean Community, the Organisation of Eastern Caribbean States, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution;
- (b) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Virgin Islands;
- (c) the relationship between the Virgin Islands and
 - (i) the United States Virgin Islands
 - (ii) The Commonwealth of Puerto Rico,in matters of mutual interest;
- (d) tourism and tourism-related matters;
- (e) taxation and the regulation of finance and financial services; and
- (f) European Union matters directly affecting the interests of the Virgin Islands.

(5) The terms and conditions referred to in subsection (4) are the following—

- (a) separate authority shall be required from or on behalf of a Secretary of State for the commencement of formal negotiation and the conclusion of any treaty or other international agreement by the Government of the Virgin Islands, provided that general authority may be granted in specified matters to commence the formal negotiation of, and where it is deemed appropriate, to conclude any such treaty or international agreement;
- (b) no political declaration, understanding or arrangement in the field of foreign policy shall be signed or supported in the name of the Government of the Virgin Islands without the prior approval of a Secretary of State;
- (c) a formal invitation to a member of government or Head of State of another country to visit the Virgin Islands shall not be issued without prior consultation with the Governor;
- (d) the costs of any activities in pursuance of subsection (4) shall be borne by the Government of the Virgin Islands;
- (e) the Premier or other Minister shall keep the Governor fully informed of any activities in pursuance of subsection (4); and
- (f) the Premier or other Minister shall provide to the Governor on request all papers and information, including the text of any instrument under negotiation, available to the Premier or other Minister with respect to any activities in pursuance of subsection (4).

(6) Any matter that is delegated to the Premier or to any other Minister under subsection (4) shall be performed by the Premier or such other Minister in a manner that is in the best interests of the Virgin Islands and not prejudicial to the interests of His Majesty and, for this purpose, the Governor and the Premier shall from time to time hold conference to ensure the proper safeguard of those interests.

(7) In the event of any disagreement regarding the exercise of any delegated authority under subsection (4), the matter shall be referred to a Secretary of State whose decision on the matter shall be final and whose directions shall be complied with.

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

Oaths and affirmations

61. Every member of the Cabinet and the Cabinet Secretary, and every member of the National Security Council (except the Governor), shall, before entering upon the duties of his or her office, make before the Governor an oath or affirmation of allegiance and an oath or affirmation for the due execution of that office in the forms set out in Schedule 1.

CHAPTER 5 THE LEGISLATURE *Composition*

Composition of Legislature

62. There shall be a Legislature of the Virgin Islands which shall consist of His Majesty and a House of Assembly.

House of Assembly

63.—(1) The House of Assembly shall consist of a Speaker elected as provided in section 69, thirteen elected members, and one non-voting *ex officio* member, namely the Attorney General.

(2) A law made under section 71 may alter the number of elected members of the House of Assembly, provided that the number of elected members shall be not less than thirteen; but no such law shall come into force—

- (a) unless, where the law provides for an alteration in the number of electoral districts referred to in section 64(2)(b), a Bill providing for the altered number of electoral districts and their boundaries to take account of the altered number of elected members has been passed following a report by an electoral district boundaries commission; and
- (b) until the dissolution of the House of Assembly next following the enactment of such law.

(3) For its enactment a Bill for a law made in pursuance of subsection (2) shall require the support of two-thirds of the elected members of the House of Assembly.

(4) A law made in pursuance of subsection (2) shall provide for the quorum in the House of Assembly and the Cabinet.

Elected members

64.—(1) The elected members of the House of Assembly shall be persons qualified for election in accordance with this Constitution and, subject to this Constitution, shall be elected in the manner provided by or under any law for the time being in force in the Virgin Islands.

(2) Subject to section 63(2), for the purposes of elections the Virgin Islands—

- (a) shall be a single electoral district and shall return four members to the House of Assembly; and
- (b) shall also be divided into nine electoral districts in such manner as may be provided by or under any law for the time being in force in the Virgin Islands, and each such district shall return one member to the House of Assembly.

Qualifications for elected membership

65.—(1) Subject to this section and section 66, a person shall be qualified to be elected as a member of the House of Assembly if, and shall not be qualified to be so elected unless, he or she—

- (a) was so qualified immediately before the commencement of the Virgin Islands Constitution Order, 2007; or
- (b) is a person who—

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- (i) is a Virgin Islander of the age of twenty-one years or upwards; and
- (ii) is otherwise qualified as a voter under section 68.

(2) Subject to subsections (3) and (4), for the purposes of subsection (1)(b)(i) a “Virgin Islander” is a person who belongs to the Virgin Islands by birth or descent who was—

- (a) born in the Virgin Islands of a father or mother who at the time of the birth was a British overseas territories citizen (or a British Dependent Territories citizen) by virtue of birth in the Virgin Islands or by virtue of descent from a father or mother who was born in the Virgin Islands;
- (b) born in the Virgin Islands of a father or mother who at the time of the birth belonged to the Virgin Islands by birth or descent; or
- (c) born outside the Virgin Islands of a father or mother who at the time of the birth belonged to the Virgin Islands by birth or descent.

(3) A person born outside the Virgin Islands who belongs to the Virgin Islands by descent shall not be qualified to be elected as a member of the House of Assembly unless one of his or her grandparents belonged to the Virgin Islands by birth.

(4) A person, whether born in or outside the Virgin Islands, who would otherwise be qualified to be elected as an elected member of the House of Assembly by virtue of subsection (1)(b) shall not be so qualified unless—

- (a) where that person has never been domiciled in the Virgin Islands, he or she has resided in the Virgin Islands for at least five years immediately before the date of his or her nomination for election; or
- (b) where that person was formerly domiciled in the Virgin Islands but has lived outside the Virgin Islands for a continuous period of at least ten years (excluding periods related to medical or educational purposes), he or she has resided in the Virgin Islands for at least three years immediately before the date of his or her nomination for election and is domiciled in the Virgin Islands at that date.

Disqualifications for elected membership

66.—(1) No person shall be qualified to be elected as a member of the House of Assembly who—

- (a) holds, or is acting in, any public office;
- (b) has been adjudged or otherwise declared bankrupt under any law in force in any country and has not been discharged;
- (c) is a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in any country;
- (d) at the date of election, is under sentence of death imposed on him or her by a court of law in any country, or is serving or has at any time within the period of five years immediately preceding that date been serving any part of a sentence of imprisonment (by whatever name called) of at least twelve months imposed on him or her by such a court or substituted by competent authority for some other sentence imposed on him or her by such a court; or is under such a sentence of imprisonment the execution of which has been suspended;
- (e) is disqualified for membership of the House of Assembly by or under any law in force in the Virgin Islands relating to offences connected with elections; or
- (f) is a party to, or is a partner in a firm, or is a director, shareholder or manager of a company, or similar participant in any other entity which is a party to, or has an interest in, any contract with the Government of the Virgin Islands for or on account of the public service or a public authority (as defined in section 26(1)(b)), and has not, within fourteen days before his or her nomination as a candidate for election, published in the Gazette or in a newspaper circulating in the Virgin Islands [filed with the Elections and Boundaries Commission] a notice setting out—
 - (i) the nature of such contract and his or her interest in such contract, or
 - (ii) the nature of such contract, and
 - (a) his or her interest in the any such firm, company, or other entity, and
 - (b) the interest of any such firm, company, or other entity, in that contract.

(2) For the purposes of subsection (1)(d)—

- (a) two or more sentences of imprisonment that are required to be served consecutively shall be regarded as separate sentences if none of those sentences exceeds twelve months, but if any one of such sentences exceeds that term they shall be regarded as one sentence; and
- (b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

Tenure of seats of members of House of Assembly

67.—(1) Every elected member of the House of Assembly shall vacate his or her seat in the House at the next dissolution of the House after his or her election.

(2) Notwithstanding that a member of the House of Assembly has vacated his or her seat by virtue of subsection (1), every such member shall be entitled to continue receiving the benefits and privileges of a member until the polling day for election for a new House of Assembly, provided that such benefits and privileges shall cease if the member fails to win a seat at the general election.

(3) An elected member of the House of Assembly shall also vacate his or her seat in the House—

- (a) if, prior to making and subscribing before the House an oath or affirmation of allegiance pursuant to section 73, he or she resigns it by writing under his or her hand addressed to the Clerk of the House, or if, after making and subscribing before the House an oath or affirmation of allegiance pursuant to section 73, he or she resigns it by writing under his or her hand addressed to the Speaker, or to such other person as may be specified in the Standing Orders;
- (b) if he or she is absent from the sittings of the House for such period and in such circumstances as may be prescribed in the Standing Orders of the House;
- (c) if he or she ceases to be qualified for election;
- (d) subject to subsections (4), (5) and (6), if any circumstances arise that, if he or she were not a member of the House, would cause him or her to be disqualified for election as such by virtue of any provision of section 66(1) other than paragraph (f);
- (e) subject to subsection (7), and in relation to any contract with the Government of the Virgin Islands for or on account of the public service or a public authority (as defined in section 26(1)(b)), if —
 - (i) he or she becomes a party to any such contract, or
 - (ii) any firm in which he or she is a partner, or any company of which he or she is a director, shareholder or manager, or any other entity in which he or she is a similar participant, becomes a party to any such contract, or
 - (iii) he or she becomes a partner in a firm, or a director, shareholder or manager of a company, or a similar participant in any other entity, which is a party to any such contract;
- (f) if he or she is recalled in accordance with any law enacted by the Legislature; or
- (g) he or she has been found by the Integrity Commission to have breached the Code of Conduct set out in Schedule 3 of the Integrity in Public Life Act, 2021.

(4) If circumstances such as are referred to in subsection (3)(d) arise because a member is declared bankrupt, adjudged to be of unsound mind, under sentence of death or imprisonment or convicted of an offence relating to elections and if it is open to the member to appeal against the decision (either with the leave of the court or other authority or without such leave) he or she shall forthwith cease to perform his or her functions as a member but, subject to subsection (5), he or she shall not vacate his or her seat in the House until the expiration of a period of thirty days thereafter; but the Speaker may, at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue an appeal against the decision, so, however, that extensions of time exceeding in the aggregate one hundred and fifty days shall not be given without the approval, signified by resolution, of the House of Assembly.

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(5) If, on the determination of any appeal, the circumstances referred to in subsection (4) continue to exist and no further appeal is open to the member or if, by reason of the expiration of any period for entering an appeal or notice of appeal or the refusal of appeal or for any other reason, it ceases to be open to the member to appeal, he or she shall forthwith vacate his or her seat.

(6) If at any time before the member vacates his or her seat the circumstances referred to in subsection (4) cease to exist, the seat of that member shall not become vacant on the expiration of the period referred to in subsection (4) and he or she may resume the performance of his or her functions as a member.

(7) If, in the circumstances and after considering a recommendation of the Integrity Commission, it appears just to the House of Assembly to do so, the House may, exempt any elected member from vacating his or her seat under subsection (3)(e) if such member—

- (a) before or within 45 days of becoming a party to any such contract as there described, discloses to the House –
 - (i) the nature of such contract, and
 - (ii) his or her interest therein, or
- (b) acting through a firm, company or other entity, before or as soon as practicable after becoming otherwise interested in any such contract there described (whether as a partner in a firm, or director, shareholder or manager of a company, or similar participant in any other entity), discloses to the House –
 - (i) the nature of such contract,
 - (ii) his or her interest in any such firm, company, or other entity, and
 - (iii) the interest of any such firm, company, or other entity, in that contract.

(8) Any request by an elected member for exemption under subsection (7) shall be made by way of motion, which shall be placed on the Order Paper for a decision of the House of Assembly.

(9) In any case in which the House of Assembly, under subsection (7), decides not to exempt an elected member from vacating his or her seat, the member may appeal to the High Court against the decision, and subsections (4), (5) and (6) shall apply in the same manner as they do in the circumstances there specified. PROVIDED that a member shall be declared by the court not to have vacated his seat if he or she establishes to the satisfaction of the court that he or she, acting reasonably, was not aware that he or she, or the firm, company or other entity, was or had become a party to such contract.

(10) For purposes of sections 66 and 67, the term “contract with the Government of the Virgin Islands for or on account of the public service or a public authority” refers to a contract or contracts with a cumulative value of US\$[10,000] or more.

Qualifications of voters

68.—(1) Subject to subsection (3), a person shall be qualified to be registered as a voter for the purposes of elections if, and shall not be so qualified unless, he or she belongs to the Virgin Islands and on the qualifying date has attained the age of eighteen years and he or she either—

- (a) is domiciled and resident in the Virgin Islands on the qualifying date; or
- (b) on that date is domiciled in the Virgin Islands and resident in the United States Virgin Islands.

(2) Subject to subsection (3), any person who was qualified to be registered as a voter immediately before the commencement of this Constitution shall continue to be so qualified thereafter.

(3) No person shall be qualified to be registered as a voter under this section who on the qualifying date—

- (a) is a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Virgin Islands;
- (b) is disqualified by or under any such law from being registered as a voter for the purposes of elections by reason of his or her having been convicted of an offence relating to elections; or

- (c) is under sentence of death imposed on him or her by a court or is serving a sentence of imprisonment (by whatever name called) for a term exceeding twelve months imposed on him or her by a court or substituted by competent authority for some other sentence imposed on him or her by a court.
- (4) In this section “the qualifying date” means such date as may be appointed by or under any law in force in the Virgin Islands as the date with reference to which the qualifications of any person for registration are to be ascertained.
- (5) For the purposes of subsection (3)(c)—
 - (a) two or more sentences of imprisonment that are required to be served consecutively shall be regarded as separate sentences if none of those sentences exceeds twelve months, but if any one of those sentences exceeds that term they shall be regarded as one sentence; and
 - (b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

Speaker and Deputy Speaker

- 69.**—(1) When the House of Assembly first meets after any general election and before it proceeds to the despatch of any other business it shall elect a person to be the Speaker of the House.
- (2) If the office of Speaker falls vacant for any reason other than a dissolution of the House of Assembly, the House shall as soon as practicable elect another person to that office.
- (3) The Speaker shall be elected from among the elected members of the House of Assembly or from persons qualified to be elected members of the House, other than Ministers, and no person shall be elected as Speaker if he or she is a person disqualified for election as a member of the House by virtue of any provision of section 66(1) other than paragraph (f).
- (4) When the House of Assembly first meets after any general election and before it proceeds to the despatch of any other business except the election of the Speaker, it shall elect a member of the House who is not a member of the Cabinet to be Deputy Speaker of the House.
- (5) If the office of Deputy Speaker falls vacant for any reason other than a dissolution of the House of Assembly, the House shall as soon as convenient elect to that office another member of the House who is not a member of the Cabinet.
- (6) A person shall vacate the office of Speaker or Deputy Speaker—
 - (a) on dissolution of the House of Assembly;
 - (b) if he or she announces the resignation of his or her office to the House of Assembly or if by writing under his or her hand addressed to the House and received by the Clerk of the House he or she resigns that office;
 - (c) if a motion on the Order Paper for his or her removal is carried by the votes of a majority of all the elected members of the House; or
 - (d) if he or she is appointed to be a member of the Cabinet.
- (7) A person shall also vacate the office of Speaker—
 - (a) if he or she ceases to be a person qualified for election as a member of the House of Assembly;
 - (b) if any circumstances arise that would cause him or her to be disqualified for election as an elected member of the House by virtue of any provision of section 66(1) other than paragraph (f);
 - (c) on the expiration of a period of thirty days from the date of his or her election if he or she was at that date a party to, or a partner in a firm or a director or manager of a company which is a party to, any contract with the Government of the Virgin Islands for or on account of the public service and if, before the expiration of that period, he or she has not disclosed to the House of Assembly the nature of such contract and his or her interest, or the interest of such firm or company, in it and the House has not exempted him or her from vacating his or her office under this paragraph; or
 - (d) if any circumstances arise that, if he or she were an elected member of the House of Assembly, would cause him or her to vacate his or her seat under section 67(3)(d).
- (8) A person shall also vacate the office of Deputy Speaker if—

- (a) he or she ceases to be a member of the House of Assembly for any reason other than a dissolution of the House; or
- (b) by virtue of section 67(4), he or she is required to cease to perform his or her functions as a member of the House.

Leader of the Opposition

70.—(1) Subject to this section, the Governor may appoint a Leader of the Opposition.

(2) The Governor shall appoint as the Leader of the Opposition the member of the House of Assembly who in the judgement of the Governor is best able to command the support of the members of the House in opposition to the Government. [Amended to conform to the new s52(1)]

(3) If at any time between the polling in a general election and the next following dissolution of the House of Assembly the Governor is satisfied that, if the office of the Leader of the Opposition were then vacant, he or she would appoint to that office a person other than the person then holding that office, the Governor shall revoke the appointment of the Leader of the Opposition.

(4) The office of the Leader of the Opposition shall also become vacant—

- (a) if for any reason other than a dissolution of the House of Assembly the holder of that office ceases to be a member of the House; or
- (b) if the holder of that office is appointed as a Minister.

(5) In this section “opposition party” means a group of members of the House of Assembly in opposition to the Government who are prepared to support one of their number as their leader.

(6) In the exercise of his or her functions under this section the Governor shall act in his or her discretion.

Powers and Procedure

Power to make laws

71. Subject to this Constitution, the Legislature shall have power to make laws for the peace, order and good government of the Virgin Islands.

Standing Orders

72. —(1) Subject to this Constitution, the House of Assembly may make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the dispatch of business, and the passing, entitling and numbering of Bills and the presentation of Bills to the Governor for assent.

(2) Standing Orders, and the implementation thereof, shall have due regard to representative democracy, accountability, transparency and public participation.

(3) Where pursuant to any enactment of the Legislature reports and accounts are to be provided to the House of Assembly or to a Minister of Government, such reports or accounts shall be made within the timeframes stipulated in such enactment.

Public Accounts Committee

72A.—(1) There shall be a Public Accounts Committee of the House of Assembly chaired by the Leader of the Opposition and appointed by the Speaker from among members who are not Ministers nor Junior Ministers.

(2) The Auditor General shall be the adviser to the Public Accounts Committee.

(3) The Public Accounts Committee shall examine and report to the House of Assembly on reports submitted to it by the Auditor General including any Special Report submitted by the Auditor General, and shall have and exercise

such other functions, and shall operate under such procedures, as are prescribed by this Constitution or as may be prescribed by any enactment or by Standing Orders.

(4) The Public Accounts Committee shall be re-elected within ninety days after the House of Assembly first meets following a general election.

The Register of Interests Committee

72B.—(1) There shall be a Register of Interests Committee of the House of Assembly appointed by the Speaker to consider all matters relating to the Register of Interests, and shall have and exercise such other functions, and shall operate under such procedures, as are prescribed by this Constitution or as may be prescribed by any enactment or by Standing Orders

(2) The Register of Interests Committee shall be re-elected within ninety days after the House of Assembly first meets following a general election.

Oaths and affirmations

73. No member of the House of Assembly shall be permitted to take part in the proceedings of the House (other than proceedings necessary for the purposes of this section) until he or she has made and subscribed before the House an oath or affirmation of allegiance and an oath or affirmation for the due execution of office as such member in the forms set out in Schedule 1; but the election of the Speaker and Deputy Speaker may take place before the members of the House have made such oaths or affirmations.

Presiding in the House of Assembly

74.—(1) The Speaker or, in his or her absence, the Deputy Speaker or, if they are both absent, a member of the House of Assembly (not being a member of the Cabinet) elected by the House for that sitting shall preside at each sitting of the House.

(1) References in this section to circumstances in which the Speaker or Deputy Speaker is absent include references to circumstances in which the office of Speaker or Deputy Speaker is vacant.

Voting

75.—(1) Subject to this section, section 53(1), section 63(3) and section 69(6)(c), all questions proposed for decision in the House of Assembly shall be determined by a majority of the votes of the members present and voting.

(1) Only the elected members of the House of Assembly shall be entitled to vote—

- (a) in an election of the Speaker or Deputy Speaker;
- (b) on a motion on the Order Paper for the removal from office of the Speaker or Deputy Speaker; or
- (c) on a motion on the Order Paper that the House of Assembly should declare a lack of confidence in the Government of the Virgin Islands.

(2) The person presiding shall not vote unless on any question the votes are equally divided in which case he or she shall have and exercise a casting vote; but where the motion before the House of Assembly is one to which subsection (2) applies the person presiding shall not have a casting vote unless he or she is an elected member.

(3) In the event of an equality of votes on any question in respect of subsection (2) the motion shall be lost.

Validity of proceedings

76. The House of Assembly shall not be disqualified for the transaction of business by reason of any vacancy in its membership (including any vacancy not filled when the House is first constituted or is reconstituted at any time), and any proceedings in the House shall be valid notwithstanding that some person who was not entitled to do so sat or voted in the House or otherwise took part in the proceedings.

Quorum

77.—(1) Subject to section 63(4), a quorum of the House of Assembly shall consist of seven members besides the person presiding at the sitting.

(1) If at any sitting of the House of Assembly any member who is present draws the attention of the person presiding at the sitting to the absence of a quorum and, after such interval as may be prescribed in the Standing Orders of the House, the person presiding at the sitting ascertains that a quorum of the House is still not present, the House shall be adjourned.

Introduction of Bills, etc

78.—(1) Subject to this Constitution and the Standing Orders of the House of Assembly, any member may introduce any Bill or propose any motion for debate in, or may present any petition to, the House, and the same shall be debated and disposed of according to the Standing Orders of the House.

- (1) Except on the recommendation of the Minister responsible for finance, the House of Assembly shall not
- (a) proceed upon any Bill (including any amendment to a Bill) which, in the opinion of the person presiding in the House, makes provision for imposing or increasing any tax, for imposing or increasing any charge on the revenues or other funds of the Virgin Islands or for altering any such charge otherwise than by reducing it or for compounding or remitting any debt due to the Virgin Islands; or
 - (b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding in the House, is that provision would be made for any of the purposes mentioned in paragraph (a).

Assent to Bills

79.—(1) A Bill passed by the House of Assembly shall become a law when—

- (a) the Governor has assented to it in His Majesty's name and on His Majesty's behalf and has signed it in token of such assent; or
- (b) His Majesty has given His assent to it through a Secretary of State and the Governor has signified such assent by proclamation published in the *Gazette*.

(2) When a Bill is presented to the Governor for assent the Governor shall declare that he or she assents to it or that he or she reserves the Bill for the signification of His Majesty's pleasure; but unless the Governor has been authorised by a Secretary of State to assent to it, the Governor shall reserve for the signification of His Majesty's pleasure any Bill which appears to him or her, acting in his or her discretion—

- (a) to be inconsistent with any obligation of His Majesty or of His Majesty's Government in the United Kingdom towards any other state or power or any international organisation;
- (b) to be likely to prejudice the Royal prerogative; or
- (c) to be in any way repugnant to or inconsistent with this Constitution.

Disallowance of laws

80.—(1) Any law assented to by the Governor may be disallowed by His Majesty through a Secretary of State; but no law shall be disallowed until the expiration of a period notified by a Secretary of State to the Governor, who shall advise the Speaker of that period, in order to give the House of Assembly an opportunity to reconsider the law in question.

(2) Whenever any law has been disallowed by His Majesty the Governor shall cause notice of such disallowance to be published in the *Gazette* and the law shall be annulled with effect from the date of publication of that notice.

(3) Section 16(1) of the Interpretation Act 1978 shall apply to the annulment of any law under this section as it applies to the repeal of an Act of Parliament, save that any enactment repealed or amended by or in pursuance of that law shall have effect as from the date of the annulment as if that law had not been made.

Governor's reserved power

81.—(1) If the Governor considers it urgently necessary, for the purpose of complying with any international obligation applicable to the Virgin Islands, that any Bill introduced, or any motion to which this section applies proposed, in the House of Assembly should have effect, then, if the House fails to pass the Bill or carry the motion within such time and in such form as the Governor thinks fit, and notwithstanding any provisions of this Constitution or any other law or any Standing Orders, the Governor may, subject to subsection (2), declare that such Bill or motion shall have effect as if it had been passed or carried by the House, either in the form in which it was introduced or proposed or with such amendments as the Governor thinks fit which have been moved or proposed in the House or any committee of the House; and such Bill or motion shall be deemed thereupon to have been so passed or carried, and the provisions of this Constitution and, in particular, the provisions relating to assent to Bills and disallowance of laws, shall have effect accordingly.

(2) The Governor shall not make any declaration under this section except in accordance with the following conditions—

- (a) the question whether the declaration should be made shall first be submitted in writing by the Governor to the Cabinet and if, upon the question being submitted to it, the Cabinet advises the Governor that the declaration should be made, the Governor shall make the declaration;
- (b) if, when the question whether the declaration should be made is submitted to it as aforesaid, the Cabinet does not, within such time as the Governor thinks reasonable and expedient, advise the Governor that the declaration should be made, then the Governor may submit the said question to a Secretary of State and may make the declaration if, upon the question being submitted to him or her, the Secretary of State authorises the Governor to make the declaration.

(3) If any member of the Cabinet so desires, he or she may, within thirty days of the date of the making of a declaration under this section, submit to the Governor a statement in writing of his or her comments on the making of such declaration, and the Governor shall forward such statement, or a copy of it, as soon as practicable to a Secretary of State.

(4) This section applies to any motion—

- (a) relating to or for the purposes of a Bill;
- (b) proposing or amending a resolution which, if passed by the House of Assembly, would have the force of law; or
- (c) proposing or amending a resolution upon which the coming into force or continuance in force of any instrument subsidiary to a Bill depends.

(5) For the purposes of this section, a Bill shall be validly introduced, and a motion shall be validly proposed, if it is introduced or proposed by any one member of the House of Assembly.

(6) The powers conferred on the Governor by subsections (1) and (2) shall be exercised by the Governor in his or her discretion, following consultation with the Premier.

Privileges, immunities and powers of House of Assembly

82. The Legislature may by law determine and regulate the privileges, immunities and powers of the House of Assembly and of its members, but no such privileges, immunities or powers shall exceed those of the Commons House of Parliament of the United Kingdom or of its members.

Miscellaneous

Sessions of House of Assembly

83.—(1) Subject to this section, the sessions of the House of Assembly shall be held at such times and places as the Governor, acting in accordance with the advice of the Premier, may appoint by proclamation published in the *Gazette*.

(2) The first session of the House of Assembly shall commence within a period of two months after the first general election held after the commencement of this Constitution, and thereafter there shall be a session of the House from time to time so that a period of three months does not intervene between the last sitting in one session and the first sitting in the next session.

(3) When the House of Assembly is in session, the Speaker may call meetings of the House from time to time and, if no meeting has been called sooner, shall call a meeting within two months of the previous meeting.

(4) In subsection (3), “meeting” means any sitting or sittings of the House of Assembly commencing when the House first meets after being summoned at any time and terminating when the House is adjourned *sine die* or at the conclusion of a session.

Prorogation and dissolution

84.—(1) The Governor, acting in accordance with the advice of the Premier, may at any time, by proclamation published in the *Gazette*, prorogue the House of Assembly; but the Governor shall prorogue the House at least once in each calendar year except in any year during which the House is dissolved.

(2) The Governor, acting after consultation with the Premier, may at any time, by proclamation published in the *Gazette*, dissolve the House of Assembly.

(3) The Governor shall dissolve the House of Assembly at the expiration of four years from the date when the House first meets after any general election unless it has been sooner dissolved.

Recalling dissolved House of Assembly in case of emergency

85. If, between a dissolution of the House of Assembly and the next ensuing general election, an emergency arises of such a nature that, in the opinion of the Governor, it is necessary for the House to be recalled, the Governor may, acting after consultation with the Premier, summon the House that has been dissolved, and that House shall thereupon be deemed (except for the purposes of section 86) not to have been dissolved, but shall be deemed (except as aforesaid) to be dissolved on the date on which the next ensuing general election is held.

General elections

86.(1) A general election shall be held at such time within two months, but not earlier than twenty-one days, after every dissolution of the House of Assembly as the Governor shall appoint by proclamation published in the *Gazette*.

(2) Notwithstanding subsection (1) the Governor, acting in accordance with the advice of the Premier, by proclamation published in the *Gazette* shall give not less than 90 days notice of the date of a general election.

Determination of questions as to membership

87.—(1) The High Court shall have jurisdiction to hear and determine an appeal under section 67(9) and any question whether—

- (a) any person has been validly elected as a member of the House of Assembly; or
- (b) any elected member of the House of Assembly has vacated his or her seat in the House or is required by virtue of section 67(4) to cease to perform his or her functions as a member.

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(2) An application to the High Court for the determination of any question under subsection (1)(a) may be made by—

- (a) any person entitled to vote in the electoral district and at the election to which the application relates;
- (b) any person who was a candidate in that district at that election; or
- (c) the Attorney General.

(3) An application to the High Court for the determination of any question under subsection (1)(b) may be made by—

- (a) any person entitled to vote at an election in the electoral district for which the member concerned was returned;
- (b) any elected member of the House of Assembly; or
- (c) the Attorney General.

(4) If an application is made under subsection (2) or (3) by a person other than the Attorney General, the Attorney General may intervene and may then appear or be represented in the proceedings.

(5) The Legislature may make provision with respect to—

- (a) the circumstances and manner in which, and the imposition of conditions upon which, any application may be made to the High Court for the determination of any question under this section; and
- (b) the powers, practice and procedure of the High Court in relation to any such application.

(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining such a question as is referred to in subsection (1).

(7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6), and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining such a question as is referred to in subsection (1).

(8) In the exercise of the powers conferred on him or her by this section, the Attorney General shall not be subject to the direction or control of any other person or authority.

Penalty for unauthorised sitting or voting

88.—(1) Any person who sits or votes in the House of Assembly knowing or having reasonable grounds for knowing that he or she is not entitled to do so shall be liable to a penalty not exceeding five hundred dollars for every day on which he or she so sits or votes, or such other penalty as may be prescribed by law.

(2) The said penalty shall be recoverable by action in the High Court at the suit of the Director of Public Prosecutions.

CHAPTER 5A LOCAL GOVERNMENT

Local Government

88A. Subject to this Constitution a law enacted by the Legislature shall provide for the establishment, functions and jurisdiction of District Councils.

CHAPTER 5B ELECTIONS AND BOUNDARIES COMMISSION

Establishment and functions of Elections and Boundaries Commission —

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88B -(1) There shall be an Elections and Boundaries Commission for the Virgin Islands and the first such Commission shall be appointed as soon as practicable after the date of the commencement of this Constitution.

(2) The Elections and Boundaries Commission shall consist of five members as follows—

(a) a Chairman with relevant experience, who shall be a Belonger of integrity and high national standing and who has attained the age of 50 years, appointed by the Governor, acting in his or her discretion;

(b) a member with relevant experience appointed by the Governor, acting in accordance with the advice of the Premier;

(c) a member with relevant experience appointed by the Governor, acting in accordance with the advice of the Leader of the Opposition; and

(d) two members with relevant experience (one of whom shall be female) to represent the public interest, one appointed by the Governor acting after consultation with the Chairman of the Judicial and Legal Services Commission, and the other after consultation with such representatives of civil society as the Governor acting in his or her discretion thinks appropriate.

For the purposes of this section, “relevant experience” means a professional qualification at Bachelor’s degree or higher in public administration, law or finance with at least 10 years work experience in one of those areas or in elections, management or governance at a senior level.

(3) A person shall not be qualified to be appointed as a member of the Elections and Boundaries Commission if he or she is a Member of the House of Assembly or if he or she holds or is acting in any public office.

(4) If any member of the Elections and Boundaries Commission dies or resigns, the Governor shall appoint another person in his or her place in the same manner in which such member was appointed.

(5) (1) The Chairman or other member of the Elections and Boundaries Commission shall vacate his or her office—

(a) subject to sub-section (2), no later than the expiration of six years from the date of his or her appointment;

(b) if any circumstances arise that, if he or she were not a member of the Commission, would cause him or her to be disqualified for appointment as such; or

(c) if the Governor, acting in his or her discretion, directs that he or she shall be removed from office for inability to discharge the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section.

(2) Neither the Chairman nor the other members shall be appointed for a term which shall expire on the same date as the term of another member. A period of at least twelve months should separate the expiration of appointments.

(6) A member of the Elections and Boundaries Commission shall be removed from office by the Governor if the question of his or her removal from office has been referred to a Disciplinary Tribunal appointed pursuant to sub-section (7) and the Disciplinary Tribunal has recommended to the Governor that he or she ought to be removed for inability or unwillingness to discharge the functions of his or her office or for misbehaviour or other good cause.

(7) Where the Governor, after consultation with the Premier and the Leader of the Opposition, considers that the question of removing a member of the Elections and Boundaries Commission ought to be investigated, the Governor shall appoint a Disciplinary Tribunal which shall consist of three persons including a religious leader, a Judge of the High Court, or an attorney at law of fifteen years standing who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States.

(8) The Disciplinary Tribunal shall inquire into the matter and report on the facts thereof to the Governor and recommend to him or her whether the member should be removed from office.

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(9) The Disciplinary Tribunal shall give the member an opportunity to show cause why he or she should not be removed from office.

(10) Where the question of removing a member has been referred to a Disciplinary Tribunal under this section, the Governor, after consultation with the Premier and the Leader of the Opposition, may suspend the member from the exercise of the functions of his or her office pending the hearing and determination of the matter.

(11) A suspension may, at any time, be revoked by the Governor and shall in any case cease to have effect if the Disciplinary Tribunal recommends to the Governor that the member should not be removed.

(12) A member of the Elections and Boundaries Commission shall not enter upon the duties of his or her office unless he or she has taken and subscribed the oath of allegiance and office.

(13) The Elections and Boundaries Commission may —

(a) regulate its own procedure and, with the consent of the Governor, acting in his or her discretion, may confer functions on any public officer or on any authority of the Government for the purpose of the discharge of its functions; and

(b) may determine from time to time to invite experts or other persons outside the Commission and knowledgeable in specific areas to attend a meeting or committee of the Commission.

(14) The Elections and Boundaries Commission may act notwithstanding any vacancy in its membership (including any vacancy not filled when appointments of members are first made) and its proceedings shall be valid even though some person who was not entitled to do so took part in them; but any decision of the Commission shall require the concurrence of not less than four of its members.

(15) The Elections and Boundaries Commission shall—

(a) have the functions conferred on it by section 88C ;

(b) direct and supervise the conduct of elections and referenda, and the registration of voters in the Virgin Islands including regulating the management, expenditure, and accountability of election campaign financing, and all matters connected therewith in accordance with any law regulating the conduct of elections and referenda; and

(c) have such other related functions as may be prescribed by Act of the Legislature.

(16) An Act of the Legislature may make further provision, subject to this Constitution, for the functions and procedures of the Elections and Boundaries Commission, and for the protection, privileges and remuneration of members of the Commission.

(17) In the exercise of its functions, the Elections and Boundaries Commission shall not be subject to the direction or control of any other person or authority.

Review and alteration of electoral districts —

88C -(1) Whenever—

(a) the House of Assembly, by resolution; or

(b) the Governor, acting after consultation with the Premier and the Leader of the Opposition, so requests, the Elections and Boundaries Commission shall review the boundaries of the electoral districts into which the Virgin Islands is divided and, shall submit a report to the Governor and the House of Assembly containing its recommendations for the establishment of, or any changes in, the boundaries of the electoral districts – or declaring that no changes are required,

provided that the Elections and Boundaries Commission shall, at intervals of not more than ten years, review the boundaries of districts.

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(2) In determining its recommendations in relation to more than one electoral district, the Elections and Boundaries Commission shall seek to ensure that electoral districts contain, so far as is reasonably practicable, approximately equal numbers of persons qualified to be registered as electors under the law then in force in the Virgin Islands; but the Commission may depart from this principle to such extent as it considers expedient in order to take into account—

- (a) the density of population and, in particular, the need to ensure adequate representation of sparsely populated areas;
- (b) the means of communication;
- (c) geographical features, physical features and natural boundaries; and
- (d) the requirement for each electoral district to have as nearly as may be an equal number of persons eligible to vote.

(3) As soon as may be after the Elections and Boundaries Commission has submitted a report under this section, the Premier shall cause a Bill to be introduced into the House of Assembly for giving effect, whether with or without modifications, to the recommendations contained in the report; and such a Bill—

- (a) may contain provision for any matters which are incidental to or consequential on its principal provisions; and
- (b) shall include a provision for the coming into force of the measure (when enacted for the determination of the electoral districts to which it relates) upon the dissolution of the House of Assembly next following its enactment.

(4) Where any Bill introduced under this section proposes to give effect to the recommendations of the Elections and Boundaries Commission with modifications, there shall be laid before the House of Assembly at the same time a statement, jointly agreed by the Premier and the Governor, of the reasons for the modifications.

CHAPTER 6

THE JUDICATURE

Eastern Caribbean Supreme Court

89. The Supreme Court Order 1967 shall continue to apply to the Virgin Islands as it applied immediately before the commencement of this Constitution, and accordingly the High Court and the Court of Appeal of the Eastern Caribbean Supreme Court shall continue to have jurisdiction in the Virgin Islands.

Subordinate courts and tribunals

90. There shall be such courts and tribunals in and for the Virgin Islands subordinate to the Eastern Caribbean Supreme Court, and such courts and tribunals shall have such jurisdiction and powers, as may be prescribed by any law for the time being in force in the Virgin Islands.

CHAPTER 7

THE PUBLIC SERVICE

Public Service - General

Public Service Commission

91.—(1) There shall be in and for the Virgin Islands a Public Service Commission which shall consist of five members, of whom—

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- (a) two shall be appointed by the Governor, acting in his or her discretion;
- (b) one shall be appointed by the Governor, acting in accordance with the advice of the Premier;
- (c) one shall be appointed by the Governor, acting in accordance with the advice of the Leader of the Opposition; and
- (d) one shall be appointed by the Governor, acting after consultation with the Civil Service Association;

but the Governor shall, as far as practicable, appoint as one member of the Commission a person who is ordinarily resident in an island of the Virgin Islands other than Tortola.

(2) The Governor, acting after consultation with the Premier, shall appoint one of the five members of the Public Service Commission to be Chairman of the Commission.

(3) No person shall be qualified to be appointed as a member of the Public Service Commission if he or she is a member of, or a candidate for election to, the House of Assembly, or holds or is acting in any public office.

(4) The office of a member of the Public Service Commission shall become vacant—

- (a) at the expiration of five years from the date of his or her appointment or such earlier time as may be specified in the instrument by which he or she was appointed;
- (b) if he or she resigns office by writing under his or her hand addressed to the Governor;
- (c) if he or she becomes a member of, or a candidate for election to, the House of Assembly or is appointed to or to act in any public office; or
- (d) if the Governor, acting in his or her discretion, directs that he or she shall be removed from office for inability to discharge the functions of that office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section.

(4A) A member of the Public Service Commission shall be removed from office by the Governor if the question of his or her removal from office has been referred to a Disciplinary Tribunal appointed pursuant to sub-section [(4B)] and the Disciplinary Tribunal has recommended to the Governor that he or she ought to be removed for inability or unwillingness to discharge the functions of his or her office or for misbehaviour or other good cause.

(4B) Where the Governor, after consultation with the Premier and the Leader of the Opposition, considers that the question of removing a member of the Public Service Commission ought to be investigated, the Governor shall appoint a disciplinary tribunal which shall consist of three persons including a religious leader, a Judge of the High Court, or an attorney at law of fifteen years standing who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States.

(4C) The Disciplinary Tribunal shall inquire into the matter and report on the facts thereof to the Governor and recommend to him or her whether the member should be removed from office.

(4D) The Disciplinary Tribunal shall give the member an opportunity to show cause why he or she should not be removed from office.

(4E) Where the question of removing a member has been referred to a Disciplinary Tribunal under this section, the Governor, after consultation with the Premier and the Leader of the Opposition, may suspend the member from the exercise of the functions of his or her office pending the hearing and determination of the matter.

(4F) A suspension may, at any time, be revoked by the Governor and shall in any case cease to have effect if the Disciplinary Tribunal recommends to the Governor that the member should not be removed.

(5) If the office of a member of the Public Service Commission is vacant or a member is for any reason unable to perform the functions of his or her office, the Governor, acting in the manner prescribed by subsection (1) for the appointment of that member, may appoint a person who is qualified for appointment as a member of the Commission to act as a member of the Commission, and any person so appointed shall, subject to subsection (4), continue so to act until he or she is notified by the Governor, acting in his or her discretion, that the circumstances giving rise to the appointment have ceased to exist; but in the case of a vacancy in the office of the Chairman or the inability of the holder of that office to perform his or her functions, the functions of the office of Chairman shall be performed by such

member of the Commission or person acting as a member as the Governor, acting after consultation with the Premier, may designate.

(6) No business shall be transacted at any meeting of the Public Service Commission if there are less than four members of the Commission present.

(7) Any question proposed for decision at any meeting of the Public Service Commission shall be determined by a majority of the votes of the members present and voting; and if on any question the votes are equally divided the Chairman shall have and exercise a casting vote.

(8) The Public Service Commission shall be served by a secretariat, the members of which shall be public officers.

(9) Subject to this Constitution, in the exercise of its functions the Public Service Commission shall not be subject to the direction or control of any other person or authority.

Power to appoint, etc, to public office

92.—(1) Subject to this section and to the other provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Governor, acting in accordance with the advice of the Public Service Commission; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice His Majesty's service.

(2) Before exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the Public Service Commission back to the Commission for reconsideration by it.

(3) If the Public Service Commission, having reconsidered its original advice under subsection (2), substitutes for it different advice, subsection (2) shall apply to that different advice as it applies to the original advice.

(4) Before appointing any person to the office of head of department or any more senior office the Governor shall in addition consult with the Premier.

(5) Power to make appointments to the office of Cabinet Secretary is vested in the Governor, acting in accordance with the advice of the Premier; but the Governor, acting in his or her discretion, may decline to act in accordance with that advice if he or she determines that compliance with that advice would prejudice His Majesty's service.

(6) Where the Governor declines to act in accordance with the advice of the Premier under subsection (5), he or she shall refer the matter to the Premier requesting advice on the appointment, pursuant to subsection (7), of another person to the office of Cabinet Secretary and the Governor shall act in accordance with that advice.

(7) Whenever occasion arises for making an appointment under subsection (5) the Public Service Commission shall submit to the Premier a list of persons who appear to the Commission to be qualified and competent for the appointment and the Premier shall advise the Governor to appoint a person whose name appears on the list, provided that the Premier may request once an additional list of persons from the Public Service Commission from which to advise an appointment.

(8) The Governor, acting after consultation with the Public Service Commission, may, by regulations published in the *Gazette*, delegate to any member of the Commission or any public officer or class of public officer, to such extent and subject to such conditions as may be prescribed in the regulations, any of the powers vested in the Governor to make appointments to public offices and to remove or exercise disciplinary control over persons holding or acting in such offices; and except in so far as regulations made under this subsection otherwise provide, any power delegated by such regulations may be exercised by any person to whom it is delegated without reference to the Public Service Commission.

(9) The Premier may from time to time request a report from the Public Service Commission about the functioning of the public service.

(10) This section does not apply to—

- (a) any office to which section 95 applies; or
- (b) any office in the Police Force.

Teaching Service Commission

93.—(1) There shall be in and for the Virgin Islands a Teaching Service Commission which shall consist of three members, of whom—

- (a) one shall be appointed by the Governor, acting in his or her discretion;
- (b) one shall be appointed by the Governor, acting in accordance with the advice of the Cabinet; and
- (c) one shall be appointed by the Governor, acting after consultation with the British Virgin Islands Teachers Union.

(2) The provisions of section 91(2) to (9) shall apply in relation to the Teaching Service Commission as they apply in relation to the Public Service Commission and for that purpose shall have effect as if the references therein to the latter were references to the former; but for that purpose the reference in section 91(6) to “four members” shall have effect as if it were a reference to “two members”.

(3) The provisions of section 92(1), (2), (3) and (8) shall, in their application to any office of teacher in the Government Teaching Service, have effect in relation to any such office as if the references therein to the Public Service Commission were references to the Teaching Service Commission.

Judicial and Legal Services Commission

94.—(1) There shall be in and for the Virgin Islands a Judicial and Legal Services Commission which shall consist of—

- (a) the Chief Justice, who shall be Chairman;
- (b) one judge of the Court of Appeal or the High Court nominated by the Chief Justice after consultation with the Governor and the Virgin Islands General Legal Council;
- (c) the Chairman of the Public Service Commission; and
- (d) two other members appointed by the Governor, acting in accordance with the advice of the Premier and the Leader of the Opposition who will each nominate one member, at least one of whom shall be a legal practitioner.

(2) For the purpose of subsection (1)(d), the Premier and the Leader of the Opposition shall alternate in nominating a legal practitioner, with the Premier making the first such nomination upon the commencement of this Constitution, provided that such nomination shall not be construed as precluding the nomination of two legal practitioners under subsection (1)(d).

(3) No person shall be qualified to be appointed under subsection (1)(d) if he or she is a member of, or a candidate for election to, the House of Assembly or holds or is acting in any public office.

(4) The office of a member of the Judicial and Legal Services Commission appointed under subsection (1)(d) shall become vacant—

- (a) at the expiration of five years from the date of his or her appointment or such earlier time as may be specified in the instrument by which he or she was appointed;
- (b) if he or she resigns office by writing under his or her hand addressed to the Governor;
- (c) if he or she becomes a member of, or a candidate for election to, the House of Assembly, or is appointed to or to act in any public office; or
- (d) if the Governor, acting in his or her discretion, directs that he or she shall be removed from office for inability to discharge the functions of that office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section.

(4A) A member of the Judicial and Legal Services Commission shall be removed from office by the Governor if the question of his or her removal from office has been referred to a Disciplinary Tribunal appointed pursuant to subsection [(4B)] and the Disciplinary Tribunal has recommended to the Governor that he or she ought to be removed for inability or unwillingness to discharge the functions of his or her office or for misbehaviour or other good cause.

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(4B) Where the Governor, after consultation with the Premier and the Leader of the Opposition, considers that the question of removing a member of the Judicial and Legal Services Commission ought to be investigated, the Governor shall appoint a disciplinary tribunal which shall consist of three persons including a religious leader, a Judge of the High Court, or an attorney at law of fifteen years standing who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States.

(4C) The Disciplinary Tribunal shall inquire into the matter and report on the facts thereof to the Governor and recommend to him or her whether the member should be removed from office.

(4D) The Disciplinary Tribunal shall give the member an opportunity to show cause why he or she should not be removed from office.

(4E) Where the question of removing a member has been referred to a Disciplinary Tribunal under this section, the Governor, after consultation with the Premier and the Leader of the Opposition, may suspend the member from the exercise of the functions of his or her office pending the hearing and determination of the matter.

(4F) A suspension may, at any time, be revoked by the Governor and shall in any case cease to have effect if the Disciplinary Tribunal recommends to the Governor that the member should not be removed.

(5) If the office of a member of the Judicial and Legal Services Commission appointed under subsection (1)(d) becomes vacant or if such a member is for any reason unable to perform the functions of that office, the Governor, acting in accordance with the advice of the Premier or the Leader of the Opposition, as the case may be, may appoint another suitably qualified person to that office for the unexpired term of the previous holder of the office or until the holder of the office is able to resume his or her functions.

(6) Any decision of the Judicial and Legal Services Commission shall require the concurrence of not less than three members of the Commission, and the Commission shall take its decisions in such form and manner as it may determine.

(7) In the exercise of its functions, the Judicial and Legal Services Commission—

- (a) shall not be subject to the direction or control of any other person or authority; and
- (b) may regulate its own procedure.

Power to appoint, etc, to legal offices

95.—(1) Power to make appointments to the offices to which this section applies, and to remove and to exercise disciplinary control over persons holding or acting in such offices, shall vest in the Governor, acting in accordance with the advice of the Judicial and Legal Services Commission; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice His Majesty's service.

(2) Before exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the Judicial and Legal Services Commission back to the Commission for reconsideration by it.

(3) If the Judicial and Legal Services Commission, having reconsidered its original advice under subsection (2), substitutes for it different advice, subsection (2) shall apply to that different advice as it applies to the original advice.

(4) This section applies to the offices of—

- (a) Attorney General;
- (b) Director of Public Prosecutions;
- (c) Magistrate;
- (d) any office in the public service of the Attorney General's Chambers or of any Registrar or other officer of the High Court who is required to possess legal qualifications;

and to such other offices in the public service, for appointment to which persons are required to possess legal qualifications, as may be prescribed by any law or Government policy for the time being in force in the Virgin Islands.

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(5) No person shall be appointed to the office of Attorney General unless he or she is qualified to be admitted in the Virgin Islands as a legal practitioner and has had at least ten years' practical experience as a legal practitioner.

(6) No person shall be appointed to the office of Attorney General unless he or she belongs to the Virgin Islands unless, in the opinion of the Judicial and Legal Services Commission, there is no such person who is suitably qualified and able and willing to be so appointed.

(7) No person shall be appointed to the office of Director of Public Prosecutions unless he or she is qualified to be admitted in the Virgin Islands as a legal practitioner and has had at least seven years' practical experience as a legal practitioner.

(8) A person qualified under subsection (7) shall be appointed to act in the office of Director of Public Prosecutions whenever the office falls vacant and until a person is appointed substantively to that office, or whenever the holder of that office is for any reason unable to perform his or her functions (including by reason of suspension under subsection (10)).

(9) A person holding the office of Attorney General, Director of Public Prosecutions or Magistrate may only be removed from office for inability to discharge the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.*

(10) Where the issue of the removal of the Director of Public Prosecutions from office has been referred to the Judicial and Legal Services Commission, the Governor shall suspend the Director of Public Prosecutions from performing the functions of his or her office pending the outcome of the referral.

**The disciplinary tribunal mechanism is not invoked here as case law establishes that these officers would be dismissed in accordance with due process procedures relevant to the public service.*

Police Service Commission

96.—(1) There shall be in and for the Virgin Islands a Police Service Commission which shall consist of five members, of whom—

- (a) two shall be appointed by the Governor, acting in his or her discretion;
- (b) one shall be appointed by the Governor, acting in accordance with the advice of the Premier;
- (c) one shall be appointed by the Governor, acting in accordance with the advice of the Leader of the Opposition; and
- (d) one shall be appointed by the Governor, acting after consultation with the Police Welfare Association.

(2) The provisions of section 91(2) to (9) shall apply in relation to the Police Service Commission as they apply in relation to the Public Service Commission and for that purpose shall have effect as if the references therein to the latter were references to the former.

Power to appoint, etc, to offices in the Police Force

97.—(1) Power to make appointments to offices in the Police Force and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Governor, acting in accordance with the advice of the Police Service Commission; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice His Majesty's service.

(2) Where the Police Service Commission advises that any person should be appointed to an office in the Police Force of a rank superior to Chief Inspector, that advice shall require the approval of the National Security Council before being submitted to the Governor; but the Governor, acting in his or her discretion, may act without the approval of the National Security Council if he or she determines that to do otherwise would prejudice His Majesty's service.

(3) Before exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the Police Service Commission back to the Commission for reconsideration by it.

(4) If the Police Service Commission, having reconsidered its original advice under subsection (3), substitutes for it different advice, subsection (3) shall apply to that different advice as it applies to the original advice.

(5) The Governor, acting after consultation with the Police Service Commission, may, by regulations published in the *Gazette*, delegate to any member of the Commission or any public officer or class of public officer, to such extent and subject to such conditions as may be prescribed in the regulations, any of the powers vested in the Governor to make appointments to offices in the Police Force and to remove or exercise disciplinary control over persons holding or acting in such offices; and except in so far as regulations made under this subsection otherwise provide, any power delegated by such regulations may be exercised by any person to whom it is delegated without reference to the Police Service Commission.

Legislation regarding Commissions

98.—(1) The Legislature may by law make provision for—

- (a) the organisation of the work of a Commission and the manner in which it performs its functions;
- (b) consultation by a Commission with persons or authorities other than its members;
- (c) the protection and privileges of members of a Commission in respect of the performance of their functions and the privilege of communications to and from a Commission and its members in the case of legal proceedings;
- (d) the definition and trial of offences in relation to the functions of a Commission and the imposition of penalties for such offences; and
- (e) conferring on a Commission other related functions, without prejudice to the functions conferred on such Commission by this Constitution.

(2) In this section “Commission” means the Public Service Commission, the Teaching Service Commission, the Judicial and Legal Services Commission or the Police Service Commission.

Pensions

Applicability of pension law

99.—(1) Subject to section 101, the law applicable to the grant and payment to any officer, or to his or her widow or widower, children, dependants or personal representatives, of any pension, gratuity or other like allowance (in this section and sections 100 and 101 referred to as an “award”) in respect of the service of that officer in the public service shall be that in force on the relevant day or any later law not less favourable to the person concerned.

(2) For the purposes of this section the relevant day is—

- (a) in relation to an award granted before the appointed day, the day on which the award was granted;
- (b) in relation to an award granted or to be granted on or after the appointed day to or in respect of a person who was a public officer before that day, the day immediately before that day;
- (c) in relation to an award granted or to be granted to or in respect of a person who first becomes a public officer on or after the appointed day, the day on which he or she becomes a public officer.

(3) For the purposes of this section, in so far as the law applicable to an award depends on the option of the person to or in respect of whom it is granted or to be granted, the law for which he or she opts shall be taken to be more favourable to him or her than any other law for which he or she might have opted.

(4) In this section “the appointed day” means the date of commencement of this Constitution.

Pensions, etc, charged on Consolidated Fund or Pension Fund

100. Awards granted under any law for the time being in force in the Virgin Islands shall be charged on and paid out of the Consolidated Fund or the Pension Fund of the Virgin Islands. The Territory shall establish transitional legislation once the Pension Fund is established addressing, amongst other things, that there shall be no further liability on the Consolidated Fund for new employees in specified circumstances.

Grant and withholding of pensions, etc

101.—(1) The power to grant any award under any pensions law in force in the Virgin Islands (other than an award to which, under that law, the person to whom it is payable is entitled as of right) and, in accordance with any provisions in that respect contained in any such law, to withhold, reduce in amount or suspend any award payable under any such law is hereby vested in the Governor, acting in his or her discretion.

(2) In this section “pensions law” means any law relating to the grant to any person, or to the widow or widower, children, dependants or personal representatives of that person, of an award in respect of the services of that person in a public office, and includes any instrument made under any such law.

CHAPTER 8

FINANCE

Consolidated Fund

102. All revenues or other moneys raised or received by or for the purposes of the Government of the Virgin Islands (not being revenues or other moneys that are payable by or under any law into some other fund established for any specific purpose or that may, by or under any law, be retained by the authority that received them for the purpose of defraying the expenses of that authority) shall be paid into and form a Consolidated Fund.

Withdrawal of money from Consolidated Fund or other public funds

103.—(1) No money shall be withdrawn from the Consolidated Fund except on the authority of a warrant under the hand of the Minister charged with responsibility for finance (in this Chapter referred to as “the Minister”); but where, in the opinion of the Governor, acting in his or her discretion, moneys are required to enable the Governor to discharge his or her responsibilities under section 60, such moneys may be withdrawn from the Consolidated Fund either—

- (a) on the authority of a warrant under the hand of the Minister; or
- (b) on the authority of a warrant under the hand of the Governor, acting in his or her discretion, following consultation with the Minister of Finance.

(2) No warrant shall be issued by the Minister for the purpose of meeting any expenditure unless—

- (a) the expenditure has been authorised for the financial year during which the withdrawal is to take place—
 - (i) by an Appropriation Act; or
 - (ii) by a supplementary estimate approved by resolution of the House of Assembly;
- (b) the expenditure has been authorised in accordance with section 105; or
- (c) it is expenditure (in this Chapter referred to as “statutory expenditure”) that is charged on the Consolidated Fund by this Constitution or any other law.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Fund unless the issue of those moneys had been authorised by or under any law.

Authorisation of expenditure

104.—(1) The Minister shall cause to be prepared and laid before the House of Assembly as soon as practicable before the beginning of each financial year estimates of the revenues and expenditure of the Virgin Islands for that year; but if the House is dissolved less than three months before the beginning of any financial year, the estimates for that year may be laid before the House as soon as practicable after the beginning of that year.

(2) The heads of expenditure contained in the estimates (other than statutory expenditure) shall be included in a Bill to be known as an Appropriation Bill which shall be introduced into the House of Assembly to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and for the appropriation of those sums to the purposes specified in it.

(3) If in respect of any financial year it is found—

- (a) that the amount appropriated by the Appropriation Act to any purpose is insufficient or that a need has arisen for expenditure for a purpose to which no amount has been appropriated by that Act; or
- (b) that any moneys have been expended for any purpose in excess of the amount appropriated to that purpose by the Appropriation Act or for a purpose to which no amount has been appropriated by that Act,

a supplementary estimate, showing the sums required or spent, shall be laid before the House of Assembly.

(4) Where in respect of any financial year any supplementary estimates have been laid before the House of Assembly in accordance with subsection (3) and approved by resolution of the House, a Supplementary Appropriation Bill shall, as soon as practicable after the end of that year, be introduced into the House to provide for the appropriation to the purposes in question of the sums included in such estimates that have been expended for that year.

(5) Where in respect of any financial year moneys have been withdrawn from the Consolidated Fund on the authority of a warrant issued by the Governor by virtue of section 103(1)(b), the Minister shall, if the circumstances of the case so require, cause a statement of expenditure in respect of such moneys to be prepared and laid before the House of Assembly.

Authorisation of expenditure in advance of appropriation

105. If the Appropriation Act in respect of any financial year has not come into force by the beginning of that financial year, the House of Assembly may by resolution empower the Minister to authorise the withdrawal of moneys from the Consolidated Fund for the purpose of meeting expenditure necessary to carry on the services of the Government of the Virgin Islands until the expiration of four months from the beginning of that financial year or the coming into force of the Appropriation Act, whichever is the earlier.

Contingencies Fund

106.—(1) The Legislature may by law make provision for the establishment of a Contingencies Fund and for authorising the Minister to make advances from that fund if he or she is satisfied that there is an urgent and unforeseen need for expenditure for which no other provision exists.

(2) When any advance is made from the Contingencies Fund a supplementary estimate shall, as soon as practicable, be laid before the House of Assembly for the purpose of authorising the replacement of the amount so advanced.

Public debt

107.—(1) All debt charges for which the Virgin Islands are liable shall be a charge on the Consolidated Fund or the Debt Service Fund.

(2) For the purposes of this section, debt charges include interest, sinking fund charges, the repayment or amortisation of debt, and all expenditure in connection with the raising of loans on the security of the revenues of the Virgin Islands or the Consolidated Fund and the service and redemption of debt thereby created.

Remuneration of certain officers

108.—(1) There shall be paid to the holders of the offices to which this section applies such salary or other remuneration and such allowances as may be prescribed by or under any law enacted by the Legislature.

(2) The remuneration and allowances payable to the holders of those offices shall be a charge on the Consolidated Fund.

(3) The remuneration prescribed in pursuance of this section in respect of the holder of any such office and his or her other terms of service (other than allowances that are not taken into account in computing, under any law in that respect, any pension payable in respect of his or her service in that office) shall not without the consent of that person be altered to his or her disadvantage after his or her appointment.

(4) Where a person's remuneration or other terms of service depend upon his or her option, the remuneration or terms for which he or she opts shall, for the purpose of subsection (3), be deemed to be more advantageous to that person than any others for which he or she might have opted.

(5) This section applies to the offices of:

- (a) Deputy Governor, Magistrate, Registrar of Interests, Chairman or other member of the Public Service Commission, the Teaching Service Commission, the Judicial and Legal Services Commission, and the Police Service Commission,
- (b) Attorney General, Director of Public Prosecutions, Auditor General, Contractor General, Complaints Commissioner, and Chairman and other members of the Integrity Commission, and Elections and Boundaries Commission.

Administration of certain offices

108A (1) The offices set out in section 108(5)(b) shall enjoy administrative and financial independence and their budgets shall be administered independently in accordance with the law.

(2) Subject to sub-section (1), the authorised budgets presented by the offices referred to in section 108(5)(b) and that of the Supreme Court shall be charged on the Consolidated Fund. The House of Assembly shall guarantee each office sufficient budgetary allocations to allow a timely and efficacious discharge of their competences.

Remuneration of Speaker and elected Members of House of Assembly

108B.—(1) There shall be paid to the Speaker and the elected Members of the House of Assembly such remuneration and allowances as may be prescribed by an Act of the Legislature.

(2) The House of Assembly shall not proceed on any Bill for an Act referred to in subsection (1) unless a report of the Integrity Commission recommending the appropriate levels of such remuneration and allowances has been laid before the Assembly and has been published.

(3) The remuneration and allowances payable to the Speaker and elected members of the House of Assembly shall be charged on and paid out of the Consolidated Fund.

The Auditor General

109.—(1) There shall be an Auditor General whose office shall be a public office.

(2) The accounts of the House of Assembly and all Government departments and offices (including the Public Service Commission, the Teaching Service Commission, the Police Service Commission and such other body as may be designated by law) shall be audited and reported on annually by the Auditor General, and for that purpose the Auditor General or any person authorised by him or her shall have access to all books, records, returns and other documents relating to such accounts.

(3) The Auditor General shall submit his or her reports made under subsection (2) to the Minister who shall, within three months of the receipt of the reports, cause them to be laid before the House of Assembly.

(4) In the exercise of his or her functions under this section, the Auditor General shall not be subject to the direction or control of any other person or authority.

CHAPTER 9

GOOD GOVERNANCE AND DEMOCRACY

The Complaints Commissioner

110.—(1) There shall be a Complaints Commissioner for the Virgin Islands.

(2) The Complaints Commissioner shall be appointed by the Governor, acting after consultation with the Premier and the Leader of the Opposition, by instrument under the public seal.

(3) No person shall be qualified to be appointed as Complaints Commissioner if he or she is or has been within the preceding three years—

- (a) an elected member of the House of Assembly; or
- (b) the holder of any office in any political party.

(4) The office of the Complaints Commissioner shall become vacant—

- (a) at the expiration of the period specified in the instrument by which he or she was appointed;
- (b) if he or she resigns office by writing under his or her hand addressed to the Governor;
- (c) if he or she becomes an elected member of the House of Assembly or the holder of any office in any political party; or
- (d) if the Governor, acting in his or her discretion, directs that he or she shall be removed from office for inability to discharge the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, or for contravention of subsection (5), and shall not be so removed except in accordance with this section.

(4A) The Complaints Commissioner shall be removed from office by the Governor if the question of his or her removal from office has been referred to a Disciplinary Tribunal appointed pursuant to sub-section [(4B)] and the Disciplinary Tribunal has recommended to the Governor that he or she ought to be removed for inability or unwillingness to discharge the functions of his or her office or for misbehaviour or other good cause.

(4B) Where the Governor, after consultation with the Premier and the Leader of the Opposition, considers that the question of removing the Complaints Commissioner ought to be investigated, the Governor shall appoint a disciplinary tribunal which shall consist of three persons including a religious leader, a Judge of the High Court, or an attorney at law of fifteen years standing who has practiced in the Virgin Islands or within the jurisdiction of the Organisation of the Eastern Caribbean States.

(4C) The Disciplinary Tribunal shall inquire into the matter and report on the facts thereof to the Governor and recommend to him or her whether the Complaints Commissioner should be removed from office.

(4D) The Disciplinary Tribunal shall give the Complaints Commissioner an opportunity to show cause why he or she should not be removed from office.

(4E) Where the question of removing the Complaints Commissioner has been referred to a Disciplinary Tribunal under this section, the Governor, after consultation with the Premier and the Leader of the Opposition, may suspend the Complaints Commissioner from the exercise of the functions of his or her office pending the hearing and determination of the matter.

(4F) A suspension may, at any time, be revoked by the Governor and shall in any case cease to have effect if the Disciplinary Tribunal recommends to the Governor that the Complaints Commissioner should not be removed.

(5) Subject to such exceptions as the Governor, acting in his or her discretion, may authorise by directions in writing, the Complaints Commissioner shall not hold any other office of emolument either in the public service or otherwise nor engage in any occupation for reward other than the duties of his or her office.

Functions of Complaints Commissioner

111.—(1) The Complaints Commissioner shall have such functions and jurisdiction as may be prescribed by law.

(2) In the exercise of his or her functions, the Complaints Commissioner shall not be subject to the direction or control of any other person or authority.

Registration of interests

112.—(1) There shall be for the Virgin Islands a Register of Interests, which shall be maintained by a Registrar who shall be appointed, and may be removed from office, by the Governor acting in his or her discretion.

(2) It shall be the duty of any person to whom this section applies to declare to the Registrar, for entry in the Register of Interests, such interests, assets, income and liabilities of that person, or of any other person connected with him or her, as may be prescribed by law.

(3) A person shall make a declaration under subsection (2) upon assuming the functions of his or her office and at such intervals thereafter (being no longer than twelve months) as may be prescribed by law.

(4) This section applies to all members of the House of Assembly (including Ministers) and the holders of such other offices (except that of Governor) as may be prescribed by law.

(5) A law made under this Constitution shall make provision for giving effect to this section, including the sanctions which may be imposed for a failure to comply with, or the making of false statements in purported compliance with, subsections (2) and (3) and, notwithstanding anything contained in Chapter 5, the sanctions which may be imposed may include the suspension of a member of the House of Assembly from sitting and voting in the House for such period as may be prescribed in such a law.

The Integrity Commission

112A. There shall be, in and for the Virgin Islands, an Integrity Commission.

Functions of the Integrity Commission

112B—(1) The Integrity Commission shall have such functions and jurisdictions as may be prescribed by law.

(2) In the exercise of its functions, the Integrity Commission shall not be subject to the direction or control of any other person or authority.

Standards in public life

112C (1) The Legislature shall promote the highest standards in public life by enacting appropriate laws, which include sanctions that may accompany the failure to conform to such standards.

(2) In the exercise of their functions Ministers, members of the House of Assembly and public officers shall uphold and conform to the highest standards in public life, in accordance with the Integrity in Public Life Act 2021 (or any Act amending or replacing it) and any codes of conduct or other laws for the promotion of good governance in force in the Virgin Islands.

The Contractor General

112D (1) There shall be, in and for the Virgin Islands, a Contractor General.

Functions of the Contractor General

112E (1) The Contractor General shall have such functions and jurisdiction as may be prescribed by law.

(2) In the exercise of his or her functions, the Contractor General shall not be subject to the direction or control of any other person or authority.

Establishment of a Human Rights Commission

112F—(1) There shall be established by law a Human Rights Commission in and for the Virgin Islands (in this section referred to as “the commission”).

(2) The composition, powers and duties of the commission (which shall not derogate from the provisions of this Chapter) shall be such as may be prescribed by the law establishing it and may include the following—

- (a) the receipt and investigation of complaints of breaches or infringements of any right or freedom referred to in Chapter 2 (Fundamental Rights and Freedoms of the Individual);
- (b) the provision of a forum for dealing with, and participation of the commission in promoting conciliation with respect to, complaints and disputes concerning any matter relating to Chapter 2;
- (c) issuing guidance on procedures for dealing with any complaints of breaches or infringements of rights and freedoms referred to in Chapter 2;
- (d) imparting knowledge to the public with respect to the rights and freedoms referred to in Chapter 2 or in relation to any international instrument or activity relating to human rights; and
- (e) preparing and submitting periodically reports concerning its activities to the Legislature.

(3) The power of the commission to deal with any matter under Chapter 2 shall be exercised only with the agreement or concurrence of the persons concerned therewith.

(4) Nothing contained in or done pursuant to any law establishing the commission shall—

- (a) oblige a person to refer any complaint of a breach or infringement of any right or freedom referred to in Chapter 2 to the commission; or
- (b) prevent a person from seeking redress directly from the court in relation to any breach or infringement of a right or freedom referred to in Chapter 2, and the fact that such person had previously sought the assistance of the commission with respect to such breach or infringement shall not be a bar.

Freedom of Information

112G Subject to this Constitution, a law shall provide for a right of access to information held by the public service or by public authorities, for the conditions for the exercise of that right, and for restrictions and exceptions to that right in the interests of international relations, the security of the Virgin Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals.

CHAPTER 9A ACCESSIBILITY OF LAWS

Accessibility of laws

112H. As an essential element of the rule of law and the administration of justice, there shall be: (a) free and easy access to the Territory's legislation (including an index of legislation); and (b) regular law revision, and financial resources must be made available for these purposes.

CHAPTER 10

TRANSITIONAL AND MISCELLANEOUS

Meaning of the appointed day

113. In this Chapter, "the appointed day" means the day referred to in section 1(2) of this Order, that is to say the date of commencement of this Constitution.

Revocations

114. The instruments specified in Schedule 2 are revoked with effect from the appointed day.

Existing laws

115.—(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of or in consistency with this Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.

(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with this Constitution or otherwise for giving effect to this Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.

(3) In this section "existing laws" means laws and instruments (other than Acts of the Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Virgin Islands immediately before the appointed day.

Existing offices and officers

116.—(1) Any office established by or under the Virgin Islands (Constitution) Order 2007 and existing immediately before the appointed day shall on and after that day, so far as consistent with this Constitution, continue as if it had been established by or under this Constitution.

(2) Any person who immediately before the appointed day holds or is acting in any office continued by virtue of subsection (1) shall, on and after that day, continue to hold or act in that office as if he or she had been appointed to hold or act in it in accordance with or under this Constitution.

(3) Any person to whom subsection (2) applies who, before the appointed day, has made any oath or affirmation required to be made before assuming the functions of his or her office shall be deemed to have made any like oath or affirmation so required by this Constitution or any other law.

Standing Orders

117. The Standing Orders of the Legislative Council established by the Virgin Islands (Constitution) Order 1976 as those Standing Orders are in force immediately before the appointed day shall, except as may be provided under section 72, have effect on and after that day as if they had been made under that section as Standing Orders of the House of Assembly established by this Constitution, but they shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.

Elections

118. A general election shall be held at such time within three months, but not earlier than twenty-one days, of the appointed day as the Governor shall appoint by proclamation published in the *Gazette*.

Power reserved to His Majesty

119. There is reserved to His Majesty full power to make laws for the peace, order and good government of the Virgin Islands.

Notification of Acts of Parliament

120.—(1) Where it is proposed that—

(a) any provision of a draft Act of the Parliament of the United Kingdom should apply directly to the Virgin Islands, or

(b) an Order in Council should be made extending to the Virgin Islands any provision of an Act of Parliament of the United Kingdom,

the proposal shall normally be brought by a Secretary of State to the attention of the Premier so that the Virgin Islands Cabinet may signify its view on it.

(2) This section does not affect the power of the Parliament of the United Kingdom to make laws for the Virgin Islands or the power of His Majesty to make an Order in Council extending to the Virgin Islands any provision of an Act of Parliament of the United Kingdom.

[Name]
Clerk of the Privy Council

SCHEDULE 1

FORMS OF OATHS AND AFFIRMATIONS

121. Oath of allegiance

I,, do swear that I will be faithful and bear true allegiance to His Majesty King Charles the Third, His Heirs and Successors, according to law. So help me God.

122. Affirmation of Allegiance

I,, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to His Majesty King Charles the Third, Her Heirs and Successors, according to law.

123. Oath for due execution of office

I,, do swear that I will well and truly serve His Majesty King Charles the Third and the people of the Virgin Islands in the office of [here insert the description of the office]. So help me God.

124. Affirmation for due execution of office

I,, do solemnly and sincerely affirm and declare that I will well and truly serve His Majesty King Charles the Third and the people of the Virgin Islands in the office of [here insert the description of the office].

SCHEDULE 2

REVOCATIONS

The Virgin Islands (Constitution) (Amendment) Order, 2007 (S.I. 2007 No. 1678)

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